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EFFICIENT AND SUITABLE PROVISION FOR THE TEXAS PUBLIC SCHOOL FINANCE SYSTEM: AN IMPOSSIBLE DREAM?

Joe Ball*

Remember Rodriguez! Remember Edgewood! Remember the Alamo! It is quite fitting that the battle over public school finance in the grand state of Texas should have started and continued in the San Antonio area, home of historic battle sites. 1 Whereas the battle for Texas Independence in 1836 lasted less than a year, the battle over the funding of Texas public schools has lasted twenty-five years. 2 When the battle began it involved the wealthy property districts versus the poor property districts. But, as war and politics make strange bedfellows, the most recent twist in the finance battle involves the formation of a rich-poor district coalition dedicated to: (1) making the state fund "a substantial majority of the expenses of a basic education;" 3 (2) achieving "equity, adequacy, and quality" for the students of the state; 4 and (3) maintaining local control, parental involvement, and district program enrichment "once an efficient system has otherwise been established." 5

A person might think the analogy to battle a bit strong until he surveyed the public school finance terminology and concepts, which include the recapturing of funds (the "Robin Hood" plan), the caps on revenue raising, the right to control schools locally, the power to tax, and the legislative duty to provide an adequate education to all the citizens of its state. The catchy phrases and lofty ideas should not, however, obscure the three basic questions for battle analysis: (1) How much money needs to be spent on public

* In memory of the greatest educator in my life, Billie Jean Ball.

1. Demetrio Rodriguez in 1968 questioned the fairness of Texas public school finance by seeking greater funding for his children's school district located in the San Antonio area. This property-poor school district, Edgewood I.S.D., would later become the focal point for a second challenge starting in 1984. JONATHAN KOZOL, SAVAGE INEQUALITIES: CHILDREN IN AMERICAN SCHOOLS 214 (1991).

2. Id. at 223. At the time of the announcement of the Texas Supreme Court's Edgewood I holding that the Texas public school finance system violated the state constitution, Edgewood I.S.D. v. Kirby, 777 S.W.2d 391 (Tex. 1989), Demetrio Rodriguez was no longer a father but a grandfather of children attending Edgewood I.S.D. schools. He spoke to a crowd at a local high school, "I cried this morning because this is something that has been in my heart . . . . My children will not benefit from it . . . . Twenty-one years is a long time to wait." Id. at 226 (quoting SAN ANTONIO EXPRESS-NEWS, Oct. 3, 1989).


4. Id.

5. Id.
education? (2) From what sources can the money be raised? and (3) How should the money be divided among those being educated? In other words, what method of taxation should be used to generate an adequate amount of public school revenue for efficient or equitable distribution to the students of Texas? 6

As noted earlier, the original adversaries in the school finance litigation have blurred as rich and poor school districts fight together for adequate as well as equitable funding of the state’s public schools. In addition, the Supreme Court of Texas and the Texas legislature are embroiled in a constitutional battle over the proper financing of the public schools. The court seeks to hold the legislature to its constitutional duty to make “suitable provision” for “an efficient system of public free schools” while the legislature endeavors to meet those vague standards without overburdening the state’s taxpayers or offending the constituents of wealthier districts.

Due to the extensive and thoughtful commentary that has preceded this Comment on (1) the Edgewood litigation, (2) the framers’ intent when drafting the Texas Constitution’s education articles, and (3) the funding options available to the Texas legislature, 8 this paper will focus primarily on the interplay between the first two supreme court decisions in Edgewood and the resulting legislation. Section I provides a summary of what has transpired from the beginning of the Edgewood litigation through the Texas Supreme

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8. See Albert H. Kauffman & Carmen Maria Bumbaut, Applying Edgewood v. Kirby to Analysis of Fundamental Rights Under the Texas Constitution, 22 ST. MARY'S L.J. 69 (1990) (lead attorneys for Edgewood plaintiffs describing Edgewood I litigation from district court to court of appeals to supreme court, including legal theories to challenge school finance schemes); see also Julie K. Underwood & William E. Sparkman, School Finance Litigation: A New Wave of Reform, 14 HARV. J.L. & PUB. POL'Y 517, 520 (1991) (discussing the three prevailing litigation challenges in school finance cases, two based on equal protection and the other based on the state’s education article); Allan E. Parker, Jr., Public Free Schools: A Constitutional Right to Educational Choice in Texas, 45 SW. L.J. 825 (1991) (in-depth historical analysis of the Texas Constitution's education article concluding that the framers' intent supports movement to establish educational choice in Texas); Mikal Watts & Brad Rockwall, The Original Intent of the Education Article of the Texas Constitution, 21 ST. MARY'S L.J. 771, 820 (1990) (emphasizing framers' intent under TEX. CONST. art. VII, § 1, for the legislature to be judicially held to its duty to create and maintain efficient schools that protect a citizen's right to education); Becky Stern, Comment, Judicial Promulgation of Legislative Policy: Efficiency at the Expense of Democracy, 45 SW. L.J. 977 (1991) (tracing the development of the Texas Constitution education articles and the legislatures' attempts to enact the constitutional requirements, concluding that the current court intervention oversteps the judicial boundaries of power); Bernard Lau, Note, Edgewood I.S.D. v. Kirby: A Political Question?, 43 BAYLOR L. REV. 187, 203 (1991) (suggesting centralized funding at the state level with option for local enrichment, tempering potential inequities by statewide open enrollment); Robert L. Mantelfel, Comment, The Quest for Efficiency: Public School Funding in Texas, 43 SW. L.J. 1119, 1128 (1990) (outlining four common funding options: increased state aid, district power equalizing, full state funding, and the voucher system); A. Thomas Stubbs, Note, After Rodriguez: Recent Developments in School Finance Reform, 44 TAX LAW. 313, 328 (1990) (analyzing the efficiency mandate in Edgewood I and the resulting funding scheme enacted by the legislature).
Court's third ruling on public school finance, including the first two legislative responses to the supreme court's rulings. Section II analyzes the question of efficiency in the public school finance system. Included in this section is a discussion of the three-tiered system of state and local funding for public education, the newly-created County Education Districts (CEDs), the recapture or "Robin Hood" operation of the CEDs, and the revenue limit, or cap, on local funding. Section III analyzes the question of suitability, or adequacy, in the public school finance system. This section discusses the state and local share of education funding, the state's option to restructure revenue through a state income tax (personal or business), and the local school districts' desire to enrich their educational programs. Throughout sections II and III, the legislature's two most recent school finance schemes are compared and contrasted. Special emphasis is placed on how well the schemes achieved or failed to achieve the constitutional requirements of efficiency and suitability. Finally, Section IV concludes the article.

9. On November 10, 1992, Governor Richards called a lame-duck special session to address the need for the passage of a new school finance plan prior to the Texas Supreme Court's deadline of June 1, 1993. Terrence Stutz, Governor Touts Plans for Schools, DALLAS MORNING NEWS, Nov. 10, 1992, at A1; see infra text and accompanying notes 124-29. The Democratic leadership announced a proposed "Fair Share" plan that would redistribute funds from property-rich to property-poor districts at about the same level under the 1991 school finance plan. Wayne Slater & Terrence Stutz, School Proposal Unveiled, DALLAS MORNING NEWS, Nov. 5, 1992, at A11; see infra text and accompanying notes 217-41. Instead of using County Education Districts (CEDs) to accomplish the redistribution, the plan called for property-rich school districts to contribute more money to the Texas Teacher Retirement System so that the state could correspondingly lessen its contribution to the retirement system and transfer the savings to property-poor districts. Wayne Slater & Terrence Stutz, School Proposal Unveiled, DALLAS MORNING NEWS, Nov. 5, 1992, at A11.

The proposed plan's redistribution of local property taxes along with a 95% equity funding standard were to be submitted to the voters of Texas as an amendment to the constitution. Id.; see e.g. infra note 206. The proposal failed to survive the special session because Texas House Republicans united together to block the two-thirds vote required for the approval of a constitutional amendment. Terrence Stutz & Christy Hoppe, GOP Fails to Offer School Fund Plan, DALLAS MORNING NEWS, Nov. 25, 1992, at A1. Throughout the session, the political parties and the educational bureaucracy pointed fingers at one another for failing to begin the process towards creating an acceptable, constitutional plan prior to the June 1, 1993 deadline which Judge McCown has pledged to enforce through an injunction against state funding of Texas schools. Id.; see also infra note 34.

Sandwiched in the middle of the talk about redistribution and equity, the state leaders announced that about $3 billion promised by the state under the 1991 finance plan would not be available for the 1993-94 biennium. Melanie Lewis, Fair Share School Plan Criticized, DALLAS MORNING NEWS, Nov. 6, 1992, at A10. Critics of the state's efforts stressed that due to increases in enrollment local districts would be forced to increase property taxes in an attempt to simply maintain current levels of spending. Wayne Slater & Terrence Stutz, School Proposal Unveiled, DALLAS MORNING NEWS, Nov. 5, 1992, at A11. Neither political party addressed the inadequacy of the state's funding of Texas public schools, continuing the trend of over-reliance on the local property tax to solve the efficiency problem. See infra text and accompanying notes 274-350. With the clear inadequacy of the current state tax structure to handle the financing of public schools, "conservative" voices opined that the state income tax should be seriously considered as an alternative to the funding of Texas schools instead of the increasingly burdensome property tax. Rena Penderson, The Texas School Hijacking, DALLAS MORNING NEWS, Nov. 15, 1992, at J2.
I. HISTORY OF EDGEWOOD LITIGATION AND RESULTING LEGISLATION

At the heart of the controversy of the public school finance battle in Texas is the educational establishment clause from the constitution of 1876. After 115 years, article VII, section 1, still provides: "A general diffusion of knowledge being essential to the preservation of the liberties and rights of 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."11

The historic United States Supreme Court decision in San Antonio Independent School District v. Rodriguez12 set the stage for the current challenges to the funding of public schools using the education articles of state constitutions.13 In 1968, Demetrio Rodriguez, whose children were enrolled in Edgewood Independent School District, brought suit in federal district court to have Texas’ system for funding public education declared a violation of the United States Constitution.14 Mr. Rodriguez and other concerned parents of children attending Edgewood schools complained that the funding disparities between property-poor and property-rich school districts violated the Equal Protection Clause.15 The plaintiffs argued that equitable funding would create educational opportunities for their children that were already enjoyed by children in wealthier districts. Once the state offered all children equally-funded educational foundations, then the students in the property-poor districts could better compete for college and employment positions.16 The plaintiffs prevailed in the district court, but the victory proved to be short lived when the United States Supreme Court held that education was not a fundamental right "explicitly or implicitly guaranteed by the Constitution."17

The Court’s decision in Rodriguez significantly limited any future hope that funding disparities arising from variances in locally raised revenue could be challenged in federal court.18 Consequently, the battle over school finance shifted to the state arena, with plaintiffs seeking to show that funding systems violated some provision of a state’s constitution.19

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10. See Parker, supra note 8, at 831; Watts & Rockwall, supra note 8, at 791; Stern, supra note 8, at 984.
11. TEX. CONST. art VII, § 1.
15. See generally Lau, supra note 8, at 191-195 (discussing plaintiff’s challenges to the Texas finance system under the Equal Protection Clause of the United States Constitution).
16. See Kozol, supra note 1, at 206, 214.
17. Rodriguez, 411 U.S. at 33-34.
18. See generally Underwood & Sparkman, supra note 8, at 521-29 (analyzing federal equal protection challenges to public school finance systems, including treatment of cases subsequent to Rodriguez).
19. See id. at 529, 532.
A. Edgewood I

In Rodriguez, the United States Supreme Court reserved questions involving "state taxation and education . . . for the legislative processes of the various States." However, the Court also admonished states like Texas to reform their funding systems in order "to assure both a higher level of quality and greater uniformity of opportunity." From 1975 until 1984, the Texas legislature experimented with increasing state aid to its Foundation School Program as a means of equalizing funding among school districts. The property-poor school districts believed that the legislature's attempts to resolve the funding disparities amounted to a trail of broken promises that failed "to ensure that every child in the state had an equal opportunity to get a first rate education." Consequently, Edgewood I.S.D. filed suit with sixty-seven other property-poor school districts in state district court alleging that the public school finance system violated Texas constitutional provisions.

In 1987, Judge Harley Clark of the 250th Judicial District Court of Travis County held for the plaintiffs by finding that the funding system violated the equal protection, the due process of law, and the education establishment clauses of the Texas Constitution. The court of appeals reversed, concluding "that which is, or is not, 'efficient' [under Art. VII, section 1] is essentially a political question not suitable for judicial review." The dissent emphasized education as a constitutional right "critical to an individual's..."
participation in today's society" which should be offered on "a relatively equal basis with others."

In 1989, the Texas Supreme Court reversed the court of appeals and declared that the current educational funding system violated the education article of the state constitution. The court limited this Edgewood I holding to the "efficiency" provision of the Texas Constitution, finding that "we need not consider petitioners' other constitutional arguments." Although the court stated that it would "not now instruct the legislature as to the specifics of the legislation it should enact," the opinion clearly articulated the constitutionally-derived mandate for an efficient finance system: "There must be a direct and close correlation between a district's tax effort and the educational resources available to it; in other words, districts must have substantially equal access to similar revenues per pupil at similar levels of tax effort."

B. THE LEGISLATIVE RESPONSE TO EDGECWOOD I

The May 1, 1990, deadline set by the Supreme Court of Texas in Edgewood I for legislative restructuring of the public school finance system passed without an enacted plan. At the district court level, Judge Scott McCown, who replaced Judge Clark in the case after Clark's resignation, threatened to impose "a court-ordered plan to redistribute state public education aid" if the legislature did not act by June 21, 1991. The political forces in Austin, Texas, wrangled over the school finance issues for three special sessions, fighting over how much more money would be put into public education and how to generate the revenue for the cost associated with equalization. On June 7, 1990, Governor Bill Clements signed Senate Bill 1, the Texas Legislature's overdue answer to Edgewood I and the financing
of public schools.\textsuperscript{38} The legislation avoided placing caps on local revenue-raising and did not attempt to redistribute locally-raised revenue from rich to poor school districts.\textsuperscript{39} Instead, the act raised the level of per-pupil expenditure for which the state equalized funding.\textsuperscript{40} The state financed the 1990-91 $528 million price tag of Senate Bill 1 by mixing together sales and sin tax increases, budget cuts, and "rainy day" fund appropriations.\textsuperscript{41}

C. Edgewood II

In July 1990, the plaintiffs returned to state district court complaining that Senate Bill 1 "failed to provide substantially equal access to funds of all the state's students, failed to create a priority allocation of state funds to education and failed to curb 'unequalized enrichment' of educational funding by local districts."\textsuperscript{42} The defendants, represented by the Attorney General's office, argued that "absolute equity" would be "prohibitively expensive" for the state to guarantee, considering the per-pupil level of spending of wealthy districts.\textsuperscript{43} In September 1990, the district court found that the finance plan enacted by Senate Bill 1 did not effect a change in the "finance system condemned in Edgewood I," thereby continuing the legislature's failure to meet its constitutional obligation.\textsuperscript{44}

\begin{itemize}
\item \textit{See generally} Stubbs, \textsuperscript{8} supra note 8, at 328 (discussing the efficiency mandate in Edgewood I and the resulting funding scheme enacted by the legislature).
\item \textit{House Research Organization,} supra note 35, at 2.
\item Senate Bill 1 retained the two-tiered foundation program put into effect by Senate Bill 1019. In 1989-90 under Senate Bill 1019, school districts received an unadjusted basic allotment of $1477 per weighted student at a tax rate of $0.34 per $100 property valuation. In 1990-91 under Senate Bill 1, school districts received an unadjusted basic allotment of $1910 per weighted student at a tax rate of $0.54 per $100 property valuation (tier one funding). For the corresponding years, Senate Bill 1019 provided a guaranteed yield of $18.25 per weighted student for each penny of tax effort above $0.34 and up to $0.70, and Senate Bill 1 guaranteed $17.90 per weighted student at tax effort above $0.54 and up to $0.91 (tier two funding). By changing the finance schemes, the legislature increased the 1990-91 scheduled amount of foundation program funding from approximately $2155 per student to $2570 per student. \textit{See Adequacy Analysis of Senate Bill 1, Research Briefs} (Dept. of Research & Dev., Tex. Educ. Agency), Autumn 1990, at 5; \textit{House Research Organization,} supra note 35, at 7.
\item \textit{From the Capitol to the Schoolhouse: An Analysis of the 1990 Education Finance Act, Fiscal Notes} (Tex. Comptroller's Office), July 1990, at 7. The "sin" taxes included increased taxes on cigarettes and mixed drinks. The "rainy day" funds were appropriated from money set aside in the Texas Economic Stabilization fund. \textit{Id.}
\item The State further argued that given time, the plan's self-adjusting equity measures would balance a substantial majority of the existing disparities. \textit{Id.} Under the plan in 1990-91, the wealthiest district had $9.6 million in property wealth per student compared to the poorest school district's $13,463 property wealth per student. \textit{Standing Education Committee of the 72nd Legislature, Report on Public School Finance Legislation 1} (1991) [hereinafter \textit{Standing Education Committee}].
\item \textit{Edgewood Indep. Sch. Dist. v. Kirby, 804 S.W.2d 491, 494} (Tex. 1991) [hereinafter \textit{Edgewood II}]. In addition, the district court vacated the Texas Supreme Court's May 1, 1990 injunction due to concern over disrupting the public schools. \textit{Id.}
\end{itemize}
On January 22, 1991, the Texas Supreme Court took direct appeal of the district court’s decision and agreed that the “State has made an unconstitutionally inefficient use of its resources.” The unanimous opinion noted the “overall failure to restructure the system” as the present district boundaries allowed the wealthiest district “to draw funds from a tax base roughly 450 times greater . . . than the poorest district.” The court reiterated the standards set forth in Edgewood I, emphasizing the failure of Senate Bill 1 “to equalize access to funds among all [school] districts.” Attorneys for the state and Texas legislators interpreted the new holding as a requirement that virtually all districts and every child have “substantially equal access to similar revenues per pupil at similar levels of tax effort.”

After two unanimous decisions, the Texas Supreme Court retreated into dissension when Chief Justice Phillips and concurring justices added a lengthy Opinion on Motion for Rehearing to the Edgewood II ruling. Plaintiff-intervenors, a second group of fifty-five low-wealth districts, had asked the supreme court, after its January 22, 1991, decision, to overrule Love v. City of Dallas “to permit the [state-wide] recapture of local ad valorem revenues for purposes of equalization.” Love held “that the Legislature cannot compel one district to construct buildings and levy taxes for the education of nonresident pupils.”

The court, in its Edgewood II opinion, did not view the prior Love ruling or the Texas Constitution as a “barrier to the general concept of tax base consolidation.” The legislature could create “school districts along county or other lines for the purpose of collecting tax revenue” to be redistributed to districts within the new boundaries. In other words, the court endorsed the creation of school districts on some form of county-wide basis for the limited purpose of tax base consolidation of property-poor and property-rich districts. On motion for rehearing, however, the supreme court refused to take the extra step of approving the state-wide recapture of locally raised

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45. Id. “We therefore treat this proceeding as being in the nature of an original mandamus proceeding to direct the district court to reinstate our injunction.” Id.

46. Id. at 496. Although the Texas Supreme Court vacated the part of the district court’s holding that vacated the higher court’s injunction, the court stayed the effects of its reinstated injunction until April 1, 1991. Id. at 498-99.

47. Id. at 496. Texas House Representative Paul Colbert labeled the decision a “SCUD attack” on the legislature. In other words, a “Supreme Court Unanimous Decision.” Wong, supra note 36, at 16.

48. Edgewood II, 804 S.W.2d at 496, 498 (citing Edgewood I at 397-98).

49. Edgewood I, 777 S.W.2d at 397; see also Wong, supra note 36, at 16.

50. Edgewood II, 804 S.W.2d at 499. On February 27, 1991 the court overruled the plaintiff-intervenors’ motion for rehearing. Id. Concurring Justice Doggett accused the majority of “shattering the good faith” of the court’s previous unity by giving “an answer to a question the movant never asked” in what amounted to an “advisory opinion.” Id. at 501-03.

51. HOUSE RESEARCH ORGANIZATION, supra note 35, at 22.

52. 40 S.W.2d 20 (Tex. 1931).

53. Edgewood II, 804 S.W.2d at 499.

54. Love, 40 S.W.2d at 27 (as quoted by the Texas Supreme Court in Edgewood II, 804 S.W.2d at 497) (emphasis added by Edgewood II opinion).

55. Edgewood II, 804 S.W.2d at 497.

56. Id. at 497, 498.
revenue for purposes of equalization.\textsuperscript{57}

After approving county but not state-wide recapture, the court continued its opinion by condoning the possibility of unequalized enrichment by individual school districts that composed the consolidated county taxing school district.\textsuperscript{58} Justice Doggett’s concurrence noted that the majority had converted the issue from “whether locally-raised taxes may be used to fund other school districts . . . to whether locally-raised taxes may be used locally to provide supplemental funds in the same district.”\textsuperscript{59} In short, the court had qualified the efficiency mandate of \textit{Edgewood I}: substantially equal access to school funding at similar tax efforts did not mandate that property-rich school districts be prevented from raising enrichment funds that property-poor school districts could not raise.

\section{D. The Legislative Response to \textit{Edgewood II}}

The Texas Legislature answered \textit{Edgewood II’s} mandate to restructure the public school finance system by passing Senate Bill 351.\textsuperscript{60} Subsequently, a “clean-up” bill, House Bill 2885,\textsuperscript{61} clarified questions concerning the County Education Districts (CEDs) created by the new plan. The new scheme, which would have been fully operational by 1994-95,\textsuperscript{62} implements a modified version of the state’s previous three-tier funding system of basic allotment, guaranteed yield, and local enrichment.\textsuperscript{63} A simple example using the funding figures for the 1991-92 school year will help to illustrate the mechanics of the plan.\textsuperscript{64} At tier one, the newly created CEDs composed of member school districts must tax at an effective rate of $0.72 per $100 of taxable property to receive the State’s unadjusted basic allotment of $2200

\begin{itemize}
\item \textsuperscript{57} \textit{Id. at 499.}
\item \textsuperscript{58} \textit{Id. at 500.} “Once the Legislature provides an efficient system in compliance with Article VII, Section 1, it may, so long as efficiency is maintained, authorize local school districts to supplement their educational resources if local property owners approve an additional local property tax.” \textit{Id.} (emphasis added).
\item \textsuperscript{59} \textit{Id. at 502} (Doggett, J., concurring). School district officials speculated that the Opinion on Motion for Rehearing constituted a political compromise thrown out to appease wealthy, influential school districts. Interview with Robby Collins, Dallas I.S.D. Assistant Superintendent, in Dallas, Texas (Oct. 10, 1991).
\item \textsuperscript{61} Act of May 27, 1991, 72d Leg., R.S., ch. 391, 1991 Tex. Gen. Laws 1475 (referred to in the text as House Bill 2885). \textit{See also House Bill 2885—A “Clean-Up Bill, And Then Some, NEWS & NOTES, (Equity Center, Austin, Tex.) May 1991, at 4 (noting the substantive changes to Senate Bill 351 by House Bill 2885 as more administrative power given to the CEDs).}
\item \textsuperscript{62} Theoretically, the equity of a funding system should be judged by full implementation, or, in other words, the final year in which changes to the system phase in. Interview with Robby Collins, \textit{supra} note 59.
\item \textsuperscript{64} See \textit{infra} text accompanying notes 217-78 for a more detailed analysis of the Act’s finance scheme.
\end{itemize}
per weighted\textsuperscript{65} student.\textsuperscript{66} At tier two, individual school districts can tax up to $0.45 for enrichment of their instructional and facilities expenses with the state guaranteeing $21.50 per weighted student for each penny of tax effort above the $0.72 CED tax rate.\textsuperscript{67} At tier three, the state provides no supplemental funds for locally-raised revenue at tax rates higher than the combined tier one and tier two tax rates ($0.72 + $0.45), and school property taxes are limited to a total tax rate of $1.50.\textsuperscript{68} Such a limit translates to a maximum $0.33 tax rate for tier three unequalized local funding.\textsuperscript{69} As to the equity or fiscal neutrality\textsuperscript{70} of the system, tier one provides full equalization,\textsuperscript{71} tier two offers only partial equalization due to wealthy districts' ability to exceed the state guaranteed yield,\textsuperscript{72} and tier three provides no equalization at all.

Unlike Senate Bill 1, the 1991 school finance legislation introduces two measures to enable low wealth school districts to generate revenue closer to that of high wealth districts.\textsuperscript{73} First, by creating the CEDs as a new taxing

\textsuperscript{65} \textbf{TEX. EDUC. CODE ANN.} § 16.151 (Vernon Supp. 1992). A weighted student is one who requires special services from a school district under the state's special education programs. The state allotment for these students is determined by multiplying the district's basic per student allotment times the statutory weight. For example, a homebound student's weight factor is 5.0, thereby entitling the school district to a basic allotment multiplied by 5.0 for the special education student. \textit{Id.} If the basic allotment for that year was $2000, the district would be allotted $10,000 ($2000 × 5) for the student.


\textsuperscript{67} \textit{Id.} § 1 at 403, 404 (codified as an amendment to \textbf{TEX. EDUC. CODE ANN.} §§ 16.302-303 (Vernon Supp. 1992)).


\textsuperscript{69} \textit{Id.} The key to understanding the limit is to first realize that the $1.50 maximum school property tax applies to levies by both the CED at tier one and the individual school district at tiers two and three. The statute phrases the tax rate limit in terms of the total levy that a school district can impose after the CED tax. For example, the 1990-91 school district tax rate limit can be calculated by finding the difference between the CED's rate and the $1.50 maximum ($1.50 - 0.72 = 0.78). Next, to find the allowable tier three tax rate, subtract the guaranteed yield tier two rate ($0.45) from the total school district rate allowed for the year ($0.78 - 0.45 = 0.33). \textit{Id.}

\textsuperscript{70} Fiscal neutrality in public school finance means that "[t]he quality of a child's education should not be a question of wealth, other than wealth of a state as a whole." \textsc{Guthrie & Reed, supra} note 23, at 117 (quoting concept contributed by \textsc{Arthur Wise, Rich Schools Poor Schools} (1970) and \textsc{John Coons et al., Private Wealth and Public Education} (1970)).

\textsuperscript{71} The CEDs are composed in such a way that their revenue will not exceed what the state ensures to all CEDs for the basic allotment. \textit{See infra} text accompanying notes 227-46 for a more detailed discussion.

\textsuperscript{72} \textit{See infra} text accompanying notes 257-67 for a discussion of how the revenue limit may help achieve greater tier two equalization.

\textsuperscript{73} \textit{See Edgewood II}, 804 S.W.2d at 497. The court noted that through some form of tax base consolidation the school finance system could be made more efficient "by utilizing the
authority on the tier one level, Senate Bill 351 effectively shifts portions of locally-raised revenue from wealthy to poor districts as the CED pools the collections of its assigned members and then equitably distributes it back to them.\(^{74}\) This recapture feature shifts a greater burden of the funding of Texas public schools from the state to the local level as wealthy property districts ease the state's obligation to fund property-poor districts.\(^{75}\) Second, House Bill 2885 establishes a procedure for calculating future caps\(^{76}\) on the amount of revenue that a wealthy school district can raise.\(^{77}\) Not surprisingly, these two equalizing mechanisms\(^{78}\) have turned property-rich districts from defenders of the public school finance system in Texas to vocal adversaries.\(^{79}\)

### E. Edgewood III

The challenge to the Texas public school finance system created by Senate Bill 351 and House Bill 2885 drew into question state constitutional provisions other than article VII, section 1,\(^{80}\) and cast the litigants in either new or adjusted roles.\(^{81}\) District Court Judge McCown separated the

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\(^{74}\) See supra note 23, at 14.

\(^{75}\) See supra text accompanying notes 91-118 and accompanying text for a discussion of the supreme court's Edgewood III holding on the first three constitutional challenges listed above.

\(^{76}\) See infra text accompanying notes 260-67 for an interpretation of the revenue limit's operation.

\(^{77}\) See Guthrie & Reed, supra note 23, at 14.

\(^{78}\) See Terrence Stutz, Court Justices Question School Funding, DALLAS MORNING NEWS, November 20, 1991, at A26. The property-rich districts spearheaded the challenge to the school finance package of Senate Bill 351. Id.

\(^{79}\) The original plaintiffs to the litigation are taking a back seat in support of the state despite displeasure with the funding of facilities and dangers of tax revolt from the plan's increased dependence on local property taxes. Various groups of property-rich districts are
mushrooming legal issues into two parts, hearing arguments concerning the constitutionally of the CEDs first and reserving for later judgment questions of efficiency and suitable provision.\(^2\) In August 1991, Judge McCown found no constitutional limits applicable to the legislature's creation of the tax collecting CEDs, specifically rejecting the argument that they imposed a state-wide property tax.\(^3\)

The district court's initial stamp of approval for the new finance scheme opened the door for the Texas Supreme Court to tackle the politically charged issue of CED constitutionality.\(^4\) On January 30, 1992, the supreme court ruled that the Texas public school finance system enacted by the 1991 legislation was unconstitutional.\(^5\) The court sustained two out of three of the appellant's challenges to the CEDs constitutionally, finding that "Senate Bill 351 levies a state ad valorem tax in violation of article VIII, section 1-e and levies an ad valorem tax without an election in violation of article VII, section 3 . . . ."\(^6\) The court overruled the appellant's third contention that the legislature did not have the power to create the CEDs due to constitutional limitations.\(^7\) The court did not consider, unlike in its decisions in *Edgewood I* and *Edgewood II*, whether Senate Bill 351 satisfied the efficiency mandate\(^8\) since that issue was not raised by the appellants representing the property-rich school districts.\(^9\) Instead, the court emphasized that the legis-

questioning the constitutionality of the plan. In addition, the property-poor plaintiff-intervenors from *Edgewood II* have requested the court to fix "provisions on facilities, program revenue caps, and related tax limits," but have stopped short of asking for a wholesale rejection of the plan. Plaintiff-Intervenors Lead Legal Challenge, *NEWS & NOTES* (Equity Center, Austin, Tex.) June 1991, at 4 [hereinafter Plaintiff-Intervenors]; New Bill Doesn't Fix Some of the Old Problems, *NEWS & NOTES* (Equity Center, Austin, Tex.) May 1991, at 2.

\(^{82}\) *Edgewood Update: Just Wait 'Til the Spring*, *NEWS & NOTES* (Equity Center, Austin, Tex.) Sept. 1991, at 6.


The county education districts created by S.B. 351 are a valid exercise of the legislature's power to provide for the formation of school districts by general law, and the direction contained within S.B. 351 to the trustees of those districts to levy taxes sufficient to raise their local share for public schools is a valid exercise of the legislature's authority to pass laws for the assessment and collection of taxes within school districts, and these taxes are not state ad valorem taxes.

\(^{84}\) *See Edgewood Update, supra note 82*, at 6.


\(^{86}\) *Id.* The appellants consisted primarily of property-rich school districts challenging the constitutionality of the CEDs. The supreme court consolidated five appeals from three district courts to hear their "similar contentions." *Id.* at 489 n.1. Three of the appeals were initiated in the Travis County District Court presided over by Judge McCown. *Id.*

\(^{87}\) *TEX. CONST.* art. VII, § 3; *TEX. CONST.* art. III, § 56; *TEX. CONST.* art. III, § 64(a).

\(^{88}\) *Edgewood III*, 826 S.W.2d at 510-11.

\(^{89}\) *TEX. CONST.* art. VII, § 1.

\(^{90}\) *Edgewood III*, 826 S.W.2d at 493. The appellees included the State of Texas and school districts that had challenged the Texas public school finance system in the earlier *Edgewood* cases. *Id.* at 493 n.3. Although the appellee school districts supported the CEDs as to their constitutionality in relation to the appellants' claims, some of these same school dis-
lature's efforts to create an efficient school finance system to fulfill its constitutional duty did not give it license to violate other constitutional provisions.90

Article VIII, section 1-e, of the Texas Constitution, a 1968 amendment, was specifically drafted to repeal the use of state ad valorem school taxes.91 The key question was whether the CED tax amounted to a state or local tax. The court concluded that it was a state tax because the CEDs were "mere puppets" of the state, assigned "to levy a uniform tax statewide."92

Two features of the CED operation convinced the court that the CED tax amounted to an unconstitutional state ad valorem school tax rather than a permissible local property tax. First, the state effectively set the CED tax rate, leaving no room for local districts to vary the level of taxation.94 The court dismissed the argument that the CEDs had authority because they set the actual tax rates (but not the effective tax rates) required to raise the state calculated local fund assignment.95 Rather than discretionary rate setting, the CED adjustments to the statutory tax rate only required plugging numbers into a formula to adjust for such factors as variable collection rates.96

Second, the court noted that a CED and its member school districts had no choice but to participate in the program.97 The court contrasted this with previous "carrot-and-stick" plans in which the state offered incentives for the school districts to tax at the local share rate but did not mandate such action.98 Based on the state-determined property tax rates and mandatory CED participation, the court believed that CEDs were actually state agents used to levy the prohibited ad valorem tax.99

The supreme court gave no guidance as to "[h]ow far the State can go toward encouraging a local taxing authority to levy an ad valorem tax" without it turning into a state tax.100 Between uninhibited local discretion (a local tax) and the kind of plan enacted by Senate Bill 351 (a state tax), the court said there "lies a spectrum of other possibilities."101 Furthermore, the
districts claimed in pending district court suits that Senate Bill 351's overall finance scheme failed to achieve the constitutional standard of efficiency. Id.

90. Id. at 502.
91. Id.
92. Id. at 501.
93. Id. at 500.
94. Id.
95. Id. at 501. See infra notes 233-34 for a discussion of the variables that could cause a CED to adjust the state's effective tax rate to raise their assigned local share.
96. Edgewood III, 826 S.W.2d at 501.
97. Id. at 500. The manner in which the CEDs were composed assured that no CED (and its component members) could afford not to participate in contributing their local shares. By consolidating the tax bases, no CED on its own could raise more money than the state would guarantee back to the CED as basic allotment funding. See infra notes 227-46 and accompanying text for a discussion of the CED operation.
98. Edgewood III, 826 S.W.2d at 502.
99. Id. at 501. The court's conclusion that the CED tax amounted to a statewide property tax posed an obstacle not easily overcome. The court emphasized this by noting that even "voter approval" of the CED taxes would not by itself remove the constitutional roadblock. Id. at 524 n.43.
100. Id. at 502-03.
101. Id. at 503.
court stated that it would be "perhaps impossible" to determine "where along this continuum such taxes become state taxes." As one prominent commentator on Texas school finance expressed, this kind of court direction would cause "[e]ven Nostradamus . . . [to] be out of his depth in predicting the future of school finance reform in Texas."103

The supreme court also ruled that Senate Bill 351 violated the education taxation provision in the Texas Constitution104 because the newly created CEDs did not have voter approval for the taxes they levied.105 The court traced the history of the amendments to article VII, section three, and concluded that, between seemingly conflicting clauses, the one requiring voter approval for the CED taxes applied to the particular facts surrounding the creation of this new taxing entity.106 The court reasoned that a contrary interpretation would unnecessarily nullify constitutional clauses in violation of principles of construction.107 In further support, the court commented that eight decades had passed since the adoption of the clause allegedly excusing the requirement of voter approval.108 During that period, the legislature, in deference to the voter approval requirement, always proposed constitutional amendments when it sought to alter the rules concerning local ad valorem taxes.109

The court denied the appellee's claim that article VII, section 3-b110 negated the requirements of article VII, section three and enabled the legisla-
ture to levy the local property tax without voter approval.¹¹¹ Instead, the purpose of the provision was to dispense with the requirement of a tax authorizing election every time school district boundaries changed.¹¹² In cases in which whole school districts¹¹³ were consolidated together or a part of a school district was disannexed, the prior voter approval sufficed as authorization for the tax.¹¹⁴ If school districts were consolidated, the tax rate approved by the school district with the largest scholastic population applied.¹¹⁵ If a school district broke off from a larger school district, it retained the rate that it had approved as part of the previous district.¹¹⁶ The court found that neither of these boundary change situations applied to the creation of the CEDs because CEDs “stripped away” at least half of “districts’ allotted tax authorization” to be “redeposited in a new state-controlled entity without voter participation.”¹¹⁷ The court, responding to the complaints of recapture critics, emphasized that CEDs fundamentally changed school districts’ property tax burden by requiring some school districts to pay the costs of others without any voice in their operations.¹¹⁸

After finding the CED tax base consolidation unconstitutional, the supreme court attempted to distinguish its Edgewood II endorsement of the “general concept of tax base consolidation”¹¹⁹ from the legislative plan that the court now rejected.¹²⁰ The court qualified its prior opinion by stating that “[w]e did not say that tax base consolidation could not be unconstitutional; all we said was it could be constitutional.”¹²¹ Despite the previous assertion that school districts could be formed “along county or other lines for the purpose of collecting tax revenue and distributing it to other school districts within their boundaries,”¹²² the court explained that implicit in the text of the opinion (and explicit in the footnotes) was the need for voter approval for such county taxing units.¹²³

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¹¹¹ Id.; see also Edgewood III, 826 S.W.2d at 548-50 (Doggett, J., dissenting) (quoting and analyzing the history and meaning of the constitutional amendment).
¹¹² Id. at 509.
¹¹³ The court viewed CED consolidation as partial rather than whole because the new districts only assumed taxation authority and not other school district operations. Such a functionally limited grant of authority did not correspond to the pre-authorization taxation provisions of article VII, § 3-b dealing with geographic changes of whole districts. Id. at 508-09.
¹¹⁴ Id. at 509.
¹¹⁵ Id.
¹¹⁶ Id.
¹¹⁷ Id.
¹¹⁸ Id. at 509-10.
¹¹⁹ Edgewood II, 804 S.W.2d at 497.
¹²⁰ Edgewood III, 826 S.W.2d at 511.
¹²¹ Id. at 512. The court’s justification is commonly known as passing the buck to the legislature. See id. at 546 (Doggett, J., dissenting) (referring to the majority’s quoted rationalization as “doublespeak” designed to hide the court’s responsibility for the misdeed of judicial entrapment).
¹²² Edgewood II, 804 S.W.2d at 497-98.
¹²³ Edgewood III, 826 S.W.2d at 512. The court cited footnote 14 from the Edgewood II opinion as evidence that it considered voter approval a prerequisite to taxes levied by a county unit created to consolidate the tax base. Id. at 512 (citing Edgewood II, 804 S.W.2d at 497 n.14).
The court's holding invalidated the entire finance scheme enacted by Senate Bill 351, not just the CED provisions. The court ruled, however, that its decision should be given prospective effect, allowing the operation of the unconstitutional CEDs through the 1991-92 and 1992-93 tax cycles. The court believed that such a forward-looking decision was within a state's rights and did not violate due process principles of the United States Constitution by levying an illegal tax on citizens. Further, the court's application of the three-part federal test for civil prospectivity justified the holding as necessary to avoid a "serious disruption in the education of Texas' children." As a last detail, the court stayed the effects of the district court's original injunction in Edgewood I until June 1, 1993, ostensibly providing the legislature with time required to enact a new plan.

If the majority's opinion did not suit a reader's taste, the supreme court justices offered a lengthy smorgasbord of alternatives, with two concurring and dissenting opinions and one dissent. Concurring Justice Gammage succinctly explained that "[t]he fatal defect in Senate Bill 351 is its failure to submit newly proposed taxing authorities to local voters as required by Article VII, sections 3 and 3-b of our State's Constitution." He criticized the majority's "overwritten opinion" for its foray into federal law prospectivity analysis and its thinly veiled, misplaced criticism of the legislature. He believed that the public school system's reliance on the presumed constitutionality of Senate Bill 351 justified an equitable, prospective application of a decision unique to the Texas Constitution and its courts. Justice Gammage did not see, however, that extending the prospectivity beyond the 1991-92 taxing cycle served any equitable education interests but rather seemed motivated more by "election-year political considerations."

Fortunately, Justice Doggett provided a table of contents to accompany his thirty-nine page dissent. The dissent placed its strongest arguments in sections II and V, first suggesting that the supreme court entrapped the legislature with its Edgewood II "advisory opinion" favoring tax base consolidation, and later insisting that the prospective ruling should be retroactive for taxpayers subjected to the unconstitutional tax. The dissent sharply questioned the majority's backtracking on tax base consolidation, outlining numerous court assurances in prior Edgewood litigation that a plan such as
Senate Bill 351 would not violate the state constitution.\(^{138}\) As to the “prospective-plus” ruling, the dissent accused the majority of trying to have its cake and eat it too.\(^{139}\) First, the court held that the legislature enacted a plan that stood outside the constitutional parameters of what the court had “obviously contemplated.”\(^{140}\) Then, the court said that despite the clear constitutional violation, the legislature acted in “good faith” and, therefore, its disallowed plan should be treated leniently.\(^{141}\) The dissent insisted that the two positions did not mix, as prospective holdings apply to unexpected, new rules of law, not to predictable, foreshadowed rulings.\(^{142}\) Consequently, the dissent warned that the spectre of federal litigation via unconstitutional tax challenges would further complicate the never-ending \textit{Edgewood} drama.\(^{143}\)

After \textit{Edgewood III}, a state judicial scorecard for the Texas public school finance battle would show one district court decision modified,\(^{144}\) a second district court decision partially vacated,\(^{145}\) a third district court decision reversed and remanded,\(^{146}\) a court of appeals decision reversed,\(^{147}\) two Texas Supreme Court decisions holding the school finance systems constitutional violations of article VII, section 1 of the Texas Constitution,\(^{148}\) one denial of motion for rehearing,\(^{149}\) and a third supreme court decision holding the most recent school finance system a constitutional violation of article VIII, section 1-e and article VII, section 3 of the Texas Constitution.\(^{150}\)

The struggle to find a public school finance plan that will both satisfy the court’s constitutional concerns\(^{151}\) and be politically acceptable to the Texas Legislature has lasted nine years. In the midst of the fight is the constitutional duty of the legislature “to establish and make \textit{suitable provision} for the support and maintenance of an \textit{efficient system} of public free schools.”\(^{152}\) The next two sections will explain and analyze the operation of the 1990

\(^{138}\) \textit{Id.} at 540-44.  
\(^{139}\) See \textit{id.} at 557.  
\(^{140}\) \textit{Id.} at 563.  
\(^{141}\) \textit{Id.} at 564.  
\(^{142}\) \textit{Id.} at 543, 563-64.  
\(^{143}\) \textit{Id.} at 569. The court of appeals for the Fifth Circuit recently shut the door on taxpayer federal due process challenges to the \textit{Edgewood III} prospective holding on the CED taxes in lower federal courts. Smith v. Travis County Educ. Dist., 968 F.2d 453 (5th Cir. 1992). The court held that the Tax Injunction Act 28 U.S.C. § 1341, barred the federal district court from hearing challenges to a state tax system since Texas offered state “procedural avenue[s] . . . to pursue [the] federal due process claim.” \textit{Id.} at 456. The pending state court actions showed that the state offered a potential remedy for the taxpayers’ claims. \textit{Id.} 
\(^{144}\) See \textit{supra} text and accompanying notes 28-33.  
\(^{145}\) See \textit{supra} text and accompanying notes 43-47.  
\(^{146}\) See \textit{supra} text and accompanying notes 81-90.  
\(^{147}\) See \textit{supra} text and accompanying notes 30-33.  
\(^{148}\) See \textit{supra} text and accompanying notes 32-35, 46-50.  
\(^{149}\) See \textit{supra} text and accompanying notes 51-60.  
\(^{150}\) See \textit{supra} text and accompanying notes 85-129.  
\(^{151}\) See generally Stern, \textit{supra} note 8, at 998-1006 (discussing the court’s actions as an unwarranted judicial intrusion into the legislative domain).  
\(^{152}\) \textit{TEX. CONST.} art. VII, § 1 (emphasis added). The Dean of the University of Texas School of Law, a distinguished commentator on school finance, suggests that the ideal constitutional system (100% efficient and suitable) is asking for perfection in an imperfect world. See Yudof, \textit{supra} note 103, at 501. He compares the cost of such a system to the cost of
(Senate Bill 1) and 1991 (Senate Bill 351 and House Bill 2885) school finance plans in relation to those twin, broad objectives. With the rhetoric flying, the law in constant flux, and a 1993 finance scheme to come, the objective is to step back and reflect on how the last two plans actually operated in order to be informed rather than indoctrinated. \textsuperscript{153}

II. ACHIEVING THE MANDATE OF EFFICIENCY

Although this comment separates the issues of efficiency and suitability in the next two sections, considerable overlap between the two concepts exists. \textsuperscript{154} For example, recapture, discussed as a matter of efficiency, obviously harms a school district's ability to provide enrichment, discussed as a matter of suitability. Additionally, the creation of CEDs, categorized as an efficiency concern, also relates to the percentage share of funding assigned to the state and local entities, categorized as a suitability concern. The separation has been made, however, for convenience of analysis, with the line of demarcation as follows: Issues primarily concerned with fiscal neutrality are questions of efficiency, whereas issues primarily concerned with the state versus the local role in funding and the amount of revenue committed to education are questions of suitability.

A. WHAT EFFICIENCY MEANS TO TEXAS

The Texas Constitution directs the legislature to establish “an efficient system of public free schools” in order to preserve “the liberties and rights of the people.” \textsuperscript{155} Texas Supreme Court Justice Mauzy addressed the meaning of efficiency at length in \textit{Edgewood I}, concluding that both the legislative and judicial branches of the Texas government recognize “the implicit link that the Texas Constitution establishes between efficiency and equality.” \textsuperscript{156} The court also asserted that the constitutional mandate of efficiency, though less than precise, provided the court with a sufficient standard to measure the constitutionality of the legislature’s school finance plans. \textsuperscript{157}

\textsuperscript{153} Concurring and dissenting Justice Gammage correctly identified the critical shortcoming of the court’s and legislature’s recent actions:

\[ \text{It will be of little avail to the people that the laws are made by men of their own choice if the laws be so voluminous that they cannot be read, or so incoherent that they cannot be understood; if they be repealed or revised before they are promulgated, or undergo such incessant changes that no man, who knows what the law is today, can guess what it will be tomorrow. Law is defined to be a rule of action; but how can that be a rule, which is little known, and less fixed?} \]

\textit{Edgewood III,} 826 S.W.2d at 536 (quoting \textit{THE FEDERALIST} No. 62 (James Madison)).

\textsuperscript{154} See \textit{supra} text accompanying note 11 for TEX. CONST. art. VII, § 1, the education clause establishing the key requirements of efficiency and suitability.

\textsuperscript{155} TEX. CONST. art. VII, § 1; see \textit{generally} Parker, \textit{supra} note 8, at 881 (framer’s did not intend for the efficient school system to be a “state operated, state-mandated, centralized bureaucracy”); Watts & Rockwall, \textit{supra} note 8, at 791-92 (framer’s intended for an efficient system to “equalize educational opportunity” among the rich and poor).

\textsuperscript{156} \textit{Edgewood I,} 777 S.W.2d at 397.

\textsuperscript{157} \textit{Id.} at 394.
The judicial test for efficiency is whether the system chosen generates "substantially equal access to similar revenues per pupil at similar levels of tax effort."\textsuperscript{158} The court rejected legislative efforts to put more money into a flawed system, concluding that legislative "band-aids" may temporarily cover the funding disparities without curing the underlying cause.\textsuperscript{159} That underlying cause arises from the gross differences in local tax bases from which individual school districts raise widely varying supplemental funds for their instructional and facilities programs.\textsuperscript{160}

State legislative policy adheres to the court's view by stating that education funding should be "substantially equal to those available to any similar student, notwithstanding varying local economic factors."\textsuperscript{161} This policy of neutral education funding now expressly extends to revenue accumulated at the local level.\textsuperscript{162} The added wording, "considering all state and local tax revenues," indicates the legislative intent to level out funding disparities arising from local ad valorem property taxes.\textsuperscript{163} As a practical matter, the judicially crafted tests and state legislative policy amount to words without substance until the legislature enacts a plan and the supreme court interprets its compliance with the standards.

B. OPTIONS FOR EQUALIZING FUNDING

Unequalized local funding of public education in Texas resulted from what Judge Clark called the "irrational accident of school district lines."\textsuperscript{164} In 1883 the Texas Constitution's school taxation provision\textsuperscript{165} was amended to allow for the legislative creation of school districts with the authority to levy local property taxes.\textsuperscript{166} At first, the local taxes levied were only a minor supplement to the state's funding.\textsuperscript{167} Today, the local property taxes con-

\begin{itemize}
  \item \textsuperscript{158} Id. at 397.
  \item \textsuperscript{159} Id.
  \item \textsuperscript{160} The deficiencies the court complained about in Senate Bill I related to the local property tax. The plan allowed "districts to draw funds from a tax base roughly 450 times greater per weighted pupil than the poorest district," failed to "attempt to equalize access to funds among all districts," placed on "[most property owners . . . a heavier tax burden to provide a less expensive education for students in their districts," and "insulate[d] concentrated areas of property wealth from being taxed to support the public schools." Edgewood II, 804 S.W.2d at 496-97.
  \item \textsuperscript{161} TEX. EDUC. CODE ANN. § 16.001(a) (Vernon 1991).
  \item \textsuperscript{162} Texas statutory policy of fiscal neutrality states as follows:
    The public school finance system of the State of Texas shall adhere to a standard of neutrality which provides for substantially equal access to similar revenue per student at similar tax effort, considering all state and local tax revenues of districts after acknowledging all legitimate student and district cost differences. TEX. EDUC. CODE ANN. § 16.001(b) (Vernon Supp. 1992) (emphasis added to the amending portion). (Act of Apr. 11, 1991, 72d Leg., R.S., ch. 20, § 1, 1991 Tex. Gen. Laws 381).
  \item \textsuperscript{163} See id.
  \item \textsuperscript{165} TEX. CONST. art. VII, § 3.
  \item \textsuperscript{166} See generally Watts & Rockwall, supra note 8, at 809-19 (discussing how the 1883 amendment was intended to equalize disparities between city and rural districts).
  \item \textsuperscript{167} Id. at 813.
\end{itemize}
tribute half of the funding required for Texas schools. The heavy reliance by the state on local property taxes along with the disparities in district property wealth necessitated that the state implement controls on local tax rates and revenues to achieve efficiency.

In theory, the state has four options to equalize funding disparities arising from local property taxes: (1) eliminate the use of the local property taxes in favor of full state funding; (2) install revenue limits on local taxing so that the state's resources can cover the less severe disparities; (3) recapture locally-raised revenues for equal distribution to the state's students; or (4) combine options two and three. The first option, full state funding, draws criticism because the state has total discretion in setting the level of educational funding. Without wealthier districts to pave the way for higher educational funding, the state commitment threatens to be tied solely to the state political budget process instead of the true cost of education. In that case, the state would no longer have to strive to meet the funding level of the wealthy districts and per-pupil expenditures might be watered down to a lower level that the state feels it can afford. Hence, equalization through full state funding may not lead to quality education for all, but rather to a mediocre, state-controlled compromise for all.

The last three options involve the state capping the amount of local tax effort to limit revenue and/or recapturing the funds of wealthy districts to be distributed to the poor districts. Caps protect a state from the prohibitive cost of equalizing to the level of the wealthiest districts while recapture shifts the burden of equalization from the state to local districts. State recap-

168. Texas Comptroller's Office, supra note 164, at 5. Estimated expenditures for the 1989-90 school year showed that $7 billion, or 46% derived from local taxes and $6 billion, or 39%, derived from state expenditures. Id.

169. Texas Research League, Bench Marks 1990-91 School District Budgets in Texas 21 (1991) [hereinafter Texas Research League]. In 1990-91, Edcouch Elsa I.S.D. could raise $21 per student at a tax rate of $1.00 per $100 of taxable district property. At the same rate, Lauraless I.S.D. could raise $10,977 per student. Id.


171. See id. at 238.

172. See id. at 251.

173. Interview with Dr. Hoyt Watson, Professor of Educational Administration at North Texas State University, in Dallas, Tex. (Oct. 3, 1991) [hereinafter Interview with Dr. Hoyt Watson]. Property-rich districts are called "lighthouse districts" because they tend to set the course for higher levels of expenditures. Id.

174. Attorneys for Texas in Edgewood II noted that the state could not afford to equalize to the level of the wealthiest districts since the expense would be "four times the annual cost of operating the entire state government." Edgewood II, 804 S.W.2d at 495-96; see also Policy Analysis for California Education (PACE), 1990 Conditions of Education in California 4-5 (Apr. 1991) [hereinafter PACE] (discussing the dominant role that state politics play in California's educational funding since the passage of Proposition 13 restricting local property taxes); Lawrence Picus, Cadillacs or Chevrolets: Effects of State Control on School Finance in California, 17 J. Educ. Fin. 33, 59 (concluding that California's state control of educational revenue "equalizes expenditure disparities and has eliminate[d] differences in tax effort" at the cost of creating "more Chevrolets and fewer Cadillacs among the state's schools").

175. See KOZOL, supra note 1, at 208.

176. See JOHNS ET AL., supra note 170, at 177.

177. Mark G. Yudof, School Finance Reform: Don't Worry, Be Happy, 10 Rev. Litig 585,
ture can be achieved either directly, through state-controlled property taxation and distribution, or indirectly, by "reorganiz[ing] the school districts of the state in such a way as to give each the same or approximately the same resources per pupil."178

The manner in which one characterizes recapture separates those who favor the equalization method from those who do not. Proponents view it as shifting a surplus from one area to subsidize shortfalls in other areas.179 Critics dismiss the popular "Robin Hood" analogy as too kind, preferring to emphasize the sacrifice of educational excellence by those districts losing money.180 The two contrasting perspectives emphasize the dilemma of drafting and funding a plan that manages to create an efficient public school finance system as well as an educationally sound one.

C. SENATE BILL 1: THE 1990 PLAN

Senate Bill 1 arose from the Supreme Court of Texas' mandate to equalize districts' level of tax effort to generate similar amounts of revenue.181 The Act of June 6, 1990 incorporated three measures to achieve the goal: (1) increases in the amount of revenue guaranteed by the state in its two-tier foundation program;182 (2) provisions for studies to monitor emerging inequities so policymakers could adjust funding accordingly;183 and (3) a state policy approximating neutral funding.184

1. The Multi-Tiered Finance System

Texas' two-tier foundation program,185 originally devised in Senate Bill 1019,186 consists of a basic allotment per pupil and a limited guaranteed

590 (1991). "Perhaps the most important point to understand about recapture is that it pits statewide elected officials against local officials. If school finance reform is achieved through a guaranteed-yield system - dependent on new state funds - then legislators will need to vote for additional taxes and take the accompanying political heat." Id.
178. JOHNS ET AL., supra note 170, at 257.
179. See GUTHRIE & REED, supra note 23, at 115.
180. Compare Gregory Curtis, Busing Money, TEX. MONTHLY, Mar. 1991, at 5 (equating court's emphasis on tax-base consolidation with a holding that it is "unconstitutional to be best") with KOZOL, supra note 1, at 223 (discounting such attorney doublespeak as "redistribution" and the "liberty" of "local control," preferring instead to cast the finance battle as a class struggle in which the property-poor school districts seek a fair share of the available education funds).
181. Edgewood I, 777 S.W.2d at 397.
185. Texas has a three-tier finance system but a two-tier state foundation program. The foundation program relates to what the state guarantees to local districts for financing their schools and constitutes two of the three tiers in the finance system. The third tier consists totally of local funding without state aid. See Texas Comptrollers' Office, supra note 164, at 1.
186. Act of May 29, 1989, 71st Leg., R.S., ch. 816, 1989 Tex. Gen. Laws 3732 (amended 1990, 1991). The earlier act set the foundation program figures for the 1989-90 school year: (1) basic allotment of $1477 per weighted student with a local fund assignment tax rate of $0.34; and (2) guaranteed yield of $18.25 per weighted student for each penny of tax effort above $0.34 and up to $0.70. TEXAS RESEARCH AGENCY, RESEARCH BRIEFS 6 (Summer 1990).
yield on a tax effort that exceeds the tax rate required to receive the basic allotment. The basic allotment under the first tier provides the minimum financing sufficient for "a basic program of education that meets accreditation and other legal standards." The guaranteed yield gives school districts "the opportunity to supplement the basic program at a level of its own choice."

Tier one's basic allotment in Senate Bill 1 was $1910 per student for the 1990-91 school year, rising to $2128 per student by full implementation in 1992-95. For a school district to receive its per pupil share of the allotment, the state required school districts to tax at a uniform rate. The revenue that each district generated at the required rate, excluding local revenues in excess of the allotment, became the local district's share of the cost of the state's foundation program. Senate Bill 1 set the 1990-91 rate at $0.54 per $100 of taxable property, with the rate rising to $0.70 at full implementation in 1994-95. Theoretically, by raising the minimum local tax rate for tier one participation, the finance plan becomes more equitable as wealthier districts end up covering the cost of their basic allotment so that the state can concentrate its resources on poorer districts.

A simple example using figures from the unconstitutional finance system of Senate Bill 1 will help to illustrate the relationship between each district's local share and the state basic allotment. District Poor (P) has $100,000 of taxable property per weighted student and District Rich (R) has $400,000 of taxable property per weighted student. The year is 1994-95, making the tax rate $0.70 per $100 of taxable property and the unadjusted basic allotment $2128 per weighted student. District P raises $700 per weighted student.

188. The basic allotment figure does not match the actual basic allotment given to school districts because a system of weights and adjustments accounts for variables peculiar to each district's make-up that raise the cost of education. Act of Apr. 11, 1991, 72d Leg., R.S., ch. 20, § 1, 1991 Tex. Gen. Laws 381, 390 (amended May 27, 1991) (small district adjustment and special education weights codified as an amendment to TEX. EDUC. CODE ANN. §§ 16.103, 16.151 (Vernon Supp. 1992)).
190. Id. § 16.301.
192. Id. The apparent redundancy in the text with school district is intentional because county education districts have taken over the tier one taxing role that school districts had under Senate Bill 1. See infra text accompanying notes 227-30.
193. Act of June 6, 1990, 71st Leg., 6th C.S., ch. 1, 1990 Tex. Gen. Laws 1 (amended 1991). Although a district had to tax at a required rate to be eligible for aid from the foundation school program, the finance system did not require districts to participate in the program. For example, in 1990-91 Glen Rose I.S.D. (a nuclear power plant located there favorably skewes the property values) only taxed at a rate of $0.22 but was able to provide each of its weighted students $10,660 without state aid. TEXAS RESEARCH LEAGUE, supra note 169, at A35.
195. HOUSE RESEARCH ORGANIZATION, supra note 35, at 10.
($100,000 \times \$0.70 / \$100)$ and District R raises $2800 per weighted student ($400,000 \times \$0.70 / \$100$). Per weighted student, district P’s local share is $700 and District R’s is limited to $2128 because a district’s local share does not exceed the basic allotment figure. The state will supplement District P’s share $1428 to raise its revenue to the state guaranteed basic allotment ($700 local share + $1428 state supplement = $2128 basic allotment). District R keeps its $2800, retaining the $672 that exceeds the amount of the state basic allotment. Hence, even at tier one, funding disparities arise when property-rich districts can surpass the basic allotment at the tier one or local share tax rate.

Tier two flexibly rewards tax effort by the state guaranteeing a set amount of funds per weighted student for each penny of tax effort above the tier one’s local share rate and not in excess of the guaranteed yield enrichment tax limit. The tax rate limit on the guaranteed yield is set by the current statute in effect. Senate Bill 1 in 1994-95 would have guaranteed $26.05 per weighted student for each penny of tax effort that exceeded the $0.70 basic allotment rate up to $1.18, making the limit on the tier two enrichment tax equivalent to $0.48. A district that can raise $26.05 or more per weighted student with each penny of tax effort receives nothing from the state but is able to keep the excess.

Using the earlier figures from Districts P and R, the state will only need to help District P. District R can raise $40 per weighted student ($400,000 \times \$0.01 / \$100$) so the state will let District R cover the $26.05 guaranteed amount. District P can raise only $10 per weighted student ($100,000 \times \$0.01 / \$100$) so that the state guarantees the difference of $16.05 ($26.05 - $10.00) to help equalize funding. If both Districts R and P choose to levy a $1.00 local property tax, $0.30 above the local share rate, at tier two they would respectively raise $1200 (30 \times \$40)$ and $781.50 (30 \times \$26.05)$ per weighted student. The total two-tier funding for District R would then be $4000 per weighted student ($2800 + $1200), whereas it would only be $2909.50 ($2128 + $781.50) for District P.

Finally, under Senate Bill 1, local tax rates that exceeded the $1.18 maximum foundation program tax rate could be used to generate revenue described as unequalized local enrichment. This third tier of financing was limited by a $1.50 effective tax rate ceiling on maintenance and operation

197. Id. § 16.303.
200. In Region 10, one of twenty educational subdivisions servicing assigned counties, four districts had taxable property wealth higher than $400,000 per weighted student and twenty-eight had taxable property wealth lower than $100,000 per weighted student. Texas Research League, supra note 169, at A31, A33.
school property taxes.\textsuperscript{202} Hence, districts could choose to tax at $0.32 above the foundation program combined rates of $1.18. This option particularly disturbed the Texas Supreme Court in \textit{Edgewood II} because at full implementation in 1994-95 a property-poor school district could tax at $1.50 and generate approximately $4600 per student, whereas a property-rich school district could generate approximately $9200 per student at the same rate.\textsuperscript{203}

2. Legislative Policy, Equity Monitoring, and Efficiency

Senate Bill 1 attempted to deal with the potential inequities of the system by giving the Foundation School Fund Budget Committee (FSFBC) the authority to adjust the two-tier funding levels after reviewing financial studies.\textsuperscript{204} State legislative boards in cooperation with the Texas Education Agency were charged with compiling information each biennium on the “fiscal neutrality of the system.”\textsuperscript{205} The legislative boards were limited to recommending an amount for future years of the program that “may not be less than ninety-five percent nor more than one hundred percent of the ninety-fifth percentile of state and local revenue per pupil.”\textsuperscript{206} This limit on state funding could be changed by the FSFBC, however, if the members felt that neutral funding policies\textsuperscript{207} were not satisfied.\textsuperscript{208}

The state argued in \textit{Edgewood II} that this “self-adjusting” equity mechanism could give wealthy districts the freedom to set desired levels of funding and, at the same time, provide the state with a barometer for setting an equitable and appropriate amount of state support.\textsuperscript{209} In practice, though, increased state funding, state equity monitoring, and 95 percent student equality failed to satisfy the court’s efficiency mandate of equal levels of tax

\begin{itemize}
\item \textsuperscript{202} \textsc{Tex. Educ. Code Ann.} \textsection 20.04(d) (Vernon 1991).
\item \textsuperscript{203} Tex. Educ. Agency, \textit{supra} note 199, at 3. The amounts cited include the appropriate weights and adjustments to the state’s basic allotment. \textit{Id}.
\item \textsuperscript{204} The FSFBC is composed of the governor, the lieutenant governor, and the comptroller. \textsc{Tex. Educ. Code Ann.} \textsection 16.256(a) (Vernon 1991).
\item \textsuperscript{205} \textsc{Tex. Educ. Code Ann.} \textsection 16.202(a)(1) (Vernon 1991).
\item \textsuperscript{206} \textsc{Act of June 6, 1990, 71st Leg., 6th C.S.}, ch. 1, 1990 Tex. Gen. Laws 1 (amended 1991 by \textsc{Act of Apr. 11, 1991, 72d Leg., R.S.}, ch. 20, \textsection 1, 1991 Tex. Gen. Laws 381, 396-97). Senate Bill 1’s confusing limit on the amount recommended by the boards requires three steps to solve. First, the districts are ranked by their previous year’s state and local revenue totals. Second, starting with the lowest ranked revenue districts, the state accumulates the populations of the districts until the figure crosses the 95% line of the total number of students statewide. The district that breaks the line becomes the 95th percentile district. Finally, the amount of state and local revenue of the 95th percentile district sets the range for guaranteed state funding, with the state having the choice to fund anywhere from 95% to 100% of that total. For example, if the 95th percentile district has revenue equalling $5000 per weighted student, the legislative board’s recommended amount for program funding would range from $4750 (95% of $5000) to $5000 per weighted student (100% of $5000). \textsc{House Research Organization, \textit{supra} note 35, at 17-18.}
\item \textsuperscript{207} Senate Bill 1 set forth the following policy pledge: “the yield of state and local educational program revenue per pupil per cent of effective tax effort shall not be statistically significantly related to local taxable property wealth per student in which 95 percent of students attend school.” \textsc{Act of June 6, 1990, 71st Leg., 6th C.S.}, ch. 1, 1990 Tex. Gen. Laws 1 (amended 1991).
\item \textsuperscript{208} \textsc{Tex. Educ. Code Ann.} \textsection 16.256(c) (Vernon 1991).
\item \textsuperscript{209} \textsc{See Edgewood II, 804 S.W.2d at 496; see also Equity Monitoring, \textit{supra} note 198, at 15.}
\end{itemize}
effort to raise substantially similar amounts of revenue.\textsuperscript{210} In 1990-91, taxes on an $80,000 homestead varied from less than $300 for fifteen school districts to more than $1000 for fifty-nine school districts.\textsuperscript{211} Further, the one hundred poorest school districts at a tax rate close to $1.00 raised a total adjusted revenue of $4063 per weighted student, whereas the one hundred richest school districts at a rate close to $0.75 raised $8212 per weighted student.\textsuperscript{212} Consequently, the court endorsed tax base consolidation as an efficient remedy to the funding disparities.\textsuperscript{213}

Only conjecture remains as to whether the changes of Senate Bill 1 would have sparked a steady movement toward greater equity or just temporarily adjusted the disparities. The supreme court’s ruling shows distrust for the self-adjusting process assigned to the FSFBC for ultimate funding decisions.\textsuperscript{214} Instead of subjecting the efficiency of the public school finance system to the decisions of currently elected legislators and executives, the court supports a clearly defined and more permanent statutory fulfillment of the constitutional mandate.\textsuperscript{215} The efficiency mandate did not ask policymakers to pledge to work towards equalization under a polished version of the old finance system. Rather, the legislature was duty bound to “restructure the system” so that equalized funding would truly be a matter of constitutional right, not legislative discretion.\textsuperscript{216}

**D. Senate Bill 351 and House Bill 2885: The 1991 Plan**

After the Texas Supreme Court found the public school finance system under Senate Bill 1 to be unconstitutional, the Texas legislature returned to the drawing board and produced Senate Bill 351.\textsuperscript{217} Shortly thereafter, in House Bill 2885, the legislature amended portions of Senate Bill 351 by filling unintended gaps and clarifying uncertain terms.\textsuperscript{218} The new legislation distinguishes itself from previous funding efforts by the creation of County

\begin{footnotes}
\textsuperscript{210} Edgewood I, 777 S.W.2d at 399; Edgewood II, 804 S.W.2d at 496.
\textsuperscript{211} Texas Research League, supra note 169, at 19.
\textsuperscript{212} Texas Comptroller’s Office, supra note 164, at 5.
\textsuperscript{213} Edgewood II, 804 S.W.2d at 497. The court also mentioned that consolidation of whole school districts, including school operations rather than just taxation authority, could be a constitutional alternative. Id. The court’s one sentence treatment of the option indicated that the prospect of such a choice would be slim. One commentator has suggested that Sadam Hussein would be “more popular in Kuwait than school district consolidation is in Texas.” Yudof, supra note 177, at 589.
\textsuperscript{214} Edgewood II, 804 S.W.2d at 500.
\textsuperscript{215} Id.
\textsuperscript{216} Id. at 497.
\textsuperscript{218} Act of May 27, 1991, 72nd Leg., R.S., ch. 391, 1991 Tex. Gen. Laws 1475; see generally Update #6, supra note 60 (concise analysis by the state’s education agency of the 1991 Acts).
\end{footnotes}
Education Districts (CEDs) for the purpose of tax base consolidation. In addition, the new law introduces revenue limits.

1. CEDs - The Mechanics of Recapture

The legislature had two major obstacles to the transfer of local property tax revenue from one school district to another. First, the Texas Constitution, article VIII, section 1-e proclaimed that “[n]o State ad valorem taxes shall be levied upon any property within this State.” Hence, unless a constitutional amendment passes, Texas cannot collect property taxes at the state level and then distribute them on an equal basis to the students of the state. Second, an old Texas Supreme Court ruling, Love v. City of Dallas, held that “districts shall be organized and taxes levied for the education of scholastics within the districts” and “that the legislature cannot compel one district to construct buildings and levy taxes for the education of nonresident pupils.” The court, however, in Edgewood II lessened the severity of this obstacle by liberally construing the ability of the legislature to create districts for the sole purpose of taxation.

As a result of the holding, the legislature had a blueprint for drafting a system of recapture in Texas. First, local taxing districts would need to be created and composed in such a way that tax base disparities could no longer be so great as to hinder the state’s equalization efforts through the foundation program. And, second, a method would need to be developed for transferring funds within each new taxing district from the wealthier to the poorer members.

219. The legislature based its authority to create the CEDs for taxation purposes on Tex. Const. art. VII, § 3:

and the Legislature may also provide for the formation of school district by general laws . . . and the 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 schools heretofore formed or hereafter formed.

TEX. CONST. art. VII, § 3. See generally 2 GEORGE BRADEN, THE CONSTITUTION OF THE STATE OF TEXAS: AN ANNOTATED AND COMPARATIVE ANALYSIS 514-19 (describing history and explaining meaning of education’s taxation provision, noting the section exemplifies “how not to write a constitution”).


222. TEX. CONST. art. VIII, § 1-e. See Senate Bill 351, which left the door open for statewide recapture by providing for the abolition of CEDs “if the voters adopt a constitutional amendment authorizing the redistribution among other school districts of taxes levied by a school district.” Act of Apr. 11, 1991, 72d Leg., R.S., ch. 20, § 2, 1991 Tex. Gen. Laws 381, 408 (to be codified at TEX. EDUC. CODE ANN. § 20.948).

223. 40 S.W.2d 20, 27 (Tex. 1931).

224. Edgewood II, 804 S.W.2d at 497 (quoting Love, 40 S.W.2d at 27).

225. Edgewood II, 804 S.W.2d at 497. The court noted that the “consolidation of school districts” could be “an avenue toward greater efficiency in our school finance system.” Id. The logistical and political problems of consolidating the school districts themselves probably motivated the court less than serious treatment of the alternative.

226. See supra text accompanying notes 185-203 for a discussion of how the foundation program operated under prior law.
a. Creation and Composition

Senate Bill 351 creates 188 CEDs for the limited purpose of levying and collecting local property taxes sufficient to raise the CED’s share of the state’s foundation program under tier one (basic allotment). The CEDs do not directly interfere with a local school district’s tax efforts at tier two (guaranteed yield) of the foundation program. The plan assigns the 1047 school districts in Texas to either a CED that corresponds to the boundaries of Texas’ 254 state counties or to a multi-county statutory CED. Ninety-seven counties have been combined into thirty-one CEDs, leaving 157 CEDs that match the state county boundaries.

The Act controls the ability of a CED and its component school districts to raise local property tax revenue by arranging the boundaries “to ensure that no district [CED] has a taxable value of property in excess of $280,000 per weighted student . . . or a value set by the foundation school fund committee.” The reason underlying the selection of the $280,000 figure becomes clear by looking at the tier one CED tax, and the basic allotment for the full implementation school year, 1994-95. The state basic allotment of $2,800 per weighted student is conditioned on the CED contributing a local fund assignment by taxing at an effective rate of $1.00 per $100 of taxable property. Assuming a CED has the maximum $280,000 property wealth, the $1.00 effective tax rate would generate the $2,800 basic allotment without a surplus. Hence, the scheme effectively prevents the property wealth of

230. See UPDATE #6, supra note 60, at 35.
232. Interview with Dr. Hoyt Watson, supra note 173.
233. The actual tax rate set by a CED to raise its local fund assignment does not match the effective tax rate due to variances in collection rates, differences between state and county appraisals, changes in property values that develop after the time of state appraisal and before the CED rate setting, and unaccounted for residence and homestead exemptions recently enacted. CED Tax Rates Vary Widely for a Reason, EQUITY CENTER NEWS & NOTES, Aug. 1991, at 4. In 1991, the effective tax rate was set at $0.72, but CEDs set actual rates ranging from a low of $0.52 to a high of $0.99 in order to raise their local fund assignment. TEXAS COMPTROLLER’S OFFICE, SURVEY OF COUNTY EDUCATION DISTRICTS - ATTACHMENT C 21, 29 (Oct. 1991). In addition, joining school districts into one CED has an equalizing effect on the above tax setting factors. Districts that could have lower actual tax rates by themselves end up shouldering part of the tax burden of member districts that would have required higher actual tax rates. See Property Tax Legislation of the 72nd Legislature, TEXAS RESEARCH LEAGUE ANALYSIS, June 1991, at 1-3 [hereinafter Property Tax Legislation].
234. TEX. EDUC. CODE ANN. §§ 16.101, 16.252 (Vernon Supp. 1992). The State Property Tax Board, using prior tax year values, determines the value of taxable property upon which the local fund assignment is calculated. Id. § 11.86.
individual school districts from causing any unequalized funding at the tier one level.235

b. Distribution of Funds Within the CED

The CEDs provide for the local share of the state's foundation program by levying an effective tax rate of "$0.72 for the 1991-92 school year, $0.82 for the 1992-93 school year, $0.92 for the 1993-94 school year, and $1.00 for each school year thereafter."236 The CED then distributes the collected funds "on the basis of the component districts' share of the taxable value of property."237 However, "no component district238 shall receive funds in excess of the cost of tier one less the distribution of the available school fund."239 The "excess" becomes subject to recapture by the CED and then distribution to the other, less wealthy CED members.240 Technically, the "Robin Hood" part of the plan occurs only at the county level without involvement by the state.

The following example illustrates a simplified view of how CED taxation and fund distribution would have operated at full implementation if the plan had been ruled constitutional.241 The year is 1994-95 and District Indigent (I), District Poor (P), and District Wealthy (W) each educate 1000 weighted students. The state creates a CED composed of the three districts. Districts I, P, and W have property wealth per student equaling $125,000, $125,000, and $500,000, respectively. At the 1994-95 $1.00 CED effective tax rate per $100 of taxable property,242 I raises $1250 per student, P raises $1250 per student, and W raises $5000 per student. Multiplied by the 1000 weighted students in each district, I, P, and W generate revenue totaling $1.25 million, $1.25 million, and $5 million, respectively.

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235. See supra text following note 196 and preceding note 194 for an example of how wealthy districts could generate tier one surpluses under prior law.
237. Id. § 16.501(b).
238. For 1990-91 budget-balanced districts (those that could raise foundation program funding strictly from local revenue and the available school fund), certain exceptions would have applied until September 1, 1994, allowing the CED to distribute funds that exceed a school district's proportional CED share if needed to maintain that district's 1990-91 funding level. Id. § 16.501(c).
239. Id. § 16.501(b). The available school fund is a per capita constitutional distribution given to Texas students regardless of their district's wealth. TEX. CONST. art. VII, § 5(a). Currently, this equals about $300 per student. TEXAS COMPTROLLER'S OFFICE, supra note 164, at 6. Subtracting the available school fund from the cost of a district's tier one foundation program ensures that it cannot be used as a surplus, thus correcting one prior contributor to unequalized funding.
241. The example does not correspond to any possible CED funding scenario. Its primary purpose is to walk through the obtuse statutory language that describes a process whereby each school district in a CED taxes at the same level to get its basic allotment and no more. Those districts that cannot raise their basic allotment are helped either by a wealthy district's surplus or, if there is none, state aid. For a realistic look at school finance, see generally, UPDATE #6 supra note 60, at 82-87 (containing a six-page "Worksheet For Estimating Foundation School Program Aid" that takes into account such variables as a cost of education index, small district adjustment, and special education weights).
The unadjusted basic allotment for the year equals $2800 per weighted student.243 The available school fund for that year turns out to be $300.244 The recapture formula dictates that an individual school district's proportional distribution cannot exceed their cost of tier one less the available school fund ($2800 - $300 = $2500).245 For W, its $5000 proportional per student share of the taxable property revenue exceeds its allowable distribution by $2500. I's and P's $1250 proportional per student share of the taxable property revenue falls below the allowable distribution of $2500. Consequently, the CED can distribute W's $2500 excess to I and P, raising them up to the basic allotment level guaranteed by the state. In terms of total CED revenue, $2.5 million of W's revenue is shared with I and P, making them all equally funded at tier one and lessening the state's burden of equalization costs.

2. Tiers Two and Three: Guaranteed Yield and Unequalized Local Enrichment

Since CEDs operate only at the tier one level, individual school districts retain limited control over taxation for guaranteed yield and unequalized enrichment.246 Tier two, or guaranteed yield, maintains its purpose "to provide each school district with the opportunity to supplement the basic program at a level of its own choice and with access to additional funds for facilities."247 For up to $0.45 above the CED actual tax rate, school districts can raise funds for enrichment and facilities.248 The state guarantees that

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243. For 1994-95, the average adjusted basic allotment for school districts is estimated to be $3167 or $367 above the unadjusted basic allotment. Unlike the example, districts' basic allotments will be different depending on their cost variables. *Edgewood Lawsuit: Curtain Going Up on Act 4*, News & Notes, (Equity Center, Austin, Tex.) May 1991, at 1 [hereinafter *Edgewood Lawsuit*].


245. TEX. CONST. art. VII, § 5(a).


249. See supra text accompanying notes 196-200 for a discussion of tier two operation under prior law.

250. TEX. EDUC. CODE ANN. § 16.301 (Vernon Supp. 1992) (Act of Apr. 11, 1991 § 1, 1991 Tex. Gen. Laws 381, 403) (emphasis added to amending portion). The issue of facilities funding, as distinguished from maintenance and operations funding for a district's instructional program, raises important questions of efficiency beyond the scope of this comment. The essential debate centers around whether such funding should be placed in equalized tier one, partially equalized tier two, or some special tier of its own. *Why Facilities Allotments in Tier 17*, News & Notes, (Equity Center, Austin, Tex.) Sept. 1991, at 3 (arguing that an efficient finance system requires inclusion of facilities funding in tier one); *Plaintiff Intervenor's*, supra note 81, at 5 (added statutory wording for facilities in tier two only codifies what had been past practice).

each penny of local tax effort will provide $21.50 per weighted student rising to $28.00 per weighted student by the 1994-95 school year. The limit on the local enrichment tax correspondingly falls from $0.33 in the first year to $0.05 by the last year.

3. The Revenue Limit

In addition to limiting tax rates, Senate Bill 351 caps the amount of revenue that can be generated by school districts in an attempt to control funding disparities that could arise above the CED level. Two caveats should precede discussion of this new law. First, school finance experts note that the ambiguous drafting makes it unclear how the cap operates. Second, the Commissioner of Education's role in determining districts' limits each year raises questions of legitimacy that cannot be answered until the system operates for a couple of years.

The new finance plan defines the revenue limit as "an amount equal to 110 percent of the amount of state and local funds guaranteed under the Foundation School Program ... at a total tax rate of $0.25 per $100 of taxable value of property as calculated for the 1994-95 school year." The revenue limit excludes funds generated for debt service of facilities, thus allowing districts to exceed the revenue limit when funds are earmarked for that purpose. A probable application for the 1994-95 school year would be as follows: (1) the Commissioner of Education determines that the average district requires an adjusted basic allotment of $3167 per weighted student ($2800 + $367

252. Id. § 16.302(a).
253. CED distribution provisions are only "for tier one." Id. § 16.501(b).
255. As to the court's efficiency mandate, Senate Bill 351's final $0.05 limit on unequalized local enrichment compares favorably with Senate Bill 1's $0.32 limit. See supra text accompanying notes 201-03.
256. The following examples illustrate how to determine the year's tier three tax rate limit: (1) 1991-92: $1.50 - ($0.72 + 0.45) = $0.33; (2) 1994-95: $1.50 - ($1.00 + 0.45) = $0.05. See id.
258. Interview with Dr. Hoyt Watson, supra note 173; interview with James Damm, Assistant Superintendent for Highland Park I.S.D., in University Park, Tex. (Sept. 19, 1991) [hereinafter Interview With James Damm].
259. Property Tax Legislation, supra note 233, at 1,3. Since the 1991 school finance system was declared unconstitutional in Edgewood III, the revenue limit's operation may forever remain a mystery if it is taken out of the new plan. See supra text accompanying notes 122-27.
261. Id. § 16.009(d) (Act of Apr. 11, 1991, § 1 at 384).
adjustment), (2) to this amount he adds the tier two cap of $700 calculated by multiplying the $0.25 tax rate and the $28 yield per penny, and (3) the total $3867 guaranteed revenue is multiplied by 110% for a per student program revenue cap of $4427.262 If the district's total state and local revenue, excluding debt service, provides more than $4427, then that district would have crossed the revenue limit for that year.263

One district alone crossing the revenue limit would not activate any caps on funding. Only when more than two percent of the state's students reside in districts that have exceeded the revenue limits will the state intervene.264 When the two percent threshold is crossed, no “school district may levy a tax that will result in its exceeding the revenue limit in the following year” except “[d]istricts already exceeding the limit do not have to lower taxes, but may not increase them.”265 The exception allows the group of districts that trigger the initiation of the revenue cap to maintain their level of funding while those non-crossover districts must stay below the cap.266 The “hold-harmless” provision for the first districts to activate the revenue limit and the Commissioner's discretionary role in setting the year's adjusted revenue limit indicate that the provision's primary purpose is to control state equalization costs rather than to achieve efficiency.267

4. Final Assessment of Efficiency

Out of twenty-one Dallas/Fort Worth area school districts in 1990-91 (Senate Bill 1 plan), the school tax rates varied from a low of $0.64 to a high of $1.50, a difference of $0.86.268 In the new legislation's first year of operation, that difference in tax rates dropped to $0.55 with a range of $1.16 to $1.71.269 In addition, the property wealth disparity between 1990-91 school districts stood at 716-to-1 whereas the CEDs dropped that ratio to 6-to-1.270 Further, at full implementation in 1994-95, the scheme would have featured strong efficiency measures: (1) $1.00 of fully equalized local property taxes by the operation of the CEDs, (2) $0.45 of optional local property taxes guaranteed by the state to yield higher returns for property-poor districts, (3) potential revenue limits on property-rich districts; and (4) a restrictive property tax rate limit of $0.05 for local unequalized enrichment. Despite difficulties with actual tax rates,271 facilities funding,272 and revenue limit

262. Edgewood Lawsuit, supra note 243, at 1.
264. Id. § 16.009(e).
265. UPDATE #6, supra note 60, at 63-64.
266. Plaintiff-Intervenors, supra note 81, at 5.
267. See infra text accompanying notes 315-26 for discussion of the cost control aspect of a revenue limit.
269. See id.
271. See supra note 233.
272. See supra note 250.
exceptions,273 the legislature's 1991 school finance plan was a legitimate attempt to meet the efficiency mandate of "similar revenue per pupil at similar levels of tax effort."274

However, as will be discussed in greater detail in the next section, the finance scheme adopts efficiency without embracing the second constitutional duty of "suitable provision."275 New administrative costs,276 greater reliance on the local property tax,277 and a substantial loss of local discretion as to the level of enrichment funding lead to questions about the price paid for efficiency at the expense of suitability.278

III. SUITABLE PROVISION FOR EDUCATION FUNDING

In the search to find an efficient or fiscally neutral Texas public school finance plan, the second constitutional duty of the legislature "to establish and make suitable provision for the support and maintenance of an efficient system of public free schools" has taken second billing.279 The issue of suitability has often been rephrased as a question of whether the finance system is adequate to support the funding of public schools in their endeavor to ensure "a general diffusion of knowledge."280 The state's responsibility is to see that "a thorough and efficient system be provided and substantially financed through state revenue sources so that each student . . . shall have access to programs and services . . . appropriate to his or her educational needs . . . ."281

Since the 1883 amendment to article VII, section 3, of the Texas Constitution, the financing of schools has been a shared responsibility of local and state governments.282 However, the proper use of local revenue has always

273. See supra text and accompanying notes 260-61.
274. Edgewood I, 777 S.W.2d at 397.
275. TEX. CONST. art. VII, § 1.
276. Less than one-third of CEDs actually have wealthy districts that can raise a surplus to be distributed to poor districts, making the CED functions insignificant but costly in the rest. CED Watch: Initial Observations, NEWS & NOTES (Equity Center, Austin, Tex.) Aug. 1991, at 5.
277. Local funds in 1991-92 cover 47% of the state's education cost whereas state funds provide only 45%. SBOE Budget Shows Local Share Growing Faster, NEWS & NOTES (Equity Center, Austin, Tex.) Sept. 1991, at 7 [hereinafter SBOE Budget].
278. The Edgewood III decision doomed the 1991 school finance legislation to a shelf life of less than two years, losing effect sometime in 1993. See supra notes 124-29 and accompanying text. However, the analysis of the legislation is by no means moot since the court did not even consider the "constitutional standard of efficiency" in its opinion and the legislature still must try to create a finance scheme that achieves constitutional efficiency (fiscal neutrality) and suitability (adequate funding) without violating other state constitutional provisions. Edgewood III, 826 S.W.2d at 494.
279. TEX. CONST. art. VII, § 1 (emphasis added).
282. Edgewood I, 777 S.W.2d at 396. See also BRADEN, supra note 219, at 518 (education funding since 1883 has been a "joint responsibility of state and local authorities"); Parker, supra note 8, at 895 (1883 amendment primarily concerned with adding a local source of taxation to provide adequate funding for schools).
been considered as a supplement to the state funding.\textsuperscript{283} The Texas Supreme Court emphasized the state's greater responsibility when it criticized the failure of Senate Bill 1 to "change the basic funding allocation, with approximately half of all education funds coming from local property taxes rather than state revenue."\textsuperscript{284} In short, constitutional, statutory, and court-interpreted law all stress the state's primary obligation to see to adequate as well as efficient funding of the public schools. Whether the state has made "suitable provision" for education depends on two major concerns: (1) how the state structures the system of taxation used for the support of schools, and (2) what level of funding it establishes to cover the costs of educational programs that meet the students' needs. The second issue raises political questions about what is an adequate education, how much that adequate education costs, how that cost should be determined, and what level of fiscal commitment the state and localities wish to make to fund that cost. These issues can best be decided by elected officials representing the interests of their constituents.\textsuperscript{285} However, these questions may never be asked if the system of taxation is structured in such a way as to preclude any meaningful attempts to set the appropriate level of funding.\textsuperscript{286} Currently, the state's revenue options and the limits placed on them predetermine the maximum amount of state education funding, making academic any discussion about what is adequate funding.\textsuperscript{287} The legislature does not decide how much money the state should contribute to public schools, rather the available revenue that can be raised through the current tax structure dictates the bottom line. This obstacle needs to be removed by tax restructuring so that the legislature can freely perform its constitutional duty to determine the necessary level of funding for the state's public schools.\textsuperscript{288} Otherwise, the legislature will continue to avoid answering the important question concerning how much money will be sufficient to provide suitable education.\textsuperscript{289} As a further complication, local districts are not likely to remedy deficiencies in state education funding since the legislature seems determined to pass on the costs and constraints of efficiency to the overburdened local property taxpayer. The remainder of this section will analyze the present tax structure,

\textsuperscript{283} Edgewood I, 777 S.W.2d at 396. See supra notes 165-70 and accompanying text.

\textsuperscript{284} Edgewood II, 804 S.W.2d at 496. The United States Supreme Court expressed a similar concern in San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1 (1973), by noting the "need . . . for reform in tax systems which may well have relied too long and too heavily on the local property tax." Id. at 58.

\textsuperscript{285} See generally Stern, supra note 8, at 998-1006 (analyzing the political question doctrine in the context of judicial challenges to state finance systems).

\textsuperscript{286} See Mumme v. Marrs, 40 S.W.2d 31, 36-37 (Tex. 1931).

\textsuperscript{287} Edgewood Lawsuit, supra note 243, at 2 (finding that the structure of a new finance system with capped revenues, tax rate limitations, and greater local share funding will prevent funding responses appropriate to changing needs of education).


\textsuperscript{289} The character of the legislative duty means more than passively responding to the circumstances of a system in place; rather it is "an affirmative duty to establish and provide for the public free schools." Edgewood I, 777 S.W.2d at 394 (emphasis added).
the constitutional question of suitability arising therefrom, and possible alternatives to the tax structure.

A. STATE AND LOCAL SHARE OF SCHOOL FUNDING

From 1989 to 1991, the state share of public education program funding dropped from fifty-two percent to forty-five percent while the local share rose from thirty-nine percent to forty-seven percent. In 1991, actual tax rates on local property in the Dallas/Fort Worth area increased from a previous average of $1.12 to $1.38 per one hundred dollars of property value. Further, the Legislative Budget Board projected a thirty-five percent or $2.2 billion increase in property taxes if Senate Bill 351 had lasted until full implementation in 1995. Obviously, the CEDs, in their role of equalization, shift a greater burden of public education funding to the local revenue source, the property tax.

B. THE IMPACT OF THE LOCAL PROPERTY TAX

Property taxes do not correspond to a person's ability to pay. In 1990, a Texas family earning $10,000 contributed 7.6% of its income to state and local taxes while a family earning $100,000 or more contributed 4.7% of its income. Texas' property tax is twenty percent above the national average, contributing to a regressive tax structure that ranks forty-eighth out of the fifty states. The above figures do not reflect the increased property taxes that will fol-

291. See Box, supra note 268, at A6. In a Texas comptroller study, state local property tax rates in 1991 rose from $1.06 to $1.20 per one hundred dollars of property value. A portion of the increase can be attributed to the effect of increased residence homestead exemptions. Terrence Stutz, GOP says Richards to Blame for Steep School Tax Increases, DALLAS MORNING NEWS, Dec. 7, 1991, at A42.
292. GOVERNOR'S TASK FORCE ON REVENUE, FINAL REPORT 9 (July 1991) [hereinafter TASK FORCE]. The Task Force projected that local share yearly funding would rise from $2.15 billion in 1990-91 to $5.17 billion in 1992-93, an increase of 141%. At the same time, state foundation aid would rise from $5.73 billion to $6.96 billion, an increase of only 21%. Legislature Passes Appropriations Bill in Final Hours, NEWS & NOTES (Equity Center, Austin, Tex.) Aug. 1991, at 2.
293. See Plaintiff-Intervenors, supra note 81, at 5.
294. See TASK FORCE, supra note 292, at 24. Critics of the property tax cite two deficiencies: harshness on low income households and administrative costs. JOHNS ET AL., supra note 170, at 96. When a tax is based on a person's income, taxation levels adjust according to whether the taxpayer's income increases or decreases. On the other hand, property taxes rise with increases in the value of property regardless of whether the taxpayer's income increases, decreases, or completely disappears. See Stubbs, supra note 8, at 315.
296. Lapari, supra note 295, at 4. Despite Texas being above average in property taxes, the state in 1989 "ranked 34th among the states in total state and local taxes per capita." TASK FORCE, supra note 292, at 25.
Governor Richard's Task Force on Revenue, recognizing the inequities of the present tax structure, made the following recommendation its number one objective: "[a]ny future change in the Texas tax structure should begin with and proceed from the premise that local property taxpayers need immediate relief, especially from the growing reliance on [sic] heavy burden of property taxes to support public education." The Task Force feared that property tax "increases of this magnitude [under Senate Bill 351 could lead to] a California-style 'Proposition 13' tax revolt in Texas.

C. Texas' Outdated Tax Structure

Texas relies on six major taxes to generate state revenue: the sales tax, the motor fuels tax, the motor vehicle sales tax, the corporation franchise tax, the natural gas production tax, and the oil production tax. The general sales tax and the oil and gas taxes have become less reliable due to the changing makeup of the Texas economy. The sales tax was originally designed to fall "heavily on tangible goods" as opposed to services. With the shift towards a greater service economy, the shrinking tax base from the sale of goods yields less revenue. More importantly, Texas, as a result of the oil and gas industry collapse, lost a revenue source that ten years ago provided twenty-eight percent of the state's taxes and now provides less than eight percent. While the solution to the sales tax problem could be solved by changing the way service providers are taxed in Texas, the oil and gas tax system is generally not based on an ability to pay. No state tax in Texas today is based on income, which is generally considered to be the best measure of the ability. The Task Force analyzed Texas' current tax structure using ten criteria of a good tax system: affordability, adequacy, equity, economic efficiency, economic competitiveness, stability, simplicity, balance, broad base, and intergovernmental linkages. Based on these factors, not just the equity of the system, the Task Force concluded that "[t]axpayers manifestly need relief" from property taxes. Id. at 28.


Texas has the sixth highest sales tax rate among the states at 6.25%. Id. at 3. In the last 6 years certain services have been added to the tax base, but "professional services remain basically untaxed." Id.
revenue loss has no corresponding industry to pick up the slack created by the slump. The heavy dependence on the oil and gas revenue is the cornerstone for an “antiquated tax structure” insensitive to “expanding revenue needs.”

The basic weakness of the Texas tax system arises from the imbalance created by using sales and property taxes for revenue without the “third leg of the . . . stool”, an income tax. The United States Advisory Commission on Intergovernmental Relations recommends equal reliance by the states on those three tax sources. The Governor’s Task Force attributed the “chronic upward pressure on local property taxes” to the current imbalance of the Texas tax system. The majority of states recognize the need for a balanced tax structure as nationwide state income taxes provide $80 billion, or close to one third of the states’ revenue.

Texas, with its present revenue options, does not have the “financial capacity . . . to provide adequate and equitable dollar support to public schools.” The tax base consolidation of Senate Bill 351 continued the state’s reliance on the local property tax in order to fund costs beyond the present system’s limited means. The result is “sky-high property taxes”, aptly described as “a recipe for fiscal distress for schools.”

D. THE INADEQUACY OF THE NEW FINANCE PLAN

The finance plan enacted by Senate Bill 351 and House Bill 2885 is “static rather than dynamic.” At tier one, the state's basic allotment peaks at $2800 by 1995 and “thereafter” remains unless the FSFBC chooses to adjust funding to meet the costs of education. Similarly, the tier two guaranteed yield levels off at $28 in 1995 with no plans for increases “thereafter.” At tier three, the full implementation $0.05 limit on unequalized local enrichment will prevent districts that were once able to offset inadequacy of the new finance plan.

306. See TASK FORCE, supra note 292, at 1.
307. Id.
308. Id. at 27.
309. Id.
310. Id.
311. Stubbs, supra note 8, at 315-16 (citing BUREAU OF THE CENSUS STATE GOVERNMENT TAX COLLECTION IN 1988, at vi (1990)).
312. Walker, supra note 288, at 36.
313. Id.
314. Id. The Lieutenant Governor of Texas, Bob Bullock, expressed his support for a personal and corporate income tax, noting that changing times require a switch to a “modern, efficient, and fair tax system.” Bob Bullock, Hand in Hand-Property Tax Relief, Income Tax Can Work to Meet Finance Needs, TEXAS LONE STAR, Apr.-May 1991, at 13, 14.
316. See supra notes 204-16 and accompanying text for past criticisms of the FSFBC's discretionary operation.
317. TEX. EDUC. CODE ANN. § 16.101 (Vernon Supp. 1992) (Act of Apr. 11, 1991, 72nd Leg., R.S., ch. 20, § 1, 1991 Tex. Gen. Laws 381, 389). Although the basic allotment increases by $600 during the four year implementation of the Act, the CED tax rate for districts' local share of the foundation program also increases by $0.28. Id. § 16.252.
318. Id. § 16.302(a).
quate state funding from suitably supplementing their program. Further, the revenue limit may help alleviate funding disparities at tier two, but it also caps local school districts at a dated estimate of what constitutes adequate funding for educating children. In short, the 1991 school finance legislation mixes together ingredients for a truly inadequate funding system: (1) predetermine future levels of state guaranteed funding, (2) give a small group of elected state officials full discretion in determining whether changes in the cost of education necessitate adjustments to the guaranteed funding, (3) shift the costs of achieving a fiscally neutral system to the local property taxpayer, and (4) substantially restrict attempts of local school districts to account for inadequate state funding levels.

Frustration, resentment, and attempts to bypass the restrictions promise to be the products of the plan’s inadequacy. For some, the motivating logic for the change is that if everybody cannot have an adequate amount of funding then nobody should. This feeling can lead to a negative commitment to public education. Higher local taxes yielding less returns will discourage taxpayers from agreeing to increases in the already burdensome property tax. Instead, communities and individuals may look for escape routes.

319. Id. § 20.09(a) (Act of May 27, 1991, 72nd Leg., R.S., ch. 391, § 12, 1991 Tex. Gen. Laws 1475, 1481). The $0.05 limit is arrived at by subtracting the school district’s tier two tax rate of $0.45 from the district’s maximum allowable tax rate of $0.50. Id. § 16.303 (Apr. 11, 1991, § 1, 1991 Tex. Gen. Laws 381, 404).
321. See supra text accompanying notes 257-67 for an interpretation of how the revenue limit would have operated.
322. Edgewood Lawsuit, supra note 243, at 2. Estimates for the 1996-97 school year (factoring in a 5% increase in costs per year) show 17% of Texas students would have been in districts with their revenue limited. Id.
323. If past comparisons to average nationwide spending on education is any indication, then Texas guaranteed funding will be not only inflexible but deficient. In the 1990-91 school year, estimates showed Texas spending $3966 per student compared to a national average exceeding $5000. Education Reform: Preparing Our Children for the Future, FISCAL NOTES, (Tex. Comptroller’s Office) March 1991, at 10. This ranks Texas last among the largest ten states in education spending. This ranking partially stems from Texas’ status as a state with a large percentage of school-age children residing in poor households. Id. at 5-6.
324. Out of the eight major state spending areas for the last ten years, education ranked seventh in average annual growth. TASK FORCE, supra note 292, at 8. Since 1980-81, the revenue per student in Texas has fallen $135 constant dollars. Per Capita Revenue Shows Slight Gain in Real Dollars in 1989-90, RESEARCH BRIEFS, (Tex. Educ. Agency), Spring/Summer 1991, at 4. The past conduct of the legislature indicates that higher adjustments will be an unlikely proposition.
325. Ron Wood, business manager for Irving I.S.D., expressed frustration over the state’s maneuvering: “Overall, Dallas County lost $85 million in state funds to poor districts in south Texas. The only person that gained in all this is the state legislator and he could say, ‘We kept your state taxes down. We didn’t bring in an income tax this year.’” Box, supra note 268, at A6.
326. The California experience with severe restrictions on local funding has resulted in at least two negative consequences: local funding no longer “buffers” state revenue drops due to downturns in the economy and the loss of competition among districts tends to decrease the amount of funds committed to public education. Picus, supra note 174, at 45.
327. The resentful attitude against recapture fuels commentary: “The court’s decision is supposed to be a victory for minorities. But is taking money away from the education of black kids in Dallas and spending it on the education of brown kids in San Antonio a big step forward for minorities?” Curtis, supra note 180, at 12.
328. Yudof, supra note 177, at 592. See also KOZOL, supra note 1, at 221 (the California
One option for some districts will be to seek community contributions to a "tax-exempt foundation" which funnels money into the district's available revenue.\(^3\)\(^2\)\(^9\) Alternatively, concerned parents may increasingly seek out private schools, pushing their legislators to increase financial incentives for entering private schools at the expense of public school funding.\(^3\)\(^3\)\(^0\)

### E. The Local Choice to Enrich

Local districts argued in the past that the state should not interfere with their funding efforts because it would compromise their local control of education.\(^3\)\(^3\)\(^1\) Increased state power over the purse strings would lead to greater state regulation of local affairs. Such arguments ran contrary to the definition of a local school district as "a political subdivision of the state created for the purpose of the local administration of the state's public school system."\(^3\)\(^3\)\(^2\) With the current degree of state regulation of curriculum,\(^3\)\(^3\)\(^3\) administration,\(^3\)\(^3\)\(^4\) and instruction,\(^3\)\(^3\)\(^5\) the idea of a partially autonomous school district is, as described by Governor Richards, a "myth."\(^3\)\(^3\)\(^6\) The degree of local control granted to school districts by the state varies with the state's views on the value of centralized regulation, not the districts' fiscal independence.\(^3\)\(^3\)\(^7\) A local school district in Texas could be one hundred percent fiscally autonomous and still be subject to state regulation of the district's operations.

The choice to enrich, however, should not be easily dismissed as strictly within the state's power since the issue of the amount of school funding can be distinguished from issues concerning regulation of districts' operations. Experience shows that taxpayers will opt for a mediocre school system when the costs of excellence for all are viewed as too high).

\(^3\)\(^2\)\(^9\). At least one district openly acknowledges the feasibility of the tax-exempt foundation for its school district. Interview with James Damm, supra note 258.

\(^3\)\(^3\)\(^0\). One author argues that voucher plans and educational choice offer the true answer to the state's efforts to educate children. He accurately reflects a major criticism of the proposed funding alternative: "The minority fear of vouchers is that if parents are allowed to supplement the state voucher with their funds for education, unequal educational opportunity will result and there will be inflation in the cost of education so that the poor will still receive the worst education." Parker, supra note 8, at 916.

\(^3\)\(^3\)\(^1\). The local school district derives its authority from state delegation, not a constitutional grant of specific power. Braden, supra note 219, at 515.

\(^3\)\(^3\)\(^2\). Id.

\(^3\)\(^3\)\(^3\). E.g., Tex. Educ. Code Ann. § 12.01 (Vernon 1991) (state controls textbook adoption process); § 21.101(c) (state writes specific, mandated essential elements for all subjects at all grade levels).

\(^3\)\(^3\)\(^4\). E.g., Tex. Educ. Code Ann. § 21.301 (Vernon 1991) (guidelines for student expulsion); § 21.751(a) (central education agency oversees accreditation of school districts); § 21.920(b) (no-pass, no-play rule for student athletes).


\(^3\)\(^3\)\(^6\). Wong, supra note 36, at 16.

\(^3\)\(^3\)\(^7\). Currently, the trend is towards decentralizing the "rigid enforcement structure that is stifling creativity and local initiative." How to "redirect, restructure, revitalize" TEA, Straight Talk, (Association of Texas Professional Educators, Austin, Tex.) Oct./Nov. 1991, at 1 (quoting advisory group report prepared for Commissioner of Education, Lionel Meno).
The claim is not that the state will use a funding scheme to dominate local decisions on school operations but that the school district has a right to supplement state funding levels to meet its view of adequacy. The current finance scheme, with the recapture and revenue limit provisions, significantly curtails the ability of local school districts to supplement their educational resources beyond state determined levels of adequacy.\footnote{The court invalidated the plan by finding that local districts have a constitutional right “to provide educational opportunities over and above those required by the state and they retain the power to raise and spend revenue.”} The reason behind the limit is lack of state money to meet the levels of the wealthy districts. If the state allowed enrichment to proceed unchecked, then the cost of efficiency or fiscal neutrality would exceed its funding capacity.\footnote{The finance system is caught in a “Catch-22” constitutional dilemma. The state can afford efficiency only if it controls the revenue levels of the states’ districts. In controlling those levels, it makes what many districts view as an inadequate provision for “a general diffusion of knowledge.”} The finance system is caught in a “Catch-22” constitutional dilemma. The state can afford efficiency only if it controls the revenue levels of the states’ districts. In controlling those levels, it makes what many districts view as an inadequate provision for “a general diffusion of knowledge.”

\section*{F. The Way Out}

The key to having the opportunity to efficiently and adequately provide for public education in Texas is to restructure the state’s tax system to include a personal and corporate income tax. The Governor’s Task Force on Revenue considered the benefits of a personal income tax at a rate of five percent with a $4000 personal exemption.\footnote{The Governor’s Task Force on Revenue considered the benefits of a personal income tax at a rate of five percent with a $4000 personal exemption.} Further, the Task Force looked into replacing the franchise tax with a 7.5\% corporate income tax.\footnote{Further, the Task Force looked into replacing the franchise tax with a 7.5\% corporate income tax.} In the end, nine out of fourteen committee members voted for the two income taxes as a way to provide local property tax relief and generate needed levels of state revenue.\footnote{In the end, nine out of fourteen committee members voted for the two income taxes as a way to provide local property tax relief and generate needed levels of state revenue.} Furthermore, two members of the committee wrote letters contained in the report’s appendix favoring the personal income tax and at least some form of a new business tax, notwithstanding their nay votes on the overall recommendations.\footnote{Furthermore, two members of the committee wrote letters contained in the report’s appendix favoring the personal income tax and at least some form of a new business tax, notwithstanding their nay votes on the overall recommendations.}

Unfortunately, the political hostility toward a state income tax in Texas continues. Comptroller Sharp summed up the knee-jerk reaction by stating that he believed “the Capitol will shrivel up and fall in before the House of Representatives approves an income tax.”\footnote{Unfortunately, the political hostility toward a state income tax in Texas continues. Comptroller Sharp summed up the knee-jerk reaction by stating that he believed “the Capitol will shrivel up and fall in before the House of Representatives approves an income tax.”} One committee member of the Task Force described present recommendations for an income tax as out of

\begin{footnotes}
\item[338.] A Wisconsin supreme court case, Buse v. Smith, 247 N.W.2d 151 (Wis. 1976) involved a challenge to a recapture scheme “designed to ensure equal tax dollars for education from equal tax effort.” Betsy Levin, \textit{Current Trends in School Finance Reform Litigation: A Commentary}, 1977 DUKE L.J. 1099, 1130 (citing \textit{Buse}, 247 N.W.2d at 151). The court invalidated the plan by finding that local districts have a constitutional right “to provide educational opportunities over and above those required by the state and they retain the power to raise and spend revenue.” \textit{Id.} (quoting \textit{Buse}, 247 N.W.2d at 151).
\item[339.] Edgewood II, 804 S.W.2d at 500.
\item[340.] TEX. CONST. art. VII, § 1.
\item[341.] TASK FORCE, \textit{supra} note 292, at C7.
\item[342.] \textit{Id.}
\item[343.] \textit{Id.} at 34. Over thirty Texas organizations expressed support for the proposed income tax during the Task Force’s hearings, including the League of Women voters, the Texas Conference of Churches, the Texas Center for Policy Studies, the Texas Trial Lawyers Association, and the Texas Populist Alliance. \textit{Id.} at 29.
\item[344.] \textit{Id.} at A11, A18.
\item[345.] Nancy Cotton, \textit{The Man with the Plan: Sharp Discusses His New Ideas as Comptroller}, TEXAS LONE STAR, June 1991, at 18, 19.
\end{footnotes}
touch with political realities or an "ivory tower" mentality. Another member felt, however, that state leaders "must challenge the conventional wisdom and offer a vision that changes that fundamental order if necessary." Under a personal and business income tax model, the $10,000 income family would be taxed at 8.27% in comparison to the $100,000 family's 7.38%. The taxes for those two families would raise an additional $2736 in state revenue with the $10,000 family limited to paying only $61 of the increase. Consequently, the state would have sufficient revenue to solve the funding dilemma of an efficient and suitable provision for the schools without overburdening families with insufficient income.

IV. CONCLUSION

Since Edgewood I, the Texas Supreme Court has told the Texas legislature to make the public school finance system efficient (fiscally neutral) in accordance with the Texas Constitution. Edgewood II instructed the Texas legislature that adding more money to a system founded on tax base disparities fails to make an inefficient system efficient. Edgewood III protected the local property taxpayer from having to bear the costs of efficiency without some degree of local control and voter approval of the property taxes levied by a state-created taxing entity (the CED).

Throughout the school finance battle the focus has revolved around the mandate of efficiency and how to raise the funds for a system that should give substantially equal access to school funding at similar levels of tax effort. But slightly below the surface boils the interrelated and central issue of what constitutes adequate funding for public schools in Texas. When the property-poor school districts originally brought suit, they essentially said: "We do not have enough money to provide a suitable education for our children, property-rich school districts do, and therefore we want to be funded like they are." The answer has been so far: "The system is unfair and unconstitutional, but who is going to foot the bill for putting property-poor school districts on par with property-rich school districts?"

If local taxes finance the equalization, then property taxpayers will be stretched beyond their limits and pushed to the point of taxpayer revolt. Alternatively, the local school boards may gauge the taxpayer disapproval in advance and opt for less than adequate funding to avoid any voter backlash. Either way, the increasing reliance on the local property tax to fund Texas public schools threatens to undermine the goal of creating a constitutional finance system. Today the system is inefficient for all but adequate for some. Tomorrow the system could be relatively efficient for all but adequate for none.

The solution lies in the state recognizing that efficient and adequate fund-
ing cannot be achieved through reliance on overtaxed revenue sources. Texas' out-dated, regressive tax structure no longer generates sufficient revenue to fund the education needs of all the students of the state. The misuse of the local property tax not only creates disparities in funding but places unfair burdens on low income taxpayers. A state income tax could solve both problems by providing a progressive source of revenue and relieving the state's reliance on the local property tax. While these ideas are not new, they need to be given a new, objective presentation to the taxpayers of the state. For those who believe adequate funding is one ingredient in providing a quality education for all the students of the state, inclusion of the income tax to raise the increased financial need is preferable to greater dependence on an antiquated tax structure.\footnote{In an extensive study of the Texas public school system and the impact of disparate funding, the most recent research shows that money alone does make a difference in student performance because it can be used to attract higher quality teachers and retain them as they increase in experience and learning. See Ronald F. Ferguson, \textit{Paying for Public Education: New Evidence on How and Why Money Matters}, 28 \textit{Harv. J. on Legis.} 465 (1991).} Without the additional revenue, an efficient and suitable public school system will truly be an impossible dream.