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The Edgewood Drama: An Epic Quest for Education Equity

J. Steven Farr†
Mark Trachtenberg ‡

I. INTRODUCTION

“It’s frustrating that we have solved the problem of sending men to the moon, and we can’t solve a problem of school funding. . . . We’re going to keep on fighting until we prevail.”¹

A. A Tale of Two Schools

If he arrived at work half an hour early, the janitor would have time to rip the bats from the eaves of Edgewood Elementary School before the children filled the crumbling building’s halls. Meanwhile, just ten minutes away, in neighboring school district Alamo Heights, a custodian might be arriving early to double-check the chlorine level in Alamo Heights High’s Olympic-sized, indoor swimming pool.

In 1968, Edgewood Independent School District employees spent one afternoon blocking off the staircases that led to the condemned top two floors of the non-air-conditioned school. That same day, just a few miles away, the Alamo Heights employees might have polished the disco ball hanging from the ceiling of the high school’s air-conditioned “club house.”²

In the early 1970s, almost half of the teachers at Edgewood Elementary School lacked the official state certification they needed in order to

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teach. Meanwhile, the rare open teaching position in Alamo Heights Independent School District might have attracted a stack of credential-laden applications.

Edgewood, one of the many independent school districts ("I.S.D.s") in the city of San Antonio, Texas, had a hard time recruiting quality teachers when its neighbor, Alamo Heights I.S.D., paid its faculty thousands of dollars more per year. Edgewood had as difficult a time keeping those teachers as it did recruiting new ones. One out of every five of Edgewood's teachers would leave each year.¹

Both are public school districts in the state of Texas, and yet, for decades, Alamo Heights's resources far surpassed those of its neighbor's. Under the Texas school-finance system, rich school districts such as Alamo Heights could spend as much as nine times the money per pupil that a poorer district such as Edgewood could.²

By the late 1960s, Edgewood's students, parents, and teachers—most of whom were poor and Mexican-American—organized to voice their dissatisfaction with an education system that valued the education of some students more than others. On a Thursday morning in May 1968, a group of students became so frustrated with the poor conditions of Edgewood campuses that they simply walked out. Four hundred chanting parents and students marched in protest from the dilapidated halls of Edgewood High School to the school district's main offices, demanding an equal opportunity for education.³

A few more minutes of marching and they might have been able to cool off in Alamo Heights' pool—instead, those protesters have continued their march of protest for over a quarter of a century. Taking many forms over the years, the quest they began that Thursday morning would lead not only up the state capitol steps but eventually up the steps of the United States Supreme Court and back again to Texas.

Over the past decade, the Texas Supreme Court has adopted those marchers' cause as its own in a landmark series of decisions known as the Edgewood cases. The court first declared in 1989 that the school-finance system violated the Texas constitution in Edgewood I.⁴ The court would revisit the school-finance issue four times. After each of the first three Edgewood cases, the Texas Legislature responded with a reformed finance system.

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3. See id.
7. See 777 S.W.2d 396.
The dramatic dissimilarity between the financial resources of the Edgewood and Alamo Heights I.S.D.s are well known to students of school finance. The combination of their glaringly disparate resources and their close geographical proximity creates an ideal backdrop not only for debating issues of equity and adequacy in the Texas education system but also for analyzing the formidable challenge of equitable school funding that faces each and every state in the Union. As the impetus for the landmark United States Supreme Court cases and a pioneering and incessant procession of state litigation and legislation, the neighboring districts of Edgewood and Alamo Heights have come to serve as an almost allegorical reminder of the grand failures of traditional avenues of school finance.

B. A Tale of One Nation

Today, twelve years after the state litigation began and five years after the Texas Supreme Court placed its seal of approval on a new school-finance system, Edgewood schools spend $6060 per pupil per year, approximately $500 more than the state average. At its core, this Article is about how and why the Texas school-finance system evolved from a nationally notorious example of disparate education funding to the relatively equitable program it is today. At the same time, however, it is a dramatic narrative of tensions based on wealth, class, and race that have arisen in similar education-finance battles across the country.

Since the United States Supreme Court’s Rodriguez decision in 1973, almost every state in the country has grappled with state court challenges to its school financing method. Approximately half of all state school-finance systems have been, at some point, judicially overturned. Among the states in which plaintiffs have succeeded at least in part are: Alabama, Arizona, Arkansas, California, Connecticut, Idaho, Kansas, Kentucky, Massachusetts, Missouri, Montana, New Hampshire, New Jersey, New York, North Carolina, North Dakota, Ohio, Tennessee, Texas, Vermont, Washington, West Virginia, Wisconsin, and Wyoming. Some of these state’s systems have been rejected on more than one occasion.

8. See infra Subsection III.A.1.
12. For example, in 1977, the Connecticut Supreme Court held Connecticut’s inequitable
In about the same number of states (although the listing is not mutually exclusive), courts have upheld the constitutionality of education-finance systems. These states include: Arizona, Colorado, Georgia, Idaho, Illinois, Iowa, Louisiana, Maine, Maryland, Michigan, Minnesota, Montana, Nebraska, New York, North Carolina, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, Virginia, and Wisconsin. In fact, only a small handful of states have managed to remain undisturbed by education-finance litigation.

These state-constitution-based challenges to school-finance reform have generally fallen into two categories—equity-based approaches and adequacy-based approaches. An equity-based reform focuses on the problem of disparate resources. These suits are usually based on a provision in the state constitution requiring equity in the state's education system or are modeled after civil rights equal-protection claims. The goal of equity litigation is to equalize educational opportunities across all districts and students. The other approach involves establishing a minimum level of education (often via interpretation of some state constitutional provision) and then showing that some or all districts do not meet that minimum level of "adequacy."

Academic commentators have repeatedly described the various trends in education reform litigation as "waves." The "first wave," dur-
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ing the 1960s and early 1970s, grew out of the United States Constitution's Equal Protection Clause. After the Supreme Court rejected that approach in 1973, the "second wave," which lasted through the 1980s, was based on state equal protection clauses. The "third wave"—of which Texas's Edgewood litigation is considered a harbinger—has been based on education clauses of state constitutions. Both equity and adequacy claims have made up that "third wave" of litigation.

As one of the earliest—and arguably the most complex and protracted—"third wave" battles for education equity in the nation, Texas's Edgewood drama continues to serve as a crude but informative map for educators, litigators, judges, and politicians saddled with the task of achieving equity in school financing. In hopes of providing such a map, Part III of this article provides a narrative account of the Edgewood drama itself. Percolating within that narrative are the patterns and themes that inspire Part IV's analysis. Not only does the Edgewood drama illustrate alternative strategies for using equal protection provisions and public education provisions of state constitutions to challenge the equity of existing finance systems, it also brings into full relief the competing but inseparable notions of adequacy and equity that have re-occurred in courtrooms and decisions across the country. Such themes will ring familiar to education reformers. Other familiar controversies, including the role of local control and the often subtextual influence of race, class, and wealth, permeate the Edgewood drama. The Edgewood cases also pose difficult theoretical dilemmas regarding the relative responsibilities and competencies of the judicial and legislative branches of government.

19. As will be discussed below, equity claims based on education clauses in state constitutions are attractive to plaintiffs for a number of strategic reasons, including the strategy's avoidance of the baggage created for state equal protection claims by the United States Supreme Court's rejection of the federal equal protection claim in Rodriguez.
20. It is the federal Rodriguez litigation that actually opens the Edgewood drama. See Rodriguez, 411 U.S. at 19; see also infra Subsection III.A.1. Before the Supreme Court heard Rodriguez, the California Supreme Court held, under both federal and state equal protection provisions, that education was a fundamental interest and that strict scrutiny of the wide disparities in funding per pupil required an overhaul of the state school finance system. See Serrano v. Priest, 487 P.2d 1241 (Cal. 1971). Serrano may be considered the pioneering state education litigation.
II. THE EXPOSITION: TEXAS EDUCATION BEFORE \textit{EDGEWOOD}

A. \textit{A School-Finance Primer}

We begin with the premise that the Texas public education system was unjustly inequitable before the \textit{Edgewood} litigation. While the ultimate durability and degree of the plaintiffs' success remains to be seen, we feel little need to dwell on the injustice of a system that allowed such vast discrepancies among average expenditures per pupil. As an introductory matter, however, we believe a cursory discussion of the traditional means of financing public schools is in order. Only in light of the long-standing system of funding schools in America can \textit{Edgewood}'s effects be appreciated.

The motivations for education equity include lofty, romantic ideals of equality and excellence. The actual machinery of education equity in any particular state, however, relies on the decidedly unromantic processes of taxes, district boundary lines, state constitutional provisions, and legislative appropriation and redistribution of wealth.

These processes—at least as they relate to education—have been delegated to state governments for reasons that we will cryptically describe here as historical.\footnote{See United States v. Lopez, 514 U.S. 549, 583 (1995) (Kennedy, J., concurring) (stating that education has traditionally been the responsibility of the states because of historical expertise in the area); \textit{Rodriguez}, 411 U.S. at 49-50 (stating that local control over education involves citizens in decisionmaking, allows communities to structure educational programs in accordance with local needs, and encourages "experimentation, innovation, and a healthy competition for educational excellence"); Martin D. Carcieri, \textit{Democracy and Education in the Thought of Jefferson and Madison}, 26 J.L. & EDUC. 1, 2 (1997). In such contexts as desegregation, disabilities law, and, more recently, national standardization of curriculum and evaluation, the relative roles of state and federal government have been hotly debated. "Nowhere is the debate over the optimum balance of responsibilities among local, state, and federal governments more lively, significant, or just plain loud than in education." Jamienne S. Studley, \textit{Lawyers at the Education Crossroads}, 31 CREIGHTON L. REV. 1049, 1049-50 (1998). While several of the themes that we will pull from the \textit{Edgewood} drama speak to that controversy, this Article will not address the prudence of assigning responsibility for school finance and education equity to the state.\footnote{347 U.S. 483 (1954).} \footnote{Id. at 493.} \footnote{See Natapoff, \textit{supra} note 11, at 757. For a list of 30 states' education-related constitutional provisions, see \textit{id.} at 784.}}

The Texas Constitution, like the constitution of every other state,\footnote{See Natapoff, \textit{supra} note 11, at 757. For a list of 30 states' education-related constitutional provisions, see \textit{id.} at 784.} includes a mandate that the state provide public schools. Article VII provides, "[a] general diffusion of knowledge being essential to the preserv-
tion of the liberties and rights of the people, it shall be the duty of the Legislature of the State to establish and make suitable provision for the support and maintenance of an efficient system of public free schools.

The Texas Legislature (like many state legislatures) is thereby faced with the relatively vague duty to create "efficient" schools.

Although not by constitutional mandate, Texas is similar to most states in the Union in its historical dependence on property taxes for school finance. The property tax "has long been . . . a prime source of revenue for schools and other local governmental entities." Even today, "[m]ost states generate a substantial portion of the education budgets from local property taxes."

Today's financing structure originated with the Gilmer-Aikin proposals in 1947-1949, which called for the provision of an equal minimum educational opportunity to every student to be financed by equalized local tax effort and supplemented by state aid sufficient to compensate for the variations in local tax bases. The minimum foundation program ("MFP"), embodied in the Gilmer-Aikin proposals, assigned a proportionate share of the local financing requirement to each school district and allowed local districts to enrich their programs beyond the guaranteed minimum. While institutionalizing a state-local partnership in the financing of education, the MFP never reached its stated goal of providing an adequate minimum education for Texas students due to flawed funding formulas and inadequate financing.

Renamed the Foundation School Program by the time the Edgewood litigation started in 1987, the state aid program "distributed [funds] to the various districts according to a complex formula such that property-poor districts receive[d] more state aid than [did] property-rich districts." Districts had to tax at a legislatively-set minimum level to receive extra


26. See Natapoff, supra note 11, at 784.

27. BILLY D. WALKER & DANIEL T. CASEY, THE BASICS OF TEXAS PUBLIC SCHOOL FINANCE 85 (6th ed. 1996). Walker and Casey go so far as to assert that the "[u]se of the property tax to support public education is an Anglo-Saxon tradition and constitutes one of the greatest influences of the Protestant Reformation on Western culture." Id.


29. See WALKER & CASEY, supra note 27, at 9.

30. See WALKER & CASEY, supra note 27, at 9.


funding. Through such a system, the state provided approximately forty-two percent of a district's money in the mid-1980s, and local taxes raised approximately fifty percent.

This scheme, however, was designed merely to provide a "foundation" for district financing. The state earmarked funds for certain purposes, and the Foundation School Program did not provide for school facilities and debt repayment. Transportation costs and career ladder salary supplements were under-funded. In fact, funding under both the older "Minimum Foundation Program" and the newer "Foundation School Program" failed to provide districts with enough money to meet the state's own minimum accreditation requirements in areas such as teacher-student ratio, infrastructure, and special programs. Local supplementation of state monies, therefore, was an absolute necessity. Before Edgewood, the state provided less than a bare minimum, explicitly expecting school districts to supplement state funds from local taxes.

Although "in the last century and a half, public education in Texas has been governed in just about every way imaginable," the political battleground has consistently involved the Foundation Program in its various incarnations and monikers. The basic structural components that made up the Foundation Program—state funding subsidized by local taxes and an emphasis on local control—have consistently defined education-finance reform in Texas. Just as a number of other states have property-tax-based school funding (if not a foundation program similar to Texas's), the policy considerations that underlie Texas's education litigation appear in other states' litigation as well.

33. See Joe Ball, Efficient and Suitable Provision for the Texas Public School Finance System: An Impossible Dream, 46 SMU L. REV. 763, 769 n.40 (1992). The ranges of tax-rates for which districts receive state aid for certain purposes are commonly known as "tiers"—a concept that will be more fully developed below. See infra notes 111, 400-419 and accompanying text.
34. See Edgewood I, 777 S.W.2d at 392.
35. See id.
36. See id.
37. This conundrum portends the inextricable interdependence of the ideals of equity and adequacy that will haunt decisionmakers throughout the Edgewood drama.
40. For example, Alabama, Florida, Georgia, Kentucky, and Louisiana, to name a few, have (or had, prior to education equity litigation) similar foundation programs. See Mark Diefenderfer, Riding the School Finance Litigation Wave: Alabama's Remedy May Not Be Enough, 104 EDUC. L. REP. 961, 963 (1996); Andrew C. Forsaith, Achieving Equity and Excellence in Kentucky Education, 28 U. MICH. J.L. REFORM 599, 601-02 (1995); Molly Townes O'Brien, Private School Tuition Vouchers and the Realities of Racial Politics, 64 TENN. L. REV. 614
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The ultimate result of a property-tax-based funding scheme is that, to raise the same sum of money, school districts with high-value property can tax at a correspondingly lower rate than districts that happen to contain low-value property. Thus, "[t]he lower expenditures in the property-poor districts are not the result of lack of tax effort. Generally, the property-rich districts can tax low and spend high while the property-poor districts must tax high merely to spend low."41 Although most states, including Texas, have used some formula of adjustment to try to account for poor-property districts, the end result is the disparity illustrated so vividly by Edgewood and Alamo Heights.

For example, in 1985-1986, Edgewood I.S.D. drew taxes from $38,854 in property wealth per student; at the same time, Alamo Heights I.S.D. enjoyed $570,109 in property wealth per student.42 Thus, Alamo Heights theoretically could tax at a significantly lower rate than Edgewood in order to collect the same dollar supplement to its basic allocation of money from the state. Alternatively, Alamo Heights could tax at a moderately lower rate than Edgewood and come away with many times the dollars-per-pupil to fund its schools.

These disparities were even more dramatic on a statewide scale. The state's wealthiest district enjoyed $14,000,000 of property wealth per student from which to draw education funding. The poorest district made do with $20,000 per student, creating an astounding 700-to-1 ratio of available taxable funds between the wealthiest and poorest school districts.43 The 300,000 students in the poorest schools had less than 3% of the state's property wealth while the 300,000 students in the highest-wealth schools drew funds from over 25% of the state's property wealth.44 The wealthiest district, taxing at a small fraction of the rate of poorer districts, could spend $19,333 on each student while the poorest could spend only $2,112.45

41. Edgewood I, 777 S.W.2d at 393.
42. See id. at 392.
43. See id.
44. See id.
45. See id. The Texas Supreme Court gave other specific and revealing examples to show precisely how this taxing process works:

In 1985-86, local tax rates ranged from $.09 to $1.55 per $100 valuation. The 100 poorest districts had an average tax rate of 74.5 cents and spent an average of $2,978 per student. The 100 wealthiest districts had an average tax rate of 47 cents and spent an average of $7,233 per student. In Dallas County, Highland Park I.S.D. taxed at 35.16 cents and spent $4,836 per student while Wilmer-Hutchins I.S.D. taxed at $1.05 and spent $3,513 per student. In Harris County, Deer Park I.S.D. taxed at 64.37 cents and spent $4,846 per student while its neighbor North Forest I.S.D. taxed at $1.05 and yet spent only $3,182 per student. A person owning an $80,000 home with no homestead exemption would pay $1,206 in taxes in the east Texas low-wealth district of Leverettsl
Analogous disparities have plagued education systems across the country for decades. How can a state honor a tradition of local control and local supplementation of state education funding while at the same time ensuring equal distribution of funds?

B. Texas: “A Whole Other Country”?

Having to this point emphasized some of the common ingredients in education equity struggles across the country, we must also acknowledge a skeptical reader’s assumption that unique aspects of the Texas litigation distinguish it from other states’ situations. Like every other state, unique aspects of Texas’s historical, constitutional, and political background have indelibly framed its quest for education equity.

While we maintain that fundamental institutional issues make the Edgewood drama an invaluable resource for those contemplating education-equity reform elsewhere, we also believe that the Texas litigation must be viewed in light of several circumstances that we believe may be unique, if only in degree, to the state of Texas. First, Texans take the notion of local control seriously. Second, all issues of property-based funding eventually encounter the uneven distribution of oil and gas across the state. Third, the Texas Constitution significantly constrains the Legislature’s ability to tax. Fourth, education may be the most political issue in a state with colorful political traditions. The influence of these four factors played critical roles in shaping the Edgewood drama.

As a general proposition, Texans take their independence extremely seriously. What may be a humorous stereotype for the rest of the country is for many Texans a historical, heart-felt ideal. In terms of school finance, this stereotype arguably surfaces in the form of an unqualified dedication to the notion of “local control.” School reformers must acknowledge that local control is not negotiable. The most tangible indica-

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Chapel, but would pay only $59 in the west Texas high-wealth district of Iraan-Sheffield.  
Id. at 393.  
46. With the promise that Texas is “Like a Whole Other Country,” the State Tourism Board lures 169 million visitors a year. See 1998-1999 TEXAS ALMANAC 136 (1997) [hereinafter ALMANAC].  
47. Such universally encountered issues include the selection of local versus state control, equity- versus adequacy-based funding, and judicial versus legislative oversight.  
48. The evidence of this phenomenon is largely anecdotal. For example, many Texans still celebrate every March 2 as “Texas Independence Day.” The anti-litter campaign “Don’t Mess with Texas” has grown into a state motto. When the state legislature tried to put “The Friendship State” on Texas license plates, a petition to recall state politicians was started. Today, the license plates still proclaim Texas “The Lone Star State.” For a more serious example of this phenomenon, see Michele Kay, The Republic of Texas Wants You, AUSTIN AM.-STATESMAN, July 7, 1996, at A1 (“Initially dismissed by many as a fringe political group that law officers said might have ties to militias, the Republic of Texas has continued to attract new members.”).
tion of this phenomenon may be the large number of small, local school districts in the state. Small school districts, with as few as two students, have refused to be incorporated into their neighbors, an antiquated side-effect of Texans' ideal of independence and "local control." While there may be educational and organizational benefits to smaller school districts, these micro-districts' costs are inordinately high on a per-pupil basis, and taxable-wealth-per-pupil calculations are therefore skewed.

A 1931 Texas Supreme Court decision arguably codified this dedication to local control of school districts. In *Love v. City of Dallas*, the court held that a school district could not be compelled to use its resources to educate students who resided outside its boundaries. Because of the *Love* court's determination that, under the Texas Constitution, "districts shall be organized and taxes levied for the education of scholars within the districts," subsequent courts have questioned whether a school-finance system that involved statewide collection and redistribution of district money could pass constitutional muster. The ramifications of the *Love* decision form a recurring subplot of the *Edgewood* drama.

The state's dependence on oil also shapes any attempt at education-finance reform. Since the 1860s, wells have drawn crude oil from Texas oil fields. The early 1900s saw the oil boom expand across Texas, from East to West. The combination of the state economy's dependence on oil and gas and the education system's dependence on local control and property taxes creates several unique dilemmas. First, oil and gas wells are not spread evenly but instead are sporadically concentrated in pockets around the state. The rich reserves of oil in west Texas happen to co-

49. In fact, a "persistent problem throughout the history of Texas education had been the existence of a large number of small, inefficient school districts. As late as 1936 there were 6953 districts in the state, including 5938 common (fiscally dependent) districts enrolling an average of sixty-five students." Hobby & Walker, supra note 29, at 381. While the smallest districts have been gradually consolidated (often in the name of transportation efficiency), many rural areas continue to defend their small independent school districts. In 1991, Texas had over 1,000 school districts with an average of 3,000 students. Two-thirds of those districts, however, had student populations under 1,000. See BILLY D. WALKER & DANIEL T. CASEY, THE BASICS OF TEXAS PUBLIC SCHOOL FINANCE 87 (5th ed. 1992). In fact, in 1991, two Texas school districts (Allamore C.S.D. and Juno C.S.D.) had only two students each. See Edgewood Indep. Sch. Dist. v. Kirby, 804 S.W.2d 491, 497 (Tex. 1991) [hereinafter *Edgewood II*].

50. See WALKER & CASEY, supra note 49, at 87 ("Many states do not encourage small districts by granting extra state dollars to them, as is done in Texas, unless the districts can meet some formula of necessity (e.g., sparse population, distance to a neighboring community, and so on).").

51. 40 S.W.2d 20 (Tex. 1931).

52. Id. at 27.

53. See infra text accompanying notes 250-252, 261, 513-515.

54. See ALMANAC, supra note 46, at 561-62.
incide with Texas's most sparsely populated school districts. Second, the value of that oil and gas can vary dramatically over time. As a result, property taxes that derive from oil and gas have been unpredictable.

The third factor unique to Texas that has shaped the state's educational-equity litigation is its institutionalized aversion to taxes. The Texas Constitution contains a number of provisions that restrict the state government's ability to raise funds. For example, as a result of political wrangling in the wake of the 1876 adoption of the Constitution's education provision, ad valorem taxes—those imposed as a percentage of property value—can, in some circumstances, be imposed in a school district only by referendum.55 Local districts still struggle with this constitutional requirement.56 The Texas Constitution also explicitly prohibits the state government from imposing any statewide ad valorem property tax. As of 1951, "no State ad valorem tax shall be levied upon any property within [Texas]."57 Although the interactions between the several tax provisions of the Texas Constitution are complex, if not hopelessly unclear,58 state officials are constitutionally required to resist the otherwise politically-unsound temptation to interfere with local districts' property taxes. Furthermore, the Texas Constitution requires voter approval to enact an income tax.59 While the issue occasionally surfaces in response to budget shortfalls, Texans have historically been adamant about avoiding a state income tax. "It's against the grain of the conventional political wisdom in Texas. Many consider it political suicide."60 While other specific provisions of the Texas Constitution will take center stage in the Edgewood cases,61 these underlying structural parameters define the arena of the

55. See TEX. CONST. art. VII, § 3.
56. See infra text accompanying notes 303-307, 319.
57. TEX. CONST. art. VIII, § 1-e.
58. An ad valorem tax is a state tax when it is imposed directly by the State or when the State so completely controls the levy, assessment, and disbursement of revenue, either directly or indirectly, that the authority employed is without meaningful discretion. How far the State can go toward encouraging a local taxing authority to levy an ad valorem tax before the tax becomes a state tax is difficult to delineate. See Carrollton-Farmers Branch Indep. Sch. Dist. v. Edgewood Indep. Sch. Dist., 826 S.W.2d 489, 503 (Tex. 1992).
59. The long-running historical aversion to an income tax was institutionalized in an amendment to the constitution approved in 1993, which states:

   A general law enacted by the legislature that imposes a tax on the net incomes of natural persons, including a person's share of partnership and unincorporated association income, must provide that the portion of the law imposing the tax not take effect until approved by a majority of the registered voters voting in a statewide referendum held on the question of imposing the tax. The referendum must specify the rate of the tax that will apply to taxable income as defined by law.

   TEX. CONST. art. VIII, § 24.
61. For example, the Texas Constitution's education clauses are key to the plaintiffs' case
debate. Thus, as in every state, a Texas lawmaker's dilemma is not only to create a politically acceptable system of funding, but also to create a system within the confines of long-standing constitutional limitations.

Finally, a spectator of the Edgewood drama must take into account Texas politics. Not only do Texas politics have a reputation for and long history of volatility, but education finance, as a political issue, seems to incite particular contentiousness. The volatile history of Texas education reform actually predates even the state itself. Charging the Mexican government with, among other injustices, having "failed to establish any public system of education, although possessed of almost boundless resources," Texas revolutionaries declared independence from Mexico and established the sovereign Republic of Texas on March 2, 1836. Four days later, 183 Texans died at the Alamo in defense of that Declaration.

Admittedly, invoking the Alamo in the name of education reform is over-dramatic, if not historically inaccurate. Yet few Texas citizens—be they parents, students, teachers, or property owners—have managed to avoid taking sides in the education-reform debate. Many Texans defend their beliefs vehemently, if not venomously. When, on June 1, 1987 (a little more than 150 years after the fall of the Alamo), Texas District Court Judge Harley Clark opened the Edgewood drama by invalidating the Texas education system, Texas Governor Bill Clements sounded the alarm: "And what he is doing is taking local control and the independent school districts and abolishing them so that local school districts will no longer elect their school board members and will no longer control the schools within their district."

Several years later, when Texas District Court Judge Scott McCown struck down one of the Legislature's attempts to answer the supreme court's demand for reform, his chambers were inundated with letters, that the finance system is unconstitutional.

62. ALMANAC, supra note 46, at 381.
63. See id. at 382.
64. Of course, the Declaration's education grievance was probably not a major motivating factor for James Bowie and Davy Crockett as they faced several thousand Mexican troops. According to Lt. Col. William Travis's February 24, 1836 "Letter To the People of Texas & all Americans in the world," the Texans' chief concerns were "[i]liberty . . . patriotism & everything dear to the American character." Id. at 234. Letters from the revolutionaries trapped in the Alamo describe their dedication to ideals of freedom and liberty, not education equity. The fact that education finance has, however, always been a critical political issue for Texans helps explain the intensity of Texas's recent education equity battle.
66. Wayne Slater, Texas Will Lose Appeal, Bullock Says, DALLAS MORNING NEWS, Apr. 6, 1988, at 20A.
“some angry, some exultant—but all full of passionate intensity.” While often less dramatic than “Remember the Alamo!”, statements like “I pray you stand firm” and “You have shit for brains ... You Mexican/Catholic loving socialist” leave little doubt as to the emotional divisiveness of this issue. One writer went so far as to explicitly blur the line between the figurative and literal battlefield of education reform: “Parents across the state will look for your resignation from the bench. ... Civil unrest will come squarely to your chambers.”

While it may be true that “[t]here is no better place than Texas to explore people’s disenchantment with how politicians treat the public schools,” one must admit, to be fair to lawmakers, that few political issues are as difficult as education-finance reform. A legislator may be torn between voting for the general welfare of the state and the more politically pressing welfare of his or her home district. Conventional wisdom is that “[i]n reviewing a public school finance bill, a legislator will vote for the bill that will bring the most money to his home school districts. In most cases, the state interest becomes secondary to the interest of the legislator's home district.”

This dilemma is further complicated by the fact that school districts and voting districts rarely, if ever, coincide geographically. Most voting districts are in fact packed with a large number of school districts. Texas Legislator Henry Cuellar called this problem “the dilemma of the computer printout.” In evaluating each new reform proposal, each legislator must consider its effect on not only the entire state and his electoral district but also the individual school districts within that district. Legislators receive computer printouts detailing each proposal’s effect on each school district in their voting districts. Legislators are thereby often forced to choose among groups of constituents. How does a legislator determine which school districts’ interests to advocate?

67. Siegel, supra note 2.
68. Id.
69. Id.
70. Id.
71. Henry Cuellar, Considerations in Drafting a Constitutional School Finance Plan: A Legislator’s Prospective, 19 T. MARSHALL L. REV. 83, 88 (Fall 1993).
72. Id.
73. As Director of the Equity Center in Austin, Texas, Craig Foster is in charge of producing those perplexing computer printouts. Working at the Capitol on a daily basis, he has seen first-hand the tendency for legislators to answer to the wealthy and more politically influential segment of their constituency. The fact that affluent school districts claim more clout in the Legislature is hardly surprising. Politicians, facing difficult decisions, must answer to money and votes in hopes of re-election.

Foster does not believe, however, that the “computer printout dilemma” presents nearly the obstacle to school-finance reform that the “good-old-fashioned” politics of the state house does. If each legislator wrestled with these issues individually, the political puzzle would be relatively
Presumably, these four factors—Texans' adherence to local control, Texas's oil-based economy, the Texas Constitution's prohibitions on certain forms of taxation, and the intense political nature of the process and its players—have analogous, if not identical, counterparts in other states' struggles for education equity. We have presented these influences not because they somehow predict or explain how and why the Texas education litigation plays out, but because these background factors create the social and political context in which the Edgewood drama is set.

III. THE EDGWOOD DRAMA

A. The Opening Act

1. The Rodriguez Case

If these historical, constitutional, and political parameters set the stage for the Edgewood drama, the Rodriguez case and House Bill 72 were the drama's opening acts. Of all the influential factors involved in shaping the legal setting of the state litigation, none was as crucial as a federal class-action suit called Rodriguez v. San Antonio Independent School District. In Texas (as in all other states), however, politicians are constantly bartering for and returning political favors. Legislators make decisions regarding a financing scheme not according to its merits or its effects on constituents, but according to who wrote the bill. "You say 'But my district will be hurt by this,' and the Speaker says 'Well, do you want to be on the team or not?'" Foster explains. "Ninety percent of the time they choose to be on the team and get their committee appointments and so forth." Interview with Craig Foster, Director of the Equity Center, in Austin, Tex. (Mar. 18, 1996).

Foster seems to believe that the nature of politics precludes straightforward answers to problems as complicated as school-finance reform. He views even well-meaning politicians as victims of their positions. "The human animal is just not well-prepared to have hundreds of people coming around every day kissing their asses, telling them they are the most wonderful, most brilliant, most affecting, having the greatest promise," Foster explains. Id.

75. See Siegel, supra note 2.
Three years later, in the early winter of 1971, a United States District Court stunned Texas citizens by declaring that Texas’s school financing scheme violated the United States Constitution. Many Texans realized for the first time that years of discussion and proposals had actually done little to affect the inequity of the state’s system. Texas politicians were finally forced to acknowledge the pleas and warnings of the parents, teachers, and students of the state’s poorest school districts—messages they had largely ignored for years.

The plaintiffs modeled their challenge on race-based equal protection claims, arguing that the property-tax-based system of education finance in Texas discriminated on the basis of wealth. Under this equal protection model, a federal court would strictly scrutinize (and thereby likely declare unconstitutional) the finance system only (1) if it operated to the disadvantage of a suspect class, or (2) it interfered with the exercise of fundamental rights and liberties explicitly or implicitly protected by the Constitution. Thus, plaintiffs had two angles of attack. They either had to convince the federal court to apply “strict scrutiny” to the finance system by convincing the court to label wealth a suspect classification, or the plaintiffs could convince the court that education is a fundamental interest and that this discrimination impinged on the poor children’s exercise of their fundamental right to education. For the plaintiffs, these legal arguments were simply meant to show the court that “the significant disparities in educational expenditures caused by the disparate property tax bases of the school districts, poor school children living in low property value districts received a poorer quality education than the wealthy school children living in high property value districts.”

The three-judge panel of the district court endorsed the plaintiffs’ contentions. Relying on decisions dealing with indigents’ rights to equal treatment in criminal trials and on cases discontinuing wealth-based restrictions on the right to vote, the district court concluded that wealth was, in fact, a suspect classification. Given the Supreme Court’s affirmation of the undeniable importance of education, the district court decided that education was, in fact, a fundamental right. Therefore, unless the state could show a compelling interest in discriminating against poor

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77. See Walker & Casey, supra note 27, at 10 (“In late 1971, Texans were stunned into a realization of the ramifications of years of neglecting the problems of equity in school finance when a U.S. District Court declared the state’s financing scheme unconstitutional.”).


80. Id.


82. See id. at 283.
children, the system had to be rejected. The district court could find no such compelling interest. Finding that the Texas education-finance system—the Minimum Foundation Program—violated the Equal Protection Clause of the Fourteenth Amendment, the judges gave the state two years to start anew. Demetrio Rodriguez’s long march had paid off—temporarily.

The plaintiffs’ victory was short-lived. In March 1973, in a 5-4 decision, the United States Supreme Court reversed the district court’s decision. While that year-long window of clear-cut victory for the plaintiffs would have far-reaching political consequences, the plaintiffs’ previously successful legal arguments were systematically rejected by the High Court.

Writing for the majority, Justice Powell first dismantled the plaintiffs’ assertion that classifications by wealth are constitutionally suspect. Pointing out that “there is reason to believe that the poorest families are not necessarily clustered in the poorest property districts,” the Court based much of its argument on the difficulty of defining a category of poor people that suffer at the hands of the Texas system. Noting some form of “absolute deprivation” in its own precedents involving wealth-based discrimination, the Court also stated that the absence of any absolute deprivation of education in any definable class of individuals undermined the plaintiffs’ suspect-class argument. “For these two reasons—the absence of any evidence that the financing system discriminates against any definable category of ‘poor’ people or that it results in the absolute deprivation of education—the disadvantaged class is not susceptible of identification in traditional terms.” Powell went on to explain that

[t]he system of alleged discrimination and the class it defines has none of the traditional indicia of suspectness: the class is not saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process.

Next the High Court rejected the plaintiffs’ other angle of attack—characterizing education as a fundamental right. While acknowledging that it had labeled education “perhaps the most important function of state and local governments,” the Court stopped short of granting edu-

83. See id. at 283-84.
84. See id. at 286.
86. Id. at 23.
87. Id. at 25.
88. Id. at 28.
89. Id. at 29 (quoting Brown v. Board of Educ., 347 U.S. 483 (1954)).
cation “fundamental right” status on the grounds that “[e]ducation . . . is not among the rights afforded explicit protection under our Federal Constitution.”90 Furthermore, in a vivid illustration of equity litigation’s tendency to draw in extraneous “adequacy” language, the Court determined that, even if education were such a right, the plaintiffs’ equity-centered argument failed to demonstrate that the present levels of education expenditures in Texas failed to meet some standard level of adequacy.91

Having denied the need for strict scrutiny of the Texas system, the Court needed only to indicate some rational basis with which to justify the inequities found among Texas schools. To that end, the Court found that “[t]he Texas system of school finance . . . [w]hile assuring a basic education for every child in the State . . . permits and encourages a large measure of participation in and control of each district’s schools at the local level . . . .”92 According to the majority, “the freedom to devote more money to the education of one’s children,” at the local level, served as a rational basis for Texas’s system.93 Hence, the High Court accepted Texas’s claim “that it was reasonable for the Legislature to use local property taxes to further the goal of local control over schools.”94 The Texas school-finance system was upheld and the district court decision was reversed.

Undoubtedly, the Supreme Court’s decision dealt a serious blow to the plaintiffs’ hopes for immediate reform of the school-finance system. At the same time, however, the process of the Rodriguez case served as a catalyst for reform in the long run.

Although it was fleeting, the plaintiffs did enjoy a dramatic victory for a short period of time—a victory not without consequences. For over a year, Texas citizens lived with the burdensome knowledge that their education system was unconstitutional. “Throughout 1972, a great many studies relating to school finance options were carried out, and many diverse recommendations were made in regard to both revenue and allocation plans.”95 Education became the state’s overriding political issue—and would remain so for over two decades.

The district court’s decision in Rodriguez, along with the accompanying public relations work of MALDEF and IDRA, helped to transform the central issue of education from whether the education-finance system should be changed to how it was to be changed. And this transformation continued despite the Supreme Court’s reversal of the lower

90. Id. at 35.
91. See id. at 36-37.
92. Id. at 49.
93. Id.
94. Sparkman & Stevens, supra note 76, at 333.
95. WALKER & CASEY, supra note 27, at 10.
Edgewood Drama

court’s decision. “[T]he publicity surrounding the case raised the consciousness of state leaders, legislators, and residents of Texas concerning the inequities of the Texas public school finance system.”

Equally important, in reversing the trial court’s decision, the Supreme Court made clear that the Texas education-finance system needed repair. While stopping short of Justice Stewart’s concurring contention that the Texas system was “chaotic and unjust,” the majority decision began with a stark picture of the severity of education inequity in Texas; the majority opinion also stressed that “this Court’s action today is not to be viewed as placing its judicial imprimatur on the status quo.” The Court went on to implore explicitly elected officials to find a solution to the school-finance problem. Having had their dirty laundry aired nationally, Texas politicians jockeyed for position in the reformation movement.

2. Introducing the Players

Not only did Rodriguez foreshadow and define the issues that would take center stage in the late 1980s, the federal case also introduced the players who would star in the Edgewood production.

As mentioned earlier, San Antonio’s chapters of both MALDEF and IDRA worked on the earliest Rodriguez litigation. The relationship developed during the federal equity case would serve as a convenient basis for their collaboration in the state equity cases.

In those cases, the two organizations played different, but for the most part complementary, roles. MALDEF, a legal advocacy group, provided much of the legal strategy and personnel. Albert Kauffman, still a MALDEF lawyer in San Antonio, wrote the original petition in the first Edgewood case and has been involved with the case through its several incarnations. IDRA, a grant-funding organization founded by...

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97. Rodriguez, 411 U.S. at 59 (Stewart, J., concurring) ("The method of financing public schools in Texas, as in almost every other state, has resulted in a system of public education that can fairly be described as chaotic and unjust.").
98. See id at 23.
99. Id. at 58.
100. MALDEF is a national non-profit organization dedicated to legal advocacy for Mexican-Americans’ rights.
102. According to Albert Cortez, IDRA was originally formed with “Texas Educational Excellence” funds as an advocacy group that would provide research and technical assistance to groups interested in reforms. Recently, its funding sources have shifted from private grants to a number of federal and state grants and contracts. IDRA currently has forty employees working on a whole range of advocacy projects. Telephone Interview with Albert Cortez, Researcher at the Intercultural Development and Research Association (Apr. 3, 1996).
Edgewood Superintendent Dr. Jose Cardenas, provided technical assistance in the form of research and number-crunching. Both MALDEF and IDRA, however, shared a heightened interest in advocating issues important to Mexican-Americans. In fact, these organizations took on the *Edgewood* case in hopes of protecting the rights of the primarily Mexican-American community served by the Edgewood School District. MALDEF and IDRA's dedication to Mexican-Americans' concerns would have a clear impact on the early rounds of the *Edgewood* litigation.

At the same time, one of the lessons of the *Rodriguez* reversal was on the need for thorough factual data to back up any claim that Texas's finance system was discriminatory. In *Rodriguez*, the majority chastised the district court for passing over key factual threshold issues. The Court pointed to the "absence of any evidence that the financing system discriminates against any definable category of 'poor' people or that it results in the absolute deprivation of education." Many observers would agree that, "in fact, the original *Rodriguez* lawsuit ... was lost because of the total absence of the factual basis." Heeding this warning, Dr. Cardenas of the IDRA helped form a spin-off organization to concentrate on the constant number-crunching necessary for careful consideration of school-finance reform. This IDRA spin-off, the Equity Center, was a crucial factor in the plaintiffs' eventual success in the *Edgewood* cases.

Directed by former IDRA employee Craig Foster, the Equity Center accepts membership dues from low wealth school districts in exchange for its advocacy services. Representing 380 of the 750 school districts with property-tax bases poorer than that of the median Texan school district, the Equity Center serves as a permanent advocacy organization for poorer school districts around the state. Having taken over IDRA's role (and become independent of IDRA), the Equity Center created the constant stream of computer printouts that illustrate the distributional effects of each reform proposal. Foster thereby hoped to remind legislators of the poorer and less influential school districts in their electoral districts and to assure lawmakers of education equity's political viability.

Perhaps more importantly, Foster cultured a familiarity with Texas politicians and learned to navigate the Capitol, periodically reminding politicians of his member-districts' interests. While a number of other states have developed ad hoc lobbying groups to promote court-induced

103. *Id.*
105. *Id.* at 25.
106. Interview with Craig Foster, *supra* note 73.
107. *Id.*
Edgewood Drama

finance reform, Foster believes that Texas is unique in having a permanent political voice for poorer districts.\supercite{108}

While an evaluation of the impact of Foster’s organization will come later, the Equity Center was unquestionably a critical factor in the attack on the Texas school-finance system. The Equity Center, throughout the Edgewood drama, served as a strategic foil to MALDEF’s emphasis on judicial remediation. While Foster and his staff were actively involved in the litigation, the Equity Center’s primary role was to keep pressure on the Legislature. “We knew when we formed that litigation was going to be the major part of our program,” he said, “but we adopted the policy that we would always go first to the Legislature.”\supercite{109} Foster, using state-of-the-art computers, supplied legislators with maps showing the funding patterns of their constituents’ school districts under various remedial schemes, and, using his hard-earned understanding of Texas’s good-ol’-boy politics, Foster orchestrated a constantly changing coalition of sympathetic legislators.

As the Edgewood cases evolved, a number of other interest groups came and went. Groups of high-wealth districts coalesced to fight MALDEF, IDRA, and the Equity Center’s efforts. The ideals and constituents of those three organizations changed over time as well. MALDEF, IDRA, and the Equity Center, however, served as the main characters of the Edgewood drama until the final curtain.

3. A Nation at Risk and House Bill 72

In the wake of Rodriguez came one legislative change after another. The Minimum Foundation Program was renamed the Foundation School Program (“FSP”). In 1975, the Texas Legislature adopted House Bill 1126, which added a second “tier” of equalization aid that was “grafted onto the foundation program and targeted to property-poor districts.”\supercite{110} House Bill 1126 marked the beginnings of the two-tiered state aid program still in place today.\supercite{111} However, momentum for equity reforms

\supercite{108} Id. (“We are the largest association of poor school districts in the world.”).
\supercite{109} Id.
\supercite{110} Hobby & Walker, supra note 29, at 391. At the time of this implementation, the aid provided in the second tier was quite sparse. The Legislature simply created a $50 million fund to distribute to districts that were well below average in property wealth per child. See id. at 391 n.61.
\supercite{111} The Foundation School Program has comprised two tiers since 1975. Local districts have often raised unequilized funds at tax rates beyond the second tier, tapping into what has been often called the “third tier.” In 1989, the Legislature expanded the second-tier equalization program by guaranteeing a certain revenue yield for every penny of local tax effort, regardless of the property wealth of the local district. See infra notes 206, 411-415 and accompanying text. For an in-depth discussion of how these tiers function today, see infra Subsection III.D.4.b.
quickly evaporated, and only minimal positive equity effects were achieved as a result of this legislation. Other "reforms" were limited to piecemeal tweaking of different aspects of the foundation program.

While Texans wrangled over the details of their Foundation School Program, Americans critically evaluated their education system as a whole. They were disappointed, if not horrified, by what they found. Spurred by the growing importance of the worldwide market, Americans compared themselves with their economic competitors around the world. In 1983, the National Commission on Excellence in Education galvanized Americans' greatest self-doubts in its report, titled *A Nation at Risk: The Imperative for Educational Reform*. In the report, which has since become a part of the education reform canon, the Commission invoked the strongest of all metaphors, reporting that, "[i]f an unfriendly foreign power had attempted to impose on America the mediocre educational performance that exists today, we might well have viewed it as an act of war. As it stands, we have allowed this to happen to ourselves." 112

Apparently, the national focus on education, immortalized in the strong language of *A Nation at Risk*, helped spur the Texas Legislature to take a more drastic approach to education reform. According to William P. Hobby, Lieutenant Governor at the time, "House Bill 72 was Texas government's response" 113 to *A Nation at Risk*.

In 1983, faced with the combined pressures of the specter of *Rodriguez, A Nation at Risk*, and static state revenues, Governor Mark White appointed billionaire H. Ross Perot to chair a Select Committee on Public Education. 114 After a year-long investigation by this Committee, a whole range of education reforms were proposed. The proposals covered everything from the structure of the school-finance system to the length of the school day. 115

Although House Bill 72 was considered a sweeping package of reforms, it made only minor changes to the structure of the education-


Our Nation is at risk. Our once unchallenged preeminence in commerce, industry, science, and technological innovation is being overtaken by competitors throughout the world . . . . We report to the American people that while we can take justifiable pride in what our schools and colleges have historically accomplished and contributed to the United States and the well-being of its people, the educational foundations of our society are presently being eroded by a rising tide of mediocrity that threatens our very future as a Nation and a people.

Id.

113. Hobby, supra note 38, at 2.


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finance system. House Bill 72's finance system became the baseline from which Edgewood plaintiffs would fight for reform. The sum result of all of these changes was that aid to poorer school districts increased by several hundred million dollars a year—at least on paper.

In terms of the Edgewood cases, perhaps one of the most important provisions of House Bill 72 was the refinement of the Foundation School Program. The state and the local school districts shared education expenses. The cost of facilities, however, were borne entirely by the districts. "Under the [House Bill 72's version of the Foundation School Program], the amount of state aid received by any given district [was] 'equalized' according to a complex formula, so that low property wealth districts generally receive substantially more state aid than do the high property wealth districts."

While many of House Bill 72's education reforms remain (often controversial) staples of the Texas education system, the school-finance components of Perot's plan soon faced two insurmountable challenges. First, as the boom of the early 1980s began to wane, the Texas economy fell into recession. Oil prices plummeted. Suddenly, rather than increasing school funding, politicians were scrambling to maintain the status quo; the money was simply unavailable. In the end, funding for education escaped relatively untouched, suffering only minor cuts.

While House Bill 72 may have been able to survive the recession, Perot's proposals faced a second, more formidable challenge. The Edgewood plaintiffs had been waiting in the wings. They were poised to sue if House Bill 72 did not remedy the inequities in the state funding system. Unsatisfied, they filed suit. In January 1987, Edgewood v. Kirby went to trial.

117. See Lau, supra note 79, at 188.
120. See WALKER & CASEY, supra note 27, at 13. Taxpayers, however, were hit with increases in sales and gasoline taxes. Politically, House Bill 72 suffered. So, despite House Bill 72's potential for salient reforms, it was dramatically weakened by "a decline in the state economy, an accompanying decrease in state revenues, failure to overhaul the antiquated Texas state tax system, and the dissolution of legislative agreement on basic school finance values." WALKER & CASEY, supra note 49, at 95.
B. Edgewood I

1. The District Victory

From the perspective of the legal strategist, the Rodriguez reversal was not so much a rejection of the plaintiffs' argument as a rejection of the plaintiffs' choice of venue. In denying the plaintiffs' federal equal protection claims, "[t]he Rodriguez decision implie[d] that public school finance systems may be successfully challenged only at the state level on state constitutional grounds. This implication has been referred to as the 'Rodriguez loophole.'" The so-called "Rodriguez loophole" would frame the Edgewood cases.

The Edgewood drama's first scene opened in the court room of Texas District Court Judge Harley Clark in Travis County. During the early months of 1987, Judge Clark listened carefully as MALDEF's Albert Kauffman led an ever-growing group of school districts in a two-flanked attack on Texas's school-finance system under the Texas Constitution. The plaintiffs argued that the school-finance system was unconstitutional under two provisions of the Texas Constitution. The first provision, article I, section 3, mandates that "All free men, when they form a social compact, have equal rights..." From the plaintiffs' perspective, this provision begged for a Rodriguez-style equal protection claim. Second, the plaintiffs seized on the Texas Constitution's "efficient system" provision in article VII, section 1, which requires that the state legislature "establish and make suitable provision for the support and maintenance of an efficient system of public free schools." The plaintiffs hoped to incorporate notions of "equity" into the Constitution's mandate of "efficiency."

The plaintiffs' two-pronged strategy cannot be disentangled from the bifurcated political dynamics that created it. That is, the fact that the case...
had two distinct groups of plaintiffs betrayed an underlying ideological division over what legal route would best produce equitable funding for Texas schools. Generally speaking, Kauffman of MALDEF and his original plaintiff group hoped to pursue an “equal protection” attack on the funding system. MALDEF, as an advocacy group for Mexican-Americans, favored the “equal protection” analysis because it was more conducive to an ethnic-discrimination argument.127

For political reasons, meanwhile, Foster of the Equity Center and his plaintiff-intervenors preferred to concentrate on the “efficient system” provision of the Texas Constitution and to use the equal-protection argument in the context of wealth instead of race.128 He hoped to attack the system for its inherent weaknesses rather than its disparate effects. Neither of these two strategies became the exclusive domain of either group. Both groups made both arguments, although each group seemed to favor one strategy over the other.129

While the plaintiffs’ complaint alleged that the finance system violated both the “equal protection” (article I, section 3) and “efficient system” (article VII, section 1) provisions of the Texas Constitution, in the initial pleadings Foster’s plan to use a wealth-based rather than race-based equal protection claim was emphasized. The plaintiffs, as a cohesive front, concentrated on the state’s disparate treatment of poor and wealthy students. This “equal protection” strategy maintained that the education-finance system valued the rights of wealthy-district students over the rights of poor-district students. Of course, this argument closely mirrors the Rodriguez plaintiffs’ unsuccessful arguments from fifteen years before. This time, however, the arguments arose out of the Texas Constitution, and this time the outcome was different.

Based on the ideas that (1) education is vitally important and (2) education is specifically mentioned in article VII of the Texas Constitution, Kauffman first argued that education is a fundamental right (and thereby required the equivalent of “strict scrutiny”) for the purposes of equal protection analysis. (The Supreme Court had relied on education’s absence from the United States Constitution for its decision in Rodriguez.130) Given education’s status as a fundamental state right, the plaintiffs argued, the state could not provide unequal protection or treatment of that right without some compelling interest. Hence, through its education funding system, the state of Texas unjustly treated groups of students differently solely on the basis of the property wealth of their

127. See id.
128. Interview with Albert Kauffman, supra note 101.
129. The distinct implications and success of these different strategies will be discussed in more detail. See infra Part IV.
130. See Rodriguez, 411 U.S. at 35.
school district. True to his core MALDEF constituency, however, Kauffman also presented an alternative race-based argument. Because the poorest school districts generally had the highest concentrations of Mexican-American students, Kauffman made a disparate impact argument. Maintaining that education is a "fundamental right" under the state constitution and that wealth and race are suspect classifications, Kauffman’s team demanded that Judge Clark strictly scrutinize the school-funding system and declare it unconstitutional.  

The "efficiency" strategy was more straightforward. The plaintiff team, still relying heavily on testimony and research from Foster, maintained that such an inequitable finance system was "inefficient" in violation of article VII, section 1, of the Texas Constitution. That section, as mentioned above, required that the state legislature "establish and make suitable provision for the support and maintenance of an efficient system of public free schools." Plaintiffs made the case that "efficiency" denotes "fiscal neutrality" in public school funding and mandates that the level of expenditures per pupil in a district should not vary in accordance with the property wealth of that district.

In response to this two-pronged attack, the defendants, who were rapidly growing in number, argued that education was not a "fundamental right" and that "equal protection" analysis thus did not apply. According to these wealthier districts, whatever disparities arose out of the Texas education system were necessary side-effects of the cherished, if not constitutionally mandated, notion of local control. Some defendant-intervenor school districts, ignoring the apparent irony of the argument, also pushed a "money doesn’t matter" argument, citing academic studies disputing the link between financial inputs and test scores or student achievement.

Despite the State’s best efforts, in June of 1987, the district court rejected the State’s and the wealthy districts’ contentions. Judge Clark ruled that Texas’s school-finance system was inequitable and therefore

131. See Edgewood I, 761 S.W.2d at 860.
132. Interview with Albert Kauffman, supra note 101.
133. Edgewood I, 761 S.W.2d at 867.
134. See id. at 861.
135. The state was not left to defend the system by itself. Spurred by fear that Democratic Attorney General Jim Mattox would not adequately defend the status quo, two separate groups of wealthy school districts joined in the suit, bringing with them private attorneys to protect their interests. Attorney Earl Luna led one group, while Attorney Jim Turner represented another group. Interview with J. David Thompson III, supra note 119. By the time the trial began, the state of Texas was joined in its defense by no fewer than forty-nine defendant-intervenor districts. See WALKER & CASEY, supra note 27, at 13.
unconstitutional under both the “equal protection” and “efficient system” provisions of the Texas Constitution. Rejecting the defendants’ Rodriguez-style defense and accepting the plaintiffs’ call for strict-scrutiny, Judge Clark concluded that education is a “fundamental right” and that wealth is a “suspect classification” in the school-finance context. The school-finance system was therefore in violation of the equal-rights provision of article I, section 3, of the state constitution. Furthermore, the court declared that the current system was “inefficient” and would have to be overhauled in order to provide each school district with “the same ability as every other district to obtain (by state funds or local taxes or both) funds for education, including the costs of facilities and equipment.”

The State’s only victory came at the expense of Kauffman’s race-based equal protection claim. On every other point, the plaintiffs were victorious. The state district court gave the Texas Legislature two years—until September 1, 1989—to create a constitutional school-finance system. The equitable and efficient system would have to be ready for implementation by September 1, 1990.

2. An Appellate Defeat

For the second time, the Texas education-finance system had failed constitutional scrutiny. Yet, once again, the plaintiffs’ sweeping victory proved short-lived. Just eighteen months later, the Court of Appeals of Texas in Austin voted 2-1 to overrule Judge Clark and reconstitutionalize the old Texas education-finance system.

If the state district court decision reads like an appeal of Rodriguez, the court of appeals decision reads like Rodriguez itself. The court of appeals returned to Rodriguez’s reading of the United States Constitution to undercut the plaintiffs’ argument that wealth is a suspect classification, declaring that “[o]ur analysis under the Texas Constitution

137. See Edgewood I, 777 S.W.2d 391, 391 (Tex. 1989).
138. Edgewood I, 761 S.W.2d at 860.
139. Id.
140. WALKER & CASEY, supra note 49, at 96.
143. See Edgewood I, 761 S.W.2d at 860.
144. Based on the following excerpt from Rodriguez, the court of appeals refused to strictly scrutinize a wealth-based classification:
[A]ppellees’ suit asks this Court to extend its most exacting scrutiny to review a system that allegedly discriminates against a large, diverse, and amorphous class, unified only
reaches no different result."\textsuperscript{145} Frequently citing Rodriguez, the court declared that Judge Clark was mistaken to qualify education as a "fundamental right." While acknowledging the importance and long history of public education, the court stated that "importance" and "fundamental right" are not synonymous concepts.\textsuperscript{146} The notion of a "fundamental right," the court emphasized, refers to a limitation on state power, not "an affirmative obligation upon government to insure that all persons have the financial resources available to exercise their liberty or fundamental rights."\textsuperscript{147} The court apparently found a rational basis for the wealth-based classification in the state's interest in maintaining "local control" of school districts. While the court's reliance on local control seems tentative at best, it does maintain that "[t]he scheme of local financing that [has] evolved is not wholly irrelevant to the goal of local control."\textsuperscript{148}

The court of appeals also quietly and in short order disposed of the second, "efficiency" prong of the plaintiffs' strategy. According to the court, because article VII, section 1, of the Texas Constitution gives no guidance as to what "efficiency" means, the question of efficiency is "essentially a political question not suitable for judicial review."\textsuperscript{149} Here the court foreshadowed one of the most divisive issues of the Edgewood drama.\textsuperscript{150}

3. A Supreme Court Victory

Not surprisingly, the plaintiffs and plaintiff-intervenors challenged the court of appeals decision. During 1989, all eyes turned to the Supreme Court.

\textsuperscript{145} Id. at 864 (quoting Rodriguez, 411 U.S. at 28).
\textsuperscript{146} Id.
\textsuperscript{147} Id. at 862.
\textsuperscript{148} Id. at 863. The court found that "the district court erroneously elevated the important state interest of financing educational opportunity into a protected right on the same level with ancient liberties long recognized by the courts as fundamental, such recognized rights which do not depend upon public financial support." Id.
\textsuperscript{149} Id. at 867.
\textsuperscript{150} Judge Shannon concluded for the court: "The opinion and judgment of this Court should not be viewed as an affirmation that the present school financing system is desirable or that it should continue without change; rather, our conclusion is solely that the system is not in violation of the Constitution of Texas." Id. at 867.
Court of Texas. Kauffman's team of poor districts faced off in court against a collection of the state's wealthiest neighborhoods. The court of appeals had relieved the Texas Legislature of Judge Clark's deadline, but political pressure to reform the finance system had only intensified. Politicians anxiously awaited the high court's decision to see just what their role in the reform process would be.

On October 2, 1989, the Supreme Court of Texas finally decided *Edgewood Independent School District v. Kirby*. In a unanimous decision, the court reversed the appellate court and once again declared the Texas school financing system unconstitutional. Focusing on the plaintiffs' "efficiency" provision, the high court affirmed, but modified, the district court's decision.

Poor districts across the state rejoiced, with perhaps the greatest celebration occurring back in Edgewood. That long march of protest, begun in 1968, had reached its greatest milestone. "This is vindication of 20 years of struggle," said James Vasquez, superintendent of the Edgewood school district. "We poor school districts have been carrying a tremendous burden for a long, long time, with the most kids, the most pressing needs and the poorest tax bases.... A fairer system cannot come too soon." Vasquez and the other plaintiffs celebrated not only the victory but also what they believed was the struggle's end.

The supreme court began its indictment of the Texas school-finance system by echoing the angry and incredulous sentiments of the original Edgewood protesters. After rehashing the contrasts in property wealth between Alamo Heights and Edgewood, the court explained exactly how Texas's education-finance system perpetuates such disparity. Under the Foundation School Program, the state distributed aid to districts under a complex formula that gave poorer districts more money than wealthier districts. As the court emphasized, however, that program did not "cover even the cost of meeting the state-mandated minimum re-

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151. By now, the plaintiff team had grown to include 67 districts and a number of individuals. See *Edgewood I*, 777 S.W.2d 391, 391-92 (Tex. 1989).

152. Kauffman was joined as counsel by David Hall of Texas Rural Legal Aid in Weslaco, Texas. Richards and Gray continued to represent the plaintiff-intervenors. The attorneys for the defendant/respondents included Earl Luna from the office of Robert E. Luna in Dallas, James Deatherage from the office of Power, Deatherage, Tharp & Blankenship in Irving, Kevin O'Hanlon and Jim Mattox from the Office of the Attorney General, Timothy Hall from Hughes & Luce in Austin, and Jerry Hoodenpyle from Rohne, Hoodenpyle, Lobert & Myers in Arlington. See id. at 391.

153. See id.


155. See *Edgewood I*, 777 S.W.2d at 392.

156. See id.
Such dramatic disparities arose out of the system’s reliance on local property taxes for enrichment of education funds. Poorer districts had to tax at a much higher rate than wealthy districts and still could not raise equal funding. The supreme court expressed grave concern about the fact that poorer districts were becoming mired in a self-perpetuating cycle of poverty, without any opportunity for escape. “Because of their inadequate tax base, they must tax at significantly higher rates in order to meet minimum requirements for accreditation; yet their educational programs are typically inferior.” Of course, these higher taxes frightened off tax-paying businesses, forcing poor districts to raise property taxes further. “[T]he property-poor districts with their high tax rates and inferior schools are unable to attract new industry or development and so have little opportunity to improve their tax base.” Meanwhile, wealthy districts, with their relatively low tax rates, represented state-sanctioned tax-havens for savvy businesses.

Although it shared Kauffman’s disgust with the finance system’s disparities, the supreme court was more selective than the district court in its endorsement of the plaintiffs’ reasoning. Modifying some of Judge Clark’s declarations, the high court did not reach the question of equal protection at all. The supreme court’s decision centered exclusively on the mandate in article VII, section 1, that the Legislature “establish and make suitable provision for the support and maintenance of an efficient system of public free schools.” The court expounded on the requirement of “an efficient system” and determined that the Texas education system fell well short of that constitutional mandate.

The court first had to dispose of the lower court’s holding that defining “efficiency” is an inherently political issue that cannot be determined by the courts, which it did directly:

We disagree. This is not an area in which the Constitution vests exclusive discretion in the legislature; rather the language of Article VII, Section 1 imposes on the legislature an affirmative duty to establish and provide for the public free schools. This duty is not committed unconditionally to the legislature’s discretion, but instead is accompanied by standards. By express constitutional mandate, the legislature must make “suitable” provision for an “efficient” system for the “essential” purpose of a “general diffusion of knowledge.” While these are admittedly not precise terms, they do provide a

157. Id. at 392.
158. See id. at 392-93.
159. Id. at 393.
160. Id.
161. See id.
163. See Edgewood I, 777 S.W.2d at 394-97.
standard by which this court must, when called upon to do so, measure the
constitutionality of the legislature's actions.\textsuperscript{164}

Having determined that the matter of "efficiency" is in fact a justici-
able question, the supreme court confronted the more difficult task of de-
fining "efficiency." Despite its disclaimer that "because of the difficulties
inherent in determining the intent of voters over a century ago, we rely
heavily on the literal text,"\textsuperscript{165} the supreme court delved into the records
of the Texas Constitutional Convention of 1875.\textsuperscript{166} The court sought to
determine what the framers did not mean by "efficiency." The court em-
phasized that the ratifiers carefully chose the word "efficient," as op-
posed to "economical," "inexpensive" or "cheap,"\textsuperscript{167} and that "in mandat-
ing 'efficiency,' the constitutional framers and ratifiers did not intend
a system with such vast disparities as now exist."\textsuperscript{168}

Based on this understanding of the original meaning of "efficient" in
the Texas Constitution, the court concluded that "the state's financing
system is neither financially efficient nor efficient in the sense of provid-
ing for a 'general diffusion of knowledge' statewide."\textsuperscript{169} As such, the fi-
nancing system violated article VII, section 1, of the Texas Constitution.
With the violation established, the court then described what would be
expected of a constitutional financing system:

Efficiency does not require a per capita distribution, but it also does not al-
low concentrations of resources in property-rich school districts that are tax-
ing low when property-poor districts that are taxing high cannot generate
sufficient revenues to meet even minimum standards. There must be a direct
and close correlation between a district's tax effort and the educational re-
sources available to it; in other words, districts must have substantially equal
access to similar revenues per pupil at similar levels of tax effort.\textsuperscript{170}

In the final analysis, the court's mandate was a relatively simple one.
It did not, on its face, require a new source of funding. Nor did it require
a large-scale redistribution of funds or limit local enrichment of state-
provided funds. The supreme court's decision simply interpreted the effi-
ciency clause of the Texas Constitution as requiring fiscal neutrality.\textsuperscript{171}

\textsuperscript{164} Id. at 394.
\textsuperscript{165} Id.
\textsuperscript{166} See id. at 395.
\textsuperscript{167} Id.
\textsuperscript{168} Id. at 396.
\textsuperscript{169} Id. at 397.
\textsuperscript{170} Id.
\textsuperscript{171} To a large degree, the true motivations of the justices remain unknown, particularly in
relationship to the ever-present dual concerns of equity and adequacy in education. By basing
their decision on "efficiency," the justices of the Texas Supreme Court held their cards close to
their vests. Both the inequitable and the inadequate aspects of the Texas school finance system
seemed to concern the court. Just which failures of the system most inspired each justice is a
sub-plot that develops throughout the remainder of the Edgewood drama.
According to the court, "a penny of property tax effort in a poor district must yield the same amount of educational dollars as a penny of tax effort in a rich district."\textsuperscript{172} Quite simply, two districts with similar tax rates should have similar funds. Rather than mandate absolute fiscal neutrality, however, the court allowed for some level of imprecision by calling for "substantially equal access" and a "close relation."\textsuperscript{173}

The simple mandate of \textit{Edgewood I} ignored the political morass it would undoubtedly create. How similar tax efforts could yield similar funds in a state with vast disparities in school districts' property wealth remained unanswered. Without expressly stating it, the Texas Supreme Court was indicting the school-finance system's dependence on local property taxes as the culprit in Texas's inequitable schools. The underlying message of \textit{Edgewood I} was that a district's resources should reflect that district's tax effort, not that district's property wealth. Perhaps for political reasons, these nine elected justices couched their decision in terms of rewarding local effort, rather than condemning local, property-based funding. One of the primary conflicts of the \textit{Edgewood} drama is the justices' vain attempt to walk this political tightrope.

This first supreme court decision, perhaps unavoidably, planted the seeds of another future conflict: a power struggle between the legislative and judicial branches of government. Clearly, the court's definition of "efficiency" was intended to provide parameters for the Legislature to use in redesigning the school-finance system. Nonetheless, these skeletal guidelines would later produce criticism from legislators despairing over the lack of guidance from the court. The \textit{Edgewood I} decision may certainly be read as somewhat contradictory. While the court ordered the Legislature to "take immediate action"\textsuperscript{174} to create an "efficient" system of school finance, the court also acknowledged limits to its demands system:

Although we have ruled the school financing system to be unconstitutional, we do not now instruct the legislature as to the specifics of the legislation it should enact; nor do we order it to raise taxes. The legislature has primary responsibility to decide how best to achieve an efficient system . . . . \textsuperscript{175}

The Texas Supreme Court gave the Legislature until May 1, 1990, to repair its unconstitutional education-finance system.\textsuperscript{176} The Governor called a special session of the Legislature in the fall of 1989 to do just that.

\textsuperscript{172} Mark Yudof, \textit{Court Limited Legislature's Options on School Funding}, \textsc{Dallas Morning News}, May 9, 1993, at SJ.
\textsuperscript{173} \textit{Edgewood I}, 777 S.W.2d at 397.
\textsuperscript{174} \textit{Id.} at 399.
\textsuperscript{175} \textit{Id.}
\textsuperscript{176} \textit{See id.}
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Despite some legislators' cynicism and the court's self-imposed limitations, the *Edgewood I* decision did provide a number of standards for the Legislature to follow. Hoping to assist legislators in their formidable task, the Texas Association of School Boards extrapolated nine guidelines from the decision:

1) Under the Texas Constitution, the state has an affirmative obligation "to make suitable provision for an efficient system" and must therefore give education funding priority.

2) The finance system must create a direct and close correlation between a district's tax effort and the educational resources available to it.

3) School districts must have substantially equal access to similar levels of revenue per pupil at similar levels of tax effort.

4) In ensuring similar levels of revenue per pupil at similar levels of tax effort, the state may consider differential pupil costs and other cost differentials.

5) The state's support must not underfund requirements and must include funding for all costs, including facilities, equipment, and debt service.

6) The Legislature must ensure horizontal tax equity (equal tax incidence) by either eliminating "tax haven" districts or greatly reducing reliance upon local property taxes.

7) The state must ensure an "efficient system" that produces a "general diffusion of knowledge," is productive of results, and maximizes the use of state resources.

8) Unequalized local enrichment is allowed, but such enrichment must not result from necessity and must be supplemental to the "efficient" state system.

9) Simply allocating more money into the current finance system is unacceptable. The "system" itself must change.¹⁷⁷

Faced with the court's mandates, and constrained by the myriad of political, constitutional, and historical factors mentioned earlier, the Legislature began work on its first response to the first *Edgewood* decision—Senate Bill 1.

a. Recurring Themes: Efficiency, Justiciability, and Politics

At this point, it will be helpful to turn briefly from the litigation narrative in order to introduce formally some of the underlying policy considerations and tensions that will resonate throughout the rest of the *Edgewood* litigation. Of the numerous subplots in the *Edgewood* drama,

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¹⁷⁷ These nine points are adapted from WALKER & CASEY, supra note 49, at 96-97.
the evolving influence of three oft-hidden but ever-present specters—efficiency, justiciability, and politics—repeatedly present formidable legal questions. Perhaps more important to non-Texan readers, these issues represent the universal and unifying dilemmas of education-equity litigation in states across the nation.

First, the notion of “efficiency,” in various forms, recurs in each episode of the Edgewood drama. In Edgewood I, the court found that the constitutional concept of “efficiency” calls for “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.” One of the revealing and fascinating aspects of this series of cases is how the court’s concept of “efficiency” changes over time. Each new decision reveals a creative and novel approach to this term.

Another recurring theme of the Edgewood drama is the concept of “justiciability.” As Edgewood I illustrates, at one level the Edgewood cases represent an ongoing exchange between the judicial and legislative branches of Texas’s government. This interaction takes the form of a complicated dance, as the two institutions continually redefine their responsibility for overhauling the school-finance system. At times, the court and the Legislature bicker over the lead; at others, they struggle to foist it on one another. Occasionally, the court and Legislature try to deny their interdependency altogether.

This tense dance begins early in, if not well before, Edgewood I. According to Foster, the Legislature and the court were preemptively passing the buck to each other even before the case was filed. Having “adopted the policy that we would always go first to the Legislature,” Foster discussed the reform process with many politicians. During his very first attempts to lobby the Legislature, Foster found that legislators expected the mandate for change to come from the court. Two of the most powerful men in the Legislature, the Chair of the Ways and Means Committee and the Chair of the Senate Finance Committee, told Foster that “[if] you want real equity in the system, you are going to have to go to the courthouse.” Libby Linebarger, former Chairperson of the House Committee on Public Education, echoed that sentiment. According to Linebarger, “the Legislature wouldn’t have acted without the litigation because they only act when there is a smoking gun pointed to their

178. Edgewood I, 777 S.W.2d at 397.
179. Interview with Craig Foster, supra note 73.
180. Id.
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headed.' For many, only a mandate from the court could provide political cover for the difficult decisions to come.

The judicial-legislative tension that incessantly plagued the Edgewood drama thus began even before the case was filed. Thereafter, the to and fro between the judicial and legislative branches only intensified. After the court of appeals deferred to the Legislature altogether, the supreme court took back the lead, giving the Legislature a deadline for action. At the same time, however, the court was careful to acknowledge the Legislature's "primary responsibility to decide how best to achieve an efficient system." While maintaining the right to approve the final product, the court seemed to recognize stringent limits on its power to design the new school-finance system. Nevertheless, the supreme court clearly included some instructions with its mandate that the Legislature assemble a new school-finance system.

Predictably, politics was another recurring theme of the Edgewood cases. On every front, political power-plays shaped the drama's action. As the court, the Legislature, the plaintiffs, and the defendants jockeyed against each other for position, various factions were inevitably jockeying for position within those groups. Nowhere was the political animus more evident than in the Legislature. As mentioned earlier, many legislators found themselves pulled in several directions by angry groups of constituents. The Legislature itself was made up of a Gordian knot of favors and debts, all of which combined to obscure any straightforward attempt to reform the school-finance system. Each legislator was continually confronted with a "conflict between representing [his] constituencies and being part of the club." Also, as the poor districts organized to trumpet their cause, the wealthy districts organized to protect their resources from dreaded "recapture"—a politician's term for the redistribution of locally raised property taxes. The combined political clout of oil and gas interests (that had been using wealthy school districts as tax havens) and wealthy residential areas created a potent lobby. As Kauffman realized early on, "[t]he strongest constraints were political. And, of course, that was related to money." Of course, the fact that Texans elect the justices of the Texas Supreme Court added one more political dimension to the Edgewood drama—a factor that became more important as the Edgewood drama unfolds. Edgewood I demonstrated that any reform can only be

182. Edgewood I, 777 S.W.2d at 399.
183. Interview with Craig Foster, supra note 73.
184. Interview with Albert Kauffman, supra note 101.
achieved within the context of the complicated give-and-take of Texan politics.

b. Abandoned Arguments

Edgewood I introduces the themes of efficiency, justiciability, and politics that recur in each of the subsequent cases. Edgewood I is perhaps most noteworthy, however, for what it does not introduce. In the process of assessing the "efficiency" of the school-finance system, the supreme court left behind several well-developed arguments for reform.

First and most obviously absent from the decision is the plaintiffs' equal protection claim. As discussed earlier, Kauffman and Foster utilized two parallel legal strategies in the original petition against the State. The first of these two strategies, the equal protection claim, was denied by the court in two distinct phases. First, the district court denied a race-based equal protection claim. Second, the supreme court ignored the plaintiffs' wealth-based equal protection claim.

At the district court level, both the wealth-based equal protection claim and the "efficiency" argument won. At the supreme court, however, the equal protection argument fell by the wayside altogether. While the court never explicitly rejected that line of reasoning, it did avoid the issue. "Because we have decided that the school financing system violates the Texas Constitution's 'efficiency' provision," wrote the unanimous majority, "we need not consider petitioners' other constitutional arguments." The plaintiffs' equal protection argument thus simply fell off the table.

As both Kauffman and Foster acknowledge, any court would be reluctant to take on an "equal protection" claim. In contrast with the "efficiency" argument, an equal protection claim is much less "crisp" and clear-cut. That is, the fact that each school district serves both poor and wealthy kids, or both white and brown kids, muddles the claim that the discrimination is aimed at one identifiable group. An "equal protection" strategy forces a court to make coarse generalizations, ignoring wealthy kids in poorer districts and poor kids in wealthier districts. "We looked at the data and we saw that the Mexican-American population around the state was disproportionately concentrated in low-wealth schools systems," explained Albert Cortez, one of IDRA's strategists and number-crunchers. "The difficulty was that there were also some in major urban

185. See supra Subsection III.A.2.
186. Kauffman, a MALDEF lawyer, had hoped to pursue a Fourteenth-Amendment-style equal protection claim against the State for unjustly discriminating against Mexican-American and poor students via the education finance system. Interview with Albert Kauffman, supra note 101.
187. Edgewood I, 777 S.W.2d at 398.
areas and in above-average wealth districts. That kind of complicated the situation."\(^{188}\)

Of course, given his dedication to MALDEF’s goals of racial equality, Kauffman was disappointed that the supreme court completely ignored the equal protection claim. Kauffman had envisioned using the equal protection argument for Mexican-Americans as a group (much like federal voting rights arguments had been used in the past).\(^{189}\) Kauffman’s statistics make a compelling case. According to Kauffman, thirty percent of students in Texas are Mexican-American. Of the bottom 5% of students in terms of education funding, 95% of them are Mexican-American. Of the bottom 25% in terms of education funding, 65% are Mexican-American.\(^{190}\) Kauffman blames himself for not being able to make that argument fly. “We did not put on as thorough a record as we could have,” he said. “We should have developed that better.”\(^{191}\)

While Kauffman regrets not pushing the ethnic component before the court more forcefully, he does acknowledge the political risks of such an argument. “There’s no doubt that having the Mexican-American issue in there would have made it tough to deal with the Legislature,” he admitted. Stopping short of accusing the Legislature of racism, Kauffman admitted a court mandate to increase spending on Mexican-American children’s education “raises hackles more” than a mandate to educate “poor kids everywhere.”\(^{192}\) Nevertheless, Kauffman, perhaps more for reasons of principle than pragmatism, still wishes he could have another shot at the equal protection claim. “To this day, I still feel there was discrimination,” he said. “The main reason this was allowed to go on was discrimination against Mexican-Americans.”\(^{193}\)

For Foster, whose constituents included a number of poor, primarily Anglo school districts, the political risk of such a race-based strategy outweighed its potential gain. Foster felt that if school-finance reform was defined as a Mexican-American issue, he would never be able to get the Legislature on board. The resistance would be too strong. In fact, Foster’s fear was the impetus for organizing the plaintiff-intervenors in the first place. “The reason for [bringing in the plaintiff-intervenors] was that MALDEF was unwilling to give up the ethnic component even though David Long from California [attorney in Serrano v. Priest\(^{194}\)] and

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189. Interview with Albert Kauffman, *supra* note 101.

190. *Id.*

191. *Id.*

192. *Id.*

193. *Id.*


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everybody that had ever done a school-finance lawsuit said that you don't really get anything out of that if you have an inequitable system,” Foster explained. “It is best to just go with inequity for everybody and not try to make it an ethnic or racial thing. That was the mood in 1986-87.”

According to Foster, many poor school districts did not want to be represented by MALDEF, so he organized the plaintiff-intervenors and hired a separate set of attorneys.

While he was sympathetic to Kauffman’s perspective, Foster felt that pragmatism demanded a straightforward, non-ethnically-based constitutional attack. “Judges don’t want to deal with [the equal protection issue],” said Foster. “If they have another basis that is effective, they will choose that rather than the racial issue.” The court did precisely that, leaving Kauffman’s equal protection theory behind in favor of a more straightforward attack on the system’s “efficiency.”

The second most important concept not explicitly present in the Edgewood I decision was “adequacy.” Unlike the equal protection issue, however, the adequacy issue never found its way into court—at least not initially. In the litigation’s earliest planning stages, the plaintiffs had rejected an argument based on adequacy in favor of equity.

At the time Kauffman filed the first petition, an equity-based lawsuit seemed the obvious choice. The first reason was precedent. The immediate precedent for the Edgewood case was Serrano v. Priest, a successful challenge to California’s school-finance model that sounded in equity.

The second reason to avoid the adequacy issue is that an equity argument is generally much simpler and more straightforward. Kauffman and Foster agreed that they would rather present numbers than curriculum to the court. With an equity suit, all the pertinent information can be presented as monetary figures. The basic argument is that one school has more money than another school. An adequacy suit, on the other hand, requires establishing some minimum standard of education by which to judge all schools. The plaintiffs doubted that a court would be willing to take on that task.

Perhaps most important in the decision to stay with the equity argument, the facts of the Texas financing scheme lent themselves to an equity suit. The plaintiffs’ dramatic 700-to-1 ratio of property wealth between the richest and poorest districts was ripe for use in an equity-based

195. Interview with Craig Foster, supra note 73.
196. Id.
197. Id.
198. Unlike the Edgewood cases, however, Serrano was based in part on an equal protection claim. See Serrano, 557 P.2d at 929.
199. Interview with Craig Foster, supra note 73; Interview with Albert Kauffman, supra note 101.
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attack on the system. Even though “[t]here is an adequacy case out there,”200 the Edgewood plaintiffs chose to pursue an equity suit.

“We made a strategic decision not to [use an adequacy argument],” explained Kauffman. “We had a much cleaner and clearer case under equity.”201

Foster agreed. “All of the advice was to deal with the equity issue because that was so bad,” he said. “That was an obvious one. If we can win on anything, we can win on this.”202

According to Albert Cortez of IDRA, an equity approach immediately put the wealthier districts on the defensive, forcing them into self-contradiction. “We wanted to make them justify the level of disparity that existed,” said Cortez. “It gave us the advantage. They tried to argue that money did not make a difference while at the same time maintaining their position. It made it easier.”203 By contrast, an adequacy approach would put the onus on the plaintiffs to determine an acceptable standard.

The division between issues of equity and adequacy, however, ultimately becomes artificial. Neither concept can stand entirely alone. The reason so many people were concerned with the inequities perpetuated by the Texas school-finance system was that schoolchildren in the poorer districts received a substandard education. Conversely, an argument that all schools should provide some minimally adequate standard of education inherently depends on underlying notions of equity.

So, while Edgewood I dealt primarily with the equity issue, concerns with “adequacy” filtered through the court’s language. The court lamented that “[b]ecause of their inadequate tax base, [property-poor districts] must tax at significantly higher rates in order to meet minimum requirements for accreditation; yet their educational programs are typically inferior.”204 Fiscal equity is important precisely because “[t]he amount of money spent on a student’s education has real and meaningful impact on the educational opportunity offered that student.”205 With such language, the court acknowledged its concerns with the adequacy of the state’s public education system. Nonetheless, adequacy, at least in the first scenes of this drama, was upstaged by concerns for equity.

200. Interview with Albert Kauffman, supra note 101.
201. Id.
202. Interview with Craig Foster, supra note 73.
203. Telephone Interview with Albert Cortez, supra note 102.
204. Edgewood I, 777 S.W.2d 391, 393 (Tex. 1989).
205. Id.
4. Senate Bill 1: The Legislative Response to Edgewood I

While the notions of "equal protection" and adequacy were largely absent from the opinion, Edgewood I did present the Legislature with a strong mandate. Shaped by underlying themes of efficiency, justiciability, and politics, Edgewood I forced the Legislature to reinvent the Texas school-finance system. Offering only minimal guidance, the supreme court had demanded a fiscally neutral reform package.\textsuperscript{206}

a. A Surprise Reprieve

Facing the supreme court's threat to shut down the schools on May 1, 1990, the Texas Legislature set up camp in Austin. It met in four consecutive special sessions to hammer out a new education-finance system.\textsuperscript{207} However, corrective legislation eluded the Legislature. The politically charged nature of the education issue stymied progress. "Early passage of a reform bill was impaired by the variety of proposals, the lack of prospects for immediate revenues, and legislative disagreement over 'accountability' and 'efficiency' issues."\textsuperscript{208}

The Legislature's fourth straight special session ended on May 1, 1990—as did the supreme court's grace period. No remedy had passed. In accordance with Edgewood I, public schools would have to shut down. The ongoing struggle between the Legislature and the court had finally come to an impasse. An injunction closing Texas schools took effect at midnight.\textsuperscript{209} Just before school doors slammed shut, however, a new Texas District Court Judge named F. Scott McCown stepped in with a reprieve. In a surprisingly bold move, Judge McCown stayed the supreme court's injunction an additional month.\textsuperscript{210} He also appointed a committee of three "masters" to draw up a financing plan that would automatically go into effect on June 1 if the Legislature could not come up with a plan of its own. In the final hour, Judge McCown had granted

\begin{itemize}
  \item 206. Significantly, while the Edgewood I case was on appeal to the Texas Supreme Court in 1989, the Legislature expanded the second tier of the Foundation School Program by passing Senate Bill 1019. See Act Relating to the Funding of Elementary and Secondary Education, ch. 816, 1989 Tex. Sess. Law Serv. 816 (West). The "new" second tier was called the "Guaranteed Yield Program," because the state promised to guarantee a school district a certain revenue yield for every penny of tax effort in a designated tax range, above the first tier, regardless of the district's property wealth. See Hobby & Walker, supra note 29, at 392; infra notes 411-412 and accompanying text.
  \item 207. The first session to deal with the education issue began on February 27, 1990. The series of special sessions continued into June of that year. See Edgewood II, 804 S.W.2d 491, 493 n.3 (Tex. 1991).
  \item 208. WALKER & CASEY, supra note 49, at 97.
  \item 209. See Bob Burns et al., Texas School Finance Reform Hits Deadline, AUSTIN AM.-STATESMAN, May 1, 1990, at A1.
  \item 210. See id. at 98.
\end{itemize}
Edgewood Drama

the Legislature an extension on its deadline and the public schools a lease on life.

The Legislature, feeling the pressure, continued its difficult negotiations. During the fifth special session, which began on May 2, 1990, a school-finance bill finally passed both houses of the Legislature. This time, however, the plan suffered a fatal flank attack. Republican Governor Bill Clements vetoed the Legislature’s hard-won compromise. As one more volley in his long-running political struggle with the Democrat-controlled Senate, Clements refused to go along with the proposed half-cent sales tax increase. With his veto, Governor Clements sent both Houses scrambling back to work with only one week before their deadline.

By June 1, the Legislature still had not managed to put together another corrective plan. This time, Judge McCown made good on the threat to close the schools (more easily done in June, given the fact that students were off for summer). That very day, McCown’s committee of masters made public their preliminary plan. They proposed a pure guaranteed yield program that would, in theory, fill the gap between what a rich district raised at a given tax rate and what a poorer district could raise at the same rate. Such a program would be constrained only by available appropriated moneys. To balance the books, however, their plan also called for a radical (and politically unpopular) redistribution of state aid. The name “Robin Hood” echoed throughout the state. As news of this plan spread, the pressure on the Legislature increased astronomically. Rapidly, the political pressure outside the Capitol overcame the political quagmire on the inside. Four days after the masters announced their redistribution plan, the Legislature enacted Senate Bill 1.

b. Political Impressions

The intense political pressure left its impression on the Legislature’s handiwork. Wealthy school districts had leaned heavily on legislators, who in turn “avoided placing caps on local revenue-raising and did not attempt to redistribute locally raised revenue from rich to poor school districts.” Rather, retaining the two-tiered foundation program implemented by Senate Bill 1019 in 1989, the politicians pledged to raise the level of per-pupil expenditure for which the state would equalize funding.

211. See Edgewood II, 804 S.W.2d at 493 n.3.
212. See Terrence Stutz & Anne Marie Kilday, Clements Vetoes School Finance Bill: Senate Fails To Override; Court Action Predicted, DALLAS MORNING NEWS, May 23, 1990, at 1A.
214. Ball, supra note 33, at 769.
215. See supra note 206.
This increase in funding would be financed by a combination of sales taxes, cigarette and liquor taxes, budget cuts, and Texas Stabilization Fund money.\footnote{216} Based on an increase in the state general sales tax rate, Senate Bill 1 promised an immediate increase in education funding and further increases in the future.\footnote{217}

Although the Legislature rightfully trumpeted its “new” plan as a thorough renovation of the school-finance system,\footnote{218} much of the reforms of Senate Bill 1 actually entailed a careful retooling of the traditional Foundation Program. The legislation added facilities and equipment to the foundation program definition and increased the funds provided by the basic foundation program.\footnote{219} The plan also provided for a “wide array of biennial studies to detect deviations from fiscal neutrality and inform senior policy makers when increased state funding is required.”\footnote{220} The reforms would take place over a five year period.\footnote{221}

The most central component of the reform law involved the Legislature’s attempts to address the supreme court’s mandate of “fiscal neutrality.” In \textit{Edgewood I}, the court had demanded that a district’s tax effort be directly and closely correlated with the educational resources available to it. Districts had to have “substantially equal access” to similar revenues.\footnote{222} In hopes of meeting this mandate, the Legislature amended section 16.001(c)(1) of the Education Code to read: “the yield of state and local educational program revenue per pupil per cent of effective tax effort shall not be statistically significantly related to local taxable wealth per student for at least those districts in which 95 percent of students attend school.”\footnote{223}

\textbf{c. The Ninety-Five Percent Compromise}

The Legislature had accepted the court’s mandate, at least for ninety-five percent of the districts in the state. By the year 1995, a penny of tax effort in even the poorest district was to yield about the same per student as it would in a district at the ninety-fifth percentile in wealth.\footnote{224}
achieve this, Senate Bill 1 “guarante[ed] the yield,” promising that the state would make up the shortfall between what a poorer district can raise on its own and the specified guarantee at the ninety-fifth percentile.\textsuperscript{225} Thus, the Texas Supreme Court’s phrase “substantially related access” was “interpreted by policy-makers, lawyers and indeed the parties themselves to mean that a school finance plan would be constitutional even if it left a relatively small number of students and school districts out of the equalized system.”\textsuperscript{226}

For both pragmatic and political reasons, the Legislature had taken the court’s qualifiers—“close” and “substantially”—and had quantified them into “95% fiscal neutrality.”\textsuperscript{227} Most important, the politicians realized that funding all districts at the level of the 100th percentile districts was impossible. “[T]he annual cost of equalizing all districts to the revenue levels attainable by the richest districts would be approximately four times the annual cost of operating the entire state government.”\textsuperscript{228} Allowing every child in Texas to attend a school like Alamo Heights was not a viable option. Furthermore, the “ninety-five percent” plan offered much greater political stability than an absolute equalization approach. By ensuring up front that the wealthiest districts’ resources would not be tapped by Senate Bill 1, a huge political burden was lifted from the Capitol. Needless to say, the 132 richest school districts in Texas (which would constitute the immunized top five percent) carried formidable political clout.\textsuperscript{229}

Thus, in early June of 1990, the Legislature had finally answered the supreme court’s mandate. With Senate Bill 1, it had created a reform package that would achieve “substantial” fiscal neutrality in just a few years. The Legislature had nobly performed its duty to create a constitutional school-finance system—or so it would have loved to have Texans believe.

\begin{footnotesize}
\begin{itemize}
\item[225.] \textit{See id.}
\item[226.] Yudof, \textit{supra} note 172.
\item[227.] The “95 in ‘95” Plan was engineered by University of Texas Law School Dean and education specialist Mark Yudof as part of a committee formed after \textit{Edgewood I} for the purpose of addressing the education finance crisis. Interview with J. David Thompson III, \textit{supra} note 119. Yudof felt that optimal reform could be reached by “essentially exempt[ing] the wealthiest districts from the plan and us[ing] state funds to guarantee tax yields in the other districts.” Yudof, \textit{supra} note 39, at 501. In his own words, “[i]n the ninety-five percent solution was not cheap, but it was economically and politically feasible.” \textit{Id.}
\item[228.] \textit{Edgewood II}, 804 S.W.2d at 495-96.
\item[229.] The 95th percentile equalization would leave out 132 districts with about 170,000 of the state’s 3.3 million students. \textit{See} Yudof, \textit{supra} note 39, at 501.
\end{itemize}
\end{footnotesize}
C. Edgewood II

It took less than a year-and-a-half for the Edgewood drama to return to the Texas Supreme Court. The basic controversies that framed Edgewood I reappeared in Edgewood II with new-found intensity. In Edgewood's next act, the tension between the court and Legislature and the perpetual political strife continued to fester. Meanwhile, the supreme court continued to pressure the Legislature to create a constitutional school-finance system while simultaneously whittling away the Legislature's options for reform.

1. Another District Win

The Edgewood plaintiffs immediately challenged Senate Bill 1. Believing that the Legislature had simply put more money into the old system instead of overhauling the system itself, the frustrated plaintiffs charged 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."

In response to these charges, the Attorney General presented a two-pronged defense. First, the state maintained that "absolute equality" would be "prohibitively expensive," given the high-level of spending in wealthy districts. As already mentioned, equalization at the level of the wealthiest districts would cost four times the operating costs of the entire state government. Second, the Attorney General argued that any challenge to Senate Bill 1 was premature, because the equalizing effects of Senate Bill 1 would take some time to kick in.

Judge McCown's district court once again dismissed the Attorney General's arguments. Senate Bill 1, said the court in 1990, failed to give each school district "substantially equal access to similar revenue per pupil at similar levels of tax effort" and was therefore "inefficient." Senate Bill 1 simply looked too much like House Bill 72 and was rejected as unconstitutional.

As the first judicial authority to interpret the supreme court's mandate of fiscal neutrality, the district court read between the lines. According to the district court, Edgewood I required dramatic structural reform, not a refurbished version of the old system. The district court outlined the bill's flaws: (1) exclusion of the top five percent of wealthy

230. Ball, supra note 33, at 4 n.42.
231. Id. at 4.
232. See Edgewood II, 804 S.W.2d at 495-96.
233. See id. at 495.
districts from the equalization process, (2) reliance on statistical tests of fiscal neutrality, (3) exclusion of certain revenues in financing calculations, (4) continued potential discrepancy in local enrichment between rich and poor districts, (5) time lags in the Bill’s self-monitoring studies and funding, (6) emphasis on “adequacy” as an equity goal, and (7) failure to fund facilities at a “substantially equal” level.\textsuperscript{234}

While perhaps nothing could top the audacity of Judge McCown’s staying of the supreme court’s injunction,\textsuperscript{235} the district court decision was again surprisingly proactive. The district court explicitly listed some of the state’s options for creating a constitutional finance system. While recognizing that some or all of these options might be “undesirable, politically unacceptable, or themselves unconstitutional,” the district court outlined four possibilities: (1) full state funding, (2) district consolidation,\textsuperscript{236} and (4) revenue caps as possible solutions to the school funding crisis.\textsuperscript{237} The court went on to suggest that a better version of the non-capped equalization approach that was in Senate Bill 1 might suffice.\textsuperscript{238} By offering this unsolicited advice, the district court made the most intrusive encroachment yet on the role of the Legislature. As it turns out, this encroachment was just a harbinger of conflicts to come.

2. A Supreme Court Endorsement . . . and Denouncement

Perhaps in acknowledgment of the firestorm it had created, the supreme court took direct appeal of the district court’s decision in the fall of 1990.\textsuperscript{239} Once again, it was the plaintiffs that refused to let the litigation end. Despite their victory against Senate Bill 1, the plaintiffs were incensed that the district court would free the state from the supreme court’s deadline. Kauffman and his troops marched on the supreme court in hopes of keeping the pressure on the Legislature to reform the system quickly and dramatically. The Texas Supreme Court heard its second round of arguments in the Edgewood litigation in November of that year. In January of 1991, the supreme court handed the plaintiffs a second victory.

The supreme court began by lambasting the district court for tampering with the high court’s order. The justices unanimously scolded the

\textsuperscript{234} See WALKER & CASEY, supra note 49, at 98.
\textsuperscript{235} See supra text accompanying note 210.
\textsuperscript{236} By “tax base consolidation,” the court meant that wealth-generating taxable property could be consolidated for revenue purposes even if actual district lines did not change.
\textsuperscript{237} See WALKER & CASEY, supra note 49, at 99.
\textsuperscript{238} See id.
\textsuperscript{239} See id. Direct appeals are permitted to the Texas Supreme Court in certain circumstances. See TEX. R. APP. P. 57; infra note 467.
district court for "clearly abus[ing] its discretion in refusing to enforce the mandate of this court issued in Edgewood I."\textsuperscript{240} The Texas Supreme Court pointedly outlined the Legislature's failure to act and re instituted the original injunction against the distribution of state aid with a new deadline: April 1, 1991. The high court warned the district court against extending this new deadline.\textsuperscript{241}

Having denounced the district court's actions, the Texas Supreme Court endorsed much of its reasoning. The court agreed with the district court that Senate Bill 1, with its "95% compromise," failed to meet the mandate of Edgewood I. Echoing the lower court's decision, the court stated that "Senate Bill 1 does make certain improvements in public school finances . . . . However, Senate Bill 1 leaves essentially intact the same funding system with the same deficiencies we reviewed in Edgewood I."\textsuperscript{242} Among these "deficiencies," was a continued reliance on an underfunded two-tiered Foundation School Program.\textsuperscript{243} Like the district court, the Texas Supreme Court ignored the state's pessimistic outlook on equalization. "Even if the approach of Senate Bill 1 produces a more equitable utilization of state educational dollars, it does not remedy the major causes of the wide opportunity gaps between rich and poor districts,"\textsuperscript{244} announced the court. Under Senate Bill 1, the same "tax havens" that plagued the old system remained.\textsuperscript{245} Savvy businesses would be lured into low tax-rate areas and wealthy districts could thus lower their tax rates still further.

The high court particularly disapproved of the ninety-five-percent-compliance plan:

By limiting the funding formula to districts in which 95% of the students attend school, the Legislature excluded 132 districts which educate approximately 170,000 students and harbor about 15% of the property wealth in the state . . . . Consequently, after Senate Bill 1, the 170,000 students in the wealthiest districts are still supported by local revenues drawn from the same [amount of available] tax base as the 1,000,000 students in the poorest districts.\textsuperscript{246}

Hence, the Texas Supreme Court found that Senate Bill 1 failed to provide "a direct and close correlation between a district's tax effort and the educational resource available to it."\textsuperscript{247}

\begin{thebibliography}{9}
\bibitem{240} Edgewood II, 804 S.W.2d 491, 498 (Tex. 1991).
\bibitem{241} See id.
\bibitem{242} Id. at 494-95.
\bibitem{243} The two-tier system continued to allow some districts to raise locally much more money than could other districts.
\bibitem{244} Id. at 496.
\bibitem{245} See id.; supra text accompanying note 160.
\bibitem{246} Edgewood II, 804 S.W.2d at 496.
\bibitem{247} Id.
\end{thebibliography}
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Like the district court, the Texas Supreme Court did not end its opinion with this declaration of unconstitutionality. Instead, the court went on to hint at what types of reforms might in fact survive constitutional scrutiny. In retrospect, one of the most critical components of the court's decision in *Edgewood II* has proven to be its not-so-subtle suggestion that "[a]nother approach to efficiency is tax base consolidation." The court seemed to hint that, even if lawmakers leave school district boundaries as they are, legislators should consider redrawing the property-tax boundaries so that the resulting tax revenues turn out equally for the school districts. In anticipation of the difficult legal questions surrounding such consolidation, the supreme court revisited its earlier interpretation of the Texas Constitution's mandate on local control.

In *Love v. City of Dallas*, the high court had determined that article VII, section 3, of the Texas Constitution means that "the Legislature cannot compel one district to construct buildings and levy taxes for the education of nonresident pupils." Apparently attempting to ease the Legislature's burden, the Texas Supreme Court preemptively denied that the *Love* decision stood in the way of tax-base consolidation. According to the court, "[t]he Constitution does not present a barrier to the general concept of tax base consolidation, and nothing in *Love* prevents creation of school districts along county or other lines for the purpose of collecting tax revenue and distributing it to other school districts within their boundaries." By providing a specific example of such an arrangement in a footnote, the court seemed to endorse the creation of school districts on some form of county-wide basis for the purpose of limited consolidation of poor and wealthy districts. As will quickly become apparent, some legislators believed they were being handed a prescription for reform.

3. *The Legislative Response to Edgewood II*

The supreme court announced its decision on January 22, 1991, and the Texas Legislature immediately jumped into action. Both wings of the state capitol bustled with activity as dramatic and draconian reforms were drafted and redrafted. While both chambers turned to the politically dangerous "revenue caps" that would put limits on the amounts of money school districts could raise locally for their schools, the Senate concentrated its reform efforts on the "recapture" of local tax dollars on a regional basis and the House of Representatives concentrated on "tax

248. *Id.* at 497.
249. *See* TEX. CONST. art. VII, § 3.
250. 40 S.W.2d. 20 (Tex. 1937).
251. *Edgewood II*, 804 S.W.2d at 497.
252. *Id.*
Recapture would involve pooling all the tax dollars of districts in a carefully selected region and then redistributing the money equitably among districts. Tax consolidation, again, would involve redrawing property-tax boundaries to redirect tax receipts.

The storm of activity in Austin spread across the state. Educational experts, teachers, and parents flooded the Legislature with conflicting interpretations of the *Edgewood II* decision. Some believed that *Edgewood II* had mandated a state-funded school system. At the same time, others maintained that *Love v. City of Dallas* prohibited such a “recapture” system. Debate over whether or not the court had mandated absolute equality also continued. Meanwhile, some court watchers believed that the Texas Supreme Court had actually prescribed voter-approved county-equalization-fund taxes, by which county lines would be used as property-tax boundaries and the money would be redistributed to districts within the county.

Many Texans were just as critical as they were confused. A popular backlash against the court swept the state. The media and many politicians denounced what they interpreted as an absolute rejection of any local enrichment at all. A guest column by former Republican gubernatorial candidate Thomas W. Luce suggested allowing unequalized local enrichment after the major disparities in wealth had been eliminated. Luce predicted a “loss of public support for the system” in response to the court’s apparent call for absolute neutrality. Meanwhile, Lieutenant Governor Bill Hobby vented his disgust with the court’s rejection of Senate Bill 1 by angrily calling for the defeat of all nine justices at the polls. Once again, the volatile political issue of local control had polarized the state.

Underlying this bitter strife was, once again, the notion of “efficiency.” *Edgewood I* had required “substantially equal” access to education funds at the same level of taxation, but the court had rejected the Legislature’s ninety-five-percent plan in *Edgewood II*. Either the court believed that 95% was not “substantial,” or it had changed its mind at the expense of the Legislature’s compromise. The state was once again left without a school-finance system. What did the phrase “substantially equal access to resources” mean? If exact equity at the level of the wealthiest schools was financially impossible and leaving out the top five

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254. *See id.*


256. *See id.*

257. *Id.*

258. *See id.*
percent of schools is unconstitutional, what solution remained? The answer to that question terrified many politicians.

It seemed clear that the court was steering the Legislature toward a massive redistribution of wealth. For many parents, teachers, and politicians—especially those in the wealthier districts—a redistribution of funds amounted to state-sponsored theft. "By God, if we decide we want a gym, hey, I live here, I paid for it. It's my kid," exclaimed David Longoria, an exasperated San Antonio resident in a relatively well-off district. "If you like it, move into this district. If you don't, stay away. Don't take from me. Don't deny my child and give elsewhere. I am willing to pay more. That's why I moved here. That's why I chose this district." The editor of Texas Monthly captured the feelings of many of these Texans when he wrote that "[t]he courts have ruled it unconstitutional to be best."260

4. Edgewood IIa: If You Can't Stand the Heat, Write a New Opinion

This swirling political storm, first unleashed by the court's own decision in Edgewood II, returned to the supreme court itself just one month later. Shortly after Edgewood II came down, the plaintiff-intervenors filed a motion for rehearing asking the justices to approve recapture, at least in principle, by explicitly overruling Love v. City of Dallas.261 Not-so-affectionately known as Edgewood Ha, the court's denial of the plaintiffs motion took on a life of its own.

After consecutive unanimous decisions in Edgewood I and II, the justices' united demand for reform crumbled into disarray on the motion for rehearing. Rather than simply deny the motion—an issue on which all nine justices agreed, a number of the justices used this opportunity to refine their own ideas for reforms. The court voted 5-4 that Love did, in fact, rule out "recapture." More critically, in an astonishing about-face, the majority seemed to amend its decision to allow some local unequalized enrichment revenues. According to Justice Phillips's majority opinion, "[o]ur Constitution clearly recognizes the distinction between state and local taxes, and the latter are not mere creatures of the former."262 Therefore, according to the court, the Legislature could not characterize local property taxes as a "state tax."263 The court thus held that the Legislature could not toy with local tax decisions. The court also seemed to

259. Siegel, supra note 2.
260. Elliot, supra note 255, at 15.
262. Id. at *4-*5.
263. See id. at *5.
be backing off its implied advocacy of absolute fiscal neutrality

With Edgewood IIa, the court bluntly used the denial of the motion for rehearing as an opportunity to fend off the brutal political attacks it had suffered. The majority deflected those attacks with straightforward acquiescence. In language remarkably similar to that of Thomas Luce’s newspaper column, the majority wrote that once the Legislature created a constitutionally efficient system, “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.” The “majority” here consisted of all four Republicans on the court. Democrat Jack Hightower provided the swing vote.

Although technically concurrences, the three other opinions registered in Edgewood IIa read like caustic dissents. The justiciability issue—lurking in the background in Edgewood I and II—burst onto center stage in Edgewood IIa. Justices Gonzalez, Gammage, and Doggett decried the court’s unsolicited “advisory opinion.” Justice Gonzalez reminded the court that “judicial power does not embrace the giving of advisory opinions.” Justice Gammage announced that “[t]he majority’s gratuitous action in addressing matters not raised in the motion for rehearing is both unnecessary and inappropriate, amounts to an advisory opinion, and is calculated to further confound and confuse the public and the legislative process.”

Justice Doggett was perhaps the most distraught by the majority’s decision to use the denial of a rehearing to advise the Legislature. As evidence that the majority had folded under political pressure, Justice Doggett included two newspaper articles with his opinion—one of which was Luce’s column. In his lengthy, often poetic concurrence, Doggett lamented the court’s loss of unity and lambasted the court’s legislative meddling. “Tragically,” he wrote, “today this unity has been abruptly abandoned, shattering the good faith upon which it was founded.”

“Determined to react to extrajudicial developments, the court exceeds its jurisdiction, contravenes its rules, and ignores limitations imposed on it by tradition and the Constitution.” Before picking apart the majority’s opinion as unnecessary and damaging, Doggett rued the further delay this opinion would mean for school reform. As he points out, a child entering the first grade when the Edgewood litigation began was now en-

264. Id. at *6 (footnote omitted).
265. Id. at *9 (Gonzalez, J., concurring) (citations omitted).
266. Id. at *10 (Gammage, J., concurring). These statements will ring ironic when Justice Gammage returns to center stage in Edgewood III. See infra notes 314, 322.
267. Id. at *11 (Doggett, J., concurring).
tering the eighth. Before concluding, Doggett had recruited Felix Frankfurter, Thomas Jefferson, and George Washington to support his cause.

Over Doggett’s vehement and dramatic objections, however, the court’s opinion became another addendum to the court’s mandate for reform. Together, Edgewood II and IIa added three standards to the guidelines developed in Edgewood I. First, “recapture” was not an option for reform under the Texas Constitution. Second, local tax-base consolidation was possibly an option. Third, tax-base consolidation alone does not guarantee a reform package’s constitutionality.

5. Underlying Tensions . . . Revisited

Doggett’s acidic dissent unearths and encapsulates all of the most difficult dilemmas of the Edgewood drama. The same underlying themes and controversies that framed Edgewood I reappear in Edgewood II and IIa. Once again, the all-important notion of “efficiency” eluded the court’s grasp. After Edgewood I, the notion of “substantially equal access to resources” was interpreted to mean that a reform system would survive judicial scrutiny “even if it left a relatively small number of students and school districts out of the equalized system.” In Edgewood II, however, many felt the court tightened the word “substantially” to mean “absolutely.” According to the lawmakers, Edgewood II essentially rejected the court’s previous definition of “substantially equal.” By criticizing the Legislature for having “excluded 132 districts which educate approximately 170,000 students and harbor 15 percent of the property wealth in the state,” the court not only surprised and angered the political branch of government but revealed its own uncertainty as to what “efficiency” meant.

Of course, a justice’s definition of “efficiency” can apparently transform under political pressure. Doggett was clearly correct in his assertion that Edgewood IIa was a response to politics. Rather than following precedent and the Texas Constitution, the five justices in the majority seem to have followed their constituency. “That is always a danger on any court, especially an elected one,” explained University of Texas Law School Dean and education expert Mark Yudof. “Certainly there was an

268. See id. at *11 n.1.
269. See id. at *22.
270. See id. at *19 n.7.
271. See id.
273. Yudof, supra note 172.
As Justice Doggett alleged, “extrajudicial developments” seem to have shaped the law. The same politics, he noted with relief, will eventually cleanse the system: “Thankfully, Texas judges can be held accountable by the people through the election process.”

Meanwhile, the tension between the legislative and judicial branches of government had obviously intensified in Edgewood II and Ilia. Once again, the court at least superficially deferred to the legislators’ lawmaking role, announcing, “[w]e do not undertake lightly to strike down an act of the Legislature.” The court, however, not only struck down Senate Bill 1, but it further narrowed the parameters of an acceptable solution to the school-finance crisis.

As mentioned above, the court’s confusing, if not shifting, mandates also did little to endear it to the scrambling politicians. Many legislators resented the court’s involvement. “Once the Court demonstrates its willingness to advise the legislature on the details of public school finance legislation, the questions will not end,” wrote one politician.

Justice Gonzalez acknowledged this tension in his concurrence in Edgewood Ilia: “We should not speculate or interfere with the ongoing legislative debate as to how to meet the mandates of Edgewood I or Edgewood II; nor should we get into the business of giving the legislature pre-clearance on proposed legislation.” Doggett went even further, asserting that the judiciary’s unwarranted interference with the Legislature’s responsibilities would set back the quest for reform. “Advice not properly sought is offered anyway,” wrote Doggett, “despite the warning of the Chairman of the Senate Education Committee that further judicial interference will be disruptive and his indication that the Legislature already has all the judicial advice necessary ‘to remedy the constitutionally flawed system of public education . . . .’”

In the next election, the political tensions on the bench underscored the constant struggle to define the judiciary’s proper role. When Justice Mauzy, the liberal leader who wrote Edgewood I, challenged the conser-
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...iative Chief Justice Phillips for his post, the chief justice repeatedly and publicly criticized Justice Mauzy for legislating from the bench.282

The controversy over the court’s rejection of the ninety-five-percent plan also revealed one more divergence between the two plaintiff camps. From the beginning, MALDEF and IDRA had been committed to absolute equality. When Albert Cortez of IDRA was asked on the stand about the level of precision required in ensuring substantially equal funding, he answered: “You know, Judge, it’s either equal or it’s not.”283

Cortez and Kauffman acknowledge that such a hard line was not always popular, but they “felt that when you start saying that something else is close enough, you get on a slippery slope.”284 By contrast, Foster and the Equity Center felt that absolute equality was politically impractical. In fact, Foster may have preferred some level of inequality to use as leverage in his constant quest to increase education funding.285

6. The Legislature’s Challenge

After Edgewood II and IIa, the Legislature’s challenge was more formidable than ever. The Texas Supreme Court had not only thrown out the Legislature’s best effort but had dramatically limited the options for reform before sending the politicians back to the drawing board. By refusing to allow even a five-percent inequity, the court had denied the Legislature the most politically viable options for reform.

Before Edgewood II, the reform effort had concentrated on bringing up the bottom. The Legislature had focused its attention on “mak[ing] the poor rich enough.”286 And yet, to bring all districts up to the levels of the richest districts was impossible. At that point, even after Edgewood IIa’s concession that some degree of inequality was acceptable, the politicians were going to have to take money away from the state’s wealthiest, most politically powerful districts. The reform effort shifted to bringing the top down.

Billionaire H. Ross Perot became the metaphor of choice to describe the Legislature’s dilemma.287 David Anderson, general counsel of Texas

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283. Telephone Interview with Albert Cortez, supra note 102.
284. Id.
285. Interview with Kevin O’Hanlon, supra note 136. This ideological division will be discussed in more detail infra Sections III.A-B.
287. “By requiring equalization at the tail end of the distribution—the equivalent of using H. Ross Perot’s income as the standard for wealth redistribution, the sums required become gargantuan unless serious structural reforms are undertaken.” Hobby & Yudof, supra note 224.
Education Agency and former aide to Lieutenant Governor Bob Bullock, described the Legislature's limited options after *Edgewood II* and *IIa*:

You can make everyone as rich as H. Ross Perot, but God doesn't have that much money. You can take money away from H. Ross Perot until his money comes down to an appropriate level. Or, you can kill H. Ross Perot—which in school finance terms is consolidating the districts.288

Anderson, like so many others, believed that the Texas Supreme Court did not fully understand the practical realities of the dilemma.289

Standing in the smoldering ruins of Senate Bill 1, the Legislature found little with which to rebuild. After *Edgewood II* and *IIa*, the politicians had, at best, four distasteful options. They could enact an entirely new tax system, consolidate school districts, design a constitutional scheme to recapture local tax revenue, or cap spending by wealthy districts. "All of these alternatives had as much popular and political appeal as a statewide election in Texas in which only Saddam Hussein, Idi Amin, Charles Manson and David Koresh were on the ballot."

Given the constitutional prohibitions against "recapture" and given the political nightmare of straightforward caps on education spending, the list of viable alternatives for the Texas Legislature was pared down to two possibilities. It could somehow abolish the local property tax, or it could consolidate school districts. "The Legislature responded with a clever if somewhat jerry-built plan in Senate Bill 351."290

7. *Senate Bill 351: The Legislature Answers Edgewood II and IIa*

The Legislature began its second attempt by rejecting the Senate's "recapture" approach in favor of the House's "tax-base consolidation" strategy. Both houses focused almost immediately on a reform plan centered around newly defined, tax-empowered school districts. Several constitutional hurdles, however, stood in the way.291

Given these constitutional obstacles, it is not surprising that the court's April 1 deadline passed without a new reform proposal from the Texas Legislature. Given the events surrounding the last missed deadline, it is also not surprising that this time the district court enforced the supreme court's injunction. On April 1, 1991, an injunction barred the

289. *See id.*
291. *Id.*
292. *See infra* notes 303-307 and accompanying text.
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state from funding public education. By April 12, the Texas Legislature passed Senate Bill 351.

Senate Bill 351 represented a major overhaul of the public education system's structure. The reform package centered around the creation of new taxing authorities called County Education Districts ("CEDs"). The state was divided into 188 CEDs, drawn roughly along the lines of the 254 counties, with 31 multi-county CEDs. All of the school districts in each CED fell under the same taxing authority. Taxes would be collected and redistributed from the CED level. In effect, each CED was a group of consolidated school districts, at least for funding and taxing purposes. The CEDs were designed so that no CED could exceed $280,000 in taxable value per weighted student in “average daily attendance.” This effectively spread the richest districts’ wealth among their neighbors.

The state funding scheme for the new CEDs retained the two-tiered system. The first tier was made up of “basic allotment” money. CEDs were required to tax at a rate of $0.72 per $100 of taxable property to receive the state’s basic allotment of $2200 per weighted student. At tier two’s guaranteed yield, CEDs could tax up to an additional $0.45 per $100 to enrich instructional and facilities funds. Local districts that wanted to raise additional, unequalized funds for local enrichment purposes could do so at what was called a “third tier.” In summary, “[a]s to the equity or fiscal neutrality of the system, tier one provides full equalization, tier two offers only partial equalization due to wealthy districts’ ability to exceed the state guaranteed yield, and tier three provides no equalization at all.”

294. See id.
296. Each district is an independent school district established by consolidation of local school districts within its boundaries for the limited purpose of exercising a portion of the taxing power previously authorized by the voters in those school districts and for the purpose of distributing CED revenues to the component school districts. See id. § 1.
297. See id.; see also infra notes 402-406 and accompanying text (explaining this concept).
298. While some would argue the distinction is little more than semantics, the CED system would stop short of a statewide system of recapture. That is, money would be kept within a given “neighborhood” of districts as opposed to being deposited in a statewide pool of funds.
299. See supra note 111 and accompanying text.
300. See 1991 Tex. Sess. Law Serv. ch. 20 (West). This “third tier” is not part of the state’s Foundation School Program.
301. Ball, supra note 33, at 772. A simple example using the funding figures for the 1991-1992 school year will help to illustrate the mechanics of the plan. 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 per weighted student. At tier two, individual school districts can tax up to $0.45 for enrichment of their instruc-
While Senate Bill 351 featured a number of other complicated details, the CED scheme became its controversial centerpiece.

D. Edgewood III

1. Proceedings in the District Court

On June 17, 1991, little more than two months after Governor Ann Richards signed Senate Bill 351 into law, three groups of rich school districts challenged the new law on three grounds. First, they asserted that the law constituted a state ad valorem tax in violation of article VIII, section 1-e, of the Texas Constitution. Although the state did not directly collect or distribute the CED taxes, it mandated that the CEDs raise their local fund assignment, set the tax rate at a predetermined level, and prescribed the CED’s distribution mechanism. These provisions, the rich school districts claimed, amounted to a de facto state property tax.

A second alleged constitutional infirmity arose from the absence of voter authorization for the infusion of tax authority into the new CEDs. Article VII, section 3, of the constitution, a confusing provision composed of a 393-word sentence, apparently prohibited the state legislature from raising school district taxes without voter approval. In crafting Senate Bill 351, the Legislature relied on article VII, section 3-b, which
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permitted taxation without voter authorization when two or more whole districts were consolidated. Of course, the CEDs were not exactly consolidated school districts—the school districts were joined only for the purpose of creating a limited taxing authority. It was an undecided constitutional question as to whether voter authorization already given to school districts could be transferred to the CEDs without a renewed mandate from the voters.

The final basis on which Senate Bill 351 was challenged was that it allegedly constituted a local or special law in violation of article VII, section 3, and article III, sections 56 and 64, of the constitution. A local or special law is one that applies to a limited class of people distinguished by some special characteristic, such as geography or wealth. The wealthy districts argued that since they, as a class, were adversely affected by Senate Bill 351, the law was unconstitutional.

The Edgewood litigation found its way back into the court of Judge Scott McCown. McCown heard the rich school districts' arguments relating to the constitutionality of CEDs and reserved for a future trial the issue of whether the scheme satisfied the "efficient" and "suitable" requirements of the educational clause of the constitution. A number of poorer districts backed by the Equity Center and MALDEF, along with several CEDs and a few individual citizens, joined the state in defense of the new law. Relying on language in Edgewood II and Edgewood IIA suggesting that tax base consolidation was "preapproved," McCown

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305. The constitution provides:

After any change in boundaries, the governing body of any such district, without the necessity of an additional election, shall have the power to assess, levy and collect ad valorem taxes on all taxable property within the boundaries of the district as changed, for the purpose of the maintenance of public free schools... in the amount, at the rate, or not to exceed the rate, in the manner authorized by the district prior to the change in its boundaries.... In those instances where the boundaries of any such independent school district are changed by the annexation of, or consolidation with, one or more whole school districts, the taxes to be levied for the purposes hereinabove authorized may be in the amount, or not to exceed the rate theretofore voted in the district having at the time of such change the greatest scholastic population according to the last scholastic census....

TEX. CONST. art. VII, § 3-b; see also WALKER & CASEY, supra note 27, at 17.


307. See Clark v. Finley, 54 S.W. 343, 345 (Tex. 1899).

308. See Joe Culbrith, School Funding Upheld; County Districts Allowed, FORT WORTH STAR-TELEGRAM, Aug. 8, 1991, at 1.

309. See Edgewood II, 804 S.W.2d 491, 497-98 (Tex. 1991) ("Consolidation of school districts is one avenue available toward greater efficiency in our school finance system. Another approach to efficiency is tax base consolidation.... The Constitution does not present a barrier to the general concept of tax base consolidation, and nothing in Love prevents creation of school districts along county or other lines for the purpose of collecting tax revenue and distributing it to schools within their boundaries.") (footnote omitted); Edgewood IIA, 1991 Tex. LEXIS 21, *3 (Tex. Feb. 25, 1991) ("[T]ax base consolidation could be achieved through the
upheld the constitutionality of Senate Bill 351 on all counts on August 7, 1991.  

2. The Supreme Court Decision

McCown’s decision was quickly appealed, and the battle again shifted to the Texas Supreme Court. On January 30, 1992, two-and-a-half months after it began hearing arguments, the court overruled Judge McCown’s decision and struck down Senate Bill 351. As a result, the Legislature found itself with one less option and several more restrictions. The decision was another crucial turning point in the Edgewood litigation.

The court’s ruling infuriated many legislators, who thought that the language in the prior opinions had endorsed the course that they followed. The ruling rekindled the bitterness and antagonism left over from the Edgewood II decision and led many to question again the court’s role in this difficult issue. The heated feelings were not confined to the Legislature as blatant hostility surfaced among the justices. Justice Doggett, joined by Justice Mauzy, turned in a stinging dissent.

The decision was also noteworthy for a concurrence by Justice Cornyn, who would later write the majority opinion in Edgewood IV. The concurring opinion injected language and ideas into the debate that had been largely hidden in the shadows of the prior supreme court opinions. Some of Cornyn’s ideas, which included a significant redefinition of “efficiency” and a rejection of the importance of equity, would prove to have important consequences for Texas’s schoolchildren.

One final source of controversy in the supreme court’s decision was its issuance of a stay until June 1, 1993, delaying any remedy for two tax cycles instead of one. This decision, supported by only a 5-4 margin (two of the justices who found Senate Bill 351 to be unconstitutional dissented on this question), spawned an unsuccessful federal lawsuit by a group of taxpayers from Travis County. Despite being harshly criticized for al-


311. See Edgewood III, 826 S.W.2d at 522.

312. Beginning his onslaught with the words “So many words — so little justice,” Doggett delivered a scathing thirty-nine page attack accusing the majority of entrapping the Legislature. Edgewood III, 826 S.W.2d at 537 (Doggett, J. dissenting).

313. See WALKER & CASEY, supra note 27, at 18. The initiators of the federal lawsuit demanded a retroactive, not a prospective remedy. They challenged the court’s decision as a de-
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allowing an unconstitutional system to persist for two years, the majority justified its decision as the only way to avoid "unduly disrupting the orderly functioning of the schools." The court also noted that the Legislature was not due to meet in session until January 1993, and it wanted to "provide the Legislature sufficient opportunity to consider comprehensive reform to the public education system." The Legislature had to have an alternative financing scheme in place by the 1993-1994 school year.

a. Infirmities in Senate Bill 351

The majority opinion, written by Justice Gonzalez, sustained two out of the three constitutional objections raised by the appellants. The court never even reached the question of whether Senate Bill 351 had created an "efficient" or "suitable" system capable of providing the schoolchildren of Texas a "general diffusion of knowledge." Nor did the court shed any more light on what it meant by "substantially equal access to similar revenues per pupil." Instead, the court held that the law had transgressed upon other provisions of the Texas Constitution—in particular, the prohibition of a statewide property tax and the requirement of

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314. One justice implied that the majority was delaying the effects for an extra tax cycle because of "election year political considerations." *Edgewood III*, 826 S.W.2d at 537 (Gammage, J., concurring in part and dissenting in part). Another called it an act of "political expediency" and wrote: "The court's disparate treatment of two different violations of the same constitution is a starkly unacceptable abdication of its constitutional responsibility." *Id.* at 525 (Cornyn, J., concurring in part and dissenting in part).

315. *Id.* at 522.

316. *Id.*


318. Although the taxes were raised and spent by the CEDs and not by the state, the majority found that the CED taxes were *de facto* state property taxes because of the myriad of restrictions and conditions placed on the CEDs by the state. The court noted:

Senate Bill 351 mandates the tax CEDs levy. No CED may decline to levy the tax. The tax rate for all CEDs is predetermined by Senate Bill 351. No CED can tax at a higher rate or a lower rate under any circumstances. Indeed, the very purpose of the CEDs is to levy a uniform tax statewide. The distribution of the proceeds is set by Senate Bill 351. No CED has any discretion to distribute the tax proceeds in any manner except as required by state statute. . . . If the State mandates that a tax be levied, sets the rate, and prescribes the distribution of the proceeds, the tax is a state tax, regardless of the instrumentality which the State may choose to use.

*Edgewood III*, 826 S.W.2d at 500. The court contrasted this approach with the prior methods of encouraging school districts to contribute local tax revenue, where financial incentives were provided to boost tax levels or state aid was conditioned on a certain tax rate. Pointing out that,
voter authorization for the infusion of new taxing authority into the CEDs.\textsuperscript{319}

\textbf{b. The Dissent: Alleged Judicial Entrapment of the Legislature}

Justice Doggett launched a two-pronged attack on the court’s holding. Aside from mounting a heated challenge to the majority’s construction of the constitutional clauses at issue, Doggett also charged the court with entrapping the Legislature with its prior opinions. Based on the court’s own pronouncements in \textit{Edgewood II} and \textit{Edgewood IIa},\textsuperscript{320} Doggett accused the majority of deception, elitism, entrapment, and a failure to accept responsibility for its previous statements. The court, in \textit{Edgewood II} and \textit{Edgewood IIa}, had come dangerously close to treading on the Legislature’s ground by mentioning possible remedies for the school-finance dilemma.\textsuperscript{321}

The majority’s response was defensive: “[W]e mentioned two examples of the kind of systemic change necessary to correct the constitutional defect. . . . We did not suggest that there were no other alternatives, or that one of these two options was preferred.”\textsuperscript{322} Having previously stated that tax base consolidation was constitutionally permissible, the majority claimed that it “obviously contemplated that approval of the voters of the county would be required,” and asserted that the court’s statement affirming the constitutional permissibility of tax base consolidation “did not exempt such action . . . from all other requirements of the Constitution.”\textsuperscript{323}

The defenses offered by the majority were considered inadequate by the dissenters and by many legislators. Justice Doggett wrote:

\begin{itemize}
\item for the first time, the state had mandated \textit{ad valorem} local taxes at a set rate, the court wrote that “Senate Bill 351 is thus all stick with no carrot attached.” \textit{Id.}
\item \textsuperscript{319} See \textit{id.} at 493 (“[W]e hold that Senate Bill 351 levies a state \textit{ad valorem} tax in violation of article VIII, section 1-e; and second, we hold that the Bill levies an \textit{ad valorem} tax without an election in violation of article VII, section 3 of the Texas Constitution.”).
\item \textsuperscript{320} For a discussion of these pronouncements, see \textit{supra} note 309 and accompanying text.
\item \textsuperscript{321} See \textit{supra} Subsections III.C.3-.5.
\item \textsuperscript{322} \textit{Edgewood III}, 826 S.W.2d at 511-12. Tax base consolidation and school district consolidation were the two suggestions previously offered by the court. See \textit{id.} Justice Gammage, who in a concurring opinion joined the majority in finding Senate Bill 351 unconstitutional, blasted the court for trying to defend its previous advisory pronouncements:

\begin{enumerate}
\item The court imprudently tried to give advice, but once undertaking the task failed to give complete advice. Legislatures enact statutes; courts decide cases. Even when this court has before it an actual case involving a specific constitutional complaint, we have no business speculating for the legislature, the executive department, or anyone else, what may or may not be otherwise constitutionally done.
\item \textit{Id.} at 537 (Gammage, J., concurring in part and dissenting in part).
\item \textsuperscript{323} \textit{Id.} at 512.
\end{enumerate}
\end{itemize}
Edgewood Drama

Although indicating that the Legislature was constitutionally empowered to implement tax base consolidation, the majority did not indicate, in any way, an election precondition. Rather it directly resolved this matter in the negative. Having charted the legislative course through the murky waters of Texas constitutional law, it is no minor matter that the majority now claims its map failed to detail the sharp rocks and swift current near the shore. The essence of the peculiar position now adopted is that by formerly providing guidelines for tax base consolidation without saying a vote was unnecessary, the majority, upon further reflection, finds that it is necessary. Disavowing paternity of the CED offspring of its prior writing, the majority tries vainly to shift the blame to the Legislature.  

These feelings of resentment were shared by many legislators. Representative Libby Linebarger said: “They really did prescribe that [CED plan] in Edgewood II. But what was interesting was they prescribed it, we didn’t, we sent it back to them, and then they said ‘Oh, this is not what we really meant.’ So it was a very frustrating experience.” Another commentator, who was an aide to Lieutenant Governor Bob Bullock at the time, noted the “tremendous anger in the Legislature after Edgewood III,” and commented that this series of events is “exactly why courts are not supposed to do advisory opinions.”

Anticipating this criticism, the majority blamed the Legislature for the constitutional infirmities of Senate Bill 351, asserting that the legislators “were not fooled into thinking that this Court had preapproved the system.” The majority pointed to testimony of expert witnesses as well as to language from legislators themselves as evidence of constitutional doubts about Senate Bill 351.

The heated debate about the propriety of the court’s advisory statements in Edgewood II and Edgewood IIa touches on much larger issues that are addressed in greater detail in Section IV.C of this Article. There is the constitutional concern that the court should abstain from offering

324. Id. at 544 (Doggett, J., dissenting). Doggett also poked holes in the court’s contention that it had “obviously” contemplated voter authorization when it previously had mentioned the constitutional feasibility of tax base consolidation. See id. at 543-44.
325. Interview with Libby Linebarger, supra note 181.
326. Interview with David Anderson, supra note 286.
327. Edgewood III, 826 S.W.2d at 513.
328. See id. The majority also insinuated that the Chairman of the Senate Committee on Public Education, Carl Parker, was aware that either a vote or a constitutional revision would be necessary to adopt a CED-type plan, see id. at 514, but the dissent claimed that the majority was intentionally distorting Parker’s testimony, see id. at 544-45 (Doggett, J., dissenting). Kevin O’Hanlon, the general counsel for the Texas Education Agency (“TEA”) at the time, supported the majority’s account. O’Hanlon insisted that there was a great debate during the creation of Senate Bill 351 about whether there should be an election to authorize the CEDs. He claimed that he recommended the election but Parker opted not to do it because he feared that there would be no other options if the voters struck it down. See Interview with Kevin O’Hanlon, supra note 136.
remedial advice for fear of violating the separation of powers doctrine. There is also the more pragmatic concern that the court may have some inherent institutional deficiencies, hindering it from acting profitably in an advisory capacity. The court itself quoted the following passage from Rodriguez: "[U]ltimate solutions must come from the lawmakers and from the democratic pressures of those who elect them." Elaborating further on its institutional limitations, the court continued:

We are constrained by the arguments raised by the parties to address only issues of school finance. We have not been called upon to consider, for example, the improvements in education which could be realized by eliminating gross wastes in the bureaucratic administration of the system. The Legislature is not so restricted.

Not heeding its own admonition, the majority continued in its advisory capacity, making thirty separate statements on the topic of "restructuring the tax system" and warning the Legislature of the dangers of over-reliance on the local property tax as a source of funding.

c. The Cornyn Opinion: The Shield of Adequacy

Because CED taxes were indispensable to the school-finance system under Senate Bill 351, the court, in declaring CEDs unconstitutional, had necessarily jettisoned the entire proposed school-finance system. Accordingly, the court never reached the issue of whether Senate Bill 351 was in conformity with the education clauses of the constitution. Nevertheless, the majority insisted that it was not deviating from the interpretations of the education clauses adopted in the prior Edgewood cases, and reaffirmed the previous definitions of "efficiency." The majority

329. Edgewood III, 826 S.W.2d at 524 (quoting San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 58-59 (1973)).

330. Id. This claim is somewhat disingenuous, considering that the court offers no proof of administrative waste—nor is it likely that, if such waste existed, the dollars squandered would be sufficient to cover the costs of meeting the constitutional requirements for the finance system set out by the court.

331. See WALKER & CASEY, supra note 49, at 105.

332. The court offered: "Our holding in this case does not conflict with our previous decisions in Edgewood I and Edgewood II, and we in no way withdraw from those opinions." Edgewood III, 826 S.W.2d at 493.

333. The majority made the following comments on the court's previous interpretations of "efficiency":

We did not hold that efficiency requires absolute equality in spending; rather we said that citizens who were willing to shoulder similar tax burdens should have similar access to revenues for education. Specifically, we said: '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.'

Id. at 497 (quoting Edgewood I, 777 S.W.2d 391, 397 (Tex. 1989)).
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did add the caveat that “money is not the only issue, nor is more money
the only solution.”

Though the majority held the line on the previous understandings of
efficiency, Justice Cornyn, in a separate opinion, introduced new lan-
guage and ideas into the school-finance debate. Though Cornyn could
not persuade any other justices to sign on to his opinion in this case, he
later wrote the majority opinion in *Edgewood IV*. The significance of
Cornyn’s *Edgewood III* opinion lies in the fact that he ends up swaying
the court to his point of view, resulting in a major shift in the constitu-
tional framework in *Edgewood IV*.

Cornyn, voted onto the court after the *Edgewood II* case was de-
cided, interpreted the word “efficiency” much differently than either
previous courts or the current majority, despite his protestations to the
contrary. Starting with the premise that “[e]fficient conveys the meaning
of effective or productive results and connotes the use of resources so as
to produce results with little waste,” Cornyn wrote:

An “efficient” education requires more than elimination of gross disparities
in funding; it requires the inculcation of an essential level of learning by
which each child in Texas is enabled to live a full and productive life in an
increasingly complex world. . . .

. . . *Edgewood I* and *Edgewood II* . . . require . . . the legislature to articulate
the requirements of an efficient school system in terms of educational results,
not just in terms of funding.

Cornyn’s move was subtle yet significant. Whereas previous defini-
tions of “efficiency” had focused almost entirely on financial disparities,
Cornyn concentrated on “results” and “outputs.” Cornyn called on the
Legislature to define and fund a “minimally adequate education for all
Texas school children.”

In addition to shifting the focus to adequacy, Cornyn advanced two
other controversial propositions: first, that the notion of equality had not
been and should not be incorporated into the definition of “efficiency,”

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334. *Id.* at 524.

335. *Id.* at 527 (Cornyn, J., concurring in part and dissenting in part) (quoting *Edgewood I*,
777 S.W.2d 391, 395 (Tex. 1989)).

336. *Id.* at 525-27 (Cornyn, J., concurring in part and dissenting in part) (emphasis added).

337. *Id.* at 527 (Cornyn, J., concurring in part and dissenting in part).

338. *See id.* at 527-28 (Cornyn, J., concurring in part and dissenting in part) (“Once a uni-
form, basic education is provided by the school system, equalization of funding is not neces-
sary.”) Justice Cornyn even accused the trial court judge of misinterpreting the language of the
prior *Edgewood* cases by bringing equal rights terminology into the discussion. *See id.* at 528
(Cornyn, J., concurring in part and dissenting in part). As the dissent points out, however,
Cornyn is the one who departs from prior understandings. *See id.* at 570 (Doggett, J., dissent-

and, second, that the link between money and educational results is at best tenuous and at worst nonexistent. Despite Cornyn's claims, these two contentions were radical departures from prior court pronouncements. The court had frequently incorporated notions of equality into the definition of efficiency, and its holdings were based on the assumption that money is a major factor in the quality of education.

Justice Cornyn's opinion is a perfect example of how adequacy issues can be used as a shield as well as a sword. Especially in the most recent wave of school-finance litigation, adequacy arguments have been used by plaintiffs as a sword, with the intention of boosting overall funding on education and improving educational results. Plaintiffs in other states have pointed to poor educational results to spur efforts for educational reform. Justice Cornyn, however, used results-oriented language as a shield, working against the expressed goals of the plaintiffs, in order to thwart the move towards equalization of access to funding. In parroting the "money doesn't matter" argument, made throughout the Edgewood saga by the wealthy school districts, Cornyn undermined the conceptual basis of the prior opinions. Those opinions sought to reduce the gross disparities in access to funding among school districts, leaving only disparities that stem from a district's tax effort rather than the size of its tax base. As mentioned above, Cornyn's positions became increasingly important in the next round of litigation.

339. See id. at 531 (Cornyn, J., concurring in part and dissenting in part).

340. The court in Edgewood I "recognized the implicit link that the Texas Constitution establishes between efficiency and equality." Edgewood I, 777 S.W.2d 391, 397 (Tex. 1989). It also wrote: "An efficient system . . . requires only that the funds available for education be distributed equitably and evenly." Id. at 398. In the next round, the court again reaffirmed its commitment to egalitarianism when it criticized Senate Bill 1 for making "no attempt to equalize access to funds among all districts." Edgewood II, 804 S.W.2d 491, 496 (Tex. 1991). Even the majority opinion in the present case recognized that the constitution, while not mandating "absolute equality," did require that districts have "substantially equal access to similar revenues per pupil at similar levels of tax effort." Edgewood III, 826 S.W.2d at 497 (quoting Edgewood I, 777 S.W.2d at 397) (emphasis added).

341. See Edgewood I, 777 S.W.2d at 393 ("The amount of money spent on a student's education has a real and meaningful impact on the educational opportunity offered that student."). Justice Doggett, in response to Justice Cornyn's assertion about the insignificance of financial inputs, quoted Justice Thurgood Marshall:

[It is difficult to believe that if the children of Texas had a free choice, they would choose to be educated in districts with fewer resources, and hence with more antiquated plants, less experienced teachers and a less diversified curriculum. In fact, if financing variations are so insignificant to educational quality, it is difficult to understand why a number of our country's wealthiest school districts, which have no legal obligation to argue in support of the constitutionality of the Texas legislation, have nevertheless zealously pursued its cause before this Court.


342. See supra text accompanying note 136.
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d. Political Motivations

Of course, Texas politics again may have been behind these legal maneuverings. In addition to providing the possible motivations of the justices in delaying the remedy,\(^{345}\) political considerations may have prompted the ruling striking down CEDs as well. Several of the attorneys involved in the case insinuated that the ruling was a result of the mistaken reading of popular opinion.\(^{346}\) The initial reaction to the implementation of the CED scheme was negative, but, after school districts had adjusted to the new system, it became increasingly popular. School districts favored the scheme because of what was labeled a "park and ride" provision, in which the Legislature mandated that the Tier One tax rate be automatically raised from $0.72 to $1.00 over a period of four years. Because local school districts had no authority to counter this rise in tax rates, Senate Bill 351 allowed districts to shift blame for the tax increases onto the Legislature while still being able to spend the extra revenue. The attorneys allege, however, that news of the late-blooming popularity of Senate Bill 351 never filtered its way up to the supreme court.\(^{347}\)

e. The Reaction

Many of the plaintiffs, having been content with the funding mechanism of Senate Bill 351, were dismayed that the latest system was ruled unconstitutional. But considering Justice Cornyn’s opinion, the plaintiffs and other supporters of school-finance reform were at least satisfied that the court held the line on the previous constitutional standards. MALDEF attorney Al Kauffman remarked: "We are disappointed that they threw out the County Education Districts. We are glad they didn’t do anything to upset the earlier decisions."\(^{348}\) Frustrated with the inability to establish a fair, constitutional finance plan, and aware of State District Judge Scott McCown’s threat to cut off state funding to schools if such a plan was not devised by June 1993, Kauffman asked McCown to appoint a special master to prepare a plan in the event of failure by the Legislature.\(^{349}\) After filing the motion on March 13, Kauffman said: "We would want a plan so that we can tell the court, 'Your honor, we do not want to

\(^{343}\) See supra note 314.

\(^{344}\) Interview with David Anderson, supra note 286; Interview with Kevin O’Hanlon, supra note 136.

\(^{345}\) See Interview with David Anderson, supra note 286; Interview with Kevin O’Hanlon, supra note 136.

\(^{346}\) Cindy Rugeley et al., Court Kills School Plan a Third Time; Funding System Illegal, Justices Tell Legislators, Hous. CHRON., Jan. 31, 1992, at A1.

stop funding...here is a plan that has been developed by the court.” He also argued that the threat of a more stringent court-imposed plan would motivate legislators to move quickly in constructing a proposal.

On July 7, 1992, McCown denied Kauffman’s request for the appointment of a special master, arguing that such action would allow legislators to abdicate their responsibility and take a “blame the court” attitude for any plan. He also reiterated the threat to shut down the public school system if the legislators did not devise a plan by June 1, 1993.

3. The Legislative Response, Part I

a. A Failed Special Session

The Legislature, stunned by the ruling in Edgewood III, now had to navigate around several more constitutional barriers, including prohibitions of mandatory local-share tax rates, new districts with taxing authority granted without local authorization, and over-reliance on local property taxes. With a tax base consolidation plan now off the table, legislators mulled over the few remaining possibilities, all of which seemed politically unpalatable.

In March, Speaker of the House Gib Lewis chose to pursue what was perhaps the most politically imprudent route of all. He proposed a school district consolidation plan (as opposed to a tax base consolidation) that would have consolidated approximately 1,050 of the districts into 188, largely along the boundaries of the now-unconstitutional CEDs. Lewis claimed that it would eliminate the need for a statewide property tax, reduce pressure for a state income tax, and avoid a massive redistribution of funds from wealthy districts to poor ones. The spokesperson for the Texas Association of School Boards called the proposal “ludicrous” and “unsound,” and the Equity Center director Craig Foster remarked that voting for consolidation in Texas would be “political suicide.” Lewis’s proposal failed to win any significant support.

When it became obvious that district consolidation was not a politically viable option, the state’s three most powerful politicians—Speaker

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348. Id.
350. See id.
351. See WALKER & CASEY, supra note 49, at 104-05.
353. See Robison & Markley, supra note 352.
354. Id.
Edgewood Drama

Lewis, Governor Ann Richards, and Lieutenant Governor Bob Bullock—crafted what they called the "Fair Share Plan," a plan based on limited recapture. This proposal would have required Texas's 111 richest school districts to surrender a portion of their local tax revenue to the state, which would then funnel the money through the Teacher Retirement System to aid poorer districts. Because the constitution had been interpreted to prohibit tax money collected in one school district from being spent in another, the plan was drafted in the form of a constitutional amendment to circumvent this restriction. It would have abolished CEDs, since recapture would have been implemented on a state-wide basis, not by county. Bullock insisted that the recapture would have touched only 10% of the districts with 6% of the students and affected only 2.5% of the total school spending. The legislation also included a proposed equity standard, which stated that 95% of the state and local funds used to finance public schools had to be equalized.

Governor Richards called legislators to Austin in November 1992 for a post-election special session, in order to resolve the school-finance issue. The "Fair Share Plan" supported by the Governor and the legislative leadership sailed through the Senate, 29-2, but the plan fell victim to partisan bickering and political gamesmanship in the House. The House fell 10 votes short of the necessary 100 to approve the constitutional amendment. The 90-57 margin was almost strictly on party lines, with only two Republicans supporting passage of the plan and only four Democrats defecting to the opposition.

The "Fair Share Plan" sparked vociferous opposition for several reasons. Many Republicans were ideologically opposed to the idea of recapture, arguing that hurting wealthy districts by "leveling down" was not the proper solution. Defenders of the plan responded that their real complaint was with the supreme court, which had severely restricted the available options, and that recapture was the best of the remaining choices. The opponents of the amendment also harped on the fact that the Plan contained estimated local property tax increases of $2.8 billion.

356. See WALKER & CASEY, supra note 27, at 19.
358. See WALKER & CASEY, supra note 27, at 19.
360. See id.
361. See id.
362. See Bullock, supra note 357.
for the biennium. The "Fair Share Plan" also ran into trouble because the proposed equity standard of 95%, while high, appeared to dilute the standard previously outlined in the Edgewood cases (similar revenue per student for similar levels of tax effort) when the revenue effects on poor districts were examined in the computer printouts that accompanied the plan. The proposed 95% equity target was not chosen by accident—it had been at the center of Senate Bill 1, and, as before, it was still considered to be a politically attractive figure.

Two other proposals were also rejected in the House. An alternative amendment offered by some Democratic representatives, which would have allowed voters to decide whether to keep the CED system, died on a procedural motion without a full vote. With the frustration level rising with every passing day, some legislators sought to capitalize on the legislative-judicial tension. A bloc of Republicans, led by Representative John Culberson, attempted to pass a constitutional amendment which would have strictly limited court intervention in matters of school finance. Democrats lambasted the idea as a breach of the separation of powers doctrine and accused its proponents of running away from the problem instead of trying to solve it. The measure gathered 57 votes, but eighty-nine representatives spurned it. The voting again was almost exclusively along party lines. Despite the setback, Culberson and his supporters would be heard from again.

b. Proposition One

After the failure to reach any sort of consensus, the special session was disbanded and the political discourse descended into invectives and attributions of blame. When a new Legislature (still in Democratic hands) convened in January 1993, tempers had cooled. The impending June 1 deadline, a change in legislative leadership, and a willingness by House Democrats to open up the legislative process to their Republican counterparts helped break the legislative logjam.
Legislators began discussing constitutional amendments as a means of circumventing the constitutional defects of Senate Bill 351. For an amendment to become enshrined in the constitution, it had to be approved by two-thirds of both houses of the Legislature and then approved by a majority of the voters of Texas. With adroit dealmaking and offers of compromise, new House Speaker Laney and Public Education Committee Chairperson Linebarger swayed 15 Republicans to their side to get the two-thirds vote needed in the House. The proposed constitutional amendment sailed through the Senate by a twenty-seven-to-four margin a few days later.

Three proposed constitutional amendments, called propositions, were to be voted on by the citizens of Texas on the May 1 ballot. The first proposition was the focus of most of the attention. Proposition One would have constitutionalized the CED system struck down in Edgewood III. It would have allowed the state to take as much as 2.75% of state and local school revenue from wealthy districts—approximately $400 million—and redistribute the money to poorer ones. It would also have allowed the state to establish county or multi-county education districts as a mechanism for redistributing this revenue and to limit to one dollar the tax rate that these districts could levy. Having never really come close to finding another way out of the quagmire, the Legislature had a lot riding on Proposition One.

The two-and-a-half month campaign for passage of Proposition One was aggressively fought on both sides. Governor Richards was the plan's most vociferous supporter, putting all the political capital she could muster into the fight. Also supporting the bill was the Democratic legislative leadership and most major education and teacher groups. Proponents of the plan were also helped by some of the state's business leaders, who contributed more than $1.5 million in order to launch a television advertising blitz.

1993, at A32.
372. Proposition Two would have allowed school districts to ignore state mandates whenever the state refused to provide the funding for the fulfillment of said mandates, and Proposition Three authorized the issuance of state bonds for the construction of school facilities. See Walker & Casey, supra note 27, at 20.
373. See Rugeley, supra note 371.
374. See id.
376. See id.
Opponents of the bill were not to be outdone, making their presence felt through talk radio and through meetings with newspaper and television reporters across the state. They had the organized backing of the Republican Party of Texas and an organization called Citizens to Stop Robin Hood Taxes, which dubbed Proposition One the “Robin Hood Amendment,” and warned voters that it would lead to massive tax increases. Even the National Republican Party chipped in for the anti-amendment campaign with a donation of $400,000 from the Republican National Committee. Some believe that the purpose of this contribution was to deliver a blow to the political fortunes of Governor Richards, damaging her chances of reelection.

Whether or not the Republicans were trying to deflate Governor Richards, the voters of Texas surely did when they overwhelmingly defeated Proposition One. Several of Proposition One’s supporters attribute their failure to a poorly managed campaign and light voter turnout. The legislators did not have much time for recrimination. With McCown’s June 1 deadline approaching and the specter of a school shutdown again looming large, legislators had only a matter of weeks to cobble together a finance plan that could pass constitutional muster, and many did not know where to start.

377. See id.
378. See Terrence Stutz, ‘Robin Hood’ Supporters Preparing To Woo Voters; School Funding Plan Will Be Tough Sale, They Say, DALLAS MORNING NEWS, Feb.13, 1993, at 1A.
379. See Wayne Slater, U.S. GOP Cash Fought School Plan; Democratic Official Calls Foes’ Tactic Hypocritical, DALLAS MORNING NEWS, Jan. 12, 1994, at 1A.
380. See id. Their efforts may have been successful. Richards went on to lose the gubernatorial race to George Bush, Jr., in November 1994.
381. Proposition One lost by a margin of 63% to 37%. See Rugeley, supra note 375.
382. One legislator, Scott Hochberg, a Democratic representative from Houston, argued that the campaign was poorly managed and not broad-based, because many legislators were left out of the loop. He contended that opposition to the amendment stemmed from misconceptions surrounding the “Robin Hood” name, as many people mistakenly believed that their districts were being affected. He also noted the opposition was bolstered by a light turnout, which magnified the power of the conservative activists. See Interview with Scott Hochberg, Texas Representative, in Houston, Tex. (Mar. 13, 1996). House Public Education Committee Chairperson Libby Linebarger asserted that she and her Senate counterpart, Bill Ratliff, wanted to campaign by telling voters how they would be affected in their pocketbooks. Richards instead tried to tug at their heartstrings—to no avail. Linebarger also accused the opposition of putting out “misinformation and outright lies” but attributed their victory to their focus on pocketbook issues. Interview with Libby Linebarger, supra note 181.
4. The Legislative Response, Part II: Senate Bill 7

a. The Genesis of the Bill

With yet another plan going down to defeat, House members quickly began stitching together a consolidation plan in order to avoid a school shutdown, believing that district consolidation was the only "lead-pipe cinch" to be constitutional. The plan that emerged would have combined 109 wealthy districts with 172 other districts in order to achieve a greater degree of equity. The consolidation bill was able to muster some support in the House, only because representatives feared that a failure to meet the June 1 deadline would tarnish the Legislature as a whole, that a school shutdown was something to be avoided at all costs, and that the only other constitutional alternative would be to institute a state income tax. Still, consolidation was not an attractive alternative for the politicians. Linebarger explained that consolidation "is a nasty word in Texas because people think they are going to have to give up their Friday night football games." The traditional importance of local control and independence in Texas education posed a major barrier to any consolidation plan.

Consolidation was even less attractive for the senators. Because only a small number of schools would be affected by the consolidation plan, there were many House members whose districts were completely unaffected. In contrast, senators represented much larger areas that were more likely to contain wealthy school districts and thus were more likely to have something to lose.

While the consolidation bill was treading water in the House, the Senate developed and passed its own plan, which was developed with the assistance of the Equity Center. The plan called for detaching commercial property from a wealthy district and annexing it to a poor district. The annexed property and the district did not have to be contiguous. One of the plan's architects, Craig Foster, contended that the scheme could have easily been implemented: "It [the annexation plan] was an ingenious thing. It was literally as simple as the legislature establishing boundary lines. We already have in Texas school districts that are split into parts for whatever reason. There was no difference except the purpose for which it [the splitting] was being done."

383. Interview with Scott Hochberg, supra note 382; see also Terrence Stutz, New Option Is Sought on Schools, DALLAS MORNING NEWS, May 3, 1993, at 1A.
384. See Terrence Stutz, Richards Tells Texans To Push Lawmakers on School Finance, DALLAS MORNING NEWS, May 14, 1993, at 1A.
385. Interview with Libby Linebarger, supra note 181.
386. Interview with Scott Hochberg, supra note 382.
387. Interview with Craig Foster, supra note 73.
The General Counsel of the TEA, Kevin O’Hanlon, strongly disagreed with Foster’s claim. The plan, which he labeled a “logistical nightmare,” would have required the TEA to keep track of millions of parcels of commercial property in the state, a task for which O’Hanlon claims it was ill suited: “We [the TEA] would lose control over it, and I didn’t have that much confidence in our ability, because we weren’t in that business. We were going to have to start this process from scratch and keep up with it.”\(^3\) Complicating matters was a constitutional provision requiring appraisals to be done by county-based organizations, adding a barrier between the base data and the administrative task that the TEA would have been asked to fulfill.\(^3\)

The Senate bill also encountered some ideological opposition in the House. Because the plan only allowed commercial property to be transferred, seven wealthy districts that were composed of primarily residential property would have remained untouched by the plan.\(^5\) Among these districts were some of the defendant-intervenors in the original *Edgewood* lawsuit, including the Alamo Heights and Highland Park school districts, that were some of the most vigorous opponents of the school-finance reform efforts.\(^3\) The House leadership was not about to let them off the hook, because they believed doing so violated the supreme court’s constitutional interpretations, particularly the pronouncements in *Edgewood II* regarding the need to bring all property into the school financing system. Linebarger, for instance, remarked: “The supreme court said all property. They didn’t say 99.6% of property. They said all property had to be in the system.”\(^3\)

In addition to worrying about the imposing time constraints and horse-trading with the various constituencies, the legislative leadership also had to deal with Representative John Culberson and his followers, who were still clamoring for a constitutional amendment that would have prohibited the courts from intervening in school-finance issues. According to Linebarger, Culberson’s troops were unwilling to discuss any alternative to their constitutional amendment.\(^3\) Had the Legislature failed to meet the June 1 deadline and an emergency special session was called, Linebarger estimates that the Culberson amendment would have passed,

\(^3\) Interview with Kevin O’Hanlon, *supra* note 136.
\(^3\) *Id.; see also* TEX. CONST. art. VIII, § 23(b).
\(^3\) See Stutz, *supra* note 384. These districts had a total of approximately 7,000 students, less than one half of one percent of the state’s total student population. *See id.*
\(^3\) Interview with Libby Linebarger, *supra* note 181.
\(^3\) Stutz, *supra* note 384.
\(^3\) Interview with Libby Linebarger, *supra* note 181.
Edgewood Drama

given the level of disgust that would have existed and the legislators' desire to free themselves from this intractable conundrum.\textsuperscript{394}

Fortunately, the Legislature was able to find its way out of the morass in time to meet the deadline. Recognizing that none of the ideas that had been circulating could gain a majority in both houses and running out of time the House developed a multi-option "cafeteria-style" plan. O'Hanlon summarized the thinking in the House: "[W]e [could] avoid this fight by giving the locals a choice. They're not good choices for the rich districts, but at least they get to participate."\textsuperscript{395} Piecing together old and new ideas, approximately 100 of the wealthiest school districts were given five choices to reduce their tax base. They could:

1) consolidate with another district by agreement (the old House plan);
2) detach commercial property to be annexed by another district (the Senate plan);
3) purchase attendance credits (a form of recapture that entailed sending funds to the state);
4) contract for the education of non-resident students; or
5) undertake tax base consolidation by setting up a mini-CED (the approach in Senate Bill 351).\textsuperscript{396}

These choices formed the core of what became Senate Bill 7.\textsuperscript{397} If one of the choices was deemed unconstitutional, the law allowed the districts to choose another.\textsuperscript{398} The bill sailed through the Senate on a vote of 25-6 and passed the House by a vote of 103-41 with only days to spare before the court-imposed deadline.\textsuperscript{399} Almost seventeen months after the supreme court ruled the Legislature's last school-finance system unconstitutional, Governor Richards signed the bill into law and Texas finally had another system in place.

\textit{b. A Description and Analysis of Senate Bill 7}

Because the finance system established in Senate Bill 7 is largely in place today, the provisions of the law warrant close scrutiny. Senate Bill 7

\textsuperscript{394} See id.
\textsuperscript{395} Interview with Kevin O'Hanlon, \textit{supra} note 136.
\textsuperscript{396} See \textsc{Walker & Casey}, \textit{supra} note 27, at 20-21.
\textsuperscript{397} An Act Relating to Public School Education and Finance, 1993 Tex. Sess. Law Serv. Ch. 347 (West). The entire education code was recodified in 1995, meaning that technically the provisions of Senate Bill 7 were repealed and replaced in different sections of the code. However, the financing provisions of Senate Bill 7 remain largely in effect. For the sake of clarity, citations to Senate Bill 7 in the following discussion refer to the pre-1995 education code.
\textsuperscript{398} See id. \S 1.01 (codified at \textsc{Tex. Educ. Code Ann.} \S 36.009 (West. 1994)); see also \textsc{Walker & Casey}, \textit{supra} note 27, at 21.

retained the two-tiered structure of the FSP, the system of formulas for the distribution of state aid to qualifying school districts.\(^4\) Within the FSP, state aid is disbursed in three basic components: (1) Tier One, (2) the Guaranteed Yield Program (Tier Two), and (3) the Available School Fund.

About three-fourths of the state funds distributed to school districts through the FSP are Tier One funds.\(^5\) Tier One is supposed to cover the cost of a basic education for each school district. In Senate Bill 7, the state set this figure at $2300 for each student in “average daily attendance” (“ADA”), $100 less than Senate Bill 351 had allotted for Tier One.\(^6\) This basic allotment is subject to adjustments on the district level (through a cost-of-education index, a small district adjustment, and a sparsity adjustment)\(^7\) and adjustments based on different student needs,\(^8\) as well as some other minor modifications.\(^9\) These adjustments, or weights, are factored into the funding mechanism through a formula called the “weighted students in average daily attendance” (“WADA”).\(^10\) To qualify for the state guarantee of $2300 per student in

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402. See id. at 23; 1993 Tex. Sess. Law Serv. Ch. 347, § 2.01 (codified at TEX. EDUC. CODE ANN. § 16.101 (West 1994)).
403. The cost of education index adjusts the basic allotment for each district to reflect the geographical variation in known resource costs and costs of education due to factors beyond the district’s control. See 1993 Tex. Sess. Law Serv. Ch. 347, § 2.0; LEGISLATIVE BUDGET BOARD, supra note 401, at 14. Districts may qualify for the small district adjustment and the sparsity adjustment depending on their student population, geographic expansiveness, and proximity to a high school district. See 1993 Tex. Sess. Law Serv. Ch. 347, § 2.01; LEGISLATIVE BUDGET BOARD, supra note 401, at 14.
404. Students with special educational needs are given different weights to recognize the differing costs in educating the students. Students in the normal educational program are counted as 1.00 for funding purposes, while weights for students in the special education program range from 2.3 to 7.11. See BILLY D. WALKER & DANIEL T. CASEY, THE BASICS OF TEXAS PUBLIC SCHOOL FINANCE: A NOVEMBER 1994 UPDATE 3-4 (5th ed. 1994). These weights, used for the 1993-1994 school year, had been retained from the previous system. Senate Bill 7 called for modification of many aspects of the weighting system beginning in the 1994-1995 school year. See 1993 Tex. Sess. Law Serv. Ch. 347, § 2.06. In addition to the special education weights, there were also weighted programs for vocational education, compensatory education, gifted and talented students, and bilingual education. See id.; LEGISLATIVE BUDGET BOARD, supra note 401, at 15; see also Dan Casey & Frank Battle, Presentation for the 1994 TASA/TASB Joint Annual Convention (Oct. 3, 1994).
405. Districts were also eligible for a transportation allotment and a technology allotment. See LEGISLATIVE BUDGET BOARD, supra note 401, at 15.
406. These weights, which reflect the varying cost of education by pupil characteristic or instructional arrangement, enable the state to direct more aid to districts whose students are more expensive to educate.

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ADA, or the approximately $2566 per student in WADA, the school districts have to agree to tax their property at an effective rate\(^4\) of $0.86 per $100 of assessed valuation,\(^5\) an increase of $0.04 over the mandatory rate the CEDs were required to levy under Senate Bill 351.\(^6\) Some wealthy districts could meet this basic allotment through this tax rate without any state aid, but most districts received some state money to bridge the gap between what they reaped in local revenues from the $0.86 tax and the basic allotment provided under Tier One.\(^7\)

The Guaranteed Yield Program, often called the second tier, was begun in 1989-1990 to provide additional funds to enrich the basic Tier One program. Its stated purpose is "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."\(^8\) It enables districts with property wealth below $205,500 per student to earn additional state aid by setting their tax rate anywhere between the $0.86 required for Tier One financing and the $1.50 statutory maximum.\(^9\) For each penny of tax effort past the first tier requirement up to an additional $0.64, the state guarantees a yield of $20.55 per penny per WADA.\(^10\) Thus, a poor dis-

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\(^4\) An effective rate differs from the actual rate in that it is a uniform statewide measure that takes into account regional differences based on prices and differing appraisal techniques.

\(^5\) The phrase "per $100 of assessed valuation" is hereafter either omitted or referred to numerically (e.g., $0.86/$100).

\(^6\) See TEXAS EDUC. AGENCY, supra note 400, at 25. The local district was responsible for the product of the $0.86 effective tax rate per $100 of value and the taxable value of the district's property for the prior tax year determined under TEX. EDUC. CODE ANN. § 11.86 (West 1994). See 1993 Tex. Sess. Law Serv. Ch. 347, § 2.06 (West).

\(^7\) In fact, for the 1993-1994 school year, local property taxes accounted for $5.026 billion of the Tier One funding, whereas the state contributed $5.973 billion. See Casey & Battle, supra note 404.

\(^8\) TEX. EDUC. CODE ANN. § 16.301 (West 1994).

\(^9\) See id. § 16.302.

\(^10\) See id. School district property taxes have two functional components: a Maintenance and Operations ("M&O") rate, for administrative and operational costs, and an Interest and Sinking Fund rate ("I&S"), or "debt service" rate, for facilities construction and renovation. See LEGISLATIVE BUDGET BOARD, supra note 401, at 10. Both M&O and I&S taxation qualify a district for state aid under the Guaranteed Yield Program of Tier Two. See William Sparkman & Fred Hartmeister, The Edgewood Saga Continues: The Texas School Finance System is Constitutional—But Not out of the Woods, 101 ED. LAW. REP. 509 (1995), available in WESTLAW, Education Library, WELR File. There is a statutory cap of $1.50/$100 for M&O taxation. Under Senate Bill 7, the tax rate for servicing old debt remained unlimited, but the rate for the issuance of new debt (after September 1, 1992) was limited to $0.50, required approval from the Attorney General, and had to be within the overall $1.50 limit. See TEX. EDUC. CODE ANN. § 20.09(d) (West 1994), superseded by TEX. EDUC. CODE ANN. § 45.003(e) (West 1996). The $1.50 cap could be exceeded for I&S taxation, but only with local voter authorization; any taxation in excess of $1.50 did not qualify for state aid under Tier Two. See id. § 20.09(a); LEGISLATIVE BUDGET BOARD, supra note 401, at 10. Because the state does not provide additional money for districts taxing (for debt service) above the $1.50 rate, such taxation leads to unequalized local enrichment, thus creating a "third tier."
istrict taxing at the maximum rate allowed ($1.50) would qualify for a
guaranteed $1315 per weighted student (64 times $20.55), in addition to
the basic allotment provided in Tier One. This scaled system provides an
incentive for districts to tax at a greater rate.144 Districts with property
values per student exceeding $205,000 would not qualify for assistance,
because their local tax revenue would exceed the state’s guaranteed
yield.145

The Available School Fund, which was constitutionally created in
1876, consists of the annual interest from the Permanent School Fund146
as well as one-fourth of the revenues from the state motor fuel tax.147
Most of the money in this fund is disbursed to school districts based ex-
clusively on the number of students in ADA. In 1993-1994, the per capita
apportionment for school districts was $334 per student in ADA.148 The
Available School Fund disbursements are not provided in addition to
Tier One and Tier Two but rather in lieu of the state’s contributions un-
der Tier One and Tier Two.

To look at the system from a broad perspective, the amount of FSP
state aid that a district is entitled to is the basic Tier One allotment (with
weights and adjustments) combined with the guaranteed yield from Tier
Two, minus the district’s allocation from the Available School Fund and
the district’s local share of Tier One and Tier Two.149

The essence of Senate Bill 7 is the multi-option formula designed to
“level down” the wealthiest districts. Under the new law, districts can no
longer exceed $280,000 in property value per student (which equals the
district property value as assigned by the comptroller’s Property Tax di-

414. The state set its guaranteed yield to the tax rates levied by the districts in 1992-93, so
that any local tax effort in 1993-1994 above the previous year’s rate was not recognized for
equalization purposes, creating what the plaintiffs called a “biennium lag.” See infra text ac-
companying note 452.

415. Under Senate Bill 7, districts with property values of $205,000 per student or greater
did not receive any state aid under Tier Two, because they could generate more than the state’s
guaranteed yield of $20.55 per penny of tax effort from their own tax base. For example, a dis-
trict with $210,000 of property wealth per student could raise $21 from its own tax base for
every additional penny of tax effort. A district with $280,000 of property wealth per student
could raise $28 of local funds for every additional penny of tax effort.

For the 1993-1994 school year, the state contributed $1.32 billion of the Tier Two money,
while the districts’ share from local tax revenue accounted for $2.63 billion of the total. See Ca-
sey & Battle, supra note 404.

416. The Permanent School Fund is an endowment consisting of land and investment
holdings established by the state in the nineteenth century. See LEGISLATIVE BUDGET BOARD,
supra note 401, at 10. The Fund was valued at $18.4 billion in 1998. See id.

417. See TEX. EDUC. CODE ANN. § 43.001 (West 1994); LEGISLATIVE BUDGET BOARD,
supra note 401, at 12. The revenues from the motor fuel tax are constitutionally allocated to the
Available School Fund. See TEX. CONST. art. VIII, § 7-a.

418. See TEXAS EDUC. AGENCY, supra note 400, at 23.

419. See WALKER & CASEY, supra note 404, at 6.
vision studies divided by the WADA.\footnote{420} Any district that exceeds the allowable wealth per student has five options to reduce its wealth.

The first option is consolidation by agreement. The board of trustees of two or more districts could voluntary consolidate so long as the combined entity would have less than $280,000 in property value per student.\footnote{422} An election is not required, and districts need not be contiguous.\footnote{423} The second option is detachment of property and annexation by agreement. The board of trustees of two districts may agree to detach property from one district (which must bring it to below $280,000 of property value per student) and annex it to the other (so long as the annexation does not increase the wealth of the annexing district above $205,000 per student).\footnote{424} A third alternative for wealthy districts is the purchase of attendance credits from the state. Money from the payment of attendance credits is deposited for use in financing the Foundation Program.\footnote{425} For each credit purchased, one student is added to a district’s WADA for calculation of property value per student.\footnote{426} This mechanism, which would require local voter approval, would allow wealthy districts to dip below the $280,000 ceiling for property wealth per student.\footnote{427} The fourth possibility, also requiring local voter approval, would involve contracting with other school districts to educate their students.\footnote{428} Finally, the last option would allow several districts to create a consolidated taxing district, but it would require local voter approval in all affected districts.\footnote{429} This type of tax base consolidation would be much like a mini-CED, except that all M&O taxing authority resides in the taxing district, whereas under Senate Bill 351 the component districts would have retained some of their M&O taxing authority.\footnote{430}
If none of these options were selected, the Commissioner of Education would be authorized, subject to certain restrictions, to detach commercial property from the noncompliant district and annex it to another district.\textsuperscript{431} For the rare wealthy district lacking a substantial amount of commercial property, the Commissioner would be authorized to force wholesale consolidation if the district were to fail to choose among the five options.\textsuperscript{432} Senate Bill 7 also included a controversial provision that allowed some of the state's wealthiest districts to retain some of their property wealth in excess of the $280,000 cap for three years.\textsuperscript{433} This "hold harmless" provision allowed wealthy districts to maintain their prior spending levels and avoid the abrupt funding decreases that they would have otherwise faced.\textsuperscript{434}

For the 1993-1994 school year, ninety-eight districts exceeded the $280,000 cap, and all made their decisions in a timely fashion, avoiding detachment or forced consolidation by the Commissioner.\textsuperscript{435} Sixty-four chose to purchase attendance credits. Thirty districts elected to contract for the education of students from other districts. Four districts opted both to purchase attendance credits and to educate students from other districts. No district opted for detachment, and no district pursued consolidation of any sort.\textsuperscript{436} In its first year of existence, the finance plan introduced by Senate Bill 7 raised $318 million in revenues "recaptured" from wealthy districts by the state.\textsuperscript{437} By 1998-1999, recaptured revenues are expected to exceed $716 million.\textsuperscript{438}

\begin{footnotes}
\footnote{431. See 1993 Tex. Sess. Law Serv. Ch. 347, § 1.01.}
\footnote{432. See id.}
\footnote{433. See id. This provision was one of the bases on which the poorer districts challenged Senate Bill 7. See Edgewood Indep. Sch. Dist. v. Meno, 917 S.W.2d 717, 734 (Tex. 1995) [hereinafter Edgewood IV].}
\footnote{434. Much to the chagrin of the poorer school districts, the hold harmless provision was extended twice by the Legislature, in 1995 and in 1997, and it is now set to expire in 2000. The provision is still the subject of fierce debate today.}
\footnote{435. See Texas Educ. Agency, supra note 400, at 24.}
\footnote{436. See id. These numbers vary among several different sources. One source agreed that 98 districts were affected but claimed that one fewer district exercised option four, choosing instead to detach property under option two. See Walker & Casey, supra note 404, at 19. Another source claimed that there were actually 99 districts touched by the law, one of which chose the detachment option (option two), 52 of which chose to purchase attendance credits (option three), eight of which opted to educate students from other districts (option four), and 38 of which combined options three and four. See Sparkman & Hartmeister, supra note 413, at 514-15. The Texas Supreme Court in Edgewood IV also claimed that there were 99 affected districts. See Edgewood IV, 917 S.W.2d at 746.}
\footnote{437. See Texas Educ. Agency, supra note 400, at 28. There was also disagreement on this figure among the various sources. The Edgewood IV court, for example, claimed that the plan raised $400 million in recaptured money. See Edgewood IV, 917 S.W.2d at 735.}
\footnote{438. See Legislative Budget Board, supra note 401, at 18.}
\end{footnotes}
In addition, as part of Senate Bill 7, the Legislature appropriated an additional $1.1 billion to fund the state's contribution to the Foundation School Program for the 1993-1995 biennium. The state delayed payment of approximately $250 million of that amount to school districts in a bid to shift twenty-five percent of the increase to the next biennium. The additional funding was still not enough to keep pace with increasing enrollment, meaning that school districts lost an average of $94 per student for the 1993-1994 school year. These funding concerns had a lot to do with the reduction of the Tier One guarantee from $2400 in 1992-1993 to $2300 for the 1993-1995 biennium, the decrease in the guaranteed yield in Tier Two from $22.50 to $20.55 per weighted student for each penny of tax effort, and the application of the guaranteed yield (in Tier Two) to 1992-1993 tax rates rather than the 1993-1994 tax rates. Given the overall changes, including the different funding mechanisms and the inadequate funding, both rich and poor districts had to raise local taxes to generate the same amount of revenue in 1993-1994 that they had received in 1992-1993.

Senate Bill 7 was not dedicated exclusively to reforming the finance system; it also sought to create an accountability regime for Texas students. It made significant reforms in Chapter 35 of the Texas Education Code that were aimed at establishing a system of assessment and accreditation for school districts to measure their progress in reaching seven educational goals. The school accountability regime grades campuses as

439. See WALKER & CASEY, supra note 404, at 9.
440. See Terrence Stutz, Richards Signs School Funding Bill, DALLAS MORNING NEWS, June 1, 1993, at 10A.
441. See Sparkman & Hartmeister, supra note 413.
442. See 1993 Tex. Sess. Law Serv. Ch. 347, § 7.01 (West). The seven educational goals mentioned were:

GOAL A: All students shall have access to an education of high quality that will prepare them to participate fully now and in the future in the social, economic, and educational opportunities available to Texas.

GOAL B: The achievement gap between educationally disadvantaged students and other populations will be closed. Through enhanced dropout prevention efforts, the graduation rate will be raised to 95 percent of students who enter the seventh grade.

GOAL C: The state shall demonstrate exemplary performance in comparison to national and international standards for student performance.

GOAL D: A well-balanced and appropriate curriculum will be provided to all students.

GOAL E: Qualified and effective personnel will be attracted and retained. Adequate and competitive compensation commensurate with responsibilities will be ensured. Qualified staff in critical storage areas will be recruited, trained, and retrained.

GOAL F: The organization and management of all levels of the educational system will be productive, efficient, and accountable.

GOAL G: Instruction and administration will be improved through research that identifies creative and effective methods. Demonstration programs will be developed and local initiatives encouraged for new instructional arrangements and management techniques. Technology will be used to increase the equity, efficiency, and effectiveness of student learning, instructional management, staff development, and admini-
either exemplary, recognized, acceptable, or low-performing, based on standardized test scores, attendance, and dropout rates. Low-performing districts that consistently fail to meet accreditation standards are subject to penalties, including dissolution of the offending school district and consolidation with another district.

Six years after the first hearing in the Edgewood suit, legislators crossed their fingers, hoping they had finally put together a plan that could survive judicial scrutiny. It did not take long for challenges to emerge and battle lines to be drawn.

E. Edgewood IV

1. A Host of Challengers and Challenges

Less than two weeks after Senate Bill 7 passed, MALDEF and the Equity Center requested that Texas District Court Judge Scott McCown: (1) overturn the law, (2) hold an immediate hearing, (3) give the Legislature an August 1 deadline to come up with a new finance system, and (4) appoint a court master to devise a plan in the event of the Legislature's failure to do so. MALDEF attorney Kauffman said that the law would "have an immediate negative effect on the poorest school districts and did not go far enough toward guaranteeing long-term equality for all school children in Texas." The executive director of the Equity Center, Craig Foster, called the new system "a step backward in terms of the equalization gains we've been making over the past four years in particular." The original Edgewood plaintiffs (and plaintiff-intervenors) objected to three elements of Senate Bill 7, in particular: inadequate state funding, a $600 gap between rich and poor districts at the maximum allowable rate of taxation, and the biennium lag in determining the amount of state aid.
Edgewood Drama

Although the Legislature did appropriate an additional $1.1 billion for public education in the biennium, the plaintiffs claimed that this amount was not enough to keep pace with rising enrollment and would force poor districts disproportionately to raise their tax rates and cut back on their programs. For an example, Kauffman pointed to the poor Brownsville district, which he argued would have to raise its taxes to $.50 per $100 valuation to offset its estimated $12 million loss in state aid, “while wealthy districts of comparable size and tax rate can maintain their level of per student revenues with no tax increases or with tax decreases.” In his court filing, Kauffman wrote: “The unconstitutional distribution of state school funds is manifested in the tremendous and impossible burdens put upon poor school districts to recoup the loss of state funds by raising their local tax rates.”

As further evidence of the law’s unfairness, plaintiffs pointed to a permanent $600 gap in revenue per weighted student between rich and poor school districts when taxing at the maximum $1.50/$100 rate. For a poor district participating in the state’s Guaranteed Yield Program of Tier Two, the state guarantees a yield of $20.55 for each additional penny of taxation above $.86/$100. A poor district taxing at the maximum rate will get the $2300 basic allotment for Tier One, plus approximately $1315 (64 times $20.55) for Tier Two, resulting in a total of $3615 per student. A wealthy district at the $280,000-property-value-per-student cap, however, will be able to generate $28 from local funds for each additional penny of tax effort. A wealthy district taxing at the maximum rate of $1.50/$100 will be able to raise $4200 in revenues per student ((1.50/100) times 280,000)—leaving a permanent gap in access to revenues of approximately $600 per student annually. This gap was unacceptable to the plaintiffs. One lawyer for poor districts, Roger Moore, said: “We felt like the $600 gap is significant. It certainly does make a difference in the quality of education.”

Kauffman, while recognizing that parts of the plan do represent a step forward in equity, said that the law “still does not guarantee to all Texas students the same access to revenues for their education.”

Finally, the plaintiffs also protested vociferously about the “biennium lag.” Senate Bill 7 limits a district’s state aid “to the amount to which the

448. Stutz, supra note 445. The loss in state aid reflects funding formula reductions from Senate Bill 351 to Senate Bill 7.

449. Id. Governor Richards recognized the need for money in the system but claimed that there was no public support for raising taxes: “The public wants to see a better educated child. They want to see a better product before we talk to them about additional money.” Stutz, supra note 440.

450. Terrence Stutz, School Finance Law OK’d, DALLAS MORNING NEWS, Dec. 10, 1993, at 1A.

451. Id.
district would be entitled at the district’s tax rate for the final year of the preceding biennium.”452 Though many poor districts raised their tax rates in 1993-1994, they could not recognize the gains in state aid because the state was using the 1992-1993 rates in calculating the amount of state aid. At the same time, wealthier districts had immediate access to the increased revenues from their 1993-94 tax rates, which are generated from their own tax bases and not from state aid.

In other criticisms of the law, the plaintiffs complained that the state did not provide enough money for construction and that the $1.50 cap on tax rates could too easily be breached, leaving unequalized revenue in the system. They also complained that the “hold harmless” provision let the wealthy districts evade equalization for too long.453

The poor districts were not the only ones unhappy with the new law. Several different groups of wealthy districts challenged the law as well, asserting that the financing system still constituted a statewide property tax, that the methodology of recapture and recapture itself were unconstitutional, and that the overemphasis on the local property taxes violated the “suitable” provision in the constitution’s education clause.454 Another group of plaintiffs, composed of parents and their children, alleged that the present system denied them their constitutional rights to a suitable and efficient education and demanded a voucher system providing them with school choice and tuition reimbursement.455 For the first time in the Edgewood saga, the state stood alone in defending the constitutionality of its school-finance system, deflecting attacks from all parts of the political spectrum.

2. Proceedings in the District Court

State District Judge McCown, who had presided over the school-finance litigation since Edgewood II, consolidated all the lawsuits into one trial. He denied the Equity Center and MALDEF’s request for an immediate hearing, injunction, and appointment of special master, and permitted Senate Bill 7 to go into effect for the 1993-1994 school year. McCown proclaimed on December 9, 1993, that Senate Bill 7 had established a constitutional mechanism for financing schools.456 He ruled, however, that the state had still failed to devise an equitable method of fi-
nancing capital outlay, which the *Edgewood I* decision had required.\(^{457}\) Accordingly, he ordered that no bonds for any school be approved, registered, or guaranteed after September 1, 1995, unless the Legislature had corrected this problem by that time.

McCown responded to the alleged constitutional defects submitted by the litigants. He asserted that the $600 gap was reasonable and noted that it had narrowed considerably since 1989, when it had been $1700 per student.\(^{458}\) He also wrote that "[t]he $600 advantage about which the plaintiffs complain is too small and enjoyed by too few to say that it was unreasonable for the Legislature to leave this gap."\(^{459}\) He cautioned legislators not to neglect their duty to fund schools properly and also warned them not to further the gap between rich and poor districts. He wrote of the law: "Perhaps it will not work. Perhaps it will not be funded. But we cannot today say that it will not. Given the progress that has been made in providing equity, further orders can await further developments."

Responding to the wealthy districts’ arguments, McCown argued that the system did not utilize a state property tax (although many wealthy districts will have property tax revenues going into the state treasury), because local districts have been required to provide a certain level of support to the educational system since 1949. In response to the assertion that recapture itself was unconstitutional, McCown noted that there was no way to have greater equity in spending without some form of recapture.\(^{460}\)

McCown reserved his harshest criticism for some of the districts that picked up ideas from Justice Cornyn’s concurrence in *Edgewood III.*\(^{461}\) These districts argued that equity was not necessary as long as the state provided a minimum adequate education. They claimed that they were being forced to “level down” programs, and called for the state to provide more “adequate” funding for all schools.\(^{462}\) McCown called their arguments “delusional” and wrote: “One measure of just how much progress is made under S.B. 7 is the ferociousness of the fight of the property-

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457. *See id.* The language McCown referred to in *Edgewood I* reads:

[T]here are no Foundation School Program allotments for school facilities or debt service. . . . Low-wealth districts use a significantly greater proportion of their local funds to pay the debt service on construction bonds while high-wealth districts are able to use their funds to pay for a wide variety of enrichment funds.

*Edgewood I*, 777 S.W.2d 391, 392 (Tex. 1989).

458. *See Edgewood IV*, slip op. at 64; *see also* Rugeley, *supra* note 454.

459. *Edgewood IV*, slip op. at 64; *see also* Rugeley, *supra* note 454.

460. *Edgewood IV*, slip op. at 77; *see also* Rugeley, *supra* note 454.

461. *See Edgewood IV*, slip op. at 26-27; *see also* Rugeley, *supra* note 454.

462. *See supra* Subsection III.D.2.c.

463. *Edgewood IV*, slip op. at 64; *see also* Rugeley, *supra* note 454.
rich districts against it." McCown allowed some testimony regarding "adequacy" issues related to this debate, but emphasized that he would not get involved in defining an adequate education.

The response to the opinion was muted, as all sides anticipated an appeal to the supreme court. They did not have to wait long, as ten separate groups of plaintiffs and plaintiff-intervenors (including the State of Texas protesting McCown's bond ruling) brought direct appeals to the supreme court. It would be the court's fourth encounter with the school-finance issue. As Justice Cornyn had noted previously, the justices must have begun "to wonder whether [they had] been assigned to some judicial purgatory where [they] must hear the same case over and over."

3. The Supreme Court Decision

After hearing arguments in May 1994, a bare majority of the Texas Supreme Court ruled that the Legislature had finally established a constitutional finance system on January 30, 1995. Justice Cornyn, author of the significant concurring and dissenting opinion in Edgewood III, persuaded four other justices—one other Republican and three Democrats—to join his majority opinion. While he conceded that the system was finally constitutional, he emphasized that it was far from optimal:

464. Edgewood IV, slip op. at 64; see also Rugeley, supra note 454.
465. Craig Foster of the Equity Center commented on the manner in which "adequacy" issues were treated in Judge McCown's courtroom:
   The adequacy issue was there in the courtroom in a very strange way. One group of districts represented by the school board association... put together this group of plaintiffs and they wanted to do an adequacy lawsuit. The judge said "I don't want to sit here and listen for weeks and weeks and weeks to experts from all over the country. I don't know how to figure adequacy anyway. But I'll let you guys come in and sit here and from time to time you can comment." So it was sort of weird. The trial wasn't about adequacy, but there was a lot of discussion of adequacy. And then, unfortunately, the supreme court picked up on some of that and used it against poor school districts in the decision that was written for Edgewood IV.
   Interview with Craig Foster, supra note 73.
466. See Rugeley, supra note 454; Stutz, supra note 450.
467. Two groups of appellants, representing primarily poor districts, raised arguments about the efficiency of Senate Bill 7. Five groups of appellants comprising primarily wealthier districts complained about the revenue system of Senate Bill 7. One group of parents, calling for a voucher system, complained about the district court's dismissal of its cause of action. Another group brought a complaint about the distribution of excess CED funds left over from the Senate Bill 351 mechanism. Finally, the State challenged the district court injunction against bond issuances. See Edgewood IV, 917 S.W.2d 717, 721 (Tex. 1995).
469. See Edgewood IV, 917 S.W.2d at 717; see also Kathy Walt & Melanie Markley, Court Upholds Texas School-Funding Law, HOUS. CHRON., Jan. 31, 1995, at A1.
Edgewood Drama

Yet sadly, the existence of more than 1000 independent school districts in Texas, each with duplicative administrative bureaucracies, combined with widely varying tax bases and an excessive reliance on local property taxes, has resulted in a state of affairs that can only be charitably called a ‘system.’ For too long, the Legislature’s response to its constitutional duty to provide for an efficient system has been little more than crisis management. The rationality behind such a complex and unwieldy system is not obvious. We conclude that the system becomes minimally acceptable only when viewed through the prism of history. Surely Texas can and will do better.470

Despite the rebuke, state lawmakers were thrilled that they had finally devised a plan that withstood judicial scrutiny. They must have felt like Atlas passing the weight of the world onto Hercules. While Senate Bill 7 survived, however, the previous standards of constitutional interpretation did not.

a. A Different Spin

Building upon his unique constitutional interpretations in his Edgewood III opinion, Cornyn dramatically altered the constitutional landscape in Edgewood IV. His views on adequacy and local enrichment shaped a much different view of what constituted an “efficient system” and colored his outlook on the arguments before the court. As mentioned above, the court had never before deviated from the Edgewood I definition of efficiency, which required districts to have “substantially equal access to similar revenues per pupil at similar levels of taxation.”471 Justice Cornyn, however, revived two dormant constitutional concerns about adequacy and local enrichment and incorporated them into his definition of efficiency. The new definition of efficiency now only required districts to have “substantially equal access to funding up to the legislatively defined level that achieves the constitutional mandate of a general diffusion of knowledge.”472

Justice Cornyn justified this shift by pointing to language in the prior supreme court opinions, never conceding that his opinion represented a major change from the prior Edgewood cases. First, he argued that the school-finance system was ruled unconstitutional in Edgewood I for both financial and qualitative reasons473 but that the vast financial disparities at

470. Edgewood IV, 917 S.W.2d at 726.
472. Edgewood IV, 917 S.W.2d at 731.
473. Justice Cornyn writes:

In Edgewood I, this court held that the school finance system was unconstitutional because it was “neither financially efficient nor efficient in the sense of providing for a ‘general diffusion of knowledge’ statewide.” While we considered the financial component of efficiency to be implicit in the Constitution’s mandate, the qualitative component is explicit . . . .

Id. at 729 (citation omitted) (quoting Edgewood I, 777 S.W.2d at 397).
the time attracted nearly all of the court's attention. Since the inception of the litigation, the exclusive focus of the cases had been on the financial disparities between districts; no court had attempted to elaborate on the meaning of the constitutional requirement to provide a "general diffusion of knowledge" statewide. Justice Cornyn, resuscitating some of the language in *Edgewood I*, attempted to provide content to this dormant constitutional standard. Responding to his own call (from his *Edgewood III* opinion) to define the contours of a "minimally adequate education," Justice Cornyn linked the accountability regime enacted in Senate Bill 7 to the "general diffusion of knowledge" standard—in essence, stating that an accredited education is the minimally adequate standard by which this constitutional duty can be satisfied.

Justice Cornyn coupled his new take on the "general diffusion of knowledge" standard with some controversial views on the constitutionality of local enrichment to forge his new definition of "efficiency." The debate over the extent to which local districts could supplement their educational programs had always rested just beneath the surface of the *Edgewood* cases. The court had previously hinted that unequalized local enrichment was tolerable but that too much local enrichment facilitated by disparate tax bases would violate the "substantially equal access to similar revenues per pupil at similar levels of taxation" definition of efficiency. Previous cases, which required "substantial," but not "absolute"

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474. See id. ("Because of the vast disparities in access to revenue at the time *Edgewood I* was decided, we did not then decide whether the State had satisfied its constitutional duty to suitably provide for a general diffusion of knowledge. We focused instead on the meaning of financial efficiency ").

475. TEX. CONST. art. VII, § 1.

476. See supra notes 335-337 and accompanying text.

477. Justice Cornyn wrote: "In Senate Bill 7, the Legislature equates the provision of a general diffusion of knowledge with the provision of an accredited education. The accountability regime set forth in Chapter 35, we conclude, meets the Legislature's constitutional obligation to provide for a general diffusion of knowledge statewide." *Edgewood IV*, 917 S.W.2d at 730.

Recognizing the danger of letting the Legislature set the bar for educational adequacy, however, Cornyn introduced a caveat:

This is not to say that the Legislature may define what constitutes a general diffusion of knowledge so low as to avoid its obligation to make suitable provision imposed by article VII, section 1. While the Legislature certainly has broad discretion to make the myriad policy decisions concerning education, that discretion is not without bounds. *Id.* at 730 n.8 (citations omitted).

478. In *Edgewood I*, the court did not rule on the constitutionality of unequalized local enrichment but held that the definition of efficiency "does [not] mean that local communities would be precluded from supplementing an efficient system established by the legislature; however any local enrichment must derive solely from local tax effort." *Edgewood I*, 777 S.W. 2d at 398. In *Edgewood IIa*, the court did sanction some unequalized local enrichment. The court held that "[o]nce the Legislature provides an efficient system . . . it may, so long as efficiency is maintained, authorize local school districts to supplement their education resources if local
equality," left some wiggle room for Justice Cornyn to maneuver. Combining the long overlooked and underutilized court pronouncements on the "general diffusion of knowledge" requirement and tolerance for some unequalized local supplementation, Justice Cornyn crafted a new definition of efficiency whereunder school districts must have substantially equal access to funds only up to the "legislatively defined level that achieves the constitutional mandate of a general diffusion of knowledge," or in other words, substantially equal access to funds necessary to provide an accredited education. After a district fulfills its duty to provide an accredited education, unequalized local supplementation is perfectly acceptable. Beyond that point, there is no need for equality in access to revenues, or, as Justice Cornyn wrote: "[A]n efficient system does not require equality of access to revenues at all levels."

Although Justice Cornyn claimed to be following the rulings of earlier courts, Justice Spector, a newly elected justice writing alone in dissent, took him to task for abandoning prior interpretations. She disparaged the majority for abandoning the court's stance against unequalized local enrichment, writing: "At no point have we ever indicated that the basic mandate of Edgewood I—similar yield for similar effort—only applies to a particular range of tax rates." Tracing the conceptual basis of

property owners approve an additional local property tax." Edgewood IIa, 804 S.W.2d 491, 500 (Tex. 1991) (citation omitted) (emphasis added).

As Justice Doggett pointed out in Edgewood III, however, allowing too much unequalized local supplementation beyond the funds required for a "minimally adequate education" would create the same disparities that were problematic in the first place. He explained that "districts with ample wealth and unlimited enrichment capability have no incentive to encourage the State to fully fund a realistically adequate level of educational services. That is why we insisted that enrichment derive solely from local tax effort" and not from the happenstance of a superior tax base.

Edgewood III, 826 S.W.2d 489, 573 (Tex. 1992) (Doggett, J., dissenting) (citation omitted) (quoting Edgewood I, 777 S.W.2d at 398).

See supra text accompanying note 170.

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

Id. at 729. Justice Cornyn argued that the court obviously did not contemplate equality at all levels if they sanctioned unequalized local enrichment, but this argument ignores the fact that the court called only for substantially equal access, a standard that could tolerate minor variations in access to revenue but not the wholesale alteration Justice Cornyn had in mind. See id.

Id. at 767 (Spector, J., dissenting). Justice Spector gave this interpretation of the case law with regard to local supplementation:

The standard adopted in Edgewood I, and applied in Edgewood II, does not require equal spending in every district. Rather, the standard recognized the importance of local control: some districts may choose to tax and spend at higher levels than others. Thus, in both opinions, we noted that a local community could choose to supplement its financing of education. We emphasized, however, that all districts must have the opportunity to provide such supplementation on a similar basis.

Id. at 766 (Spector, J., dissenting) (citations omitted).
the majority opinion back to Justice Cornyn’s concurrence in *Edgewood III*, Spector lambasted Cornyn for incorporating adequacy questions into the established constitutional standards, stressing at one point that “[t]he ‘general diffusion of knowledge’ has never been a part of this debate.” She also attempted to shatter the link between a “minimally adequate education” and the accreditation requirements, writing: “The little evidence that did come in [before the district court] indicates that Senate Bill 7’s accreditation requirements do not even satisfy any previously-articulated concept of a ‘minimally acceptable education.’” She quoted the Texas Commissioner of Education, who said that “our present accreditation criteria at the acceptable level... does not match up with what the real world requirements are.”

Finally, Justice Spector criticized the court for the way it allowed the adequacy issues into the debate. Spector noted that because the district court had applied the original *Edgewood I* standard of efficiency, setting aside adequacy issues, “there [was] virtually no evidence on this issue in the record.” Justice Spector also observed that, “in all of the voluminous briefing before this court, no party makes any argument based on a ‘general diffusion of knowledge’ requirement. On its own initiative, the majority simply seizes upon these four words, equates them with accreditation requirements and decides that our constitution requires no more.” Foster, echoing Justice Spector, went so far as to call Justice Cornyn’s introduction of this adequacy language “intellectually dishonest.”

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483. Of Justice Cornyn’s opinion, Justice Spector wrote: The last time this case was before this Court, one justice authored an opinion criticizing the *Edgewood I* standard. The opinion urged this Court to decide “the substantive level of education our constitution requires”; and it repeatedly referred to this level as “a minimally adequate education.”... The position taken in this one-justice opinion, which advocated a standard very different from the one set out in *Edgewood I*, has now been adopted by a majority of this Court. *Id.* at 767 (Spector, J., dissenting) (citations omitted).

484. *Id.* at 768 (Spector, J., dissenting).

485. *Id.* (Spector, J., dissenting). The previously articulated concept of a “minimally adequate education” to which Spector referred was the one Justice Cornyn had defined in *Edgewood III* as “an essential level of learning by which each child in Texas is enabled to live a full and productive life in an increasingly complex world.” *Edgewood III*, 826 S.W.2d 489, 525-26 (Tex. 1992) (Cornyn, J., concurring in part and dissenting in part).

486. *Edgewood IV*, 917 S.W.2d at 768 (Spector, J., dissenting).

487. *Id.* (Spector, J., dissenting).

488. *Id.* (Spector, J., dissenting).

489. Interview with Craig Foster, *supra* note 73. Adequacy issues had seeped into the trial court hearing despite Judge McCown’s aversion to dealing with the issue. *See supra* notes 462-465 and accompanying text. Foster felt that the adequacy testimony in the district court was misused by Justice Cornyn because it was unanticipated and not subject to cross-examination: “[Nobody] anticipated it would be used this way. They didn’t anticipate the extent to which [McCown] would let things in. Then Cornyn said, ‘Ha, I’ll use some of this right now’ because it
Nevertheless, the constitutional landscape had been convincingly altered. Not only had Justice Cornyn persuaded four other justices to adopt his new definition of efficiency, three of the dissenters also embraced Cornyn's new standards while finding other constitutional infirmities with Senate Bill 7. Only Justice Spector reiterated the previous understandings of what constituted "efficiency." Having steered Texas into new constitutional waters, Justice Cornyn could deal with the arguments of the plaintiffs and plaintiff-intervenors on his own terms.

b. Deflecting Objections from All Sides

The court found that the qualitative and financial components of the new definition of efficiency had been met by the provisions in Senate Bill 7. The State, by adequately funding Tier One and Tier Two, had fulfilled its obligation to provide a "general diffusion of knowledge" statewide. Noting that the disparity of access to funds within the two tiers had fallen to 1.36-to-1, the court concluded that "[c]hildren who live in property-poor districts and children who live in property-rich districts now have substantially equal access to the funds necessary for a general diffusion of knowledge," and found Senate Bill 7 to be thus constitutionally "efficient."

Having made this determination, the court proceeded to deflect the challenges presented by the poor school districts. Justice Cornyn first dismissed the contention that the $600 gap between rich and poor districts at the maximum rate of taxation rendered Senate Bill 7 unconstitutional. The poor districts argued that this gap would leave them with a "permanent educational disadvantage," but Justice Cornyn indicated that their viewpoint was based on an incorrect understanding of efficiency. The proper focus was not on the gap at the maximum rate of taxation but on the tax rate differentials necessary for funding a basic (or minimally adequate) education at Tier One and Tier Two. Justice Cornyn found that the poor and wealthy districts could meet this obligation (by spending $3,500 per weighted student) at tax rates of $1.31/$100

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490. See Edgewood IV, 917 S.W.2d at 731. Interestingly, the court blurred the distinction between Tier One and Tier Two in making this determination. Previously, Tier One was supposed to supply all necessary funds for a "basic" education. Tier Two was supposed 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." See TEX. EDUC. CODE ANN. § 16.301 (West 1994). The district court determined that $3,500 per weighted student was needed to meet accreditation standards, but Tier One provided an average of only $2,537 per weighted student. See Edgewood IV, 917 S.W.2d at 731 n.10.

491. Id. at 731.

492. For an explanation of how the $600 gap arises, see supra Subsection III.E.1.
and $1.22/$100 respectively. The court recognized that a disparity still existed but found it to be “not so great that it renders Senate Bill 7 unconstitutional.” Justice Cornyn’s argument in this instance is consistent with his definition of efficiency, which allows for unequalized local enrichment once the state meets its obligation to provide an accredited education.

The court also dismissed the poor districts’ contention that the $1.50 cap on tax rates could too be easily breached, creating a “third tier” of unequalized supplementation and thereby making the system “inefficient.” The poor districts had interpreted a provision of Senate Bill 7 to mean that a district could exceed the $1.50 cap for any purpose so long as the tax rate was approved by the local voters in an election. Justice Cornyn disputed this interpretation, claiming that a district could breach the $1.50 cap only for old or new long-term debt service and only if the increase was approved in an election called for that purpose. He also asserted that, even if the poor school districts were correct, and wealthy districts could exceed the cap with only approval in a local election, the law would still not be deemed “inefficient” so long as the poor districts could provide a basic education through Tier One and Tier Two financing. The court reiterated its conclusion that “[a]s long as efficiency is maintained, it is not unconstitutional for districts to supplement their programs with local funds, even if such funds are unmatched by

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493. See Edgewood IV, 917 S.W.2d at 731. As legislator Scott Hochberg later noted, there is a dangerous implication hidden in the court’s point. Because any extra funding beyond what is required to provide a “general diffusion of knowledge” is just “gravy,” the court would have likely approved the use of state equalization aid only to the tax rate of $1.31 rather than the $1.50 provided for in Senate Bill 7. The realization of this logic would lead to much greater inequities in the system and would be a “disaster” for schoolchildren. Interview with Scott Hochberg, supra note 382.

494. Edgewood IV, 917 S.W.2d at 732.

495. The relevant statutory language is: “Except as provided by subsections (c) and (d), and unless specifically approved in an election for that purpose, a school district may not impose a total tax rate on the $100 valuation of taxable property that exceeds $1.50.” TEX. EDUC. CODE ANN. § 20.09(a) (West 1994). Justice Cornyn explained that “[s]ubsection (c) of section 20.09 allows a district to exceed the $1.50 limit for the purposes of collecting taxes pledged and levied to pay the principal of and interest on old debt.... Subsection (d) created a similar exception for new debt subject to some restrictions.” Edgewood IV, 917 S.W.2d at 732.

496. See Edgewood IV, 917 S.W.2d at 732.

497. See id. at 733 (“Once all districts are provided with sufficient revenue to satisfy the requirement of a general diffusion of knowledge, allowing districts to tax at a rate in excess of $1.50 creates no constitutional issue.”). For the same reason, certain special laws that allow some 63 districts with 37% of the total weighted student population in the state to tax at a rate of $2.00 do not pose constitutional barriers. See id.; Sparkman & Hartmeister, supra note 413, at 573 n.18.
Edgewood Drama

state dollars and even if such funds are not subject to statewide recap-

Next, the court responded to the poor districts’ complaints about the “biennium lag” in calculation of state aid. The court found that while, the plaintiffs’ concern was a valid one, there were enough public policy considerations on the other side of the debate to justify the Legislature’s decision. The court also brushed off complaints about changes to the tax rollback election process and the “hold harmless” provision, which allowed certain wealthy districts to keep money in excess of the $280,000-per-student cap for three years following the implementation of Senate Bill 7. The court found that these provisions did not seriously impair the implementation or equalizing effects of Senate Bill 7 and were thus not constitutionally problematic.

Finally, Justice Cornyn’s opinion dismissed the allegations of the poor school districts that Senate Bill 7 had been inadequately funded. Though

498. *Edgewood IV*, 917 S.W.2d at 732. The court warned, however, that “the amount of ‘supplementation’ in the system cannot become so great that it, in effect, destroys the efficiency of the entire system. The danger is that what the Legislature today considers to be ‘supplementation’ may tomorrow become necessary to satisfy the constitutional mandate for a general diffusion of knowledge.” *Id.*

499. See *supra* text accompanying note 452.

500. See *Edgewood IV*, 917 S.W.2d at 733. David Anderson, General Counsel of the Texas Education Agency, explained the public policy considerations behind the creation of the “biennium lag”:

The entitlement of the school district was based on three factors: average daily attendance, tax rate, and property value. None of those are known with any exactitude ahead of time. The legislature only knows one year's property value.... Out of six variables for those three years, it's only got one that it knows with any certainty. The school districts uniformly, through all the years of school finance plans, raised their taxes more than expected to draw state aid. In the last biennium of the old system, before Senate Bill 7, there was almost a billion dollars in proration—in entitlements of school districts... that the state had not appropriated for. As late as April in the school year, school districts would find out that they weren't going to get a bunch of state aid that they were counting on, which created a vicious cycle when they again raised their taxes a little more than needed the next year to account for the anticipated proration, which caused more proration. It was an awful system.... Almost 90% of it [proration] was being caused by unanticipated tax increases. So what [the Legislature] did in Senate Bill 7 was say, “OK, you can set your tax rate at whatever you want to but you're only going to draw state aid up to the tax rate you had in the last year of the previous biennium—the last tax rate we know of when we do the appropriation. And we will pay you based on estimates [of attendance and property values] that match the appropriation.... We will know when we do your budget how much state aid you can count on, and then we will settle up with you the following year.” The system has been fairly successful.

Interview with David Anderson, *supra* note 286.

501. Before Senate Bill 7, “the voters of a school district could petition for a rollback election whenever the district raised its tax rate by $0.08 or more. A successful rollback election operated to limit the rate the district could adopt for the following year.” *Edgewood IV*, 917 S.W.2d at 733. Senate Bill 7 changed some of the rules for rollback elections, making “significant tax increases more difficult.” *Id.*

502. See *id.* at 733-34.
the Tier One allotment had been reduced from $2,400 under Senate Bill 351 to $2,300, and the Tier Two guaranteed yield dropped from $22.00 per penny to $20.50 per penny, Justice Cornyn reminded the plaintiffs that the court had never passed judgment on the previous formulas (from Senate Bill 351), having been sidetracked by other constitutional concerns in *Edgewood III*. The majority admitted that, relative to Senate Bill 351, the new law might be considered a “setback” for the poor districts but argued that, in relation to the system in place before *Edgewood I*, Senate Bill 7 gave the poorest districts “vastly improved access to revenue.”

“In view of these facts,” Justice Cornyn wrote, “the differences between the funding formulas of Senate Bill 7 and Senate Bill 351 do not compel the conclusion that the system embodied in Senate Bill 7 is inefficient.”

Having deflected the constitutional challenges from the poor districts, Justice Cornyn turned his attention to the arguments offered by the wealthy school districts. What angered these districts was not the debate surrounding the meaning of “efficiency” but rather the manner in which revenue was to be raised and recaptured under the new system, especially through the use of the $280,000-per-student cap on a district’s wealth. Among a host of objections, three in particular stand out. First, the wealthy districts charged that the state had, by relying so heavily on local property taxes, forsaken its duty to “make suitable provision for the support and maintenance of public free schools.” The state, by supplying only 43% of the combined state and local revenue in the system, as compared to the 57% generated locally, was not making “suitable provision” for its citizens’ educational needs, according to this argument.

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503. See id. at 734.
504. Id.
505. Id.
506. Among the arguments these districts made were: (1) the cap violates the “suitable” provision in the education clause of the constitution, (2) the new finance system effectively imposes a state *ad valorem* tax, (3) the legislature cannot compel one school district to pay for the education of nonresident students, (4) the law illegally authorizes the use of public funds for private purposes and constitutes a gratuitous grant of public funds, (5) the law is an unconstitutional delegation of power to the Commissioner of Education, (6) the law improperly impairs judicial review of the decisions made by the Commissioner of Education, (7) the law unconstitutionally impairs contractual obligations for property that is subsequently detached, (8) school districts are unconstitutionally required to include property that is not contiguous to the remainder of the district, (9) the detachment and annexation provisions violate the constitutional requirement that taxes on property be paid in the county where the property is situated, (10) the law violates the federal Voting Rights Act because it is an attempt to intimidate, threaten, or coerce citizens for the purpose of interfering with the right to vote, and (11) the law is a local or special law in violation of constitutional provisions because only 99 districts were affected. See id. at 734-46; Sparkman & Hartmeister, *supra* note 413, at 523 n.57.
508. See *Edgewood IV*, 917 S.W.2d at 735-36. An attorney for one of the wealthier districts,
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The court shrugged off this challenge by, first, indicating that the word "suitable" was an elastic term that gave the Legislature a lot of flexibility in determining how to undertake its constitutional responsibilities and, second, emphasizing that the clause "contains no specific requirement that public education be funded completely with state revenue."

Second, the wealthier districts argued that the new finance system imposed a state *ad valorem* tax in violation of article VIII, section 1-e, of the constitution, one of the charges that felled Senate Bill 351. Senate Bill 7 gave the state such complete control over the finance system, these districts argued, that localities had "no meaningful discretion." The court admitted that the imposition of maximum and minimum tax rates does limit local discretion, but noted that "[d]istricts are still free to set a tax rate within a range," and that the imposition of such limits does not presently "so completely control the [levy], assessment and disbursement of revenue, either directly, or indirectly, that the district is without meaningful discretion." The court found, therefore, that Senate Bill 7 did not constitute a statewide property tax.

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formerly General Counsel of the TEA, crafted this argument. He said:

> Once the legislature does define whatever an efficient system is, there is an absolute, unqualified duty to suitably provide for and support that system. And we argued that that contemplated, if you look at it historically, a system that was principally supported out of state revenue with local supplementation, and that what has happened in the last decade of downloading the cost of reform onto the local property tax was, in and of itself, unconstitutional.

Interview with J. David Thompson III, supra note 119.

509. *Edgewood IV*, 917 S.W.2d at 736 ("The Legislature alone is to judge what means are necessary and appropriate for a purpose which the Constitution makes legitimate.") (quoting Mumme v. Marrs, 40 S.W.2d 31, 36 (Tex. 1931)). In support of its conclusion that the word "suitable" is not rigid, the court stated: "The word 'suitable' used in connection with the word 'provision' in this section of the Constitution, is an elastic term, depending upon the necessities of changing times or conditions, and clearly leaves to the legislature the right to determine what is suitable..." Id. (quoting Mumme, 40 S.W.2d at 36).

510. *Edgewood IV*, 917 S.W.2d at 737.

511. *Id.* at 737-38. The court also relied on language from *Edgewood III*. See *id.* at 738 ("If the state required local authorities to levy an *ad valorem* tax but allowed them discretion on setting the rate and disbursing the proceeds, the State's conduct might not violate article VIII, section 1-e.") (quoting *Edgewood III*, 826 S.W.2d 489, 502 (Tex. 1992)).

512. *Edgewood IV*, 917 S.W.2d at 738 (alteration in original). The court warned, however, that the local discretion could eventually be minimized to such an extent as to make the whole finance system unconstitutional:

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

*Id.*
Finally, the wealthy districts pressed the concern that the court's 1931 decision in *Love v. City of Dallas*\(^1\) prohibited the Legislature from compelling a school district to use its resources for the education of nonresident students. The wealthy districts argued that options three and four (the purchasing of attendance credits from the state and contracting with other districts to educate nonresident students, respectively) both violated this principle.\(^2\) The court pointed out, however, that the wealthy districts were not being compelled to educate nonresident students, because options one, two, and five were available to the districts. Additionally, in the event that the districts failed to make a choice, neither default provision contemplated the use of a district's resources to educate students from other districts.\(^3\) *Love* was thus not a constitutional hurdle for Senate Bill 7.

The court, after brushing off some of the other arguments made by wealthy districts and handling other peripheral matters, finally dealt with the debate over the financing of facilities that was prompted by Judge McCown's injunction. The poorer school districts argued that the absence of a separate component for facilities rendered Senate Bill 7 unconstitutional. Because facilities in poor districts were older and in greater need of repair and because debt service rates were higher in these districts, they had to spend a greater amount of their money for capital outlay and reduce the amount they spent on their educational programs. Justice Cornyn admitted that the "evidence at trial shows that the lack of a separate facilities component has the potential of rendering the school-finance system unconstitutional in its entirety in the very near future."\(^4\) Still, the court vacated McCown's injunction prohibiting the issuance of new bonds, because the plaintiffs did not meet their evidentiary burden in proving that Senate Bill 7 failed to provide efficiently for facilities. The majority found that every district, at least for a short-term, could simultaneously provide funding for facilities and an accredited

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513. 40 S.W.2d 20 (Tex. 1931). As mentioned above, this case has been cited frequently over the course of the *Edgewood* litigation. *See supra* notes 51-53, 250-252, 261; *see also Edgewood III*, 826 S.W.2d at 512-13.

514. *See Edgewood IV*, 917 S.W.2d at 738-39. As one observer pointed out, the group of wealthy districts chose a risky strategy in pursuing this argument, considering that the court could have struck down only these two options, leaving the other three intact. Interview with Scott Hochberg, *supra* note 382. Coincidentally, these two options turned out to be the most popular choices for the wealthy school districts. *See supra* note 436 and accompanying text.

515. *See Edgewood IV*, 917 S.W.2d at 738-39. Justice Cornyn further rejected the contention that the choices are unconstitutional because they are made under duress, noting that Senate Bill 7 does not create rights with respect to control of local wealth. Even if these rights did exist, Justice Cornyn argued, the Legislature must implicitly be able to limit the districts' authority to tax, since the districts were created and given taxing authority by the Legislature. *See id.* at 739.

516. *Id.* at 746.
education for its students through the Tier Two Guaranteed Yield Program (which would provide state aid conditioned on local tax effort, irrespective of whether the taxes were for the educational program or for facilities). Still, the court warned that the debate over funding of facilities was not over:

[I]f the cost of providing a general diffusion of knowledge rises to the point that a district cannot meet its operations and facilities needs within the equalized program, the State will, at that time, have abdicated its constitutional duty to provide an efficient school system. From the evidence, it appears that this point is near.

**c. The Reaction to the Ruling**

The new governor of Texas, George W. Bush, and other legislative leaders hailed the ruling. They had finally extricated themselves from the school-finance morass. Budget planners for school districts were also relieved finally to have an element of certainty to their enterprise. Neither the poor nor the wealthy districts were pleased with the court’s decision. Craig Foster of the Equity Center was upset because “[t]he court totally changed the concept of equality.” He wrote: “Eventually, we predict, Texas will find it cannot compete effectively with the rest of the country and the world if all it offers the bulk of its students is Justice John Cornyn’s ‘minimally adequate’ education.” MALDEF attorney Al Kauffman lamented: “We felt like we had a good case and it continued to be an inequitable system.” On the other side of the debate, one attorney called the ruling “unbelievable,” while another, Earl Luna of Dallas, said that “it was a state [property] tax, but apparently the state Supreme Court says it’s not.” Al Kauffman filed a motion for rehearing on behalf of the original Edgewood plaintiffs, requesting that the court modify its ruling and return to the previous understanding of “efficiency,” but his efforts were unsuccessful. Senate Bill 7 would stand, and the curtains had finally closed on the Edgewood drama.

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517. See id. at 746-47.  
518. Id. at 747 (citation omitted).  
519. See Walt & Markley, supra note 469.  
520. Id.  
523. Id.  
524. See Plaintiffs File Motion for Rehearing, NEWS & NOTES (Equity Center, Austin, Tex.) Feb. 1995, at 8.
d. A Political Explanation for Edgewood IV

One puzzle about the Edgewood IV case was why the court had abandoned its previous interpretation of “efficiency” in favor of Justice Cornyn’s approach, which had not garnered any support in Edgewood III. Four justices—Gammage, Gonzalez, Hightower, and Phillips—signed off on Cornyn’s majority opinion after having previously supported the standard for “efficiency” articulated in Edgewood I, II, & III. An obvious explanation for this turnaround was simple exasperation with the school-finance debate. One observer remarked that both the trial court and the supreme court wanted to “declare victory and go home,” fearing that the alternative would be a disaster.525

Moreover, the court was under political pressure from all sides. Had it struck down Senate Bill 7, there might have been a revolt in the Legislature, particularly among the legislative leaders who had invested so much into the creation of the law. House leader Libby Linebarger surmised that, had the court declared Senate Bill 7 unconstitutional, the Culberson amendment would have passed, sharply restricting the court’s jurisdiction over education-related issues.526 The justices, having been snubbed by the Legislature on several occasions following their Edgewood III ruling, must have known that their relationship with the Legislature would have become even more rocky had its latest effort been struck down.527

The court was also mindful of the conservative bent to the November 1994 elections and faced its own electoral pressures from restless voters. One interviewee said that part of the decision could be attributed to the court’s making amends for striking down the CED plan after having become aware of Senate Bill 351’s popularity among school districts only after deciding Edgewood III.528 Another felt that pressure from wealthy

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525. Interview with J. David Thompson III, supra note 119.
526. Interview with Libby Linebarger, supra note 181. Craig Foster also hypothesized that “maybe [the justices] were legitimately concerned that if they sent the system back to the Legislature in the winter of 1995, its chances of getting better were slim-to-none, and its chances of getting worse were substantial.” Foster, supra note 521, at 3.
527. The Legislature snubbed the justices in numerous ways following the Edgewood III opinion. It first abolished a biannual State of the Judiciary speech given by the Chief Justice to the Legislature. Legislators also reduced funding for several pet programs of the supreme court. They ignored a series of bills that contained sweeping judicial reforms recommended by a supreme-court-appointed commission and strongly backed by Chief Justice Phillips. The Legislature also requested plans for redrawing the boundaries of many appellate courts to equalize widely disparate caseloads but did not adopt any of the five changes proposed by the court. Another perceived snub occurred when the Chief Justice had been requested to visit the House floor during a debate of a controversial resolution: Once he arrived, minority lawmakers backing the resolution called for strict enforcement of House rules preventing visitors on the floor. See Janet Elliott, At the Capitol, Court Wore Dunce’s Cap, TEX. LAW., June 7, 1993, at 1.
528. Interview with Kevin O’Hanlon, supra note 136.
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districts and other special interests likely swayed the court, remarking: "Part of the reason we see some of the stepping back from Edgewood III to Edgewood IV is not because the definitions of equity changed." There was no doubt that the frustration with the court and Legislature was growing quickly, as the public grew weary of the nearly decade-long saga. Whatever the reason for the shift in interpretation, the court clearly believed that it had finally extricated itself from the school-finance debate with the Edgewood IV ruling.

4. A Conclusion?

Early in 1995, almost twenty-five years after Demetrio Rodriguez filed suit on behalf of the children of Edgewood School District, the litigation came to a close. Under the new school-finance system, funding was still tied closely to property taxes, but districts across the state would have generally equitable access to funding.

Although it was not a crisp finale, Edgewood IV represented in most observers’ minds an end to a truly epic drama. At long last, the Texas Legislature’s education-finance system had the approval of the judicial branch. At long last, politicians could focus on other issues and other problems. At long last, the students, teachers, and parents who had marched in protest in 1968 could sit down and evaluate their accomplishments. Temporarily.

IV. THE EDGEWOOD DRAMA: A MODEL FOR REFORM?

A. Substantive Assessment: Texas Education-Finance Today

1. The Equity Numbers

Needless to say, the Edgewood litigation dramatically altered the education landscape in Texas. Over the course of the litigation, significant improvements were made in fashioning a more equitable finance system and in giving poor districts greater access to funds. Just as they did when the Edgewood students, teachers, and parents marched in protest in 1968, the numbers tell the story.

Whereas, at the inception of the litigation, there was a 700-to-1 ratio between the property values per student of the richest and poorest school districts in Texas, the ratio dropped to 28-to-1 at full implementation of the Senate Bill 7 system. To a large degree, the new finance scheme has

529. Interview with Scott Hochberg, supra note 382.
530. Interview with Libby Linebarger, supra note 181.
531. See Edgewood IV, 917 S.W.2d 717, 730 (Tex. 1995). Before the Litigation, the wealthi-
relaxed the link between local property values and access to revenues. During the 1988-1989 school year, the correlation between tax effort and revenue was only 0.37 while the correlation between wealth and revenue was 0.75. By 1994, the correlation between tax effort and revenue was 0.81 and the correlation between wealth and revenue was only 0.34. Put another way, in 1989, wealth explained 56% of the variation in revenue for local districts, while tax effort explained only 13.5%. By 1994, wealth only explained 18% of the variation, while tax effort accounted for 65%.

The Foundation Program and the financing system modifications initiated by Senate Bill 7 have had a sweeping effect on public education in Texas. In the 2000-2001 biennium, only a small fraction of the overall revenue in the system, less than 5%, will be unequalized. This is a significant achievement, considering that, in 1989, 21% of all state and local revenues were unequalized. In 1998, 87% of the students in Texas were projected to fall within the equalized system, meaning that they will be getting some amount of state aid through the Guaranteed Yield Program (Tier Two). In addition, putting aside the wealthiest 10% of school districts, the variation in revenue per student across school districts is less than $500. At full implementation of the system, poor districts will have 78% more revenue per student than they had in 1988-1989.
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The amount of overall funding in the system has risen dramatically as well. While the state's share of education expenses has consistently (if only slightly) fallen,\(^{539}\) growth in the overall resources in the system continues to substantially outpace inflation. Between 1989 and 1994, budgeted operating expenditures per pupil increased 30.1\%.\(^{540}\) In 1988-1989, before Edgewood I, budgeted expenditures per pupil was $3,352.\(^{541}\) That figure rose to $5,282 by the 1996-1997 school year, after Edgewood IV had been decided.\(^{542}\) By the 1996-1997 school year, approximately $23.1 billion dollars were being spent on K-12 public education in Texas,\(^{543}\) a major jump from the $8.7 billion in 1984-1985.\(^{544}\) The considerable increase in overall money in the system was caused in part by an influx of money from wealthy districts, which were forced to raise their tax rates to maintain their educational programs under the new regime.

2. The Lingering Shadow of Adequacy

The ultimate purpose of the Edgewood litigation was to improve the education of children in poor school districts. While the improvements in access to revenue and financial equity are easy to document, conclusions regarding improvements in the adequacy of Texas's educational system as a result of the Edgewood drama are not so easily made. There has been no consistent test administered to Texan students over the course of litigation. Although Texas has been administering the TAAS (Texas Assessment of Academic Skills) test to measure academic achievement since 1990, the content of the test has been frequently altered, and the number of students exempted from the test has varied.\(^{545}\) Analysis of trends in academic performance across time therefore remains difficult.\(^{546}\)

\(^{539}.\) The state provided 48.7% of overall education revenue in 1987, but by fiscal 1995, this percentage had dropped to 45.4%. See LEGISLATIVE BUDGET BOARD, FISCAL SIZE UP: 1998-1999 BIENNIAL, TEXAS STATE SERVICES/EDUCATION (visited Dec. 28, 1998) <www.lbb.state.tx.us>. Because of the 1997 increase in the homestead exemption for local property taxes, the state's share is projected to rise again to 48.7% in 1999. See id.

\(^{540}.\) See TEXAS EDUC. AGENCY, supra note 400, at 30. Another source indicates that, between 1985 and 1995, local spending rose 117%, and state spending rose 60%. See GAO STUDY, supra note 533, at 35.

\(^{541}.\) See TEXAS EDUC. AGENCY, supra note 400, at 30.

\(^{542}.\) See TEXAS EDUC. AGENCY, SNAPSHOT 97, at 27 (1998).

\(^{543}.\) See id.

\(^{544}.\) See School Funding Suit Anniversary, HOUS. POST, May 23, 1994, at A15.

\(^{545}.\) The process by which certain students are exempted from the TAAS test and certain students' test results are excluded from the school rating system has come under increasing scrutiny by the Legislature and threatens to undermine public confidence in the accountability regime. See LEGISLATIVE BUDGET BOARD, STAFF PERFORMANCE REPORT TO THE 76th LEGISLATURE 31-41 (Jan. 1999), available at <www.lbb.state.tx.us>.

\(^{546}.\) See TAAS Needs Standard Format To Weigh Yearly Results, HOUS. CHRON., June 12, 1996, at A38 ("With these and other changes in the administration and content of the TAAS, it
Other possible indicators of academic performance are also flawed. For example, the SAT is not a helpful gauge, because the pool of students taking the exam is self-selected and varies considerably from year to year. The dearth of performance studies done by the state prior to the implementation of the Senate Bill 7 accountability regime also hinders efforts to assess the changes in the condition of public education over time.

Despite the uncertainties in testing procedures and in the relationship between educational inputs and outputs, it appears that, by almost every indicator, Texas schools have made significant improvements in recent years. Between 1994 and 1998, the proportion of students passing all TAAS tests rose from 55% to 77%. These gains were achieved despite the fact that more students were tested and fewer students in special education or with limited English proficiency were exempted from the test. Minority and economically disadvantaged students have made some of the greatest gains. In 1998, 58% of low-income students passed the TAAS exam, whereas only 33% had in 1994. In the school accountability regime that grades campuses as either exemplary, recognized, acceptable, or low-performing, school ratings have consistently improved. Texas students have also made significant gains on the National Assessment of Educational Progress Test and have been taking college admissions tests and advanced placement classes for college credit in increasing numbers. According to a study conducted at Texas A&M University that was released as this Article was going to press, the improvements

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is impossible for educators and others to accurately compare test results from year to year. The ability to make such comparisons in a way that is meaningful is crucial to knowing how well students are really faring in the public schools.”; Unexcused; Too Many TAAS Absences Make Scores Dubious, HOUS. CHRON., Aug. 8, 1995, at A16 (“But unless all students take the test, or the state’s exemption policy is more clearly defined and strictly followed, TAAS scores will be virtually meaningless—at least as a matter of inspiring the public’s confidence that they are on the up and up as a true and honest measure.”).


548. See Mike Moses, TAAS Has Improved Our Schools, DALLAS MORNING NEWS, May 31, 1998, at 6J.

549. See Scheurich & Skrla, supra note 547; TEXAS EDUC. AGENCY, supra note 542, at 12-15.

550. See Terence Stutz, Property-Rich District Loses Bid To Avoid School Fund Sharing, DALLAS MORNING NEWS, May 23, 1998, at 32A.

551. See Brooks, supra note 443, at A1. The grades depend on TAAS scores, dropout rates, and attendance rates. This accountability regime was created as part of Senate Bill 7. See supra notes 442-443 and accompanying text.

552. See Moses, supra note 548; Scheurich & Skrla, supra note 547; Texas Ass’n of School Boards, Education Reporter Newsletter (visited Jan. 6, 1999) <http://www.tasb.org/education/reporter/ER-fore.html>.
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that have been observed over the past few years are “clear[ly] link[ed]” to the equalization reforms brought about by the *Edgewood* litigation.\(^{553}\)

**B. Procedural Assessment: The Choice To Pursue Equity**

The *Edgewood* plaintiffs filed their original complaint as an equity-based lawsuit. Throughout the *Edgewood* drama, however, the debate often switched, sometimes inexplicably, between concepts of adequacy and equity. It seems safe to assert that both ideals permeate the *Edgewood* drama and are inextricably linked.

An ongoing task for education reformers and potential plaintiffs across the country is assessing the prudence of choosing equity or adequacy or both as the basis for their litigation and lobbying. To that end, the *Edgewood* drama poses two questions. First, was the choice to bring a lawsuit on grounds of equity rather than adequacy correct in Texas? Second, once the plaintiffs and plaintiff-intervenors chose to pursue an equity-based attack, which approach was more successful—the Equity Center's flexible approach or MALDEF's all-or-nothing strategy?

Clearly, the goal of any education-reform lawsuit, whether based on “equity” or “adequacy” theories, is to improve the educational lot of children in poorer school districts. However, there is a vigorous debate about which theory can best advance this goal. Several academic commentators have recently pronounced the demise of the equity theory in favor of adequacy-based lawsuits.\(^{554}\) These commentators criticize the equity theory on a number of grounds, including the legislative resistance it engenders and its questionable success in equalizing educational outputs or boosting overall educational spending.\(^{555}\) Nevertheless, it appears in hindsight that an equity-based lawsuit was the correct strategic choice for the Texas plaintiffs.\(^{556}\)

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556. An equity-oriented lawsuit also proved to be a much more successful vehicle for reform than a racially-based equal protection suit (MALDEF pursued both claims). MALDEF's decision to bring a suit based on the disparate impact of the educational inequities suffered by Mexican-Americans did not appeal to Craig Foster and the Equity Center, who felt that, politically, an overall indictment of the educational system would be more successful. Interview with Foster, *supra* note 73; see *supra* text accompanying notes 194-196. Foster was hesitant about the equal protection argument for two reasons. First, the constituency of the Equity Center was composed of many poor Anglo districts that also wanted to participate in equity-based lawsuit.
First, in the mid-1980s, when the first Edgewood complaint was filed, the wave of successful adequacy lawsuits had not yet arrived.\textsuperscript{557} There was no roadmap for a successful adequacy suit. On the other hand, the plaintiffs were attracted to the relative simplicity of an equity-based attack.\textsuperscript{558} An equity-based claim seemed to have much better prospects of victory, especially given the enormous statistical discrepancies between rich and poor in Texas.

An equity case was also deemed more promising because it was considered more justiciable.\textsuperscript{559} Although the Edgewood drama may cast doubt on the proposition, courts may be generally reluctant to usurp traditional legislative functions, such as determining curriculum requirements and figuring teacher-to-student ratio. At the same time, from the perspective of a largely minority plaintiff class, an adequacy strategy carried unwanted connotations. Albert Cortez of IDRA explained that an adequacy-based lawsuit “puts a lot more pressure on the plaintiff. And we wanted to stay away from the notion of a minimum education required for citizenship.”\textsuperscript{560}

The plaintiffs’ fears about the difficulty of winning an adequacy suit were well-founded. Even some of the most ardent supporters of school-finance reform efforts are troubled by the specter of an adequacy lawsuit, particularly because of concerns over the court’s proper institutional role. In Edgewood III, Justice Doggett remarked: “I must note my personal concern that measuring the ‘outputs’ of the educational system is even more likely to produce prolonged judicial intrusion than the task on which we have already embarked.”\textsuperscript{561} Justice Spector, the lone justice in agreement with the arguments made by the original plaintiffs in Edgewood IV, cautioned that delving into adequacy issues “will mire the judiciary in purely political questions. Even if we could speak coherently on

\begin{itemize}
\item \textsuperscript{557} The wave of adequacy lawsuits was launched by the Kentucky Supreme Court in Rose \textit{v.} Council for Better Education, Inc., 790 S.W.2d 186 (Ky. 1989). See Heise, \textit{supra} note 554, at 577. The Rose court not only invalidated Kentucky’s school-finance system but held that the state’s entire educational system was inadequate and therefore unconstitutional.
\item \textsuperscript{558} See \textit{supra} text accompanying note 199. As Albert Cortez of IDRA explained: “We felt that the inequities and how the system created those would just be a more straightforward case. The courts understand it. The plaintiffs understand it. The opponents even understand it.” Telephone Interview with Albert Cortez, \textit{supra} note 102.
\item \textsuperscript{559} Albert Cortez states that the courts “thought that adequacy just wasn’t a justiciable argument.” Telephone Interview with Albert Cortez, \textit{supra} note 102. Al Kauffman agreed, stating: “We had a much clearer case under equity. It was one thing to ask a court to look at numbers . . . versus asking a court to look at curriculum.” Interview with Albert Kauffman, \textit{supra} note 101.
\item \textsuperscript{560} Telephone Interview with Albert Cortez, \textit{supra} note 102.
\item \textsuperscript{561} Edgewood \textit{III}, 826 S.W.2d 489, 574 (Tex. 1992) (Doggett, J., dissenting).
\end{itemize}
such issues, addressing them at all is inconsistent with the proper role of the judiciary.”\textsuperscript{562} The General Counsel of the TEA, David Anderson, also has made clear his skepticism about adequacy-based lawsuits:

If they [the justices] get into specific measures of what it costs to build a building, what the appropriate level of teacher salaries is, how many square feet should a classroom be, how many children should be in a class, or how should you fund special ed students—we’d get into this morass all over again.\textsuperscript{563}

At another level of detail, the Edgewood drama may be analyzed for the divergent approaches within the plaintiffs’ equity-based strategy. Once the equal protection claim fell by the wayside in Edgewood I and the focus of the plaintiffs and the court turned to the equity claim and fiscal neutrality, MALDEF and the Equity Center, though often working in tandem, pursued two distinct strategies.

MALDEF consistently pursued an all-or-nothing strategy with both the courts and the legislature throughout the litigation. In simplest terms, MALDEF refused to accept anything below 100\% equity. Anderson characterized MALDEF’s perspective as follows: “If someone has three cents more than me—that’s wrong. There should be absolutely no difference in how much money my district gets if I levy the same tax rate.”\textsuperscript{564} This strategy was motivated by a fear of the slippery slope. If not 100\% equity, the standard of what was close enough could be ratcheted down.\textsuperscript{565}

According to many of the key players, the Equity Center adopted a more pragmatic approach.\textsuperscript{566} Its directors were willing to compromise, if they thought it would improve the chances of the enactment of their favored reforms. The Equity Center’s amenability to compromise stemmed from its founding purpose. While equalizing access to funds was a major aim, the Equity Center’s primary objective was to maximize funding for school districts. To that end, it was usually willing to “leave the rich guys out there and force the state to chase and chase and chase.”\textsuperscript{567} In other words, the Equity Center was willing to tolerate some inequalities in order to create leverage in the legislature—leverage that would be used towards the goal of boosting overall education spending.

The Equity Center’s tactics sometimes conflicted with MALDEF’s. Kevin O’Hanlon, who worked both for and against the plaintiffs at vari-
ous stages in the decade-long battle, characterized the different strategies as such: "Kauffman [of MALDEF] thought you could get [more education funding] by forcing absolute equity, then everybody would come to the legislature and want more money, but Foster had less trust in the legislative process at the Equity Center and wanted a little bit of inequity so he could threaten litigation." These divergent approaches were evident in the struggle to forge the first Senate Bill 1 in 1990. The Equity Center was much more willing to go along with the "95% compromise" that emerged in the bill, whereas MALDEF refused to bend to the political realities of the day.

It is difficult to say which strategy was superior. Having two different groups adopting both strategies likely minimized the risk for poor school districts. MALDEF's all-or-nothing strategy could have been very costly had it been undertaken in isolation. Practically speaking, MALDEF's goal of 100% equity was impossible to achieve without cutting the wealthier districts down to size (as opposed to bringing the poorer districts up to the wealthy districts' level). Its strategy of demanding absolute equity provoked a vociferous, determined, and powerful opposition. Fortunately for the plaintiffs, this opposition did not derail the movement towards financial reform, though it did come close to doing so at several points. The Equity Center's pragmatic approach and its behind-the-scenes dealmaking in the Legislature often greased the lawmaking machinery to its advantage and kept the engine of reform on track. The movement for school-finance reform, however, was no doubt aided by the rhetorically effective calls for absolute equity coming from MALDEF. The divergent tactics of MALDEF and the Equity Center collectively pushed both the Legislature and the courts toward reform.

C. Theoretical Assessment: The Legislative/Judicial "Conversation"

1. Separation of Powers in the Edgewood Drama

Education reform litigation, by its very nature, invites separation of powers dilemmas. The issue arose in the Edgewood drama in at least two contexts. First, the separation-of-powers-based "political question" doctrine was explicitly considered by the Texas Supreme Court as an independent legal issue. Second, the very structure and process of the long "conversation" between the court and the capitol exhibited the incremental, and some would say questionable, entanglement of the two branches of government over the course of the Edgewood drama.

568. Interview with Kevin O'Hanlon, supra note 136.
Edgewood Drama

The district court's original Edgewood decision was overturned by the Court of Appeals of Texas on the grounds that school finance is a "political question not suitable for judicial review." According to that court, "under our system of government efforts to achieve [education equity] come from the people through constitutional amendments and legislative enactments and not through judgments of courts."

Although the appellate court cited no precedent for this doctrine (and the Texas Supreme Court later rejected its application to the Edgewood litigation), the "political question" doctrine is a long-standing and often referenced—though rarely actually applied—legal principle that forbids courts from taking on controversies that should be settled directly by the people or by institutions politically responsive to them. Closely tied to the constitutional notion of separation of powers, the doctrine asserts that the proper judicial role is to approve or disapprove the legislature's laws, not to create new ones.

Perhaps its most thorough, and convoluted, elaboration comes from the United States Supreme Court:

It is apparent that several formulations . . . may describe a political question, although each has one or more elements which identify it as essentially a function of the separation of powers. Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to

571. Id.
572. In doing so, the Texas Supreme Court observed:
[We] have not been unmindful of the magnitude of the principles involved, and the respect due to the popular branch of the government . . . Fortunately, however, for the people, the function of the judiciary in deciding constitutional questions is not one which it is a liberty to decline . . . [We] cannot, as the legislature may, avoid a measure because it approaches the confines of the constitution; [we] cannot pass it by because it is doubtful; with whatever doubt, with whatever difficulties a case may be attended, [we] must decide it, when it arises in judgment.

Edgewood I, 777 S.W.2d 391, 394 (Tex. 1989).
574. See Baker v. Carr, 369 U.S. 186, 210-11 (1962) ("The nonjusticiability of a political question is primarily a function of the separation of powers. Much confusion results from the capacity of a 'political question' label to obscure the need for case-by-base inquiry.").
a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.\textsuperscript{575}

Academic commentators have questioned not only the political question doctrine's necessity,\textsuperscript{576} but its existence.\textsuperscript{577} At times, it is relegated to little more than a statement of judicial efficiency.\textsuperscript{578} Moreover, the political question doctrine, at least as it applies to federal constitutional challenges, may not be relevant to the review of state actions in state courts.\textsuperscript{579} Elusive as it may be, the doctrine aspires to prevent situations in which "a judge moves far beyond the normal competence and authority of a judicial officer, into an arena where legal aspirations, bureaucratic possibilities, and political constraints converge, and where ordinary legal rules frequently are inapplicable."\textsuperscript{580}

While the political question doctrine enjoyed but fleeting prominence in the string of \textit{Edgewood} decisions,\textsuperscript{581} it lurked in the background throughout the litigation. Always on the minds of the defendants in the most recent (if not the last) \textit{Edgewood} decision, the issue was rekindled by Texas Supreme Court Justice Enoch in his partial dissent: "I believe a credible argument can be made that the determination of what is an efficient, suitable educational system is a political question that this Court is ill-equipped to answer."\textsuperscript{582}

A second incarnation of separation-of-powers issues appears when all the \textit{Edgewood} cases are considered as a holistic progression. Clearly, the court became increasingly involved in shaping reform proposals over the course of the litigation. In each successive case, the opinions became more instructive and advisory. In \textit{Edgewood I}, the supreme court did little more than declare the finance system unconstitutional. In fact, the court acknowledged that:

[although we have ruled the school financing system to be unconstitutional, we do not now instruct the legislature as to the specifics of the legislation it

\begin{itemize}
  \item \textsuperscript{575} Id. at 217.
  \item \textsuperscript{576} See, e.g., Simard, \textit{supra} note 573.
  \item \textsuperscript{577} See Louis Henkin, \textit{Is There a "Political Question" Doctrine?}, 85 \textit{Yale L.J.} 597 (1976).
  \item \textsuperscript{578} See Martin H. Redish, \textit{Judicial Review and the 'Political Question'}, 79 \textit{Northw. U. L. Rev.} 1031, 1031 (1985) ("The so-called 'political question' doctrine postulates that there exist certain issues of constitutional law that are more effectively resolved by the political branches of government.").
  \item \textsuperscript{579} See \textit{Baker}, 369 U.S. at 226.
  \item \textsuperscript{580} William A. Fletcher, \textit{The Discretionary Constitution: Institutional Remedies and Judicial Legitimacy}, 91 \textit{Yale L.J.} 635, 641 (1982).
  \item \textsuperscript{581} The Texas Supreme Court did later invoke the "political question" doctrine in upholding a district court decision to decline to decide certain parent-intervenors' claim that they had a constitutional right to select the school of their choice and receive state reimbursement for their tuition. \textit{See Edgewood IV}, 917 S.W.2d 717, 747 (Tex. 1995).
  \item \textsuperscript{582} Id. at 751 n.1 (Enoch, J., concurring in part and dissenting in part).
\end{itemize}
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should enact; nor do we order it to raise taxes. The legislature has primary responsibility to decide how best to achieve an efficient system.583

In Edgewood II and IIa, the court’s opinions read somewhat differently. Despite its disclaimer that “[w]e do not undertake lightly to strike down an act of the Legislature,”584 the court went so far as to make specific recommendations to the politicians in both decisions, introducing phrases like “tax base consolidation.”585

Continuing the trend, the Edgewood III opinion was mired in the technical language of school reform. The court picked apart the complicated CED proposals in Senate Bill 351, making further suggestions to the Legislature.586 By that point, of course, the Legislature had become exasperated with the court’s involvement.

Finally, in its Edgewood IV opinion the court approved the Legislature’s proposal with the declaration that “[W]e have consistently refrained from prescribing ‘the means which the Legislature must employ in fulfilling its duty.’”587 The high court went on to repeat its Edgewood III claim that “[w]e do not prescribe the structure for ‘an efficient system of public free schools.’ The duty to establish and provide for such a system is committed by the Constitution to the Legislature. Our role is only to determine whether the Legislature has complied with the Constitution.”588

Here is a court exercising a fine sense of irony or wallowing in a profound state of denial. To the court’s critics, the Legislature did not create Senate Bill 7 at all. Rather, the supreme court created that final legislation by gradually paring down the Legislature’s options—a process that amounted to an unacceptable intrusion into the legislative process. From the opposite perspective, the court did exactly what it had to do to ensure a constitutional reform package. In this view, the Legislature was a reluctant, if not obstinate, player in the Edgewood drama. As Libby Linebarger, former Chairperson of the House Committee on Public Education, acknowledged, “the Legislature wouldn’t have acted without the litigation because they only act when there is a smoking gun pointed to their heads.”589 The court was thus reluctantly drawn into the specifics of designing reform because of the Legislature’s inability to produce a constitutional alternative.

585. See id. at 497.
586. See Edgewood III, 826 S.W.2d 489, 504-10 (Tex. 1992).
588. Id. at 747-48 (quoting Edgewood III, 826 S.W.2d at 523) (citation omitted).
589. Interview with Libby Linebarger, supra note 181.
Although the term is most often used in reference to federal lawsuits, this progressive entanglement of the judiciary and the legislature may qualify the Edgewood litigation for the notorious and largely academic classification of an “institutional suit.”[^590] This genre of cases, in which federal judges use their injunctive powers to reform state institutions, have often dealt with school desegregation, prison reform, and treatment in mental hospitals. To varying degrees, there is the “initiation of a relationship between the judge and an institution—a declaration that the judge will henceforth manage the reconstruction of an ongoing social institution.”[^591]

In the Edgewood drama, the fact that the Texas Supreme Court persistently denied that it micro-managed the reformation of the school-finance system does not change the fact that it did assume a supervisory role. Should it have, however?

2. A Prudential Separation of Powers and an Inconsistent Supreme Court

Beyond its rhetorical utility for opponents of education-finance reform, the charge of “judicial activism” in the Edgewood drama raises profound questions regarding the most basic structures of our democracy. To some, a court’s intrusion into a policy issue such as education “will necessarily sacrifice the legitimacy of the judiciary.”[^592] Hence, the argument continues, “such involvement must be regarded as a presumptively illegitimate exercise of judicial power.”[^593]

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[^590]: The Edgewood litigation clearly meets the profile of such suits: The institutional suits... are typically brought against state officials to enforce asserted constitutional norms. Frequently, such suits are filed only after the plaintiffs have unsuccessfully exerted pressure on the political branches of the state government to correct the problems of which they complain. Sometimes, as part of a general attack, such suits are filed concurrently with the exertion of pressure on the political branches. The subject matter of these suits and the litigants’ desire to influence political as well as judicial action frequently result in extensive news coverage of the problems giving rise to the litigation, and, though sometimes to a lesser degree, of the litigation itself.

The structure of an institutional suit tends to be sprawling, with a large number of parties, intervenors, and amici. The actual trial, during which plaintiffs seek to establish the existence of a constitutional violation, often involves many witnesses and extensive testimony. . . .

If the court does find a constitutional violation, that finding is typically only a prelude to a drawn-out and complex process of devising a decree directing the defendants to reform their institution and practices.

Fletcher, *supra* note 580, at 637-38 (citations omitted).


[^592]: *Id.* at 810.
While acceptance of the judiciary's "activist" role has grown in the last several decades "as the concepts of legal entitlement and rights assertion have become central to the American political culture," traditionalists continue to view a court's involvement in the intricacies of education policy as all but apocalyptic. Using courts to affect education policy, they say, "comes at the expense of one of the central tenets of our democratic form of government; namely, the separation of powers doctrine." The traditionalist thus condemns the Texas Supreme Court for undermining American democracy.

Such a "top-down," formalistic perspective, however, unjustly sacrifices all-too-real constitutional violations to ethereal ideals of separation of powers. The inequitable funding system should, in that view, be left in place to preserve a supposed "separation." Given the obvious irrationality of an absolute doctrine of separation of powers, even the formalist must acknowledge that the doctrine offers no bright lines. Since *Marbury v. Madison*, this democracy has been experimenting with the acceptable level of judicial intrusion into the political branches of government. This is not to say that the notion of "separation of powers" is meaningless. Rather, it must be a living and dynamic doctrine. Professor Alex Bickel was a proponent of just such a "prudential" interpretation of the separation of powers:

Such is the basis of the political-question doctrine: the court's sense of lack of capacity, compounded in unequal parts of the strangeness of the issue and the suspicion that it will have to yield more often and more substantially to expediency than to principle; the sheer momentousness of it, which unbalances judgment and prevents one from subsuming the normal calculations of probabilities; the anxiety not so much that judicial judgment will be ignored, as that perhaps it should be, but won't; finally and in sum ("in a mature democracy"), the inner vulnerability of an institution which is electorally irresponsible and has no earth to draw strength from.

Pragmatically speaking, the threat to judicial legitimacy posed by relaxing an absolutist's view of the separation of powers doctrine is minor compared to that of a doctrine that would inhibit a court's ability to correct constitutional violations.

In the *Edgewood* litigation, the Texas Supreme Court did not violate the separation of powers doctrine. The key to this proposition is not what the court did but what the Legislature did not do. Perhaps, if the *Edgewood* Drama

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596. 5 U.S. (1 Cranch) 137 (1803).

wood IV decision had been its first, the court would have undermined this doctrine. Instead, the court became more and more involved in the policy decision of education reform in response to legislative inaction. Under those circumstances, the court faced the conundrum of stretching the separation of powers doctrine or letting stand constitutional violations in Texas's schools.

The Texas Supreme Court found a legislatively-created institution unconstitutional. The court, therefore, had to order reform of an institution. Inevitably, in the course of such evaluation, judicial and legislative roles will overlap. An absolute adherence to separation-of-powers doctrine would have preserved the incredible disparities among public school districts in Texas.

This is not to say that the judiciary should have free rein to draft legislation. Judicial involvement in a policy matter should be avoided if at all possible. As a general proposition, however, we agree that "even where a constitutional violation has been found, a court cannot legitimately resolve such a problem unless the political bodies that ordinarily should do so are in such serious and chronic default that there is realistically no other choice."

The most convincing opponents of judicial involvement in traditionally political issues shore up their reverence for the separation of powers with a competency-based argument. A strong case may be made that "[c]reating and administering a statewide system of public school education requires constant supervision, and courts are simply not designed to undertake such monitoring activities." While this assertion may be true, however, there is little evidence that legislatures are much better designed to undertake such monitoring activities. As a matter of fact, if a court declares the unconstitutionality of some institution, some legislative body has presumably failed in that task.

More importantly, the competency-based, pro-separation-of-powers argument may be countered with an efficiency-based call for judicial activism: Allowing judicial intrusion in traditionally legislative arenas in certain circumstances is a more efficient path to creating constitutional systems and institutions. If, for example, the Texas Supreme Court had merely told the Legislature that its system was unconstitutional and had given no guidance as to what policies to adopt at all, the politicians would have been left guessing as to what direction of reform to pursue. Policy-making by a random process of elimination is surely less efficient and de-

598. For a comprehensive proposal to use community involvement as a means of avoiding judicial involvement altogether, see Rebell, supra note 594.
599. Fletcher, supra note 580, at 696.
600. Stern, supra note 595, at 1006.
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sirable than some level of judicial guidance that would help the legislature to close in on a constitutional system of financing.

Unfortunately, the very premise on which this idealized theory is based was missing in the Edgewood drama. The judicial activism in the Edgewood cases, particularly in Edgewood IIa and III, seems only to have undermined the Legislature's policy-making ability. Worse than giving the legislature no guidance at all, the court repeatedly changed its directions. By shifting its definitions of "efficiency" over time, the court did not give the Legislature an opportunity to answer its demands.

Consistency must be the first requirement of judicial activism. According to Justice Doggett, the court's unsolicited "judicial tampering" only impeded resolution of the problem. The court thus erred even according to our holistic and prudential concept of separation of powers.

Of course, in culling the Edgewood drama for morals on judicial activism, one must remember that the justices were themselves political creatures. One of the rationalizations for the political question doctrine is that certain institutions need to be monitored and reformed by persons who can be held accountable for their actions. The Texas Supreme Court is politically accountable for its actions, blurring the legislative-judicial distinction from the start.

V. THE DENOUEMENT: EDGEOOII AS A "HOUSE OF CARDS"

In the years following Edgewood IV, education reformers have been put on the defensive. Every legislative session presents an opportunity for opponents of reform to chip away at the plaintiffs' gains. Former Lieutenant Governor Bob Bullock compared the school-finance system to a "house built of cards"—"You remove one card and the whole house may fall down."601 Texan politics, both judicial and legislative, lend an air of unpredictability to the situation. The wisdom of one prominent commentator in 1991 holds true today: "Even Nostradamus would be out of his depth in predicting the future of school finance reform in Texas."602

A. School Finance in the Legislature after Edgewood IV

1. Responses to Property-Tax Pressures

The considerable improvements in financial equity came at a cost, mainly in the form of increased property taxes. The total average effective tax rate was $1.38/$100 in 1993-1994, a 77% increase from the 1987-

602. Yudof, supra note 39, at 505.
1988 average of $0.78/$100.603 In 1993-1994, 94% of the districts had an effective tax rate over $1.00/$100, whereas only 18% of districts were taxed above this level in 1987-1988.604 At the time of the adoption of Senate Bill 7, this heavy reliance on local property taxes sparked considerable concern among even those players celebrating the reforms as a victory. Craig Foster noted that “a lot of superintendents and school boards are finding it difficult to maintain support in their communities for progressive programs and new building programs because of increasing concern about high property taxes.”605

The dramatic rise in property taxes has dominated Texas politics since 1994, playing a major role in the ouster of Democratic governor Ann Richards and spawning an “anti-Robin Hood” wing of the Republican party. The Texas Republican Party tapped into the hostility to the school-finance reforms and the accompanying property tax increases in shaping its “Compact with Texas,” its 1996 legislative campaign platform that was modeled on the national party’s “Contract with America.”606

Increases in property taxes have already played a large part in shaping the two most recent legislative sessions, in 1995 and 1997. In the first session, Governor Bush was not able to honor immediately his 1994 campaign pledge of reducing the state’s reliance on the local property tax.60 Soon after the Edgewood IV decision, the Legislature passed and Governor Bush signed into law Senate Bill 1, which rewrote the educational code while largely keeping the financing structure of Senate Bill 7 intact. Only minor alterations were made to the funding scheme: The

603. See TEXAS EDUC. AGENCY, supra note 400, at 26. Effective tax rates are different from nominal, locally adopted rates in that they are standardized by the state. See id. Widening the time frame by only a few years, the Legislative Budget Board reported that the average school district effective tax rate jumped 128% between 1984 and 1995, from $0.601$100 to $1.37/$100. See LEGISLATIVE BUDGET BOARD, supra note 539.

604. See TEXAS EDUC. AGENCY, supra note 400, at 26.

605. Interview with Craig Foster, supra note 73.

606. Craig Foster had harsh words for the purveyors of the “Compact with Texas”: The message they are trying to get out is, one, if your school property taxes have gone up in recent years you can blame Robin Hood for it. Number two—Robin Hood taxes and Robin Hood increases are being spent for arbitrary, unnecessary, non-essential enrichment . . . . And third, if you help us get rid of Robin Hood, then your property taxes will go down and the state will increase its appropriations, and you’ll have a really good basic essential education. Then, once that is in place, then what little is left of the property tax will be used for enrichment purposes in those schools that can have enrichment. And once again, you’ll be back to 700-to-1 wealth disparities. Of course, people proposing this are taxpayers and residents of those 100 districts from which the state is recapturing money. They want the other 938 districts to believe that they are all in the same boat, that all the tax increases are the result of Robin Hood, when in fact in those 938 other districts, their property tax increases are lower than they would be without Robin Hood.

Id.

guaranteed yield in Tier Two was bumped from $20.55 to $21.00 per penny; the basic Tier One allotment was increased from $2300 to $2387 per student; and the Legislature appropriated $19 billion for public education for the 1996-1997 biennium, an increase of 14% from the previous biennium. These measures brought the state’s share of public education costs only up to 47%, a far cry from the 60% that Governor Bush had promised, and represented merely a fine-tuning of the Senate Bill 7 school-finance system.610

Although the focus of the Senate Bill was elsewhere, Bush did not retreat from his goals of reforming the tax structure. Warning of the potential for a “local property-tax revolt,” Bush made property-tax reform the centerpiece of the 1997 legislative session. Bush placed three restrictions on any new tax system: (1) it must be “revenue neutral,” meaning it must not raise any more money than it replaces, (2) it must be fair and uncomplicated, and (3) it must not include a personal income tax of any size. His initial proposal envisioned major cuts in local property taxes, with the lost revenue replaced by a slight hike in the state sales tax, budgetary savings, and a new broad-based state business-activity tax.612

Bush’s proposal ran into vociferous opposition, sparked mostly by interests that would have been hurt by the business-activity tax. When it became clear that Bush’s proposal lacked legislative support, the focus shifted to a House tax bill that would have cut local property taxes by as much as 50% in some districts. Instead of using a business-activity tax, the House bill would have replaced the lost revenue by raising numerous state taxes, transferring $1 billion in state budgetary savings to the public schools, and by having the state, rather than local districts, tax commercial property. The plan would have required a constitutional amendment to repeal the prohibition on a statewide property tax.

608. See TEX. EDUC. CODE ANN. § 42.101-.302 (West 1995); Brooks, supra note 607.
609. See Brooks, supra note 607.
610. The foundation of the new law, however, was the major shift in power from the state to the local districts. The power of the TEA was sharply constricted by the law, as its duties were limited to those expressly provided for in the law. Senate Bill 1 also allowed for limited experimentation with charter schools, home rule schools in particular, which with voter approval will free these schools from most state regulations. See Kathy Walt, Education Law Returns Power to the Schools, HOUS. CHRON., May 31, 1995, at A19.
611. Wayne Slater, Governor Renews Call for Tax System Review, DALLAS MORNING NEWS, Feb. 7, 1996, at 12D.
612. See Wayne Slater & Rich Oppel, Property-Tax Panel Appointed; Bush Seeking Public Opinion on Ways To Relieve Burden, DALLAS MORNING NEWS, Mar. 20, 1996 at 18A.
614. See Clay Robison, Tax Plan Would Aid Rich Most, HOUS. CHRON., Apr. 19, 1997, at A1. The House bill would have lowered the cap on residential property taxes for school operations from $1.50 to $0.70 and would have set the business-property tax rate at $1.05. See id.
Both Bush's original proposal and the House tax bill he supported would have promoted greater long-term fiscal equity. Governor Bush declined the political opportunity to use the anger generated by the rise in local property taxes to undo the progress made in equalizing school funding, as some "Robin Hood" opponents would have preferred. Instead, the House plan would have increased the state's share of public education funding from 46% to 80% and thus would have alleviated the biggest source of inequity in the system—the widely disparate resources of the local school districts. Governor Bush and his supporters in the House, however, could not overcome Senate opposition to a hike in state taxes. Bush's dramatic effort to restructure the state tax system failed after a contentious 1997 legislative session. Instead, the Legislature settled for only minor property tax relief, using $1 billion in budgetary savings to boost homestead exemptions across the state.

Because of the failure of the tax-reform effort, school finance is still largely dependent on local property tax revenues. This dependence requires the continuation of the politically unpalatable recapture and redistribution of local tax revenue from wealthy districts (those with over $280,000 in property value per student) if the state is to stay within the Edgewood mandates. These aspects of the system, combined with the continuing pressures to boost revenue to keep up with the influx of students, put the finance system under a great deal of political and economic pressure—pressure that could result in major modifications in the legislative arena in the near future.

2. Other School-Finance-Related Legislation

Though the Legislature did not make any major modifications to the overall tax structure or the school-finance system in the 1995 or 1997 legislative sessions, it took several steps that angered poor school districts.

First, the "hold harmless" provision, originally set to lapse after three years, was extended twice, and is now effective through the 1999-2000 school year. This provision allows certain wealthy districts to stay above the $280,000 cap on property value per student. The Legislative Budget Board calculated that, in 1996-1997, approximately $2.3 billion of the state's tax base was not recaptured because of the "hold harmless" provi-


617. See id. Even this minor tax relief was partially negated when almost half the state's school districts raised their tax rates in 1997. See Clay Robison, School Tax Hikes Partially Negate Bush Relief Plan, HOUS. CHRON., Apr. 9, 1998, at A25.
sion, resulting in a loss of $27.4 million in recaptured funds. Poor school districts assert that the additional four-year extension cost the state $240 million in recaptured funds; the state puts this figure closer to $100 million.

Second, the Legislature has altered certain formulas related to the manner in which school districts raise money for debt service. In 1995, the Legislature repealed the total tax rate limitation of $1.50/$100 that was part of Senate Bill 7. The $1.50 cap on maintenance and operations taxes was retained, but districts were permitted to levy up to an additional $0.50/$100 to pay for bond indebtedness. In 1997, the Legislature excluded from recapture the revenue raised by wealthy districts to pay for debt service for facilities. Poor school districts estimate that $56 million in recaptured funds were lost as a result of this measure.

In the years after Edgewood IV, the Legislature did begin to address the court’s concern over funding for facilities. The Edgewood IV court acknowledged that the state was fast approaching a point where poorer districts would not be able to meet both their operational and facilities needs within the equalized program. The Legislature responded by providing $170 million in the 1996-1997 biennium for grants to help districts construct or improve facilities. In 1997, the Legislature created an “instructional facilities allotment” (IFA), which changed the mechanism for distribution of funds for capital projects. Under the revised program,

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618. See LEGISLATIVE BUDGET BOARD, supra note 539. The loss for 1995-96 was estimated at $55 million. See WALKER & CASEY, supra note 27, at 44.


620. State Defendants’ Motion to Strike, Plea to the Jurisdiction, Special Exceptions, and Original Answer at 3, Edgewood Indep. Sch. Dist. v. Meno, No. 362,516 (Travis County Dist. Ct., 250th Jud. Dist. of Tex., filed June 1, 1998) [hereinafter State Defendants’ Motion]. The Legislative Budget Board has recently calculated that the net reduction in “recaptured” revenue due to the hold harmless provision is about $30 million per year. See LEGISLATIVE BUDGET BOARD, supra note 401, at 18.

621. See WALKER & CASEY, supra note 27, at 70; LEGISLATIVE BUDGET BOARD, supra note 401, at 10 (discussing “rollback” elections where voters can reduce proposed tax increases above a specified limit and noting voter approval of rate increases in school districts between 1982-1998).

622. See 1997 Tex. Sess. Law Serv. Ch. 592, § 1.02 (codified at TEX. EDUC. CODE ANN. § 41.093(a)); LEGISLATIVE BUDGET BOARD, supra note 401, at 18 & n.22; Plaintiff-Intervenors’ Petition at 10-11; Cindy Horswell, Schools Push Ahead with Bonds, HOUS. CHRON., Oct. 11, 1998, at A37.

623. See Plaintiff-Intervenors’ Petition at 11.

624. See supra text accompanying notes 516-518.

625. Interview with Joe Wisnoski, Coordinator for School Finance and Fiscal Analysis at the Texas Education Agency, in Austin, Tex. (Mar. 19, 1996); see also WALKER & CASEY, supra note 27, at 25.
eligible districts will receive yearly support to pay long-term-debt service costs rather than one-time cash awards. The Legislature appropriated $200 million through the IFA in the 1997-1998 biennium, which, according to the state, has leveraged $3 billion in construction.

The 1999 legislative session brings another major challenge for the Edgewood plaintiffs. Poor districts fear that recent offensives by pro-voucher groups threaten to alter the education equity landscape. In the last year, a well-endowed pro-voucher group—as much in the interest of political capital as of educational enhancement—offered $50 million in private school tuition to Edgewood students. Thus far, over 700 students have accepted the “scholarships,” resulting in a loss of $4 million in state funding and further eroding the activist base that has for so long fought for equity in the public school system. Sparked by Governor Bush’s support for a pilot voucher program, the debate over vouchers promised to reach a crescendo in the 1999 legislative session.

B. School Finance in the Courts After Edgewood IV: Will There Be an Edgewood V?

In addition to legislatively-induced disturbances of the status quo, there are potential challenges waiting in the judicial arena as well. After Edgewood IV was decided, many observers believed that the equity issue was dead. The supreme court was exasperated with the question. Observers also believe that, by approving the finance system created under Senate Bill 7, the court had essentially constitutionalized the equity ratios in existence at the time. Prior to the Edgewood IV decision, legislators had to try and figure out what qualified as “substantially similar” and were frustrated by the vague language. Now they could simply look to the financing system in place at the time of the Edgewood IV decision. The Texas Supreme Court had given its constitutional blessing to a system in which 85% of students fell within the equalized system, 98% of the revenue in the system was equalized, the gap between rich and poor did not exceed $600 per student at the maximum tax rate, and the varia-

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627. See LEGISLATIVE BUDGET BOARD, supra note 401, at 28-29; see also State Defendants’ Motion at 3.

628. See Kathy Walt, Voucher Foes Take Case to Austin, HOUS. CHRON., Feb. 4, 1999, at 32A.

629. See id.; see also No Magic Bullet Fix, Including Vouchers, for Bad Schools, HOUS. CHRON., Nov. 29, 1998, at 2.

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tion in revenue available to the poorest districts did not exceed 15% of
the revenue available to the wealthiest districts. As long as these targets
were met, many presumed, the system would be safe from an equity-
based challenge.

Despite the conventional wisdom, a few legislators predicted that the
equity battle would return to the courts. Representative Scott Hochberg
cautioned that “[I]f we stray too much, the Equity Center will have us
back in court.” Former chairperson of the House Committee on Public
Education, Libby Linebarger predicted:

There will be a challenge within the next ten years, because I don’t think our
system will stay equitable because we rely on the property tax. Until we
change our tax structure in the state, you are not going to really have a real
equitable financing system. This was the best we could get in my opinion with
our tax structure. . . . The Legislature, in my opinion, is going to start backing
off and backing off and backing off from funding it. Our system depends on
its being fully funded . . . but historically, the Legislature has started backing
away. When that happens, it’s going to get out of kilter and there will be an-
other lawsuit.

Both Hochberg and Linebarger proved prophetic. On May 7, 1998,
the Plaintiff Intervenors Committee, represented by attorney Buck
Wood, filed a petition for declaratory and injunctive relief in Judge Scott
McCown’s state district court.

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631. Some of these “target” numbers were specifically mentioned in the Edgewood IV
opinion, see 917 S.W.2d 717, 731 & n.12 (Tex. 1995), and all are used by the Legislative Budget
Board in projecting the school finance system’s compliance with the supreme court’s equity
mandates, see LEGISLATIVE BUDGET BOARD, supra note 532. These statistics are explained
above. See supra notes 534-537 and accompanying text.
Kevin O’Hanlon weighed in on the importance of these targets:
I think we are done in a lot of respects with fiscal neutrality. We have a measure now,
we know what passes muster in the supreme court, we can calculate what those ratios
were and we have got a distinct notion of what it’s going to take. What the legislature
wants is certainty. How much do we need in order to get over the line? In the first
couple of cases, the words were “substantially similar”—well, what’s that? They were
wiggle words and it drove the legislators nuts. Now they can look at the ratios in exis-
tence at the time Edgewood IV was passed. They have a target.
Interview with Kevin O’Hanlon, supra note 136.

632. Interview with Scott Hochberg, supra note 382. The possibility of the Legislature un-
derfunding its portion of the system is a prospect that some interviewees take very seriously,
especially given the court’s warning that “the amount of ‘supplementation’ in the system cannot
become so great that it in effect destroys the efficiency of the entire system.” Edgewood IV, 917
S.W.2d at 732.

633. Interview with Libby Linebarger, supra note 181.

634. The Plaintiff Intervenors Committee is a group of 126 property-poor school districts,
led by Alvarado I.S.D., that has long been involved in the Edgewood litigation.

635. Kathy Walt, School Districts File Suit to End Funding Loopholes, HOUS. CHRON., May
8, 1998, at A37. Out of the 126 districts on the Plaintiff Intervenors Committee, 110 have de-
cided to join in the lawsuit, although Wood expects more to join after the end of the 1999 legis-
lation session. Telephone Interview with Randall “Buck” Wood, attorney for the Plaintiff Inter-
The plaintiff-intervenors assert that, after *Edgewood IV*, the Legislature provided breaks to wealthy districts and spurned the poorer ones. Craig Foster characterized the Legislature’s attitude as: “We got our system declared constitutional, now we’ll just damn well do what we please.” Buck Wood asserted: “The Legislature has handed out a half billion dollars to rich school districts, mostly over the last four years.” The poorer school districts allege that legislators have begun to fall down the slippery slope towards greater inequities.

Among the legislative actions and omissions decried by the plaintiff-intervenors are: (1) the extensions of the “hold harmless” provision, (2) the exemption of revenue raised for facility construction and renovation from the recapture provisions of Senate Bill 7, (3) the creation of a discrepancy between wealthy districts and others in the speed in which declines in property value are recognized, and (4) the absence of a revenue-equalization mechanism for certain old debt service payments. The plaintiff-intervenors also emphasized the irony in the wealthy districts’ pursuit of a “hold harmless” provision from the Legislature. Whereas these districts once argued that money did not matter, they now argue that they cannot provide an adequate education to their students within the Senate Bill 7 limits.

The plaintiff-intervenors charge that cost inflation and the legislative changes outlined above have eroded the equity targets that were established in *Edgewood IV*. The State disagreed, asserting that other legislative adjustments, including the increase in the basic Tier One allotment and the increase in the Tier Two guaranteed yield, have actually improved equity figures.
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The lawsuit has been put on hold during the duration of the 1999 legislative session. Wood has suggested that his clients filed the suit to bring lawmakers to the negotiating table. Poor districts hope to persuade the Legislature to expand its investment in the IFA. Legislators, however, have not reacted favorably to the lawsuit. Teel Bivins, chairman of the Senate Education Committee, remarked: “I don’t see how this lawsuit benefits the schoolchildren of Texas.” Bill Ratliff, the chairman of the Senate Finance Committee, said that the lawsuit “is tantamount to putting a gun to our head, and I don’t work well with a gun to my head... My attitude now is ‘Go to the Supreme Court if you can get a better deal.’” He predicted that the poorer districts “might lose ground” there.

Should a trial occur, adequacy issues might come to the fore. Ironically, the potentiality of an adequacy debate was significantly enhanced by Justice Cornyn’s choice of words in Edgewood IV. The General Counsel of the TEA, David Anderson, blamed Cornyn for opening Pandora’s box: “The bad news in Edgewood IV was that the court opened the door to adequacy litigation, which previously had not been part of the mix and which the trial court had rejected.” By redefining or enlarging the constitutional standards of “efficiency” and “general diffusion of knowledge,” and equating these standards with a “minimally adequate” education in Edgewood III, and an “accredited” education in Edgewood IV, Justice Cornyn may have opened another angle of attack for the plaintiff-intervenors. In addition to the equity angle, the plaintiff-intervenors might try to prove, in either this lawsuit or a future one, that an accredited education does not imply a minimum level of adequacy—that the state is setting the bar too low.

Whether or not adequacy issues seep into the case now before Judge McCown, both sets of the original Edgewood plaintiffs predict that the chances of an adequacy lawsuit being brought in the future are good. Craig Foster said: “There are studies ongoing right now that assume we are going to have an adequacy lawsuit before we are finished with this

645. See Walt, supra note 635.
646. Id.
647. Id.
648. Terrence Stutz, Schools’ Fund Fight Reignited; Officials Say Wealthy Aren’t Being Favored, DALLAS MORNING NEWS, May 8, 1998 at 1A. Notably, after the November 1998 election, the Texas Supreme Court is composed exclusively of Republicans. Only one member of the Edgewood IV majority, Chief Justice Tom Phillips, remains on the court. Democrat Rose Spector, the only justice in Edgewood IV who stood by the earlier standards of efficiency, was defeated in her bid for reelection.
649. Interview with David Anderson, supra note 286.
650. See supra notes 335-337 and accompanying text.
651. See Edgewood IV, 917 S.W.2d 717, 730 (Tex. 1995).
thing in Texas. I think it is a good bet that it is coming in Texas.\textsuperscript{652} MALDEF attorney Al Kauffman agreed that "there is an adequacy case out there."\textsuperscript{653}

There are other potential causes of action, in addition to an adequacy-oriented case, that could be brought by future plaintiffs. A revamped equal protection suit is always a possibility, especially considering the prominent role of MALDEF in the school-finance saga.\textsuperscript{654} The trial court in the original case did rule that the school-finance system violated the equal protection clause in the state constitution. The court of appeals overturned this decision,\textsuperscript{655} and the supreme court never considered it, having been sidetracked by the violations of the education clause of the Texas Constitution. The MALDEF plaintiffs still feel very strongly that remaining inequalities disproportionately impact Mexican-Americans and are still attracted to the equal protection argument.\textsuperscript{656} One key observer hypothesized that since "results matter" was the main message of \textit{Edgewood IV}, MALDEF would be poised to make an equal protection claim based on racial disparities in academic performance rather than in appropriations.\textsuperscript{657} A similar claim recently proved successful in Connecticut's highest court.\textsuperscript{658}

Another aspect of the \textit{Edgewood IV} decision could also spark litigation in the near future. The court insinuated that, if the $1.50 cap became "a floor as well as a ceiling," then districts would have lost all meaningful discretion in setting their tax rates, practically converting the finance system into an unconstitutional state \textit{ad valorem} tax.\textsuperscript{659} In other words, if districts have to tax at the maximum rate of $1.50/$100 just to provide a "general diffusion of knowledge," then their lack of discretion would transform the finance system into a virtual state property tax. Many interviewees expressed skepticism that this development would occur. If many districts are running into the cap, they theorized, the Legislature

\textsuperscript{652} Interview with Craig Foster, \textit{supra} note 73.

\textsuperscript{653} Interview with Albert Kauffman, \textit{supra} note 101.

\textsuperscript{654} MALDEF has recently filed a federal class-action suit against the State of Texas, the TEA, and the State Board of Education, claiming that the TAAS test, the state's standardized high school exit exam, discriminates against black and Hispanic students. \textit{See Hispanic Group Files Suit Against Use of Exit Exams}, HOUS. CHRON., Oct. 15, 1997, at 1.

\textsuperscript{655} \textit{See Edgewood I}, 761 S.W.2d 859 (Tex. App. 1988).

\textsuperscript{656} Telephone Interview with Albert Cortez, \textit{supra} note 102; Interview with Albert Kauffman, \textit{supra} note 101.

\textsuperscript{657} Interview with Kevin O’Hanlon, \textit{supra} note 136.

\textsuperscript{658} In \textit{Sheff v. O’Neil}, 678 A.2d 1267, 1281 (Conn. 1996), the Connecticut Supreme Court concluded that "the existence of extreme racial and ethnic isolation in the public school system deprives schoolchildren of a substantially equal educational opportunity" as required by the Connecticut Constitution.

\textsuperscript{659} \textit{See Edgewood IV}, 917 S.W.2d 717, 737 (Tex. 1995).
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will correctly perceive that there is not enough money in the system to provide a “general diffusion of knowledge” and will likely raise the cap to alleviate the problem. 660

Whether the most recent petition will turn into Edgewood V remains to be seen. According to Foster and Wood, a full-fledged legal battle can only be averted by affirmative relief from the Legislature. One thing is certain: If the school-finance reformers believe that the poorer districts are being treated unfairly, they will not hesitate to turn to the courts for relief.

VI. CONCLUSION

Few would dispute the critical importance of educating children. Perhaps an equally small number would dispute the proposition that the quality of a child’s education should not be a function of affluence, location, race, sex, or the property values around campus. The ideal of equal opportunity to achieve success is a fundamental tenet of American society. Nevertheless, to this day drastic disparities in the quality of education provided to public school students remain institutionalized by inequitable school-finance schemes. As indicated by the waves of school-finance litigation that continue to inundate state courts across the country, Edgewood and Alamo Heights school districts are not exceptions, but representatives—representatives of both the stark disparities created by many states’ school funding programs and also the dramatic improvements attainable through litigation.

Of course, it would be naive to assume that as a result of decades of litigation these two neighboring school districts today provide equally valuable academic opportunities to their students. The point of the Edgewood drama is not that equal funding creates high quality—or even equal—education. Rather, the point of the Edgewood drama is that, even in the face of overwhelming political, logistical, and constitutional obstacles, reform is necessary and possible. As education reformers continue to do in almost every other state, the Edgewood players blazed a trail through the morass of tensions between equity and adequacy, separation-of-powers dilemmas, recalcitrant legislators, and politically sensitive judges. After twenty-five years of literal and figurative marching, Edgewood’s protesting students, teachers, and parents earned relatively equal access to education funding for every child in their state.

660. Interview with David Anderson, supra note 286; Interview with Kevin O’Hanlon, supra note 136; Interview with Joe Wisnoski, supra note 625. A TEA spokesman, Omar Garcia, also reiterated this point: “As time goes on, more and more districts will be bumping up against the cap. But it will take an act of the Legislature to raise it. This is something that will have to be dealt with.” Cindy Horswell, “Robin Hood” Fails To Cure Schools’ Ills, HOUS. CHRON., June 2, 1996, at A1.