

## REMNANTS OF ‘SEPARATE, BUT EQUAL’: WHAT IS WRONG WITH TEXAS PUBLIC SCHOOL FINANCING?

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*“In the 21st century, the best anti-poverty program is a world-class education.”* – Barack Obama<sup>1</sup>

### I. INTRODUCTION

The Texas Constitution mandates the state provide an efficient system of public schools, and the United States Supreme Court has found a right of equal opportunity to education. But between contradictory Texas Supreme Court opinions and discriminatory Texas public school funding, students are failing to receive the education that can allow them to preserve the rights and liberties of being a Texan and American. One of the most important and influential parts of a child’s life is the education they receive from kindergarten through twelfth grade.<sup>2</sup> As Chief Justice Warren commented in *Brown v. Board of Education*:

In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms.<sup>3</sup>

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<sup>1</sup>President Barack Obama, State of the Union Address (Jan. 27, 2010) (transcript available at <http://www.nytimes.com/2010/01/28/us/politics/28obama.text.html>).

<sup>2</sup>Michael Greenstone & Adam Looney, *A Dozen Economic Facts About K-12 Education*, BROOKINGS (Sept. 27, 2012), <https://www.brookings.edu/research/a-dozen-economic-facts-about-k-12-education/>.

<sup>3</sup>347 U.S. 483, 493 (1954).

The United States Constitution gives no express right of equal opportunity to education, but the Supreme Court of the United States has found a right of equal opportunity to education in cases such as *Brown v. Board of Education*, *Sweatt v. Painter*, and *United States v. Virginia* when the Court determined people could not be denied education because of their gender or the color of their skin.<sup>4</sup> In the 1973 case of *San Antonio Independent School District v. Rodriguez*, however, the Supreme Court refused to consider education a fundamental right or to consider the poor a suspect class under the Fourteenth Amendment Equal Protection Clause.<sup>5</sup> The plaintiff in *Rodriguez* had two main arguments: (1) the poor should be considered a suspect class under the Equal Protection Clause and thus subject to strict judicial scrutiny because a system can be discriminatory on the basis of wealth,<sup>6</sup> and (2) education should be considered a fundamental right under the United States Constitution, and any encroachment on that right must be subject to strict scrutiny.<sup>7</sup> The Supreme Court applied a rational basis test because people cannot be discriminated against on the basis of wealth and the right to education cannot be a fundamental right.<sup>8</sup> Then, the Court found that the existing finance system did not violate the United States Constitution because the Texas school finance system rationally furthers some legitimate, articulated state purpose.<sup>9</sup>

Both Justice Brennan's and Justice Marshall's dissents highlighted previous holdings by the Court and how the majority's deviated from its previous Equal Protection analysis in cases such as *Weber v. Aetna Casualty & Surety Co.* and *Reed v. Reed*.<sup>10</sup> In *Weber*, the Court required that any statutory classification bear a rational relationship to a legitimate

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<sup>4</sup> See *Sweatt v. Painter*, 339 U.S. 629, 633 (1950) (“[W]e cannot find substantial equality in the educational opportunities offered white and Negro law students by the State.”); see also *United States v. Virginia*, 518 U.S. 515, 547 (1996) (“The constitutional violation in this case is the categorical exclusion of women from an extraordinary educational opportunity afforded men.”).

<sup>5</sup> 411 U.S. 1, 28–31 (1973).

<sup>6</sup> See *id.* at 19.

<sup>7</sup> See *id.* at 35.

<sup>8</sup> Angela Marie Shimek, Comment, *The Road Not Taken: The Next Step for Texas Education Finance*, 9 SCHOLAR 531, 538 (2007); see *Rodriguez*, 411 U.S. at 58–59.

<sup>9</sup> Shimek, *supra* note 8, at 538; see *Rodriguez*, 411 U.S. at 58–59 (maintaining that the ultimate solution to disparities in public education financing must come from the legislative branch).

<sup>10</sup> See generally *Rodriguez*, 411 U.S. at 62–133 (Brennan, J., White, J., and Marshall, J., dissenting).

state purpose,<sup>11</sup> an analysis that Justice White's dissent said the majority did not apply in *Rodriguez*.<sup>12</sup> Justice Brennan expressed a belief that "education is inextricably linked to the right to participate in the electoral process and to the rights of free speech and association guaranteed by the First Amendment . . . [and] any classification affecting education must be subjected to strict judicial scrutiny."<sup>13</sup> Justice Marshall argued that the majority relied on whether the school finance system was adequate rather than whether the system was inequitable, because while the Constitution does not require "precise equality in the treatment of all persons," the United States Supreme Court has "never suggested that because some 'adequate' level of benefits is provided to all, discrimination in the provision of services is therefore constitutionally excusable" and thus, just because a system could be found adequate does not mean it is immediately not discriminatory.<sup>14</sup>

This decision did not end the attacks against the finance system. Rather, plaintiffs began attacking Texas public school financing under the Texas Constitution Article VII, Section 1, which mandates that the state provide a general diffusion of knowledge for all its people and thus provide and support an efficient system of Texas public schools.<sup>15</sup>

The Texas Supreme Court decisions from *Edgewood Independent School District v. Kirby*<sup>16</sup> in 1989 to *Morath v. Texas Taxpayer & Student Fairness Coalition*<sup>17</sup> in 2016 have led Texas to where it is today—a state of confusion as to what is required for public school financing and what is constitutional under Texas's education mandate—because the court throughout seven decisions has changed the test district courts need to

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<sup>11</sup> *Weber v. Aetna Casualty & Surety Co.*, 406 U.S. 164, 176 (1972).

<sup>12</sup> *Id.* at 67 (White, J., dissenting).

<sup>13</sup> *Id.* at 63 (Brennan, J., dissenting).

<sup>14</sup> *Id.* at 88–89 (Marshall, J., dissenting). For more information on using the Equal Protection Clause to challenge school finance disparities, see generally Preston C. Green & Bruce D. Baker, *Circumventing Rodriguez: Can Plaintiffs Use the Equal Protection Clause to Challenge School Finance Disparities Caused by Inequitable State Distribution Policies?*, 7 TEX. F. ON C.L. & C.R. 141 (2002).

<sup>15</sup> TEX. CONST. art. VII, § 1 ("SUPPORT AND MAINTENANCE OF SYSTEM OF PUBLIC FREE SCHOOLS. A general diffusion of knowledge being essential to the preservation of the liberties and rights of the people, it shall be the duty of the Legislature of the State to establish and make suitable provision for the support and maintenance of an efficient system of public free schools.").

<sup>16</sup> See 777 S.W.2d 391, 397–98 (Tex. 1989).

<sup>17</sup> See 490 S.W.3d 826, 846 (Tex. 2016).

apply.<sup>18</sup> In its most recent decision, the court determined it must defer to the legislature and find any inequalities between schools in the public school funding scheme constitutional so long as the Texas Legislature's funding scheme is not arbitrary.<sup>19</sup>

This paper discusses the Texas public school finance scheme, its discriminatory effects on Texas public school students, and a potential solution to resolve the inequality between schools and the education they can provide. Part II of this paper outlines how the funding of public education currently works in Texas. It addresses federal, local, and state funding, and how the state determines the funding for each school district under the Foundational School Program.

Part III of this paper outlines the problems students face in Texas public schools today when the funds for schools are generated through property taxes. This part will address two main points to describe the problems: (1) an example of the problem the system has created by comparing two Texas school districts; and (2) the discriminatory effects of the current funding system.

Finally, Part IV of this paper addresses possible solutions to remedy the discriminatory effects of public school funding. Part IV suggests new funding options: (1) a state income tax; (2) sales tax; and (3) the franchise tax. The State of Texas needs to take steps towards remedying the discriminatory funding public schools face so all students can receive a general diffusion of knowledge that allows them to preserve their rights as an American and a Texan.

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<sup>18</sup>The most recent case determining the constitutionality of public school funding is *Morath*, where the Texas Supreme Court reversed the lower court and laid out six factors to consider when determining whether any inequalities in the school finance scheme are constitutional: (1) adequacy; (2) suitability; (3) financial efficiency; (4) qualitative efficiency; (5) charter school claims; and (6) the statewide ad valorem tax, after the district court followed the test the court had previously laid out in *Neeley*. *Morath*, 490 S.W.3d at 894 (holding the Robin Hood finance system constitutional as it “must defer to the Legislature and uphold its policy choices unless those choices are ‘arbitrary’ and ‘unreasonable’” without reference to “guiding rules or principles”); see *Neeley v. W. Orange-Cove Consol. Indep. Sch. Dist. (Edgewood VI)*, 176 S.W.3d 746, 787–95 (Tex. 2005). For more information on the Texas Supreme Court's decisions on school financing, see Albert Kauffman, *The Texas Supreme Court Retreats from Protecting Texas Students*, 19 SCHOLAR 145, 146–68 (2017).

<sup>19</sup>*Morath*, 490 S.W.3d at 894 (Boyd, J., concurring).

## II. FUNDING TEXAS PUBLIC SCHOOLS

Texas public school funding has three sources: local ad valorem taxes, state funds, and federal funds.<sup>20</sup> An ad valorem tax is any tax imposed based on the monetary value of the taxed item.<sup>21</sup> In the school funding context, the ad valorem taxes are property taxes with rates applied to the value of the property.<sup>22</sup> In 2012, funding sources for Texas public schools were: (1) 44.8% from the local government; (2) 45.1% from the state government; and (3) 10.1% from the federal government.<sup>23</sup> The federal government and the Department of Education thus do not provide many funds to state public schools because education has historically been a state and local responsibility in the United States.<sup>24</sup>

Arne Duncan, a former Education Secretary, said that “federal spending was never intended to equalize funding for poor children . . . [i]t was meant to add more money for students who need more services.”<sup>25</sup> Twenty-three states, including Texas, are using federal funds as an equalizer because state

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<sup>20</sup>TEX. EDUC. CODE ANN. § 42.251(b) (West 2012) (“The program shall be financed by: (1) ad valorem tax revenue generated by an equalized uniform school district effort; (2) ad valorem tax revenue generated by local school district effort in excess of equalized uniform school district effort; (3) state available school funds distributed in accordance with law; and (4) state funds appropriated for the purposes of public school education and allocated to each district in an amount sufficient to finance the cost of each district’s Foundation School Program not covered by other funds specified in this subsection.”); Jason Delisle, *Putting a Number on Federal Education Spending*, ECONOMIX (Feb. 27, 2013, 10:00 AM), <https://economix.blogs.nytimes.com/2013/02/27/putting-a-number-on-federal-education-spending/>.

<sup>21</sup>*Ad Valorem Tax*, ENCYCLOPEDIA BRITANNICA, <https://www.britannica.com/topic/ad-valorem-tax> (last visited March 17, 2018).

<sup>22</sup>*Frequently Asked Questions About Property Tax*, TEX. COMPTROLLER, <https://comptroller.texas.gov/taxes/property-tax/ptax-faqs.php> (last visited March 17, 2018).

<sup>23</sup>*How Much Money Does our School District Receive from Federal, State, and Local Sources?*, DATA FIRST (2015), <http://www.data-first.org/data/how-much-money-does-our-school-district-receive-from-federal-state-and-local-sources/>; U.S. Department of Education, National Center for Education Statistics, *Revenues and Expenditures for Public Elementary and Secondary School Districts: School Year 2011-12 (Fiscal Year 2012)* (January 2015), <https://nces.ed.gov/pubs2014/2014303.pdf>.

<sup>24</sup>U.S. Department of Education, *The Federal Role in Education*, <https://www2.ed.gov/about/overview/fed/role.html> (last updated May 25, 2017).

<sup>25</sup>Emma Brown, *In 23 States, Richer School Districts Get More Local Funding than Poorer Districts*, WASH. POST (March 12, 2015), [https://www.washingtonpost.com/news/local/wp/2015/03/12/in-23-states-richer-school-districts-get-more-local-funding-than-poorer-districts/?utm\\_term=.1385c180cfc4](https://www.washingtonpost.com/news/local/wp/2015/03/12/in-23-states-richer-school-districts-get-more-local-funding-than-poorer-districts/?utm_term=.1385c180cfc4).

and local governments are spending less per student in poorer school districts than in the more affluent school districts.<sup>26</sup> With state and local funding only, poor school districts in Texas receive 1.5% fewer funds per pupil than wealthier school districts.<sup>27</sup> However, when federal funds are added, poor school districts receive 11.5% more funds per pupil than wealthier school districts.<sup>28</sup> The amount a school district receives per pupil is crucial because children who live in poverty start school at a disadvantage and require more intensive and expensive programs than their middle-class and affluent counterparts.<sup>29</sup> Currently in Texas, the state determines the amount of state and local funds a school district receives using the Foundation School Program (FSP).<sup>30</sup> The FSP is composed of two tiers.<sup>31</sup>

#### A. FSP Tier One

Tier One is made up of several allotments for basic educational programs, including regular basic education, special education, English as a second language (ESL) education, and transportation.<sup>32</sup> Tier One also includes an additional allotment based on average daily attendance.<sup>33</sup> For each school district, the basic allotment is adjusted based on: (1) the cost of education index for that district;<sup>34</sup> (2) whether the school is small or mid-sized, making the cost of educating per student higher; and (3) the sparsity of the district's population.<sup>35</sup> The average daily attendance is calculated by adding up the number of students who are in attendance each day of the school year, and then dividing that by the number of instructional days in

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<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

<sup>30</sup> Office of School Finance, Texas Education Agency, *School Finance 101: Funding of Texas Public Schools 7* (January 2013, revised September 2014), <https://tea.texas.gov/WorkArea/DownloadAsset.aspx?id=2147511834> [hereinafter *School Finance 101*].

<sup>31</sup> *Id.* at 7.

<sup>32</sup> *Id.* at 11.

<sup>33</sup> *Id.*

<sup>34</sup> *Id.* at 12. The cost of education index was assigned in 1991 based on the size of the district, the teacher salaries of nearby districts, and the percentage of low-income students in the district in 1989–1990. *Id.* This index has not been updated since 1991. *Id.*

<sup>35</sup> *Id.* at 12–13.

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the school year.<sup>36</sup> For example, if a school has 2,500 students and 238 instructional school days, and the average number of students that show up every day is 2,300, then 2,300 is the average daily attendance. The school districts receive money for each student that shows up to school, not the total number of students that district has.<sup>37</sup> In this example, the school district only receives money for the 2,300 rather than the 2,500 students.

Once the state calculates the Tier One allotment, it then calculates the local fund assignment (LFA) to determine how much of the Tier One allotment the local school district must pay.<sup>38</sup> The LFA is the amount of property taxes collected by assessing either the compressed tax rate (CTR) or a tax rate of \$1.00, whichever is lower, for each \$100 of property valuation, multiplied by the property tax assistance division's (PTAD's) property valuation from last year.<sup>39</sup> The formula looks like this: "LFA = lesser of CTR or district tax rate of \$1.00 x PTAD prior year property value."<sup>40</sup> Then, to determine the state share, the LFA is subtracted from the total Tier One entitlement due to the district.<sup>41</sup> Texas then moves to a Tier Two calculation to determine the amount needed to supplement Tier One's basic funding.<sup>42</sup>

### B. FSP Tier Two

Tier Two is designed to ensure that school districts generate a specific amount of state and local funds per student using a weighted average daily attendance (WADA).<sup>43</sup> This guaranteed level of funding is intended to supplement Tier One's basic funding.<sup>44</sup> The WADA is calculated by

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<sup>36</sup> *Id.* at 12.

<sup>37</sup> *Id.* at 11.

<sup>38</sup> *Id.* at 18.

<sup>39</sup> *Id.* at 18. The Texas Legislature established a compressed tax rate to provide property tax relief. Property Tax Programs and Incentives, Texas Education Agency, *History of Tax Rates 1*, <https://tea.texas.gov/WorkArea/DownloadAsset.aspx?id=51539610864> (last visited March 17, 2018). A school district's CTR is its 2005 maintenance and operations tax rate multiplied by the state compression percentage. *Id.* The state compression percentage is currently 66.67%. *Id.* For example, if a district's 2005 maintenance and operation tax rate was \$1.50, then its CTR would be \$1.00. *Id.*

<sup>40</sup> *School Finance 101*, *supra* note 30, at 18.

<sup>41</sup> *Id.*

<sup>42</sup> *Id.* at 7.

<sup>43</sup> *Id.* at 21.

<sup>44</sup> *Id.*

dividing the adjusted Tier One entitlement amount by the district's basic allotment amount.<sup>45</sup> The adjusted Tier One entitlement is the Tier One entitlement minus any transportation allotment, the new instructional facility allotment, any high school allotment, and 50% of the cost of education index—a number the state assigned to each school district in 1991.<sup>46</sup> The percentage of state funds that contribute to a school district's Tier Two allotment depends, in part, on local revenue based on the previous year's property value.<sup>47</sup>

### III. THE PROBLEM: FUNDING WITH PROPERTY TAXES CREATES INEQUALITY

Currently, Texas has a school finance system that does not treat all taxpayers and students equally.<sup>48</sup> The Texas Legislature created limits on the percentage of students in school districts that may be classified to be in need of special need services, including economically disadvantaged students and students in special education programs.<sup>49</sup> This limit artificially reduces the amount of state funds a school district can receive.<sup>50</sup> Since 2004, the Texas Education Agency (TEA) has threatened action against school districts whose special education enrollment exceeded 8.5% because of concerns about school districts adding students to those programs purely to receive more state funds.<sup>51</sup> In 2007, the TEA determined Laredo ISD had too many special education students, causing Laredo ISD to remove many students from the special education program if they had shown any amount of improvement.<sup>52</sup> This creates a problem for students that are improperly removed from the special education program because it removes their accommodations, such as receiving extended time on tests or having the test read to them.<sup>53</sup> For example, in 2009, the TEA instructed school employees

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<sup>45</sup> *Id.*

<sup>46</sup> *Id.*

<sup>47</sup> *Id.* at 25.

<sup>48</sup> Kauffman, *supra* note 18, at 186.

<sup>49</sup> *Id.* (citing Bill Zeeble, *Texas May be Denying Tens of Thousands of Children Special Education*, NPR (Oct. 21, 2016), <https://www.npr.org/sections/ed/2016/10/21/496943376/texas-may-be-denying-tens-of-thousands-of-children-special-education>).

<sup>50</sup> *Id.* at 186 n.304.

<sup>51</sup> Zeeble, *supra* note 49.

<sup>52</sup> Brian M. Rosenthal, *Denied: Schools Push Students Out of Special Education to Meet State Limit*, HOUS. CHRON. (Oct. 22, 2016), <http://www.houstonchronicle.com/denied/2/>.

<sup>53</sup> *Id.*



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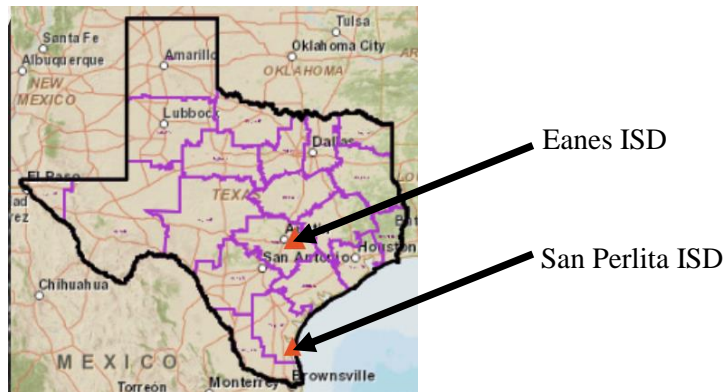
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to end tutoring for students with severe dyslexia, which can cause students not to learn how to self-accommodate after they graduate and move into higher education or careers.<sup>54</sup> This arbitrary limit does not allow a school district to meet their students' needs or give the district the funding they need.<sup>55</sup>

The crux of the State's inability to fulfill the "promises of our Texas Constitution and our moral obligations to meet the needs of our students" is that the State funds education through property taxes.<sup>56</sup> Many states have moved away from this system and their high courts have found funding education through property to be unconstitutional because of the discriminatory effects.<sup>57</sup> To demonstrate the effects of Texas's current school finance system and the inadequate education it provides, the author will describe the differences between Texas's wealthiest and poorest school districts and describe the school finance system's discriminatory effects.

#### A. *San Perlita ISD v. Eanes ISD*



San Perlita Independent School District in San Perlita, Texas, is the poorest school district in the United States, and Eanes Independent School

<sup>54</sup> *Id.*

<sup>55</sup> *Id.*

<sup>56</sup> See Kauffman, *supra* note 18, at 186.

<sup>57</sup> Paul A. Minorini & Stephen D. Sugarman, *School Finance Litigation in the Name of Educational Equity: Its Evolution, Impact, and Future*, EQUITY AND ADEQUACY IN EDUCATION FINANCE: ISSUES AND PERSPECTIVE 34, 35 (Helen F. Ladd et al., eds., 1999).

District is the wealthiest school district in Texas.<sup>58</sup> The median household income in San Perlita is \$22,784, which is less than half of the national median household income.<sup>59</sup> Eanes ISD has a median household income of \$122,195, which is more than double the national median.<sup>60</sup> The median home sale price in San Perlita ISD is \$24,050.<sup>61</sup> The median home sale price in Eanes ISD is \$485,624.<sup>62</sup>

There are four main factors to analyze when comparing the education available to students at Eanes ISD versus San Perlita ISD: (1) testing scores; (2) graduation rates; (3) demographics; and (4) socio-economic status. First, for testing scores, the author began by looking at the SAT, ACT, and the STAAR. The SAT and ACT are both college-readiness exams.<sup>63</sup> The STAAR test, or State of Texas Assessments of Academic Readiness, is a standardized test given to students throughout elementary and secondary school.<sup>64</sup> Its purpose is to see if a student has mastered specific knowledge of a core subject at a certain grade level, and to provide educators and administrators with information from across the state based on the same test and testing environment.<sup>65</sup>

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<sup>58</sup>Michael B. Sauter et. al., *America's Richest (and Poorest) School Districts*, U.S.A. TODAY (Oct. 3, 2015), <https://www.usatoday.com/story/money/business/2015/10/03/24-7-wall-st-richest-poorest-school-districts/73205874/>; Matt Levin, *The Best School District in Texas is Also Ridiculously Wealthy*, HOUS. CHRON. (April 12, 2016), <http://www.chron.com/news/education/article/The-best-school-district-in-Texas-is-also-7241858.php>.

<sup>59</sup>Sauter, *supra* note 58; *San Perlita Independent School District*, POINT 2 HOMES, <https://www.point2homes.com/US/Neighborhood/TX/Willacy-County/San-Perlita-Independent-School-District-Demographics.html> (last visited March 17, 2018) [hereinafter San Perlita Demographics]; Tanza Loudenback, *Middle-Class Americans Made More Money Last Year Than Ever Before*, BUS. INSIDER (Sept. 12, 2017), <http://www.businessinsider.com/us-census-median-income-2017-9>.

<sup>60</sup>*Eanes Independent School District*, POINT 2 HOMES, <https://www.point2homes.com/US/Neighborhood/TX/Travis-County/Eanes-Independent-School-District-Demographics.html> (last visited March 17, 2018) [hereinafter Eanes Demographics]; Loudenback, *supra* note 59.

<sup>61</sup>San Perlita Demographics, *supra* note 59.

<sup>62</sup>Eanes Demographics, *supra* note 60.

<sup>63</sup>Pennsylvania Higher Education Assistance Agency, *Making Sense of ACT/SAT Scores*, EDUCATIONPLANNER.ORG, <http://www.educationplanner.org/parents/act-sat-scores.shtml> (last visited March 17, 2018).

<sup>64</sup>Student Assessment Division, Texas Education Agency, *STAAR Resources*, <https://tea.texas.gov/student.assessment/staar/> (last visited March 17, 2018).

<sup>65</sup>*Id.*

	San Perlita ISD <sup>66</sup>	Eanes ISD <sup>67</sup>
SAT: <sup>68</sup>	1271	1824
ACT: <sup>69</sup>	16.3	26.8
STAAR Reading: <sup>70</sup>	39%	84%
STAAR Science: <sup>71</sup>	36%	83%
STAAR Math: <sup>72</sup>	47%	81%
STAAR Social Studies: <sup>73</sup>	44%	85%

Last year's Texas Academic Performance Report (TAPR) shows that in Eanes ISD, the overwhelming majority of students performed at least at grade level on the STAAR test, whereas in San Perlita ISD less than half of the students performed at grade level.<sup>74</sup> This indicates that more than half of San Perlita ISD students are performing below their grade level. Performing below grade level also indicates a need for remedial classes, an additional expense on a school district. The TAPR indicates that with the SAT and ACT scores for San Perlita ISD students, the chances of acceptance to a good college is low because their median SAT and ACT fall far below the maximum and national average of 1484 for the SAT and a 20.8 for the

<sup>66</sup>Division of Performance Reporting, Texas Education Agency, *2016-17 Texas Academic Performance Report for San Perlita ISD 2*, 11 (2017), [http://www.spisd.org/files/\\_jLBGs\\_/f0c5ff164a9ba0353745a49013852ec4/TAPR\\_-\\_campuses.pdf](http://www.spisd.org/files/_jLBGs_/f0c5ff164a9ba0353745a49013852ec4/TAPR_-_campuses.pdf) [hereinafter San Perlita TAPR]; Junho Suh, *The SAT from 2016 Onward*, IVY GLOBAL, <http://sat.ivyglobal.com/new-vs-old/> (last visited March 17, 2018).

<sup>67</sup>Division of Performance Reporting, Texas Education Agency, *2016-17 Texas Academic Performance Report for Eanes ISD 2*, 12 (2017), [https://www.eanesisd.net/uploaded/District/Our\\_District/Reports/TAPR/tapr\\_whs.pdf](https://www.eanesisd.net/uploaded/District/Our_District/Reports/TAPR/tapr_whs.pdf) [hereinafter Eanes TAPR].

<sup>68</sup>This refers to the average SAT score for the Class of 2016.

<sup>69</sup>This refers to the average ACT score for the Class of 2016.

<sup>70</sup>This refers to the percent of students scoring at "Meets Grade Level" in STAAR Reading testing in 2017.

<sup>71</sup>This refers to the percent of students scoring at "Meets Grade Level" in STAAR Science testing in 2017.

<sup>72</sup>This refers to the percent of students scoring at "Meets Grade Level" in STAAR Math testing in 2017.

<sup>73</sup>This refers to the percent of students scoring at "Meets Grade Level" in STAAR Social Studies testing in 2017.

<sup>74</sup>San Perlita TAPR, *supra* note 66, at 2; Eanes TAPR, *supra* note 67, at 2.

ACT.<sup>75</sup> This is key because performing well on a college-readiness exam can help students when applying for colleges and also indicates how they might perform in college.

The demographics and socio-economic background for these two school districts are also dramatically different.

	San Perlita ISD <sup>76</sup>	Eanes ISD <sup>77</sup>
African American:	0.4%	0.7%
Hispanic:	89.8%	12.9%
White:	9.5%	69.7%
American Indian:	0%	0.2%
Asian:	0%	12.2%
Pacific Islander:	0%	0%
Two or more races:	0.4%	4.4%
Economically Disadvantaged: <sup>78</sup>	74.1%	2.4%
English Language Learners: <sup>79</sup>	10.6%	2.2%
At-Risk: <sup>80</sup>	42.7%	9.4%

The Texas Supreme Court in *Morath*, its most recent decision on the school finance system, reminded us that it has recognized that “more money

<sup>75</sup> See San Perlita TAPR, *supra* note 66, at 2; Eanes TAPR, *supra* note 67, at 2; 2016 *College-Bound Seniors: Total Group Profile Report*, COLLEGEBOARD 1 (2016), <https://reports.collegeboard.org/pdf/total-group-2016.pdf> (combined average SAT score for 2016); *The ACT Profile Report – National: Graduating Class 2016*, ACT, INC. 8 (2016), [https://www.act.org/content/dam/act/unsecured/documents/P\\_99\\_999999\\_N\\_S\\_N00\\_ACT-GCPR\\_National.pdf](https://www.act.org/content/dam/act/unsecured/documents/P_99_999999_N_S_N00_ACT-GCPR_National.pdf) (average ACT score for 2016).

<sup>76</sup> San Perlita TAPR, *supra* note 66, at 12.

<sup>77</sup> Eanes TAPR, *supra* note 67, at 13.

<sup>78</sup> Division of Research and Analysis, Texas Education Agency, *Glossary of Terms, 2007–08* (2007), <https://rptsrv1.tea.texas.gov/acctres/gloss0708.html> (“An economically disadvantaged student is defined as one who is eligible for free or reduced-price meals under the National School Lunch and Child Nutrition Program.”) [hereinafter *Glossary of Terms*].

<sup>79</sup> TEX. EDUC. CODE ANN. § 29.052 (West 2012) (defining “student of limited English proficiency” as a student whose primary language is other than English and whose English language skills are such that the student has difficulty performing ordinary classwork in English).

<sup>80</sup> *Glossary of Terms*, *supra* note 78 (defining “at-risk” as a student who meets one or more of thirteen criteria).

does not guarantee better schools or more educated students,” after dismissing the studies showing support for the relationship between school funding and long-term educational outcomes.<sup>81</sup> To come to this conclusion, the court ignored the “tremendous inequities at the higher tax levels and higher expenditures that exist within the Texas school finance system.”<sup>82</sup> The court excused the State’s failure to calculate the actual cost of education by assuming that the cost of an adequate education was not of constitutional import.<sup>83</sup> Attending an underfunded school reduces the student’s long-term educational outcomes.<sup>84</sup>

### *B. The Discriminatory Effects of the Current School Finance System*

Often discrimination based on race and discrimination based on class can go hand in hand when looking at education. Student enrollment in Texas public schools set a record when it surpassed five million students in 2014.<sup>85</sup> During the 2012–2013 school year, the number of economically disadvantaged students in Texas rose to 60.3%, but no changes in funding have occurred, which means that even with this demographic change in Texas, the state agency still relies on a metric from 1991 to determine the cost of educating children.<sup>86</sup> Many of the economically disadvantaged live in property-poor areas with school districts that are unable to provide the funding necessary for their growing economically disadvantaged student population.<sup>87</sup>

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<sup>81</sup> *Morath v. Tex. Taxpayer & Student Fairness Coal.* (Edgewood VII), 490 S.W.3d 826, 852 n.152, 860 (Tex. 2016). When the court relied on this finding, it relied on the Coleman Report, a fifty-year-old study that has since been discredited. Kauffman, *supra* note 18, at 177–78 (“Those who argue that increased funding does not make a difference in public school educational outcomes heavily rely on The Coleman Report.”).

<sup>82</sup> *Morath*, 490 S.W.3d at 852 n.152; Kauffman, *supra* note 18, at 170–71.

<sup>83</sup> Kauffman, *supra* note 18, at 171.

<sup>84</sup> For more on the effects of the *Morath* ruling, see generally Kauffman, *supra* note 18.

<sup>85</sup> Aamena Ahmed, *Public School Enrollment Tops 5 Million in Texas*, THE TEX. TRIBUNE (April 1, 2014), <https://www.texastribune.org/2014/04/01/report-texas-public-schools-enrollment-soars/>.

<sup>86</sup> See *id.*; *School Finance 101*, *supra* note 30, at 12.

<sup>87</sup> Ahmed, *supra* note 85.

This change in demographics is important because it also changes the cost of education.<sup>88</sup> Both English Language Learners and economically disadvantaged students cost more to educate because they require specialized faculty or more remedial classes.<sup>89</sup> Economically disadvantaged students often hear fewer words and come to school with smaller vocabularies because they may have parents who may work multiple jobs and do not have the resources or time to prepare their children for school, such as having time to read to their children at night.<sup>90</sup> This can set economically disadvantaged students off at a disadvantage compared to peers whose parents did have the resources to prepare their children for starting school.<sup>91</sup> When students start off with this type of disadvantage, it becomes important to have more teachers to cater to their needs, more classroom intervention, and more opportunities for small group learning.<sup>92</sup> Currently, economically disadvantaged students are five times less likely to graduate than more affluent students.<sup>93</sup> School districts in property-poor areas currently do not have the funds to provide economically disadvantaged students with additional services and supports.<sup>94</sup> Chandra Kring Villanueva, a policy analyst with the Center for Public Policy Priority, says that it always comes back to funding and also said the following:

There's a reason why private education costs up to \$25,000 per year sometimes for high school students. Money does play a large role . . . . Schools are staff intensive. When you cut funding, you almost automatically increase class sizes because that's where schools make up the cuts. They cut teachers. Without the funding there, you can't provide extra tutoring.<sup>95</sup>

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<sup>88</sup> See The Classroom Teacher, *Texas Teachers Take on Tougher Challenges as the Number of Economically Disadvantaged Students Continues to Grow*, TEX. CLASSROOM TEACHERS ASSOC. (2014), [https://tcta.org/node/13805-teachers\\_deal\\_with\\_the\\_prevalence\\_of\\_poverty](https://tcta.org/node/13805-teachers_deal_with_the_prevalence_of_poverty).

<sup>89</sup> See *id.*

<sup>90</sup> *Id.*

<sup>91</sup> See *id.*

<sup>92</sup> See *id.*

<sup>93</sup> *Id.*

<sup>94</sup> See *id.*

<sup>95</sup> *Id.* (internal quotations omitted).

When schools are forced to cut funding and then cut programs such as extra tutoring, students who need additional support or are struggling with a subject cannot receive the help they need. Adding more funding to schools can allow them to provide more support to struggling students.<sup>96</sup>

Economically disadvantaged students often live in school districts in property-poor areas.<sup>97</sup> These property-poor school districts have the most difficult time raising money to adequately support their schools and allow their students an equal opportunity to education.<sup>98</sup> Thus, these school districts have to tax property at a higher rate.<sup>99</sup> Even though they tax at a higher rate, the property value of property-poor areas is low, so they receive fewer tax dollars, and the TEA tends to refer to them as underperforming school districts.<sup>100</sup> By basing school funding off property taxes, Texas ensures that those in poor areas are forced to attend inferior schools compared to those in affluent areas.<sup>101</sup> Judge Dietz, the district court judge for *Morath*, explained the need for change:

If existing gaps between Whites and other minorities in educational attainment levels and household income remain in place, Texas will have a population that not only will be poorer, less well educated, and more in need of numerous forms of state services than its present population but also less able to support such services. It is likely to be less competitive in the increasingly international labor and other markets.<sup>102</sup>

Education is one means for the poor to leave poverty, as education has been shown to correlate with an increase in income.<sup>103</sup> Better education in

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<sup>96</sup> *See id.*

<sup>97</sup> Brian Stork, Comment, *What About Our Future? The Chaos That Is the Texas School Finance System*, 8 SCHOLAR 307, 339 (2006).

<sup>98</sup> *Id.*

<sup>99</sup> *Id.* at 345

<sup>100</sup> *Id.* at 335.

<sup>101</sup> *Id.*

<sup>102</sup> Stork, *supra* note 97, at 339 (internal quotations omitted) (citing Findings of Fact and Conclusions of Law at 23, No. 70, W. Orange-Cove Consol. Indep. Sch. Dist. v. Neeley, No. GV-100528 (250th Dist. Ct., Travis County, Tex. Nov. 30, 2004)).

<sup>103</sup> *See generally* Masood Sarwar Awan et al., *Impact of Education on Poverty Reduction*, 3 INT'L J. OF ACADEMIC RESEARCH 659 (2011). Awan's study was conducted outside of the United States and looked at income rates of individuals in impoverished communities to calculate the

Texas might similarly impact Texas incomes. There is a direct correlation between education and income.<sup>104</sup> Thus, if Texas provides education without the current discriminatory effects, the state is more likely to have citizens with higher incomes who are more competitive in the international marketplace.<sup>105</sup>

#### IV. POSSIBLE SOLUTIONS

As long as Texas chooses to fund schools through local property taxes, Texas will not allow students an equal opportunity to education.<sup>106</sup> Profits and wealth vary across the state, making it almost impossible for property taxes to provide all schools with the necessary funding.<sup>107</sup> Texas's unequal urban and suburban development creates differing property wealth and education revenues across the state.<sup>108</sup> For years, Texas legislators have promised lower local property taxes while, at the same time, passing education finance schemes like Robin Hood that heavily rely on local property taxes.<sup>109</sup> School districts need more funds, but Democrats and

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impact of education. I believe this study can be extrapolated to apply to Texas communities as well.

<sup>104</sup> *See id.*

<sup>105</sup> *See id.*

<sup>106</sup> *See* Shimek, *supra* note 8, at 533–35; Corydon Ireland, *The Costs of Inequality: Education's the One Key That Rules Them All*, THE HARVARD GAZETTE (Feb. 15, 2016), <https://news.harvard.edu/gazette/story/2016/02/the-costs-of-inequality-educations-the-one-key-that-rules-them-all/> (“Right now, there exists an almost ironclad link between a child’s ZIP code and her chances of success . . . . Our education system, traditionally thought of as the chief mechanism to address the opportunity gap, instead too often reflects and entrenches existing social inequities.”).

<sup>107</sup> Shimek, *supra* note 8, at 551–52.

<sup>108</sup> *Id.*; *see* R.G. Ratcliffe, *GOP Collapse on Robin Hood: When Promises to Voters Flop*, HOUS. CHRON. (Aug. 17, 2005), <http://www.chron.com/news/article/Analysis-Unkept-vows-keep-Robin-Hood-alive-1946901.php> (emphasizing the different views across Texas—Harris County focused on property tax cuts, the Dallas area wanted to end Robin Hood, and rural legislators wanted more money for their schools).

<sup>109</sup> Shimek, *supra* note 8, at 545–46; *see* Tex. H.B. 21, 85th Leg., R.S. (2017) (reducing the property taxes subject to recapture); Mike Collier, *Texas Policies that Contribute to the Current Property Tax Crisis*, TRIBTALK (Jan. 24, 2018), <https://www.tribtalk.org/2018/01/24/texas-policies-that-contribute-to-our-current-property-tax-crisis/> (“If elected lieutenant governor, I will be honest about all this, which is the only way to solve the property tax crisis. I will work with the Legislature to close the big corporate loophole and recover the missing funds from owners of large, commercial and industrial properties. This isn’t raising taxes—this is simply enforcing the law. My hope is that this will recover enough revenues to begin addressing the property tax crisis and our chronically underfunding public schools.”).



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Republicans in the Texas legislature struggle to agree on another taxable source. Increasing the funding and reducing the monetary inequities between school districts will not eliminate all the problems, but it will alleviate many of them.<sup>110</sup> Texas should consider alleviating many of the inequities in the current finance system by changing or modifying the taxation methods.

#### A. *Taxation Methods*

Texas needs to consider both implementing new funding options as well as changing parts of the current system to remove the inequities from school district to school district. Other scholars have recommended creating a state income tax, modifying the franchise tax, modifying the sales tax.<sup>111</sup>

##### 1. State Income Tax

Implementing a state income tax would allow the school system to receive greater funding and reduce the pressure for school districts to

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<sup>110</sup>See Shimek, *supra* note 8, at 547–48 (discussing external factors that inhibit equality in educational achievement such as the student’s home life, the size of facilities, the number of faculty and staff, and support services for families).

<sup>111</sup>See Paula Moore, Comment, *Robin Hood: To Not Be or How to Be, that is the Question – An Analysis of the Problems with Texas School Financing Today and a Proposal for a Better Tomorrow*, 38 TEX. TECH. L. REV. 455, 482–86 (2006); see also Stork, *supra* note 97, at 345–48. Some scholars have recommended school-based funding or a micro-level school finance where the State would continue with its normal tax laws, but also compute a campus foundation program allotment for each public school in Texas to reflect the cost of a basic accredited education in Texas. See Catherine Clark & Laurence Toenjes, *Exploring Alternatives for School-Based Funding*, NAT’L CTR. FOR EDUC. STATISTICS: SELECTED PAPERS IN SCH. FIN., 114 (1996), available at <https://nces.ed.gov/pubs98/clark.pdf>. This would also substantially increase the State’s share of public education funding. *Id.* at 126. The Joint Select Committee on Public School Finance has also recommended expanding the existing lottery by adding video lottery terminals to provide additional revenue. Joint Select Comm. On Pub. Sch. Fin., Report to the Legislature, 78th Leg., at 41 (2004), available at [http://www.senate.state.tx.us/cmtes/78/c880/JSCPSF\\_fr2004.pdf](http://www.senate.state.tx.us/cmtes/78/c880/JSCPSF_fr2004.pdf) [hereinafter 2004 Public School Finance Report].

increase property.<sup>112</sup> Only seven states have no state income tax: Alaska, Florida, Nevada, South Dakota, Washington, Wyoming, and Texas.<sup>113</sup>

State income tax works similarly to federal income tax.<sup>114</sup> Residents of that state report all income, take deductions, and file either a paper tax return or an electronic tax return.<sup>115</sup> The main difference between a state income tax and a federal income tax is that states tend to charge lower tax rates, and each state has their own tax bracket system.<sup>116</sup> The IRS also allows individuals to deduct the state income tax from their federal tax return, which has the effect of lowering the individual's taxable estate and allows them to pay less federal taxes, easing the burden on taxpayers whose state has an income tax.<sup>117</sup> If Texas implements a state income tax, Texan taxpayers would benefit from this federal deduction. A personal state income tax also has the advantage of being more progressive.<sup>118</sup> A progressive tax is a tax that takes a higher percentage of income from high-income taxpayers and a lower percentage of income from low-income taxpayers, and is designed to place the greater tax burden on those with the greater ability to pay.<sup>119</sup> Such a progressive solution is preferable to other proposed methods, including raising a sales tax or removing exemptions for groceries and medicines, which are regressive in nature.<sup>120</sup>

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<sup>112</sup>Stork, *supra* at 97, at 345; Joint Select Comm. on Pub. Sch. Fin., Report to the Leg., 77th Leg., at 44 (2002), available at [http://www.house.state.tx.us/\\_media/pdf/committees/reports/77interim/school\\_finance.pdf](http://www.house.state.tx.us/_media/pdf/committees/reports/77interim/school_finance.pdf) [hereinafter 2002 Public School Finance Report].

<sup>113</sup>Travis H. Brown, *Texas Has No State Income Tax, and Millennials Use That to Their Advantage*, HOW MONEY WALKS (Aug. 5, 2015), <http://www.howmoneywalks.com/texas-has-no-state-income-tax-and-millennials-use-that-to-their-advantage/>.

<sup>114</sup>Dennis Hartman, *Pros & Cons of State Income Tax*, SAPLING (Nov. 6, 2010), <https://www.sapling.com/7453876/pros-cons-state-income-tax>.

<sup>115</sup>*Id.*

<sup>116</sup>*Id.*

<sup>117</sup>2002 Public School Finance Report, *supra* note 112, at 19; Internal Revenue Service, *Topic Number: 503 – Deductible Taxes* (Jan. 3, 2018), <https://www.irs.gov/taxtopics/tc503>.

<sup>118</sup>2004 Public School Finance Report, *supra* note 111, at 43; Gregory Hamil, *Pros & Cons of State Income Tax*, POCKET SENSE, <https://pocketsense.com/pros-cons-state-income-tax-8295.html> (last visited March 17, 2018).

<sup>119</sup>Hamil, *supra* note 118.

<sup>120</sup>Bruce Davidson, *Texas Kids Need State Income Tax*, SAN ANTONIO EXPRESS-NEWS (July 24, 2005), available at <http://shapleigh.org/news/413-texas-kids-need-state-income-tax> (“A state income tax is by far the most sensible way to make sure all Texas children get a fair chance to succeed.”).

One drawback of adding a state income tax is it creates an additional responsibility for taxpayers, who must file two separate tax returns and pay taxes to the federal and the state government.<sup>121</sup> This creates more opportunities for error on the part of citizens.<sup>122</sup> Another concern is that state residents may choose to move based on state income tax rates or move to a state without a state income tax.<sup>123</sup> On the other hand, many states without state income tax have higher sales tax and property tax rates to make up for the money the state loses from not taxing its residents' income.<sup>124</sup> Another economic concern is that, since state income taxes take money from average workers, this can result in less disposable income and cause consumer spending to decline, which would harm the economy.<sup>125</sup>

According to the Joint Select Committee on Public School Finance, a state income tax would reduce school property taxes by 85%.<sup>126</sup> Article VIII, Section 24 of the Texas Constitution has already provided for personal income tax and guarantees that two-thirds of the proceeds would go back to taxpayers in lower property taxes if implemented by referendum.<sup>127</sup> Implementing an income tax would allow Texas legislators to fulfill two promises to Texas citizens that currently stand as contradictory goals: (1) to reduce property taxes; and (2) to adequately fund public schools.<sup>128</sup>

## 2. Franchise Tax

The Joint Select Committee noted that the franchise tax is considered one of the most inefficient taxes utilized by the State.<sup>129</sup> The Texas franchise tax is imposed on taxable entities that are formed, organized, or

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<sup>121</sup>Hartman, *supra* note 114.

<sup>122</sup>*Id.*

<sup>123</sup>*Id.*

<sup>124</sup>*Id.*

<sup>125</sup>Hamil, *supra* note 118.

<sup>126</sup>2002 Public School Finance Report, *supra* note 112.

<sup>127</sup>Davidson, *supra* note 120; *see* TEX. CONST. art. VIII, § 24.

<sup>128</sup>*See* Davidson, *supra* note 120; *see also* R.G. Ratcliffe, *Are Your Property Taxes Too High? Thank a Legislator*, TEX. MONTHLY (Feb. 15, 2017), <https://www.texasmonthly.com/politics/property-taxes-high-thank-legislator/>; Ross Ramsey, *There's a Reason Texas Governors Keep Failing to Lower Property Taxes*, THE TEX. TRIBUNE (Jan. 17, 2018), <http://www.star-telegram.com/opinion/opn-columns-blogs/other-voices/article195185509.html>.

<sup>129</sup>2004 Public School Finance Report, *supra* note 111, at 42.

doing business in Texas.<sup>130</sup> This tax is based on a taxable entity's margin, which is determined using the total revenue and either cost of goods sold or another percentage determined by the Texas Tax Code.<sup>131</sup> In Texas, each taxable entity must file a Franchise Tax Report and an Information Report as a privilege for doing business or being organized in Texas.<sup>132</sup> The franchise tax was initially created by the Texas Legislature to reform Texas's school finance system, but it needs to be utilized more efficiently to be an effective method of taxing businesses.<sup>133</sup>

The franchise tax currently applies to businesses with liability protection provided them by the states, but not to other entities, including general partnerships.<sup>134</sup> The tax is more politically acceptable with the general public because, since 2006, the Texas Legislature has begun to modify the franchise tax to provide more funding for public school that does not come from property taxes.<sup>135</sup> Because of this, the public likely would not oppose modification to the franchise tax as strongly as it would other forms of taxation, as all revenue collected as a result of the franchise tax reform is distributed to the Property Tax Relief Fund—a fund used to offset lost school district revenue because of the 2008 property tax decrease.<sup>136</sup> The franchise tax can be beneficial to a new school financing system because in 2015–2017, it made up 5.4% of Texas revenue sources, or \$5.7 billion.<sup>137</sup> Franchise tax reform would also be more progressive because by taxing business, the State is taxing those individuals or entities that are more likely

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<sup>130</sup> *Franchise Tax Overview*, TEX. COMPTROLLER, <https://comptroller.texas.gov/taxes/publications/98-806.php> (last visited March 17, 2018).

<sup>131</sup> *Id.*

<sup>132</sup> *Id.*

<sup>133</sup> Edgar Walters, *Texas House Votes to Cut Business Tax that Funds Public Schools*, THE TEX. TRIBUNE (April 27, 2017), <https://www.texastribune.org/2017/04/27/texas-house-votes-cut-business-tax-funds-public-schools/>.

<sup>134</sup> *Franchise Tax Overview*, TEX. COMPTROLLER, <https://comptroller.texas.gov/taxes/publications/98-806.php> (last visited March 17, 2018).

<sup>135</sup> Moore, *supra* note 111, at 484; *Texas School Finance: Basics and Reform*, TEX. PUB. POLICY FOUND., at 46 (March 2016), <https://www.texaspolicy.com/library/doclib/TexasSchoolFinanceBasicsAndReform.pdf>.

<sup>136</sup> Moore, *supra* note 111, at 484; *Texas School Finance: Basics and Reform*, TEX. PUB. POLICY FOUND., at 46 (March 2016), <https://www.texaspolicy.com/library/doclib/TexasSchoolFinanceBasicsAndReform.pdf>.

<sup>137</sup> Moore, *supra* 111, at 484; *Texas School Finance: Basics and Reform*, TEX. PUB. POL'Y FOUND., at 11–12 (March 2016), <https://www.texaspolicy.com/library/doclib/TexasSchoolFinanceBasicsAndReform.pdf>.

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to be able to pay a higher tax burden, unlike the regressive consequences of raising the sales tax.<sup>138</sup>

To allow for the franchise tax to support Texas public schools rather than property taxes, the Texas Legislature could apply the franchise tax to all forms of business, subject to a small firm exemption.<sup>139</sup> This reform should include various measures, such as reducing or closing loopholes to reduce opportunities for tax avoidance.<sup>140</sup> The Texas Legislature should apply the franchise tax more widely, reduce loopholes, and analyze the use of franchise tax funds to find a way to use the revenue more efficiently to fund public schools.<sup>141</sup>

Texas elected officials often promote the idea of cutting both property taxes and the franchise tax, sometimes at the same time as promoting funding Texas public schools.<sup>142</sup> Since both the franchise and property taxes are commonly used to fund public schools, cutting both taxes would contribute to our under-funded school system.<sup>143</sup> By sealing the franchise tax loopholes and using franchise tax revenue to fully fund public schools, Texas legislators could cut property taxes as well as create an equal opportunity to education for all its students across the state.<sup>144</sup>

### 3. Sales Tax

One option the Joint Select Committee on Public School Finance offered was to change the current sales tax to remove all exempt goods.<sup>145</sup> Removing all exempt goods from our current sales tax could replace property taxes as the funding base for Texas public schools.<sup>146</sup> However, at 6.25%, Texas's sales tax rate is already one of the highest in the nation, notwithstanding the fact that municipalities can increase this rate to 8.25%.<sup>147</sup> Additionally, some of the goods that are sales tax exempt are

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<sup>138</sup>2004 Public School Finance Report, *supra* note 111, at 42.

<sup>139</sup>*Id.*

<sup>140</sup>*Id.*

<sup>141</sup>*Id.*

<sup>142</sup>Walters, *supra* note 133.

<sup>143</sup>*Id.*

<sup>144</sup>Moore, *supra* note 111, at 482.

<sup>145</sup>*Id.*

<sup>146</sup>*Id.*; 2004 Public School Finance Report, *supra* note 111, at 42.

<sup>147</sup>Moore, *supra* note 111, at 482; 2002 Public School Finance Report, *supra* note 112, at 19.

staple consumer goods, such as medicine and groceries.<sup>148</sup> Removing these exemptions could prevent low-income individuals from having access to necessities.<sup>149</sup>

The Joint Select Committee recommended that, to avoid this, the State could exempt goods disproportionately used by the poor or offer a sales tax rebate.<sup>150</sup> One way to offer the poor a sales tax rebate is through the Texas Supplemental Nutrition Assistance Program (SNAP) using the Lone Star Card. Expanding the utilization of the Lone Star Card program could help prevent a rising sales tax rate or removing exemptions from disproportionately affecting the poor by providing a rebate on any Lone Star program dollars used on sales taxes.<sup>151</sup> This could work by either making necessities bought using a Lone Star Card tax free, or by immediately refunding the card for amounts spent on sales tax.

An issue with this solution is that, in order to receive a Lone Star Card, a Texan must be eligible for SNAP benefits.<sup>152</sup> Many Texans who face food insecurity and would be affected by enforcing a sales tax on groceries and medicine may not meet the requirements to qualify for SNAP benefits.<sup>153</sup> For example, a two-person household must make less than \$21,112 a year to meet the income requirements.<sup>154</sup> Individuals above that level may still be considered the working poor and face food insecurity, and thus would still be affected by taxing sales of consumer goods like groceries and medicine.

Instead of removing the sales tax exemption on groceries and medicine, the Committee alternatively recommended raising excise tax rates to levels comparable to other states that tax these items more aggressively.<sup>155</sup> An

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<sup>148</sup>Moore, *supra* note 111, at 482; 2004 Public School Finance Report, *supra* note 111, at 41.

<sup>149</sup>Moore, *supra* note 111, at 482; 2004 Public School Finance Report, *supra* note 111, at 41.

<sup>150</sup>Moore, *supra* note 111, at 482–83; 2004 Public School Finance Report, *supra* note 111, at 41.

<sup>151</sup>Moore, *supra* note 111, at 482–83; 2004 Public School Finance Report, *supra* note 111, at 41.

<sup>152</sup>*Lone Star Card*, TEX. HEALTH & HUMAN SERVS., <https://hhs.texas.gov/services/financial/lone-star-card> (last visited March 17, 2018).

<sup>153</sup>*Id.*; Barbara Jones, *SNAP Basics*, 46 CLEARINGHOUSE REV. 236 (2012); *SNAP Food Benefits*, YOUR TEX. BENEFITS, <https://yourtexasbenefits.hhsc.texas.gov/programs/snap> (last visited March 17, 2018).

<sup>154</sup>*Texas Supplemental Nutrition Assistance Program*, BENEFITS.GOV, <https://www.benefits.gov/benefits/benefit-details/1348> (last visited March 17, 2018).

<sup>155</sup>2004 Public School Finance Report, *supra* note 111, at 42.

excise tax is a tax directly levied on specific goods by the state or federal government.<sup>156</sup> Texas collects excise taxes on gasoline, diesel, cigarettes, alcoholic beverages, and phone service plans.<sup>157</sup> Texas does not have as high an excise tax rate as many other states, such as California and New York.<sup>158</sup> The Committee pointed out that one possible concern is that raising these tax rates may be regressive, as it raises the tax burden on the poor.<sup>159</sup>

#### 4. What to Do with Tax Revenue

The State needs to focus on making an equitable fund disbursement when it receives tax revenue. First, the cost of education index should be annually or bi-annually updated to allow for inflation and demographic changes so that if a school's ESL student population grows over a year or two, for example, the funds the school needs to provide adequate education can also increase. Also, as Texas is a large state with varying socioeconomic statuses, any state-wide cost of education will be skewed. Texas has several small school districts where the cost of education per student is higher, but it also has large school districts where the cost of education per student may be lower. Because of this great variability, if the State developed a statewide cost of education, then some schools might not get the funds they need. This index needs to be weighted based on what it takes to equitably educate all students in each district. For example, if a student needs special education services, then the student will cost more to educate, and that should factor into the cost of education for that district.

Second, the cap on the amount of special education services a school can provide is inequitable and does not allow schools to provide their students with the necessary services to allow them to have an equal opportunity to an education. Thus, the State needs to look at a weighted cost per pupil for education expenses at each district that considers how many low socioeconomic, at-risk, or special education students the district has. This might seem like a complicated task with over one thousand school

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<sup>156</sup>Lisa Minton, *How Texas Taxes 'Sin'*, Fiscal Notes, TEX. COMPTROLLER, <https://comptroller.texas.gov/economy/fiscal-notes/2015/november/sintax.php> (last visited March 17, 2018).

<sup>157</sup>*Id.*; *Texas State Excise Taxes 2018 – Fuel, Cigarette, and Alcohol Taxes*, TAX-RATES.ORG, <http://www.tax-rates.org/texas/excise-tax> (last visited March 17, 2018).

<sup>158</sup>2004 Public School Finance Report, *supra* note 111, at 42.

<sup>159</sup>*Id.*

districts in Texas, but if the State aids districts in consolidating, this calculation becomes simpler.<sup>160</sup> Texas currently has 1,037 school districts, many of which are very small.<sup>161</sup> If these school districts consolidate, there would be fewer districts for the State to calculate, and there would also be lower overhead costs on school districts.<sup>162</sup> For example, Maine began consolidating school districts in 2007 and saved the state \$36 million and local districts \$30 million each year.<sup>163</sup> Even without school district consolidation, the State needs to be more intentional with these funds so that every Texas school district can receive the funds necessary to educate its students.

## V. CONCLUSION

*“If inequality starts anywhere . . . it’s with faulty education. Conversely, a strong education can act as the bejeweled key that opens gates through every other aspect of inequality, whether political, economic, racial, judicial, gender- or health-based.”*<sup>164</sup>

Funding public education is no simple task, but it is a crucial one. It is Texas’s job to ensure education for each student within its borders. The system as it stands separates the wealthy and the poor—when Texas students attend a system funded by property taxes, the wealthy schools stay well-funded, while the poor schools stay under-funded.

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<sup>160</sup> See *infra* Part IV.B.

<sup>161</sup> Chris Patterson, *School District Consolidation and Public School Efficiency* 1, TEX. PUB. POLICY FOUND. (2006), <https://www.texaspolicy.com/library/doclib/2006-02-PP-consolidation-cp.pdf>.

<sup>162</sup> Ulrich Boser, *Size Matters: A Look at School-District Consolidation* 11, CTR. FOR AM. PROGRESS (2013).

<sup>163</sup> Tim Weldon, *The Promises and Perils of School District Consolidation*, THE COUNCIL OF ST. GOV’TS (Jan. 27, 2017), <http://knowledgecenter.csg.org/kc/content/promises-and-perils-school-district-consolidation>. For more on school district consolidation, see *School and District Consolidation*, NAT’L CONF. OF ST. LEGISLATURES (March 14, 2011), <http://www.ncsl.org/research/education/school-and-district-consolidation.aspx>; see also Dwight A. Cooley & Koy A. Floyd, *Small Rural School District Consolidation in Texas: An Analysis of Its Impact on Cost and Student Achievement*, 3 ADMIN. L.J.45, 46 (2013); William Duncombe & John Yinger, *Does School District Consolidation Cut Costs?*, Center for Policy Research Working Paper No. 33 (2001), available at [https://www.maxwell.syr.edu/uploadedFiles/cpr/publications/working\\_papers/wp33.pdf](https://www.maxwell.syr.edu/uploadedFiles/cpr/publications/working_papers/wp33.pdf).

<sup>164</sup> Ireland, *supra* note 106.



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As a state in the country known for “living the American dream,” Texas starts a portion of its public school students off at a disadvantage.<sup>165</sup> Texas legislators continue to try to fix the symptoms rather than cut to the root of the issue. Our system may have worked 200 years ago, but it cannot stand today, and legislators need to consider more proactive ways to remedy a growing problem. In Texas, a zip code should no longer predict a student’s success.<sup>166</sup>

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<sup>165</sup> Kimberly Amadeo, *What Is the American Dream? The History that Made It Possible*, THE BALANCE (September 15, 2017), <https://www.thebalance.com/what-is-the-american-dream-today-3306027>.

<sup>166</sup> *Id.*