The Property Tax in Texas
Under State and Federal Law

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In a popular play by the French playwright and novelist Albert Camus, a character gleefully defends a law that is so complex that virtually no one can ascribe any meaning to it: "It's intended to get them used to that touch of obscurity which gives all government regulations their peculiar charm and efficacy. The less these people understand, the better they'll behave."1 With respect to the administration of local and state property taxes, the American people have endured so much obscurity that the average citizen comprehends little about the workings of the property tax system; his understanding is largely limited to the tax bill that mysteriously arrives once a year. Notwithstanding the advice of Camus' character, this lack of understanding has not led to better behavior by American taxpayers. In the constantly fluctuating hierarchy of unpopular governmental measures, the property tax in recent years has forged into the lead.2 In part, this dubious notoriety reflects the visibility of the tax as the mainstay of local government. Most communities across the country rely substantially on the property tax to support public services including police and fire protection, sewage disposal, roads, hospitals, and public schools.3 But the largest share of public criticism is directed at its failings. While it is difficult to characterize any form of taxation as popular, the property tax is widely perceived as more inequitable, inefficient, and corrupt than other revenue sources.4

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This article is a modified version of a report submitted to the Texas Legislative Property Tax Committee. The views expressed are entirely the author's and not those of the committee. The author wishes to acknowledge the helpful assistance of Carol Couch, David Hilgers, and Irene Jackson.

2. ADVISORY COMMISSION ON INTERGOVERNMENTAL RELATIONS, FINANCING SCHOOLS AND PROPERTY TAX RELIEF—A STATE RESPONSIBILITY: THE REPORT IN BRIEF 9 (1973) [hereinafter cited as TAX RELIEF REPORT].
3. ADVISORY COMMISSION ON INTERGOVERNMENTAL RELATIONS, TAX OVERLAPPING IN THE UNITED STATES 4 (1964).
The criticisms of the property tax are as diverse as they are numerous. Some economists have attacked it for casting a disproportionate burden on those who are least able to pay. Other critics have argued that its unpopularity threatens continued public support of vital government services. President Nixon captured the sense of both criticisms in his State of the Union Address of January 1972:

[S]oaring school costs, soaring property tax rates now threaten both our communities and our schools. They threaten communities because property taxes . . . have become one of the most oppressive and discriminatory of all taxes, hitting most cruelly at the elderly and the retired; and they threaten schools, as hard-pressed voters understandably reject new bond issues at the polls.

Still other critics have dwelled on the inadequacies of property tax administration, leaving untouched a more fundamental question—whether it continues to be a vital and acceptable revenue source. Perhaps the most influential of these critics is the Advisory Commission on Intergovernmental Relations, which characterized modern property tax administration as one of the few “treasured relics of pioneer days” that cannot be found in a museum. The ACIR examined practices in many states and found that “[t]he average assessor makes himself a sort of one-man legislature.” This element of lawlessness, combined with ancient assessment and collection practices, produces a property tax structure riddled with inequality and inefficiency.


8. ACIR REPORT, supra note 7, at 3.

9. Id. at 4.

10. The ACIR concluded that a number of problems of property tax administration were widespread: (1) the failure to tax tangible and intangible personal property even where state law provides for their inclusion in the property tax base, id. at 30; (2) the erosion of the tax base by improvidently granted exemptions which were unequally applied across the state, id. at 76-87; (3) the sham of relying on self-assessment to discover and value real and personal property, id. at 31-32; (4) the lack of professionally qualified assessors, id. at 105-08; (5) the practice of assessing property at only a fraction of true market value and of applying unequal fractions (assessment ratios) so
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The pattern of property tax administration in Texas is no exception to the national picture. Texas provides a model of inept and unfair administration. Over the years prestigious groups such as the Governor's Committee on Public School Education, the Texas Research League, the Texas State Tax Study Commission, the Texas Commission on State and Local Tax Policy, as well as many scholars, have pointed out that Texas has a completely inadequate property tax system. As Charles Bartlett stated in his report to the Governor's Committee on Public School Education, "inequalities are the rule in this State rather than the exception."

Despite the widespread and informed criticisms of the Texas property tax, both the legislature and the state courts have been unresponsive to the necessity for reform. While other states have moved to correct property tax abuses and inequalities, Texas decisionmakers have chosen to remain silent. Facts, studies, and public concern have apparently not shaken their complacency. Yet the prospect of intervention by the courts recently has created some stirrings. Suits challenging current methods of financing public education were filed in more than thirty states before the Supreme Court upheld these laws in Rodriguez v. San Antonio Independent School District. A number of challenges to state assessment practices have been sustained. The consequences of this litigation for the property tax have been widely misinterpreted—none of the suits demand its abolition. But present and future litigation may require significant changes in property tax administration.

that all property within a district is not assessed at a uniform percentage of true market value, id. at 40-43; (6) the practice of allowing local assessors complete discretion to fix an assessment ratio for their districts so that property in different districts is assessed at vastly unequal percentages of true market value, id.; (7) the failure of state governments to create viable structures for ensuring that assessments are properly and fairly reached and that taxpayers in the same district or in different districts are treated equally, id. at 47-58; (8) the unresponsiveness of state courts to the legitimate grievances of property taxpayers, id. at 135.

12. TEXAS RESEARCH LEAGUE, PUBLIC SCHOOL FINANCE PROBLEMS IN TEXAS (1972).
15. C. Bartlett, supra note 11, at 3.
19. TAX RELIEF REPORT, supra note 2, at 13.
I. Description of the Property Tax in Texas

An analysis of relevant judicial decisions concerning the Texas property tax requires a detailed view of its administration. While state statutory and constitutional provisions govern property taxation, the practical, day-to-day operations of the tax system reveal that practice often bears little relationship to the law. The most important statutory provision is Title 122 of the Texas Revised Civil Statutes, which deals specifically with state and county ad valorem property taxes. In addition, Title 28 governs the assessment and collection of property taxes by independent school districts and cities. Although for most purposes the two provisions have the same requirements, the Texas courts have been somewhat confused about whether Title 122 applies to independent school districts when Title 28 is silent.

In addition to counties, cities, and school districts, the legislature has authorized more than twenty types of special districts to fund water facilities, hospitals, housing, urban renewal, rural fire protection, and other local services. Most districts are governed by five-member boards; approximately three-fourths of these boards are elected, and the remainder are appointed, usually by a state official or by each county or municipality incorporated into the district.

A. The Tax Base

Texas is one of a declining number of states which insist that all property—real and personal, tangible and intangible—is taxable unless specifically exempted by the state constitution. To say that this definition of the tax base sweeps broadly is a gross understatement. Yet legislative exemptions partially undercut the property tax base, even though they must conform to state constitutional requirements. Generally, statutory exemptions apply to the property of governmental, charitable, educational, religious, nonprofit, and quasi-

21. Id. arts. 961-1269m.
22. No one knows how many special districts exist in Texas because those that are organized under general law provisions need never report their existence to the state. One source estimates that there are 1001 special districts in Texas. TAX FOUNDATION INC., FACTS AND FIGURES ON GOVERNMENT FINANCE 14 (1971). Not all districts have the power to levy ad valorem taxes, and the tax rates among districts having this power vary widely.
23. See generally W. Newhouse, CONSTITUTIONAL UNIFORMITY AND EQUALITY IN STATE TAXATION, 257-58 (1959) [hereinafter cited as CONSTITUTIONAL UNIFORMITY].
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public organizations. But the Texas Constitution also exempts $250 worth of household furnishings and allows an exemption of $3000 for homesteads from the state ad valorem property tax. The overwhelming bulk of these exemptions obviously are not available to individuals and businesses.

An even greater erosion of this broad tax base results from the helter-skelter, informal exemptions that assessors grant taxpayers. The net effect is that the laws of Texas give little indication of the true size of the tax base. In practice, personal property is rarely included—except for automobiles, which some 400 districts tax. Likewise, business personal property is exempted in many districts, and inventory is assessed only after it has been largely depleted. In reality, the property tax has become discriminatory: it taxes heavily those who invest in real property while the more affluent, who often invest in intangibles, remain largely beyond the reach of the tax laws.

While assessors must share a portion of the blame for the lawless diminution of the property tax base, they are not the major cause of the problem. Most taxpayers would be outraged if the assessor actually complied with the applicable laws on the property tax base. An assessor who insisted on taxing personal property would be courting political suicide. Equally important, the structure of the property tax system and the assessors' training are not geared to locating and taxing all real and personal property. An assessor does not have the legal power or the manpower to discover all the personal property in his district. He is usually at the mercy of the taxpayer, who is generally under no practical compulsion to reveal the full extent of his holdings. The solution is to change the law to comport with the actual tax base or to give the assessor the wherewithal to enforce it.

B. Property Tax Procedure and Practice

1. Assessment.—Texas statutes direct taxpayers to list or render all taxable property upon request by the assessor. Nonetheless, the only legal burden imposed on a taxpayer who fails to render voluntarily

26. Tex. Const. art. VIII, § 1. The provision also exempts household goods from a special county tax on road maintenance and flood control. Id. § 1-b.
27. C. Bartlett, supra note 11. Mortgages, savings accounts, stocks, bonds, and the whole panoply of household goods and chattels are largely untouched by the property tax.
is the denial of access to the local board of equalization, which may grant an exception. Because rendition is not mandatory, the statutes require the assessor to call on every taxpayer to request a listing of all property. If the taxpayer refuses, he may be fined up to $1000. Although research in the area is scanty, this archaic assessment procedure seems rather impractical. Since the assessor cannot personally call on every taxpayer except in small districts, the procedure is probably ignored. Additionally, the statutes impose a duty on the assessor to find and list all unrendered property. The assessor’s ability to discover unrendered property, however, is limited. He has the right to enter upon all real property in the district and list all the property he finds, but has no power to subpoena a taxpayer’s books or papers. In this fashion, his power of discovery is effectively limited to tangible property.

Although a taxpayer affirms that his list is complete and that his property valuation is correct, there is little practical compliance with these requirements. A taxpayer who is foolish enough to obey the law and render at fair market value places a floor beneath his assessment ratio that controls future judicial proceedings to contest the assessment. He may bind himself to an assessment ratio that is higher than the one in effect for the whole district. The assessor likewise swears that he has listed all eligible property on the tax roles and that he has listed all property at fair market value. But since fractional assessment and the exclusion of personal property from the tax roles are standard practices, neither assessors nor taxpayers take these oaths seriously.

If an assessor is not satisfied with a rendition received through the
mail, he notifies the taxpayer and refers the rendition to the board of equalization. If, in a face-to-face meeting, assessor and taxpayer disagree about the taxpayer's sworn valuation, the assessor must at that time notify the taxpayer, who may disagree under oath. In practice, these disputes are often settled by informal negotiation between the two parties. Otherwise, the rendition and the assessor's own estimate are referred to the board of equalization.

The statutory admonitions and unenforced punitive measures probably do not have much influence on assessment procedures. A more realistic scheme would require compulsory property tax returns with automatic listing of improvements to property and transfers of ownership. Moreover, if the legislature genuinely wants enforcement of its laws, it will have to provide expanded staffs and services for assessors.

2. Equalization of Assessments.—The Texas Constitution provides that "Taxation shall be equal and uniform. All property . . . shall be taxed in proportion to its value, which shall be ascertained as may be provided by law." The assessment statutes do not define the term "value," but Title 122 states that "true and full value" is the price obtainable at a private sale, rather than at a forced sale or auction. It further provides that county assessors are not free to "adopt a lower or different standard of value because the same is to serve as a basis of taxation." The actual state of assessment equalization in Texas bears no relationship to the statutory and constitutional requirements. Not only do counties fail to assess property at full market value (other taxing jurisdictions are not required to do so) but effective assessment ratios vary tremendously among and within counties.

Most assessors are poorly trained and lack the basic tools for competent assessment. One study of over 1200 assessments offices revealed that only sixty-eight assessors were professionally trained. Most did not have adequate maps, did not use building cost schedules, and did not have appraisal record cards on individual parcels. Since assessors have great difficulty valuing large businesses, they often arrive at an assessment ratio by negotiation with the company. Moreover, assessors are typically so unprepared for oil and gas property valuation

37. Id. art. 7185 (1960) (no comparable section in Title 28).
38. Id. art. 7211 (no comparable provision in Title 28).
41. Id. art. 7174 (Supp. 1973) (no comparable provision in Title 28).
42. C. Bartlett, supra note 11, at 5.
that outside firms are hired to perform the task. Even with this outside aid, a 1970 Nader research group found that the valuations placed on 1500 acres in two counties were 56 percent below full market value. Moreover, even assessors who are competent to determine property values still engage in fractional assessment in order to allow themselves greater room for error, hide any inequality from individual taxpayers, and avoid distressing their constituents.

In addition to inaccuracy in valuation, the constitutional promise of uniformity and equality within cities, school districts, and other taxing districts has not been realized. Some intradistrict variations arise from honest differences in judgment about the proper valuation of property, but most arise from deliberate policies of differentiation between types of property. Charles Bartlett found tremendous discrepancies in assessment ratios applied to different classes of property within individual districts. The 1970 Nader Report on the property tax in Texas compared assessment ratios for commercial and industrial property with the ratios for residential property in Houston and Harris County. The report found that residential property in Houston was assessed at 31 percent of true market value while commercial and industrial property was assessed at 13 to 17 percent. Harris County residences were assessed at 18 percent, but commercial and industrial property ranged from 7 to 11 percent.

Ostensibly the boards of equalization for each type of taxing district should correct the inequalities in assessments. By statute the boards

44. Inequality, supra note 16, at 1378.
45. C. Bartlett, supra note 11, at 12.

Average Statewide Assessment Ratios
By Class of Property (1966)

<table>
<thead>
<tr>
<th>Property Type</th>
<th>Assessment Ratio</th>
</tr>
</thead>
<tbody>
<tr>
<td>Undeveloped Land</td>
<td>14% of true market value</td>
</tr>
<tr>
<td>Commercial and Industrial Real Property</td>
<td>32%</td>
</tr>
<tr>
<td>Business Personality</td>
<td>27%</td>
</tr>
<tr>
<td>Utilities and Railroads</td>
<td>33%</td>
</tr>
<tr>
<td>Banks</td>
<td>41%</td>
</tr>
<tr>
<td>Minerals</td>
<td>26%</td>
</tr>
<tr>
<td>Private Homes</td>
<td>41%</td>
</tr>
</tbody>
</table>

Id.

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are quasi-judicial bodies whose decisions are final after a hearing on the merits. The various boards of equalization have the power to raise and lower assessments and the power of subpoena. After the board has corrected and equalized the assessor's list, it is returned to the assessor, who then makes up the tax rolls. Like assessment procedures, the statutory equalization procedures bear little relation to reality. Obviously the county boards do not take seriously their duty of ensuring that all property is listed at fair market value. The rampant inequalities in assessments attest to the failure of the boards to comply with their statutory and constitutional mandates.

The legislature must bear a large part of the blame for the absence of a workable structure for equalizing assessments. Despite its constitutional obligation to provide for equalized values within taxing jurisdictions, the legislature has never seen fit to establish a state board of equalization. There is a State Intangible Tax Board that apportions and equalizes the value of certain intangible assets, but this board has not been used for general equalization purposes. The establishment of a state equalization board, composed of qualified appointees who are well acquainted with the techniques and practicalities of property valuation, is essential to the proper administration of the Texas property tax system. An equalization board could be structured along three lines. It could be purely advisory, providing technical assistance to local assessors and recommending statutory changes to the legislature. Such a board might accumulate statistics on market values across the state, commission appropriate studies, and issue advisory opinions as to the proper interpretation of vague statutory provisions. While the board might monitor some local assessment practices, it would have no power to impose sanctions on taxing jurisdictions that flouted state law. Given the history of independent local assessors and the political facts of life for property tax assessment in Texas, there is no likelihood that an advisory equalization board would have any significant impact on inequalities and improprieties in property tax administration.


49. Id. art. 7212 (1960).
50. Id. art. 1055 (1963), and arts. 7206, 7218 (1960).
A second state equalization board model would give it extensive powers to monitor the activities of local assessors, impose sanctions where appropriate, and authoritatively interpret state property tax laws. While this board might well engage in many of the same activities as an advisory board, the critical difference is that it would have the ability to put some teeth into its pronouncements. It could spot check taxing jurisdictions for compliance with the law and take appropriate action to cure inadequacies. Such actions might include a public hearing on the taxing jurisdiction's assessment activities, an order to cease and desist from illegal activities, the withholding of required approval of the tax rolls before collections may begin, an injunctive suit brought in state court, or, in the extreme, the removal of a local tax assessor and the appointment of a master to oversee assessment and collection in the jurisdiction. This approach would require extensive changes in property tax laws, which would probably meet stiff political opposition. Its redeeming virtue, however, would be to offer the substantial prospect of reducing inequities while preserving the essential character of local administration of the property tax. In a large and decentralized state like Texas, it might offer the best balance between state intrusion and local autonomy.

Finally, a state equalization board might be given the power to assess all property in the state. Assessors would be paid employees of the board assigned to particular taxing jurisdictions—possibly on a temporary basis—who would be responsible to the central authority rather than local constituencies. Alternatively, the board might assess all property, leaving local assessors to issue tax bills and collect taxes based upon state certified tax rolls. Presumably such a system would yield equality and uniformity across the state, but the price would be a further expansion of central authority at the expense of local autonomy. There is little to suggest that such an approach would be acceptable to Texas executive and legislative officials.

C. Overlapping Tax Districts

Each ad valorem taxing district in the state—county, municipality, school district, special district—is entitled separately to assess and to set its own tax rates within legal limits. To some extent assessment and collection are consolidated; counties assess and collect state, county, and school district ad valorem taxes. Sometimes a county or city and an independent school district will combine tax offices. Yet because Texas has approximately 3000 taxing districts and 1500 different assessment offices, that collaboration is necessarily limited. In addition,
with the exception of special districts whose tax rates are fixed by their enabling legislation, the governing bodies of each district never relinquish their power to set tax rates within the legal maxima. Since Texas has 254 counties, the degree of overlap and waste is considerable.

In addition to this administrative inefficiency, special districts functionally overlap each other. Ideally, special districts exist to meet the difficulties that local governments encounter in providing essential public services. They can overcome a disparity between county or city lines and the relevant service area. A water district, for example, is a function of geography and rarely conforms to county or city lines. A special district, however, uses the same tax base as coterminous taxing entities and usually tends to be an instrument of the other entities. By simply imposing an additional special district tax, a county can avoid raising assessments, thus limiting state ad valorem taxes, which are based on county assessments. Moreover, since the increase is assigned to the special district that may or may not have a maximum rate, the increase in the tax rate is not included in the computation of the coterminous entity's legal maximum tax rate. Even when a county or district is not taxing at a rate close to the maximum, local officials may wish to unload an expensive service in order to have money for other services without appearing to raise taxes.

This system opens many pitfalls for the taxpayer. An individual who renders voluntarily to all the taxing districts that may tax his property faces an impossible task in deciding at what assessment ratio to render his property, since various districts probably employ different effective assessment ratios. The unequal effective ratios for different classes of property within each taxing district compound the problem. The claimed ratio may be available, but the actual ratio may not. Finally, the taxpayer must decide what personal property he must render to each district. The complexities of the rendering process may discourage even those who otherwise comply with the law.

II. Property Taxation and the Texas Courts

The ambiguities and shortcomings of constitutional and statutory property tax provisions have been accentuated by the treatment that Texas state courts have given property tax disputes. Court decisions are often cryptic, ill-considered, and ambiguous. Inconsistencies in legal doctrine are commonplace. Precedents are treated with a cavalier attitude; little effort is made to achieve uniformity in the application of the laws or to explain why earlier cases are not apposite. In the absence of legislative pronouncements, Texas courts have invented legal doctrines,
controlling presumptions, and burdens of proof that are mechanically applied. They have imposed upon themselves a remedial framework, which at times jeopardizes the financing of public services without making any progress toward compliance with constitutional and statutory dictates. In short, courts must bear a significant share of the blame for the lawless and inequitable operation of the Texas property tax system.

With the notable exception of fractional assessment by counties, courts give ample lip-service to the enforcement of state property tax laws. Numerous cases support propositions such as the necessity to tax personal property, to assess at a uniform assessment ratio within a district, and to value property in proportion to its market value. Notwithstanding the favorable language, taxpayers rarely prevail. An imposing number of rules governing presumptions and burdens of proof impede taxpayers, even when the illegality of the assessment process is perfectly apparent. In those rare cases in which taxpayers prevail, courts never adopt a remedy that will secure future compliance with the law. They show little inclination to exercise their judicial powers in a forceful fashion to bring a halt to the lawless activities of assessors, local governing bodies, and boards of equalization.

A. Grounds for Invalidating an Assessment

Aside from attacks on a taxing district's jurisdiction, a taxpayer has four major avenues along which to challenge his assessment in state court. First, the courts will invalidate excessive valuations, following the provision in the Texas Constitution that property may not be assessed in excess of its true market value. Texas courts have been understandably reluctant to substitute their judgment for that of the assessors and the boards of equalization. The assessment must be

53. A local taxing jurisdiction may tax only property that is situated within its jurisdiction. Tex. Const. art. VIII, § 11. Location is not a problem with respect to real property, since the situs of the property can be readily ascertained. For personal property the general rule is that tax situs is determined by domicile, but Texas courts have allowed taxation of personal business property without reference to this rule. See, e.g., Hall v. Miller, 110 S.W. 165 (Tex. Civ. App.—Austin 1908), aff'd, 102 Tex. 289, 115 S.W. 1168 (1909); State v. Fidelity & Deposit Co., 80 S.W. 544 (Tex. Civ. App.—Austin 1904, writ ref'd).

The other jurisdictional ground for invalidation is that the property was exempted under state or federal law. Texas Commission on State and Local Tax Policy, An Analysis of the Property Tax Laws of Texas (1962) [hereinafter cited as Property Tax Laws of Texas]. See generally A. Balk, The Free List, Property Without Taxes (1971).


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grossly excessive in order to trigger judicial invalidation.\textsuperscript{56} Some courts indicate that the taxpayer must demonstrate fraud or illegality, but they tautologically hold that an excessive assessment constitutes evidence of fraud or illegality.\textsuperscript{57} Other courts have attempted to combine notions of fraud with a somewhat esoteric definition of grossly excessive—assessments which “shock a correct mind.”\textsuperscript{58} The courts seem to be striving for an element of blatantness that is something more than a disagreement between experts about the cash value of the property.\textsuperscript{59} They have not, however, explicitly defined the precise amount by which an assessment must exceed cash market value before it will be invalidated.\textsuperscript{60}

The Texas Constitution requires that property be assessed in proportion to its market value.\textsuperscript{61} Thus, even where a taxing jurisdiction is not required to assess at full market value, it still must determine full market value in order to calculate and make uniform a particular assessment ratio.\textsuperscript{62} Most challenges on this second ground involve an arbitrary assessment scheme whereunder the assessor and the board of equalization did not even go through the motions of attempting to ascertain market value.\textsuperscript{63} For example, in \textit{Rowland v.}\n


\textsuperscript{58} Pierce v. City of Jacksonville, 403 S.W.2d 512, 517 (Tex. Civ. App.—Tyler 1966, writ ref’d n.r.e.). \textit{See also Lubbock Hotel Co. v. Lubbock Independent School Dist., 85 S.W.2d 776 (Tex. Civ App.—Amarillo 1935, no writ).}

\textsuperscript{59} The concept of cash market value is too elusive to bar minor variations. \textit{See generally J. Bonbright, The Valuation of Property (1937); Keith, Value for Tax Purposes, 1 Assessor’s J. 1 (1967).}

\textsuperscript{60} In Pierce v. City of Jacksonville, 403 S.W.2d 512 (Tex. Civ. App.—Tyler 1966, writ ref’d n.r.e.), the court of civil appeals upheld assessments 33% or less above market value (as determined by a jury) and invalidated those greater than 33% above market value. More often assessments are reversed when they are found to represent some multiple of true market value. \textit{See, e.g., Howth v. French Independent School Dist., 115 S.W.2d 1036 (Tex. Civ. App.—Beaumont 1938), aff’d, 134 Tex. 211, 134 S.W.2d 1036 (1940).}

\textsuperscript{61} Tex. Const. art. VIII, § 1.


\textsuperscript{63} See, e.g., Rowland v. City of Tyler, 5 S.W.2d 756 (Tex. Comm’n App. 1928, jdgmt adopted); Power v. Andrews, 253 S.W. 870 (Tex. Civ. App.—Forth Worth 1923,
City of Tyler, the assessment of taxpayer's property was made by simply multiplying the monthly rental by ten and taking 65 percent of that figure. Thus, if the taxing authority confesses that it has no notion of the market value, the taxpayer will prevail. Obviously, few taxing jurisdictions are inclined to be so forthright. If they emphasize the discretion of the board of equalization, the difficulties in determining market value, and their good faith efforts to fix assessments, they may prevail even though they have made no realistic attempt to determine market value.

While some assessments need only be in proportion to market value, county assessments, in contrast to city and school district assessments, must be made at full market value. Notwithstanding the clearest statutory language, however, both the Texas courts and the Texas Attorney General have condoned fractional assessment. Much of the confusion is due to the misinterpretation of the Texas Supreme Court's decision in Lively v. Missouri, K. & T. Ry., a case in which the taxpayer railroad attacked the discriminatory assessment of its property and sued to enjoin the collection of taxes. The evidence showed that the property of individuals in the county was assessed at two-thirds of its market value while the intangible property of the taxpayer railroad was assessed at full market value. The court found that the assessment violated the state and federal equal protection clauses. The plaintiff insisted, however, that the proper remedy was to raise all other assessments in the county and not simply to lower its assessment. The court rejected this argument:

It would be utterly impracticable to increase the assessment of all other property owners in Dallas County to its full value, therefore a court of equity will adopt the other method,
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reducing the assessment made by the State board to the same proportion of value as was placed upon the mass of property in the county.\textsuperscript{69} 

\textit{Lively} does not stand for the proposition that fractional assessment is constitutional.\textsuperscript{70} The court simply stated that under the circumstances of the case (years had elapsed since other taxpayers had paid their taxes) it was more practical to lower the plaintiff's assessment than to raise the assessments of every taxpayer in Dallas County.\textsuperscript{71}

Notwithstanding the widespread practice of omitting intangibles and other personal property from the tax rolls, Texas courts and the Attorney General have steadfastly clung to the position that such omissions are unlawful.\textsuperscript{72} This allows a third ground of attack: that the property of other taxpayers has been omitted from the tax rolls. Taxpayers rarely prevail on this theory, however, because of various judicially created rules relating to proof of injury, proof that the omission was deliberate, and proof of fraud or bad faith.\textsuperscript{73} One court has even said that the taxpayer must show that he owns substantially more real than personal property before he can challenge the omission of personal property from the tax rolls.\textsuperscript{74}

Texas courts have generally interpreted the constitutional requirement of uniformity of taxation\textsuperscript{75} to forbid the creation and implementation of taxing schemes that use different assessment ratios for dif-

\textsuperscript{69} Id. at 560-61, 120 S.W. at 857-58.


\textsuperscript{71} See \textit{Sioux City Bridge Co. v. Dakota County}, 260 U.S. 441 (1923).

\textsuperscript{72} Perhaps the clearest statement of this principle was made by Mr. Justice Calvert in \textit{Arlington v. Cannon}, 153 Tex. 556, 271 S.W.2d 414 (1954). In that case taxpayers alleged that the City of Arlington had failed to tax personal property including "furniture, stocks, bonds, notes, mortgages and money in banks" and certain real property in outlying parts of the city. The court held:

\textit{The deliberate adoption of a plan for the omission from the tax rolls of a large volume of property, personal or real, is in direct contravention of constitutional and statutory provisions for equality and uniformity of taxation. . . . Such a plan of taxation results in the rankest kind of discrimination between taxpayers. It does not lie with local taxing authorities to say that certain classes [of property] shall bear the entire burden of ad valorem taxation.}\textsuperscript{Id. at 570, 271 S.W.2d at 416. See also Tex. Att’y Gen. Op. Nos. V-862 (1949), o-5749 (1944).}


\textsuperscript{75} \textit{Tex. Const.}, art. VIII, § 1.
different classes of property in the same district.\textsuperscript{76} They have also struck down taxing schemes that discriminate between taxpayers who own the same type of property.\textsuperscript{77} The most outstanding example of a successful attack on such a discriminatory scheme is \textit{City of Houston v. Baker.}\textsuperscript{78} In that case, plaintiff taxpayer brought suit to compel the city to abandon the so-called "Houston Plan," under which land was assessed at 70 percent of market value, improvements on land at 25 percent, and stocks and merchandise and certain personal property at 50 percent. Other personal property was not assessed. The court held that the plan was contrary to the state constitution.

This final avenue of attack on assessments is weakened by the fact that a taxing jurisdiction can fairly easily assess property at different ratios, if it simply avoids blatantness. As long as the variations do not approach grotesque magnitudes,\textsuperscript{79} the taxing jurisdiction does not state different ratios for different classes of property, and in "good faith" says it reached different conclusions about the true market values of different properties, its decisions will be largely insulated from judicial review. A premium is placed on "secrecy as to the ratio or ratios actually being applied . . . ."\textsuperscript{80} Thus, the impact of these court decisions may be to encourage assessors to hide inequalities and alter their rationale for justifying them rather than to prevent inequitable practices.

\textbf{B. Pitfalls for the Taxpayer}

Despite the many cases in which Texas courts have affirmed statutory and constitutional requirements relating to property taxation, taxpayers have no effective way of compelling assessors and boards of equalization to abide by the law. State courts have imposed a heavy


\textsuperscript{77} \textit{See, e.g.}, Whelan v. State, 155 Tex. 14, 282 S.W.2d 378 (1955) (remanded for factual determination as to discrimination and injury); Aycock v. Travis County, 255 S.W.2d 910 (Tex. Civ. App.—Austin 1953, writ ref'd).

\textsuperscript{78} 178 S.W. 820 (Tex. Civ. App.—Galveston 1915, writ ref'd).

\textsuperscript{79} \textit{See, e.g.}, Dallas County v. Dallas Nat'l Bank, 142 Tex. 439, 179 S.W.2d 288 (1944) (bank's land assessed at seven times the assessment of similar land of other taxpayers). \textit{See also} Hawthorne v. Hillin, 463 S.W.2d 266 (Tex. Civ. App.—Waco 1971, no writ).

\textsuperscript{80} \textit{Inequality}, supra note 16, at 1378.
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burden of proof on taxpayers and have been niggardly in granting remedies sufficient to force compliance with the law. The procedural posture of the taxpayer is vital in determining exactly what he must prove in order to prevail. Although in a few cases courts have permitted individuals to pay their taxes under protest and sue for the excess, this means of challenging an assessment is not generally accepted. Typically, the taxpayer has only three alternatives. First, he may bring an action to enjoin the collection of taxes before the taxing jurisdiction has formally approved the tax roles and begun the process of collecting taxes. Second, he may seek an injunction after the rolls have been approved and the collection process begun. Third, he may allow the taxing scheme to go into effect and challenge his assessment as a defense to a suit brought by the taxing jurisdiction for delinquent taxes. The last two alternatives are less attractive because courts view challenges after the approval of the rolls less favorably than challenges before the scheme goes into effect.

The courts have given confused statements of the elements of proof for a taxpayer who challenges his assessment prior to the finalization of the tax rolls. They substitute jargon for legal analysis. In State v. Whittenburg the Texas Supreme Court gave its most thorough treatment of these challenges. The court stated that no attack on a


82. See generally Comment, supra note 57.

83. See, e.g., City of Wichita Falls v. Cooper, 170 S.W.2d 777 (Tex. Civ. App.—Fort Worth 1943, writ ref’d); City of Honston v. Baker, 178 S.W. 820 (Tex. Civ. App.—Galveston 1915, writ ref’d).


board's valuations could be sustained without "proof of fraud, want of jurisdiction, illegality, or the adoption of an arbitrary and fundamentally erroneous plan or scheme of valuation." Although it failed to explain its meaning fully, the court's language indicates that to prevail a taxpayer must show some element of blatantness or deliberateness. It is not enough for him to prove that his property was erroneously assessed or that some classes of property were omitted from the tax base; he must demonstrate that the entire assessment scheme was arbitrary or that the authorities intended to treat him unfairly. The good faith of public agencies such as boards of equalization is presumed, and the taxpayer must prove that they acted in bad faith. The local assessor and the board of equalization have broad latitude to determine the proper valuation of property, and a showing of mere errors in judgment is not sufficient for the taxpayer to prevail.

To succeed on a claim of inequality in the assessment ratios, the taxpayer must make a reasonable showing that the district assessed other property at a lower percentage of market value. It is unclear whether he must make this showing for all other property in the district or merely "that his parcel has been assessed at a ratio higher than the average for his class [although he] . . . cannot claim to be a unique or isolated victim of the alleged inequality." The former is more likely. When a taxpayer bases his attack on allegations of arbitrariness in the board's scheme, he must show "not only that the plan was an arbitrary and illegal one but also that the use of the plan worked to his substantial injury . . . ." While the Whittenburg court imprecisely defined "substantial injury," it indicated that even a showing that different property interests with different values were assessed at the same value would not suffice. To establish injury, the taxpayer must show that a district is assessing his property at a substantially higher rate than that of other taxpayers who own property of equal or greater value.

These catchphrases of burden of proof mean that even taxpayers who have brought suit prior to the finalization of the assessment roll rarely prevail. The taxpayer will not prevail if he simply demonstrates that the board of equalization's decision is not supported by substantial evidence. Perhaps deference to the discretion of the assessor and the

87. 153 Tex. at 209, 265 S.W.2d at 572-73. See also Hellerstein, Judicial Review of Property Tax Assessments, 14 Tax L. Rev. 327, 328-29 (1959).
88. Inequality, supra note 16, at 1388.
89. 153 Tex. at 210-11, 265 S.W.2d at 573.
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board justifies this limited standard of review when the value of the taxpayer's property is at issue. When, however, the case involves the assessment ratio placed upon other properties in the district, tax officials should have a smaller range of discretion, and the limited scope of review may completely defeat the requirement of equality. Moreover, a taxpayer may have great difficulty in proving the common assessment ratio for other properties in the district, if tax officials either refuse to provide the information or provide figures that the taxpayer argues are inaccurate. The expense of hiring an appraiser to value his own property, much less other property in the district, may effectively bar relief.

Perhaps an illustration will demonstrate the plight of the taxpayer who sues before finalization of the assessment rolls. In *Kelly v. A. & M. Consolidated Independent School District*, plaintiffs proved, and the school district did not dispute, that bank deposits, automobiles, household furnishings, and other personal property were not taxed. The court held, in accordance with the findings of the jury, that the omission was not deliberate and intentional. The court further held that there was no evidence that the scheme was arbitrary. It referred to the assessor's testimony that "there had never been any discussion concerning leaving property off the roll," and to the failure to adopt a specific plan omitting personal property from the tax roll. The court concluded with a paragraph which, in effect, noted that the assessor had promised to try harder to adopt a lawful assessment scheme. The verdict for the school district was affirmed notwithstanding the clear illegality of the scheme.

If the taxpayer delays his attack upon his assessment until after the board of equalization has approved the tax rolls and the process of collection has begun, he has only a slim chance of success. In practice, a taxpayer who sues to enjoin the collection of his taxes is in the same position as one who defends a suit brought to collect delinquent taxes. Both state and federal courts, however, have held that the grounds for setting aside an assessment are identical in an injunctive or a delinquency action, since any other interpretation of article 7329 would render it unconstitutional. *Norton v. Cass County*, 115 F.2d 884, 886 (5th Cir. 1941); *Whelan v. State*, 115 Tex. 14, 282 S.W.2d 378 (1955).

90. 398 S.W.2d 438 (Tex. Civ. App.—Waco 1966, writ ref'd n.r.e.).
91. *Id.* at 440.
92. *Tex. Rev. Civ. Stat. Ann.* art. 7329 (1960) appears on its face to contradict this conclusion, limiting a taxpayer's defenses in a delinquency proceeding to only a few of the grounds which would be available to the taxpayer who seeks injunctive relief. *See* note 85 *supra*. Both state and federal courts, however, have held that the grounds for setting aside an assessment are identical in an injunctive or a delinquency action, since any other interpretation of article 7329 would render it unconstitutional. *Norton v. Cass County*, 115 F.2d 884, 886 (5th Cir. 1941); *Whelan v. State*, 115 Tex. 14, 282 S.W.2d 378 (1955).
The Texas courts have not imposed any uniform procedural penalty on taxpayers who delay in attacking their assessments. Many courts simply reiterate the requirements typically applied to taxpayers who sue before finalization of the rolls and then declare the taxpayer the loser. Other courts, however, have dwelled on two specific disabilities. First, the taxpayer must prove injury with more precision than in a suit for an injunction prior to the finalization of the rolls. Thus, it is not enough to show that certain property has completely escaped taxation; the taxpayer must place a value on the omitted property, calculate the reduction in tax rate if the property had been taxed, and determine the exact amount of money that he would have saved. Since probably not even the assessor or the board of equalization knows the true market value of omitted property, this requirement almost invariably kills the taxpayer's claim.

Second, the recovery of the taxpayer who files his suit after the taxing scheme has been put into effect is limited to the “excess,” a term that has no precise meaning. This requirement may mean that the taxpayer can no longer enjoin the entire collection process, but can only recover taxes for which he is not lawfully liable. If so, the language changes nothing, since this is the typical remedy in any event. On the other hand, the “excess” requirement may mean that the taxpayer may not attack the omission of property from the tax rolls or inequalities in assessment; he may only prevail if the assessment of his property substantially exceeds market value. Since fractional assessment is widely practiced, however, the “excess” doctrine indicates that a taxpayer in an unfavorable procedural posture may not prevail with a showing that his assessment is above the district’s ratio but below full market value. If the latter interpretation is correct, the delaying taxpayer has only a single ground upon which to attack his assessment and cannot prevail when omission or inequality is shown, even if he meets the more stringent proof requirement. The requirement of excessiveness is thus inconsistent with the implicit premises of the


94. City of Orange v. Levingston Shipbuilding Co., 258 F.2d 240 (5th Cir. 1958); State v. Federal Land Bank, 160 Tex. 282, 329 S.W.2d 847 (1959); Pierce v. City of Jacksonville, 403 S.W.2d 512 (Tex. Civ. App.—Tyler 1966, writ ref’d n.r.e.).


96. Id. See also Bass v. Aransas County Independent School Dist., 389 S.W.2d 165 (Tex. Civ. App.—Corpus Christi 1965, writ ref’d n.r.e.).
dollar injury requirement. While courts may characterize the excessive-ness doctrine as part of the taxpayer's burden of proof, in reality the doctrine substantively limits the legal grounds upon which he may attack the assessment of his property.

The courts do not explicitly say why they penalize a taxpayer who delays in challenging his assessment. In the case of delinquent taxes, they may be indicating their displeasure with a person who deprives the taxing jurisdiction of revenues without making an affirmative effort to seek legal redress. They may believe that he contrived his defense of illegal assessment in order to avoid his financial obligation to the community. Somewhat different reasoning may apply to the case of a taxpayer who seeks to enjoin the collection of his taxes until after the rolls have been finalized. Victims of their own abstractions, courts insist that a taxpayer seek to enjoin the collection of all taxes by the taxing jurisdiction, even if he is only challenging his own assessment. Once the rolls are finalized and collection has begun, it is impractical to enjoin all taxation. The plan is already operational, and the taxing jurisdiction has begun to rely upon the revenues that have been generated. Thus, the delaying taxpayer carries a much heavier burden of proof when he seeks to interfere with the ongoing process.

The courts' time requirement has numerous logical and practical problems. Since Texas law does not allow a person to pay his taxes under protest and then sue for the excess, it seems peculiarly unfair to penalize him for making use of a less desirable method of litigating his objections. Moreover, boards of equalization often fail to notify taxpayers that they are meeting to finalize the rolls on a particular date; and even where notice is given, only a very short time period may elapse between notifying the taxpayer of the assessed value of his property, the hearing before the board, and the finalization of the tax rolls. In any event, the board of equalization never informs a taxpayer that his failure to file suit before finalization jeopardizes the success of his litigation. Since practical considerations may make it impossible for taxpayers to comply with the courts' notions of the proper time to file suit, they are seldom able to place themselves in the favored procedural position.

The requirement that a person file suit before finalization of the rolls leads to further difficulties. The rolls may be finalized before any collections have occurred, making irrelevant arguments based on the taxing jurisdiction's reliance interest. More important, the suit's filing date has little relation to interference with the collection process. Even if a taxpayer sues before collection begins, the suit may not come
to trial until after the revenues have been collected. Thus, the reason for procedural distinctions in favor of a person who files before finalization of the rolls disappears. At least one court has taken this position. Acceptance of the contrary position forces the taxpayer to obtain a temporary restraining order before collection begins. Yet this form of relief is difficult to obtain since most judges are reluctant to deprive a taxing jurisdiction of all its revenues until one taxpayer's complaints are resolved. Once again the taxpayer who wants to attack his own assessment falls victim to the notion that he must simultaneously enjoin the collection of all taxes in his district.

Thus far the judicial record indicates that few taxpayers successfully attack their individual assessments or an entire assessment scheme. In a typical case, the taxpayer must seek to enjoin the collection of all taxes in the taxing jurisdiction, and usually must post a large bond in order to vouchsafe the district against injury if he does not prevail. If he obtains a temporary restraining order, he deprives the taxing jurisdiction of all revenues until the suit is finally settled. Notwithstanding the interim injunctive remedy, however, the court will not order the taxing jurisdiction to cure its violations of law. It will not instruct the district to assess personal property, to equalize assessments, or to assess at full market value; nor will it require the submission of a plan setting forth proposals to ensure future compliance with the law. Since Lively, the courts have limited themselves to lowering the assessment of the party who initiated the action and have made no attempt to force the district to obey the law.

With one notable exception, Texas courts have never required a district to formulate a new taxing scheme. They are even hostile to class actions brought by aggrieved taxpayers, insisting that each claim of injury be treated separately. The result is a remedial doctrine that undermines any conceivable policy goal. It jeopardizes the revenue source of the taxing jurisdiction; it puts the taxpayer and the

taxing jurisdiction to great bother and expense; and it allows assessors and boards of equalization to flout the law on a massive scale, subject only to a few minor individual adjustments.

A large part of the remedial difficulties encountered by Texas taxpayers results from the failure of courts and litigants to distinguish between the two major types of relief. The taxpayer may seek to alter his individual tax bill by reducing his assessment. In this essentially private action the taxpayer makes no attempt to compel the taxing authority to alter the assessments of other taxpayers. Rather than attacking the assessment scheme, the taxpayer tries to demonstrate that some error, intentional or otherwise, has occurred with respect to his property. This private action is virtually the only avenue open in Texas courts.

On the other hand, the taxpayer may seek "to increase the tax burden borne by other property to the level of his own by compelling the reassessment of all property at the legally required uniform standard."\(^\text{101}\) Public action usually takes the form of mandamus, designed to compel the taxing jurisdiction to comply with constitutional and statutory provisions governing the assessment of property.\(^\text{102}\) Although this public action is available in federal courts, unfortunately, it is unavailable in Texas state courts. Their reasoning is difficult to discern. Texas courts may be confusing the requirement of substantial injury for standing to sue with a limitation on their remedial powers. If a taxpayer demonstrates that other property is systematically under-assessed, his injury can be conceptualized in two ways. His assessment is disproportionately greater, and therefore, at a constant tax rate, his tax bill is higher than those of other similarly situated taxpayers. Alternatively, assuming that the fiscal needs of the taxing jurisdiction are fixed, the tax rate applied to his property is higher than it would ordinarily be since the underassessment of other properties has diminished the breadth of the tax base. Under the latter concept of injury the taxpayer should be permitted to seek the upward reassessment of other property in the district; he should not be restricted to a reduction of his own assessment.

Other possible reasons for the unavailability of the public action in Texas are more straightforward. Since assessment inequality is so well entrenched in Texas, the courts may hesitate to grant sweeping

\(^{101\text{. } Inequality, supra note 16, at 1380.}\)

\(^{102\text{. See, e.g., Russman v. Luckett, 391 S.W.2d 694 (Ky. 1965); Switz v. Township of Middletown, 23 N.J. 580, 130 A.2d 15 (1957).}\)
relief that will affect virtually every taxing jurisdiction in Texas. They may fear that tax officials will simply refuse to abide by their decrees, and they may wish to avoid the difficulties in policing assessors and boards of equalization. Finally, the great expense of systematic reassessment and the politically volatile character of property taxation may have dissuaded the courts from granting more far-reaching remedies.

Public actions have numerous advantages. They save valuable court time and litigation costs by eliminating many individual claims. Their effect is comprehensive and long lasting, since an injunction "is likely to retain its force beyond the fiscal year in which it issues,"103 and to apply to an entire taxing jurisdiction. Courts can fashion decrees that will not unduly disrupt ongoing tax assessments and collection, but that carry the sanction of contempt if officials do not comply with the law. Finally, even though the property tax is a volatile issue, the public should not react as strongly against a decree that forbids all inequalities instead of simply bestowing "on a single taxpayer an advantage not shared by many others similarly situated."104

In the absence of intervention by the federal courts, assessment reform in Texas will not take place through the litigation process until Texas courts begin to entertain public actions. Private actions serve a vital function in ameliorating injury to specific taxpayers, and reform of the private action should be encouraged, but such individual recoveries by a limited number of taxpayers will never cure the lawlessness in the Texas property tax system.

C. Conclusions and Recommendations

Unless constitutional and statutory changes are made, taxing jurisdictions in Texas must abide by the following legal strictures: (1) counties and other taxing jurisdictions must assess all property within the taxing jurisdiction at the same effective assessment ratio; (2) counties and other taxing jurisdictions may not deliberately omit personal property, including intangibles, from the tax base; (3) counties must assess all property within their jurisdiction at full market value. In addition, fair and impartial administration of property tax law requires procedural fairness. The taxpayer should always have an opportunity to present his grievance before the board of equalization, and he should have ample time to appeal the board's decision and challenge his assessment in the courts without being exposed to the added perils

103. Inequality, supra note 16, at 1386-87.
104. Id.
of an attack after finalization of the tax rolls. Furthermore, when a taxpayer prevails, courts should not simply adjust that individual taxpayer's bill; they should entertain public actions and require the non-complying district to submit a plan for bringing itself into compliance with property tax laws.

III. Property Taxation and the Federal Courts

The local nature of the property tax, its complexities, the politics of interfering with the revenue sources of local government, and unfamiliarity with local taxing schemes have combined to make federal courts even more reluctant than state courts to tinker with the property tax. Yet when disgruntled taxpayers make an attack on the property tax system, they typically ground it on the equal protection clause. It forbids arbitrary and capricious classifications of taxpayers and property and requires that some thread of rationality holds together schemes which cast differential tax burdens on taxpayers. Under this equal protection test, federal courts will not uphold property tax classifications not allowed by a state's constitution or laws, because the state has by definition offered no rational justification for its action.

The Texas Constitution calls for equal and uniform taxes within taxing jurisdictions. This mandate and the federal equal protection clause should be violated by the omission of property from the tax rolls, the unequal treatment of different classes of property within the same taxing jurisdiction, and the unequal treatment of like property within the state.

Three caveats may undermine federal constitutional attacks in states like Texas. First, notwithstanding the clarity of a state constitution, state judicial interpretations of its uniformity clause bind federal courts. If state courts permit various types of discriminations, federal courts must accept that construction and determine the rationality of the classifications, as if the state constitution expressly sanctioned them. Second, federal courts, like state courts, often place a heavy

105. WORLD TAX SERIES, TAXATION IN THE UNITED STATES 165 (1963).
109. Union Bank & Trust Co. v. Phelps, 288 U.S. 181 (1933); Bells Gap R.R. v. Pennsylvania, 134 U.S. 232 (1890). For example, the construction of the Texas Con-
burden of proof on a taxpayer who alleges discrimination within the same classification. The taxpayer must prove "actual" discrimination, which may simply be a catchphrase for gross discrimination, and he must show that there was some intention to discriminate.\textsuperscript{110} Finally, federal law prohibits federal courts from enjoining or restraining "the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State."\textsuperscript{111} Before a taxpayer can successfully litigate in federal court, he must persuade it that the state probably affords no adequate remedy. To complicate a litigant's problems, federal courts, even within the same circuit, have varied their approaches to this statute.\textsuperscript{112} The recent trend is toward federal restraint.

The statute should not, however, bar federal relief to Texas taxpayers. Litigants seeking addition of property to the tax rolls might not fall within the ambit of the statute because they are not seeking to restrain the assessment or collection of taxes.\textsuperscript{113} Moreover, the state remedy for property tax discrimination in Texas is clearly inadequate. The substantial burden of proof placed on taxpayers, the difficulty in filing a timely suit, the judicial hostility to class actions, and the total unavailability of public actions in state courts illustrate the failings of the Texas remedy. Thus, a Texas taxpayer who is aggrieved by the discriminatory

\textsuperscript{110} Charleston Fed. Sav. & Loan Ass'n v. Alderson, 324 U.S. 182 (1945); Southland Mall v. Garner, 455 F.2d 887 (6th Cir. 1972); Grand Trunk Western R.R. v. Brown, 32 F. Supp. 784 (E.D. Mich. 1940). Three factors seem to be relevant to a court's decision about whether there is discriminatory intent. First, if a new taxing scheme is being attacked, federal courts may be more sympathetic to the taxing jurisdiction. They may feel that mistakes are unintentional and will be corrected as both taxpayer and taxing officials become accustomed to the new procedures. See, e.g., Sunday Lake Iron Co. v. Wakefield, 347 U.S. 350 (1918). Second, the more overt the discriminatory scheme, the more likely that it will be struck down by a federal court. If state or county ordinances expressly create property classifications in the face of a state constitutional provision to the contrary, or if tax assessors forthrightly admit their intention to discriminate, federal courts will declare the taxing system unconstitutional. See, e.g., Cumberlind Coal Co. v. Board of Revision, 284 U.S. 23 (1931). Third, a discriminatory intent may be implied from the magnitude of the discrimination. A gross inequality may lead a federal court to find the requisite discriminatory intent even in the absence of other evidence. See, e.g., In re Chicago Rys., 175 F.2d 282, 290 (7th Cir. 1949). The requirement of discriminatory intent, so construed, is virtually identical to requirement of proof of "actual" discrimination.


assessments within a taxing jurisdiction or by the omission of property from that district's tax base should have a cause of action in federal court.

Since each taxing jurisdiction, defined geographically, is free to establish its own taxing policies subject to constitutional and statutory limits, Texas law does implicitly classify property by geographic area. An attack on this classification would rest on the idea that it is unconstitutional for property owners in different districts to bear disproportionate tax burdens in order to support public services. This beguiling notion, however, is more complex than it appears at first glance. Specifically, the precise definition of an unequal burden is uncertain. Although a tax burden is typically computed in relation to real and personal property wealth and not in absolute dollar terms, in reality some measure of income may more appropriately gauge the burden imposed by the property tax. To the extent that the property tax charges the taxpayer for the benefits he receives, inequalities in tax burdens that are reflected in inequalities in services may be unobjectionable. This view, however, is probably unrealistic, since the property tax "requires each household to contribute to community expenses in proportion to its residential investment regardless of benefits." Additionally, assuming that demand for housing is relatively inelastic so that poor families must spend a larger portion of their income on housing than affluent families, then even a proportional property tax, equitable on its face, is regressive.

The ethically, if not legally, offensive aspect of the property tax is that individuals who receive the same benefits are called upon to make vastly different sacrifices in proportion to their property wealth. This disparity arises because communities vary in the amount of taxable property per capita within their jurisdiction. More affluent communities can provide services at a lower effective tax rate because they have a broader base upon which to levy taxes. Yet a federal court would not find that this disparity in tax burdens violates the constitution under the traditional concepts of equal protection.

Federal courts generally have been reluctant to overturn property tax classifications. They have strained to find some rational basis

115. Id. at 513.
116. Id. at 514. See also C. Benson, The Economics of Public Education 117-18 (1968).
117. See, e.g., Fort Smith Light & Traction Co. v. Board of Improvement, 274 U.S.
for tax distinctions either in the taxing structure or in extrinsic state policies. Although virtually no federal cases deal directly with the problem, the traditional justifications for a territorial property tax classification indicate strongly that a federal court would uphold such a classification on two grounds. First, the state may wish to encourage local control of public services, particularly education. Taxing similarly situated taxpayers who live in different communities at different effective tax rates, while inequitable, is simply a collateral effect of the principal purpose of allowing communities to support local services in accordance with their tastes and needs. A better system with districts of equal fiscal capacity is certainly attainable, but the rationality standard applicable to taxpayers does not demand perfection. Second, the local property tax may be "efficient" in an economic sense; it may "guide society to that overall use of its resources which will maximize the output of individual satisfactions." Other equally efficient methods may be less inequitable, but again the state is not constitutionally obligated to choose one of these alternatives.

On a number of occasions the Supreme Court has upheld nontax discriminations that are based on geographic location, further supporting the constitutionality of geographically discriminatory tax laws. In several cases involving taxes other than the property tax, the Court has permitted geographic classifications. For example, in *Toyota v. Hawaii*, the state imposed a higher licensing fee for auctioneers in

387 (1927); Southwestern Oil Co. v. Texas, 217 U.S. 114 (1910); Cook v. Marshall County, 196 U.S. 261 (1905).


119. F. MICHELMAN & T. SANDALOW, supra note 114, at 511.


121. 226 U.S. 184 (1912). See also Ocampo v. United States, 234 U.S. 91 (1914); Missouri v. Lewis, 101 U.S. 22 (1879).
Honolulu than it did for auctioneers in other districts. The Court held that the classification was not arbitrary since the state may properly take "into account varying conditions in the respective localities, as, for example, in the amount of business transacted and in the corresponding value of such licenses."\(^\text{122}\)

The only tax case suggesting the unconstitutionality of a territorial classification is *Liggett Co. v. Lee*,\(^\text{123}\) which may be a relic of a bygone constitutional era. In that case the Supreme Court held unconstitutional a Florida law that taxed retail store owners who owned outlets that were located in more than one county more heavily than others who owned stores in only one county. The Court felt that while it might be reasonable to tax city businesses at a higher rate than rural businesses, county lines provided no rational basis for their distinction. In *Toyota*, there was such a reason—auctioneers in Honolulu did significantly more business than auctioneers in other parts of the state. In *Lee*, the majority was unable to discern such a reason, finding no relationship between county lines and the nature and extent of the business enterprise. In short, depending upon the specific context, geographic classifications may be constitutional. The state interest in local control of public services and in the efficient allocation of resources brings the geographic property tax classification within the ambit of *Toyota* and renders *Lee* distinguishable.

Another attack on the local property tax can be framed in terms of unequal municipal benefits for equal tax sacrifice, relying on the Supreme Court's decision in *Myles Salt Co. v. Iberia Drainage District*.\(^\text{124}\) In that case two Louisiana parishes organized a drainage district to levee and drain flat lands adjacent to the Gulf coast. State law authorized the drainage district to levy a five-mill tax on all property subject to taxation in the district. Plaintiff, who owned an island that had an elevation of 175 feet above sea level, urged that the inclusion of his property in the drainage district was a taking of property without due process of law, since he would receive no benefit from the district's drainage activities. The Supreme Court agreed.

The *Myles Salt* decision is virtually the only federal judicial intrusion into the relationship between the state or local tax burden imposed on a taxpayer and the benefit he derives from the services financed by
the tax. As it has not been followed since the era of substantive due process, it may no longer be good law.\textsuperscript{125} Moreover, the case was decided on defendant's demurrer to the plaintiff's pleadings, and thus the Court accepted the plaintiff's allegations of the facts. If the defendants had sought to prove that the plaintiff did receive some indirect benefit, that the defendant acted in the good faith belief that plaintiff's land would benefit, or that there was some technological reason for the inclusion of the plaintiff's land, the case might have been decided differently.\textsuperscript{126}

Application of \textit{Myles Salt} to geographical property tax classifications would make little sense from a policy perspective. A taxpayer only rarely has a colorable argument that he receives no benefit from the imposition of the tax. For example, even a taxpayer without school age children is the beneficiary of the external economies of the educational system.\textsuperscript{127} Furthermore, the imposition of a strict constitutional rule that tax burdens must be proportional to public benefits would destroy the great strength of our structure of governance—the power of state and local elected officials to distribute public services irrespective of the recipients' tax contributions. This power enables the poor or the welfare recipient to take full advantage of police, fire, recreational, medical, or educational services despite the relative paucity of his contribution to the tax base.

Recent federal cases cast additional light on constitutional challenges to geographic property tax classifications. On March 21, 1973, the Supreme Court decided \textit{San Antonio Independent School District v. Rodriguez},\textsuperscript{128} upholding the Texas school financing scheme which allowed substantial interdistrict disparities in the allocation of education monies. Justice Powell, writing for the majority, held that since the case did not involve either a fundamental interest or a suspect classification, the Court would apply the traditional rational basis test rather than the more stringent compelling state interest standard. The majority concluded that the Texas financing system was rational since it assured a basic education for every child while encouraging local control of education. Even though some school districts were too poor to exercise

\begin{enumerate}
\item \textsuperscript{125} See \textit{American Commuters Ass'n v. Levitt}, 405 F.2d 1148 (2d Cir. 1969); \textit{State ex rel. Pan American Prod. Co. v. Texas City}, 157 Tex. 450, 303 S.W.2d 780 (1957); F. MICHELMAN & T. SANDALOW, \textit{supra} note 114, at 524. \textit{But see Lipford v. Harris}, 202 So. 2d 109 (Fla. App. 1967).
\item \textsuperscript{126} See F. MICHELMAN & T. SANDALOW, \textit{supra} note 114, at 523-24.
\item \textsuperscript{127} \textit{Id.} at 34-35.
\item \textsuperscript{128} 93 S. Ct. 1278 (1973).
\end{enumerate}
meaningful budgetary control over their schools, this was sufficient to justify the inequalities in school expenditures between districts. 129

One commentator, writing before the Rodriguez decision, has argued that the school financing cases should be viewed in tax rather than educational terms. 130 The constitutional infirmity in this view lies in the "irrational allocations of taxable property that . . . afford the taxpayers and voters of different school districts unequal budgetary options, solely because of their place of residence." 131 I have argued elsewhere that this approach misconceives the legal and ethical notions at the heart of the school financing cases—the unequal distribution of educational benefits between school children in different school districts. 132

To be sure, in Rodriguez Justice Powell referred to the Court's traditional deference to state legislatures in the area of tax policy. Taken in context, however, this reference was either gratuitous or intended as a refutation of the unequal tax burdens theory, which this article also attempts to disprove. In any event, the limited standard of equal protection review urged by Justice Powell for tax cases is perfectly consistent with the precedents and with the position taken herein. 133 Application of this standard must await Supreme Court review of cases specifically raising property tax burden issues.

The most significant recent case affecting property taxpayers is Weissinger v. Boswell. 134 In that case a class of taxpayers and public school students challenged an Alabama statute that violated the state constitution by allowing different counties to assess property at different ratios. The court held that these variations between counties violated the equal protection clause and ordered the state to equalize them within one year. Yet the court's reasoning in Weissinger is difficult to discern. It failed to recognize that the effective tax burden depends not only on the assessment ratio but also on the tax rate. Equalizing assessment ratios across a state serves no purpose when each taxing unit is perfectly free to adjust its tax rate to maintain interdistrict inequalities in tax burden. Although the Weissinger court may have intended to require

131. Id. at 1407.
132. See Yudof, supra note 129.
the equalization of both tax rates and assessment ratios, it expressly
denied that tax rates must be equalized. Moreover, if the court had
equalized tax rates, the decision would have been a likely subject for
Supreme Court reversal.\textsuperscript{135}

The real reason for objecting to inequalities in assessment, which
the \textit{Weissinger} court never directly addressed, is that an unequal assess-
ment has consequences beyond the immediate computation of the local
tax bill. In Alabama, county assessments were employed to determine
the amount of state ad valorem property tax for which a taxpayer was
liable. If a county kept its assessment ratio low and adjusted its tax
rate upward, its taxpayers could largely avoid payment of the state prop-
erty tax. Many districts, however, may be unable or unwilling to raise
their tax rates and lower assessments. The maximum bonded indebted-
ness that a district may incur under state law may be a function of as-
sessed property value in its jurisdiction. If the assessment ratio is
lowered to avoid a state tax, it may lose its ability to borrow in accord-
ance with its needs. Additionally, a state may have a maximum tax rate
law. If a district is close to the maximum rate, it must keep assessments
high in order to generate sufficient revenues. Moreover, local officials
for political reasons or out of honesty may not seek to avoid state taxes.
A taxpayer should not have to pay higher state taxes simply because his
county officials did not seek to evade the state tax.

The rule of law emerging from \textit{Weissinger} is that the state may
not allocate a statewide burden in accordance with an arbitrary geo-
graphic classification. The logic of the opinion also requires that the
state should be prohibited from distributing statewide benefits in accord-
ance with a territorial classification tied to the local assessment ratio.
That is, if the state uses local assessments to calculate entitlements under
a state funding program, the assessments must be made on an equalized
basis. These rules can be understood from two perspectives. First,
Alabama’s statewide property tax law rendered each taxpayer liable for
the same proportion of his property’s value. The variations in assess-
ment ratios from county to county disregarded the state constitution, as
Alabama courts had interpreted it, and effectively obliterated the legis-
liative tax scheme by creating territorial classifications. Since the state’s
laws did not countenance such discriminations, the local assessments
were irrational under traditional equal protection analysis. Second,
even if the state property tax laws permitted geographic disparities in

\textsuperscript{135} \textit{See} note 118 \textit{supra} \& accompanying text.
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state ad valorem property tax burdens, the classification would be irrational. The considerations of efficiency, local control, and autonomy that made variations in local tax burdens rational did not apply to a statewide tax. Since no state policy was furthered, there was no rational basis for distinguishing among taxpayers by their place of residence.

The essence of this analysis is worth emphasizing. The only reason that assessment variations are unconstitutional is their use in statewide benefit or tax burden formulas. If a state discontinues its policy of relying on local assessments, either by using other criteria such as tax receipts or individual income or by requiring local communities to calculate equalized values which are used only for state purposes, there is no constitutional infirmity attached to interdistrict inequalities in assessment ratios employed in the computation of local property taxes.

Texas assessment practices clearly fall within the scope of Weis-singer. Varying local assessments are a significant factor in a whole variety of statewide funding and taxing programs. Texas like Alabama, levies a diminishing statewide ad valorem property tax that applies unequally across the state. In addition, Texas has a residence homestead exemption of $3,000 in assessed value for the statewide property tax that also creates grave inequalities.136 Moreover, funds distributed by the state to local school districts under the Foundation School Program are contingent, in part, on local (county) assessed property values, since the state attempts to apportion more dollars to poor communities under a formula entitled the "Economic Index."137 County assessments are obviously a poor indicator of relative wealth. Finally, the state employs local assessments to calculate both the maximum indebtedness and maximum tax rates permissible under Texas law.138 These ceilings have a vastly different impact depending upon the assessment ratio utilized by the relevant taxing jurisdictions.

In conclusion, federal courts are likely to require, under appropriate circumstances, several changes in the administration of the property tax in Texas. Under the Texas Constitution, all property within a

136. TEx. Const. art. VIII, § 1b. For example, suppose two taxpayers each own a $30,000 home. If the first taxpayer lives in a district with a 50% assessment ratio, he must pay state property taxes on $15,000 minus $3000 (homestead exemption), or $12,000. If the second taxpayer's district values property at only 10% of its market value, his property's assessed value will be $3000, and he will not pay any state property tax.


taxing jurisdiction must be assessed and taxed. Personal property, including intangibles, may not be deliberately omitted from the tax base. Since these requirements are compelled by Texas law, federal courts will find no rational basis for discriminations by taxing officials. Under both the Texas and federal constitutions, all property with a taxing jurisdiction must be assessed in accordance with the same assessment ratio regardless of its use. Finally, the federal constitution alone requires that assessment ratios between taxing jurisdictions must be equalized or the state must discontinue its policy of relying on such assessments in the calculation of state tax burdens or funding distributions. No particular assessment ratio is required so long as the adopted ratio is applied uniformly.