

# TEXAS

## *RODRIGUEZ v. SAN ANTONIO INDEPENDENT SCHOOL DISTRICT: GATHERING THE EYES OF TEXAS—THE POLITICS OF SCHOOL FINANCE REFORM*

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### I

#### TEXAS SCHOOL FINANCE REFORM BEFORE 1965

The history of state support for public schools mirrors the evolution of philosophical and popular perceptions of the aims of education. In the mid-nineteenth century, as American society moved away from a system of private education dominated by the churches, the emphasis was on socializing the young into acceptance of national values.<sup>1</sup> An uneducated man was a dangerous man, a man likely to challenge widely shared beliefs, to find fault with the economic system, and ultimately to assault established authority. While the schools were charged with the transmission of skills and the promotion of the individual's economic well-being, their overriding mission was to ensure the survival of the state by creating a common culture undiminished by factionalism.<sup>2</sup> The methods of financing and regulating public education corresponded with this goal. Schooling was universal and compulsory, with those most dangerous to authority—the poor and the immigrants—subjected to its homogenizing influences.<sup>3</sup> The state did not need to provide for the maximization of human potential or even for the equitable distribution of its school resources; rather, the state was obliged to provide only the minimum educational opportunity necessary to achieve socialization.

The concept of a minimum educational opportunity came early to Texas and stayed late. The Texas constitution of 1845, adopted upon admission to the Union, required the legislature "to establish free schools throughout the State, and . . . [to] furnish means for their support, by taxation on property."<sup>4</sup> Less than ten years later, Texas created the pre-

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<sup>1</sup> See generally H. BEALE, *ARE AMERICAN TEACHERS FREE?* (1936); R. ELSON, *GUARDIANS OF TRADITION* (1964).

<sup>2</sup> L. GARBER, *EDUCATION AS A FUNCTION OF THE STATE* 3-11 (1934).

<sup>3</sup> See generally D. KIRP & M. YUDOF, *EDUCATIONAL POLICY AND THE LAW* 1-61, 85-134 (1974). Nevertheless, a compulsory attendance law was not enacted in Texas until 1915. Ch. 49, [1915] Tex. Gen. Laws 92.

<sup>4</sup> TEX. CONST. art. X, § 2 (1845). The present Texas constitution provides that "it shall be the

decessor to the Permanent School Fund, which eventually consisted of millions of acres of public land.<sup>5</sup> The income from the Permanent School Fund, combined with revenues derived from a number of designated taxes, became the Available School Fund,<sup>6</sup> the primary source of state support for public education for almost one hundred years. These funds were allocated as flat per pupil grants.<sup>7</sup>

But the aims of education were changing. While the socialization objective remained strong, particularly in the post-World War I period, the late nineteenth and early twentieth centuries saw a revolution in the direction taken by public schools. Education was no longer valued simply as a means of socializing a diverse and heterogeneous population; instead, the primary aim of education became the development of the individual's potential for intellectual growth, to produce both a viable economic unit and an informed citizen. This shift in focus from the state to the individual reflected both economic and philosophic trends. As technology advanced, the need for skilled labor became more apparent, and society's interest in imparting skills merged with the individual's advantage in gaining them. At the same time, John Dewey and his followers urged that there was no inconsistency between child-centered education and the transmission of democratic values.<sup>8</sup> The maximization of the individual's educational growth was the ideal way to create and preserve a democratic consensus. Moreover, as Horace Mann had argued many years before, education was increasingly viewed as the primary means of legitimately gaining access to income and social status.<sup>9</sup>

The impact on school financing in Texas of the shift from state-justified to individual-justified compulsory education was profound, if predictable. The state-supported minimum rose sharply as the scope of school activities broadened beyond those necessitated by primitive socialization goals. By 1940-1941, the Available School Fund provided almost \$40 per child,

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duty of the Legislature of the State to establish and make suitable provision for the support and maintenance of an efficient system of public free schools." TEX. CONST. art. VII, § 1 (1876).

<sup>5</sup> Ch. 18, [1853] Tex. Laws 17. See generally *San Antonio Independent School Dist. v. Rodriguez*, 411 U.S. 1, 6-7 (1973). In 1839, the Congress of the Republic of Texas set aside three leagues of land in each county for public education. In 1854, local school districts were established and "companies granted land for railroads [were ordered to] . . . survey alternate sections of land for a public school endowment." 1 GOVERNOR'S COMMITTEE ON PUBLIC SCHOOL EDUCATION, *THE CHALLENGE AND THE CHANCE: RESEARCH REPORT 27* (1969).

<sup>6</sup> TEX. CONST. art. VII, § 5 (1876).

The Constitution of 1876 set aside half of the public domain and all lands previously granted to the public schools as an endowment totalling some 52,000,000 acres. It also set aside one-fourth of the proceeds from all occupation taxes and the income from a poll tax levy for school support.

1 GOVERNOR'S COMMITTEE ON PUBLIC SCHOOL EDUCATION, *THE CHALLENGE AND THE CHANCE: RESEARCH REPORT 27* (1969).

<sup>7</sup> TEX. CONST. art. VII, § 5 (1876).

<sup>8</sup> J. DEWEY, *DEMOCRACY AND EDUCATION* (1966). See also G. DENNISON, *THE LIVES OF CHILDREN* (1969); A. NEILL, *SUMMERHILL* (1960).

<sup>9</sup> M. KATZ, *CLASS, BUREAUCRACY AND SCHOOLS* ch. 1 (1971). See also L. CREMIN, *THE GENIUS OF AMERICAN EDUCATION* (1965); F. KEPPEL, *THE NECESSARY REVOLUTION IN AMERICAN EDUCATION* 5-6 (1966).

with this figure reaching \$101 in 1948-1949.<sup>10</sup> The remaining portion of educational expenditures (except for minor federal aid) was raised by local school districts which were empowered to levy ad valorem property taxes for the purpose of supplementing the state allocation.<sup>11</sup> In 1940-1941, local revenues roughly matched the state's contribution, but by 1948-1949, local revenues were approximately \$85 per child.<sup>12</sup>

To be sure, some communities in Texas were more willing than others to bear heavy local taxes. There were other communities which had such substantial property wealth per pupil that enrichment beyond the state minimum became inevitable—even at marginal local tax rates. Still others were not really communities at all, but only hastily incorporated school districts, levying no taxes and designed as havens for affluent landowners.<sup>13</sup> The results were dramatic variations in per pupil expenditures, with an imperfectly realized system of minimum quality education for all. Equality—apart from a small program of aid to poor rural school districts enacted in 1915<sup>14</sup>—was never on the school financing agenda.

By 1949, the pressures for change in the Texas school financing system became irresistible. Enrollment had remained nearly constant since 1930, but predictions were that a baby boom would cause enrollment to surge by the mid-1950's.<sup>15</sup> The cost of living had risen rapidly, and there were fears that increases in educational spending would not keep pace.<sup>16</sup> Legal attacks on segregation in the public schools and inequalities in the allocation of resources and services between white and black youngsters were mounting.<sup>17</sup> The total number of school districts had grown to more than 5,000; a majority of these districts were inoperative, simply providing tax shelters for the fortunate few.<sup>18</sup> In addition, the troubling concept of equal educational opportunity had entered the vocabulary of school reformers.<sup>19</sup> These reformers challenged the very notion of a state established minimum education, preferring instead to emphasize the necessity for providing equal treatment, or at least non-discriminatory treatment, for all children in Texas. The result was the formation of the Gilmer-Aiken Committee,<sup>20</sup> which was

<sup>10</sup> TEXAS RESEARCH LEAGUE, *THE ROAD WE ARE TRAVELING* 29 (1956) [hereinafter cited as *THE ROAD WE ARE TRAVELING*]. These statistics include some monies allocated under the Rural Equalization Aid and Special Vocational Education Aid programs.

<sup>11</sup> TEX. CONST. art. VII, § 3 (1876).

<sup>12</sup> *THE ROAD WE ARE TRAVELING* 31-34.

<sup>13</sup> TEXAS RESEARCH LEAGUE, *TEXAS PUBLIC SCHOOL FINANCE: A MAJORITY OF EXCEPTIONS* 3 (1972) [hereinafter cited as *A MAJORITY OF EXCEPTIONS*].

<sup>14</sup> Ch. 10, [1915] Tex. Gen. Laws 1st Called Sess. 22.

<sup>15</sup> *THE ROAD WE ARE TRAVELING* 13. Enrollment was 1,362,526 in 1930-1931, 1,324,186 in 1940-1941, 1,309,415 in 1948-1949, and rose to 1,673,601 in 1954-1955.

<sup>16</sup> In fact, however, the Consumers Price Index (1947-1949 = 100) rose from 60.5 in 1940-1941 to 103.1 in 1948-1949, roughly a 70 per cent increase. *Id.* at 21. This compares with a more than 150 per cent increase in state educational expenditures (\$39 in 1940-1941 and \$101 in 1948-1949). *Id.* at 29.

<sup>17</sup> See generally D. KIRP & M. YUDOF, *supra* note 3, at 289-307.

<sup>18</sup> *A MAJORITY OF EXCEPTIONS* 3.

<sup>19</sup> See generally Coleman, *The Concept of Equality of Educational Opportunity*, 38 HARV. EDUC. REV. 7 (1968); Kirp, *The Poor, the Schools, and Equal Protection*, 38 HARV. EDUC. REV. 635 (1968); Yudof, *Equal Educational Opportunity and the Courts*, 51 TEXAS L. REV. 411 (1973).

<sup>20</sup> The Gilmer-Aiken Committee was created by the Texas legislature during the administra-

to design a new system of financing public education in Texas for the second half of the twentieth century.

The Gilmer-Aiken Committee in its famous report, *To Have What We Must*,<sup>21</sup> publicized the sorry plight of public schools in Texas. Given the conflicting demands for equality, the preservation of local control of schools, the establishment of minimum salary schedules for teachers, adherence to the concept of a state-supported educational minimum, and a fairer distribution of tax burdens, the Committee adopted a beguilingly simple premise: every school-age child should receive an *equal minimal educational opportunity*, to be financed by an equalized tax effort among school districts.<sup>22</sup> It proposed the Minimum Foundation Program, a set of formulas for allocating state funds for personnel and operations. In most instances, the state would pay the bulk of the costs of the program, later established at eighty per cent, while the local districts would contribute the remainder. By the use of an "economic index," additional funds were to be allocated to poorer school districts, in effect forgiving all or part of their required twenty per cent share, to enable them to provide an education at the state established minimum. Local districts were, of course, free to enrich their educational programs beyond the state minimum in accordance with their fiscal capacity and willingness to tax. The legislature scaled down the Gilmer-Aiken Committee's proposals, but essentially embodied its approach in new school financing legislation.<sup>23</sup> The immediate impact was a significant rise in minimum support levels.<sup>24</sup>

While equality was not achieved (for this was not the real purpose of the changes), the Minimum Foundation Program proved to be the salvation for thousands of Texas school districts on the verge of fiscal chaos. By the school year 1955-1956, the State of Texas contributed \$242 million in aid to local school districts or roughly sixty per cent of their operating costs. This was equivalent to \$159 per child compared with a contribution of only \$101 per child in 1948-1949, the last year under the old school financing system.<sup>25</sup> In 1957, the legislature added another \$15 per pupil to this figure.<sup>26</sup>

Meanwhile, the weaknesses in the Minimum Foundation Program were becoming apparent. First, the increased state aid helped perpetuate hundreds of school districts with few children, poor educational programs, and low ad valorem property tax rates. These districts, as in the period before 1949,

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tion of Governor Beauford Jester, and it had equal numbers of legislators and public representatives. One-third of the members were appointed by the Speaker of the House, one-third by the Lieutenant Governor, and one-third by the Governor. H. Con. Res. 48, 50th Tex. Legisl. (1947). See generally GILMER-AIKEN COMMITTEE, *TO HAVE WHAT WE MUST* 3-6 (1948).

<sup>21</sup> GILMER-AIKEN COMMITTEE, *TO HAVE WHAT WE MUST* (1948).

<sup>22</sup> *Id.* at 15. See also A MAJORITY OF EXCEPTIONS 3; TEXAS RESEARCH LEAGUE, *TEXAS PUBLIC SCHOOLS UNDER THE MINIMUM FOUNDATION PROGRAM* 1-3 (1954).

<sup>23</sup> TEX. EDUC. CODE ANN. ch. 16 (1969).

<sup>24</sup> *THE ROAD WE ARE TRAVELING* 29. State aid rose from \$101 per pupil in 1948-1949 to \$129 in 1949-1950. Note, however, that a similar rise took place between 1946 and 1948 (\$72 to \$95) under the old Available School Fund system.

<sup>25</sup> TEXAS RESEARCH LEAGUE, *THE MINIMUM FOUNDATION SCHOOL PROGRAM IN TEXAS v* (1957).

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

continued to operate as tax havens.<sup>27</sup> Second, the economic index had proved to be a complex and inaccurate mechanism for determining the relative wealth of school districts. This was a result of ill-conceived credits given school districts, flaws in the basic formula, and the fact that the economic index attempted to measure income while the basic school finance system was premised on property values.<sup>28</sup> Finally and most significantly, the minimum funded by the state turned out to be more a function of the budgetary process in the legislature than an accurate appraisal of the costs of a minimally adequate education. As the Texas Research League delicately posed the problem in 1957,

Indications are that many school districts are spending local tax money outside the minimum program for services and supplies which are, in reality, part of their basic minimum needs. If so, parallel upward adjustments in both the minimum program and in local required tax shares toward that program may be desirable so as to strengthen the educational programs in the poorer school districts of the state.<sup>29</sup>

While the Gilmer-Aiken Committee's work may well have saved the public school system from collapse by infusing needed resources into local districts, it completely failed in its objectives to provide a quality education to each child in Texas and to supplement the efforts of the poorest districts in the state.

## II

### THE GOVERNOR'S COMMITTEE ON PUBLIC SCHOOL EDUCATION (1965-1968)<sup>30</sup>

By 1965, there had been so many additions and deletions to the basic Gilmer-Aiken framework that it was later described by the man who understood it best, Glenn H. Ivy of the Texas Research League, as "a majority of exceptions."<sup>31</sup> Recognizing the inadequacies of the Minimum Foundation Program, Governor John Connally created a blue ribbon Governor's Committee on Public School Education to "conduct a pervasive inquiry" of elementary and secondary schooling in Texas and to recommend "a definite long range plan" which would catapult Texas into national leadership in public education.<sup>32</sup> This committee, with the assistance of an

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

<sup>28</sup> *Id.* at vii-viii. See also GOVERNOR'S COMMITTEE ON PUBLIC SCHOOL EDUCATION, *THE CHALLENGE AND THE CHANCE* 59-60 (1968) [hereinafter cited as GOVERNOR'S COMMITTEE REPORT]; TEXAS RESEARCH LEAGUE, *TEXAS PUBLIC SCHOOLS UNDER THE MINIMUM FOUNDATION PROGRAM* 8-9 (1954).

<sup>29</sup> GOVERNOR'S COMMITTEE REPORT vii.

<sup>30</sup> The findings of the Governor's Committee on Public School Education were published in seven volumes. In August, 1968, a digest of recommendations and an official report were published. GOVERNOR'S COMMITTEE ON PUBLIC SCHOOL EDUCATION, *THE CHALLENGE AND THE CHANCE: DIGEST OF RECOMMENDATIONS* (1968); GOVERNOR'S COMMITTEE REPORT. In 1969, five additional volumes were published, more carefully detailing and documenting their research and findings. 1-5 GOVERNOR'S COMMITTEE ON PUBLIC SCHOOL EDUCATION, *THE CHALLENGE AND THE CHANCE: RESEARCH REPORT* (1969).

<sup>31</sup> A MAJORITY OF EXCEPTIONS.

<sup>32</sup> Ch. 438, [1965] Tex. Gen. & Spec. Laws 880.

able staff, was the first official body in the history of Texas to address itself in a logical, coherent, and sympathetic fashion to the issue of inequalities in educational opportunity.

The proposals of the Governor's Committee were developed in a period of considerable fluidity nationally in the definition of equal educational opportunity. Educators were concerned not only with equality of access to school services and dollars, but also with schooling outcomes, the societal and individual benefits derived from particular resource mixes.<sup>33</sup> They questioned whether a public school system which systematically reserved its highest rewards, superior scores on achievement tests, and access to additional years of schooling to white and middle-class children was adequately serving the nation. A redistribution of school resources to remove the substantial correlation between educational failure on the one hand and race and socioeconomic status on the other was urged, resulting in Title I of the Elementary and Secondary Education Act of 1965<sup>34</sup> which provided for federal aid to educationally deprived, low-income students. Federal funds were also made available for Operation Headstart on the premise that preschool education was necessary for the poor to overcome the deficits of their home environment. And a landmark national survey of equality of educational opportunity was commissioned by Congress, to be headed by the distinguished social scientist James Coleman.<sup>35</sup>

The trend toward compensatory education nationally was reinforced by the widespread opposition to school desegregation among whites and dissatisfaction with the progress of desegregation among blacks.<sup>36</sup> Many whites perceived school financing reform as a way of avoiding the constitutional obligation to desegregate, ironically resurrecting a revitalized separate-but-equal doctrine. Others doubted the political feasibility of integration, particularly in the large urban centers in the North, and urged that the salvation of black students lay with the development of expensive and innovative programs designed to meet their special needs.<sup>37</sup> Finally, there were elements among the black leadership so dissatisfied with the snail's pace in school integration that resource equality and black community control of the schools were advanced as desirable alternatives.<sup>38</sup> Indeed, even in communities where integration was a reality, the results, in terms of black achievement and the humanization of the school environment, were not at all encouraging. As an outgrowth of these and other pressures, constitutional challenges to the distribution of school resources began to emerge

<sup>33</sup> See, e.g., J. COLEMAN, *EQUALITY OF EDUCATIONAL OPPORTUNITY* (1966) [hereinafter cited as COLEMAN REPORT]; Bowles, *Towards Equality of Educational Opportunity*, 38 HARV. EDUC. REV. 89, 95-98 (1968).

<sup>34</sup> 20 U.S.C. § 241a-m (1970). See generally Murphy, *Title I of ESEA: The Politics of Implementing Federal Education Reform*, 41 HARV. EDUC. REV. 35 (1971).

<sup>35</sup> COLEMAN REPORT.

<sup>36</sup> See generally D. KIRP & M. YUDOF, *supra* note 3, at 347-98.

<sup>37</sup> See generally Cohen, *The Price of Community Control*, 48 COMMENTARY, July 1969, at 23.

<sup>38</sup> See Hamilton, *Race and Education: A Search for Legitimacy*, 38 HARV. EDUC. REV. 669 (1968). See also A. ALTSHULER, *COMMUNITY CONTROL* (1970); *COMMUNITY CONTROL OF SCHOOLS* (H. Levin ed. 1970); Kirp, *Community Control, Public Policy, and the Limits of Law*, 68 MICH. L. REV. 1355 (1970).

by the end of the 1960's,<sup>39</sup> reversing nearly fifteen years of almost exclusive emphasis on racial integration by the civil rights movement following *Brown v. Board of Education*.<sup>40</sup>

Against this background, the Governor's Committee undertook an in-depth study of the Texas elementary and secondary education system, and recommended a whole host of changes. Most significantly, all the recommendations—at least in theory—flowed from the basic proposition that “the public schools should help each student to develop his personal knowledge, skills and competence to the maximum of his capacity, and to learn behavior patterns which will make him a responsible member of society.”<sup>41</sup> Socialization had not been forgotten, but, in large measure, it had yielded to the equal educational opportunity ethic. The most far-reaching of the Committee's proposals were the following:

1. With few exceptions, all school districts with less than 1,600 students in average daily attendance should be consolidated with other districts.<sup>42</sup>

2. The state should finance a kindergarten program, initially giving preference to low income and non-English speaking children. By the end of the 1970's all Texas school children should have the opportunity to participate in the program.<sup>43</sup>

3. The Minimum Foundation Program should be strengthened by the allocation of additional monies for personnel, operations, textbooks, and materials. One additional paraprofessional and an extra operating allowance of \$1,000 should be allocated to school districts for each 100 students (grades 1-8) below grade-level achievement and from low-income families.<sup>44</sup>

4. The State Board of Education should be empowered and given sufficient resources to assess the quality of education in the state, evaluate the efforts of local districts, and make appropriate recommendations to the legislature.<sup>45</sup> In short, the Committee hoped to create something that Texas had never had—a responsible State Board of Education capable of setting educational policy.

5. All the major current expenditure items should be brought under the Minimum Foundation Program so that more equality between affluent and poor districts might be achieved.<sup>46</sup>

6. The Economic Index should be abandoned as a method of calculating the wealth of school districts for purposes of entitlement to state education funds. Over a ten-year period, the state should come to rely upon determinations of the amount of taxable property in each district, calculated

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<sup>39</sup> See, e.g., *McInnis v. Ogilvie*, 394 U.S. 322 (1969); *Hobson v. Hansen*, 269 F. Supp. 601 (D.D.C. 1967), *aff'd sub nom. Smuck v. Hobson*, 408 F.2d 175 (D.C. Cir. 1969). See generally Kirp, *Judicial Policy-Making: Inequitable Public School Financing and the Serrano Case (1971)*, in *POLICY AND POLITICS IN AMERICA* 83, 95-96 (A. Sindler ed. 1973) [hereinafter cited as *Public School Financing*].

<sup>40</sup> 347 U.S. 483 (1954).

<sup>41</sup> GOVERNOR'S COMMITTEE REPORT 12.

<sup>42</sup> *Id.* at 24.

<sup>43</sup> *Id.* at 40.

<sup>44</sup> *Id.* at 41-42.

<sup>45</sup> *Id.* at 49.

<sup>46</sup> *Id.* at 66.

at an equalized assessment ratio.<sup>47</sup>

7. The state should adopt a program of guaranteed teacher salary increases, mandating increments each year for a ten-year period.<sup>48</sup>

Compared to later plans for revamping school financing, the Governor's Committee's approach was far from radical. But it was an ambitious effort to achieve some measure of equality of educational opportunity without completely abandoning the politically entrenched Gilmer-Aiken Minimum Foundation system. The formula was old hat—the level of minimum support was to be raised—but this time the hope was that the floor would be sufficiently high so that few districts would find it necessary to supplement substantially beyond the basic program. In addition, the designation of funds specifically for the disadvantaged, the establishment of higher statewide teacher salaries for qualified teachers, and the use of a more accurate index of local taxpaying capacity would all be steps in the direction of equalizing educational opportunity. While it was not a plan for the ages, it did offer immediate relief to those disadvantaged by the existing financing structure.

The Governor's Committee report, *The Challenge and the Chance*, was published in 1968, too late to have much chance of success. John Connally was no longer Governor, and his successor showed no inclination to push for school financing reform. Neither the Governor's Committee nor its staff was in a position to lobby effectively. Only two of the Governor's Committee's major recommendations were enacted: (1) a state-financed kindergarten program,<sup>49</sup> which would take most of the decade of the seventies to phase in, and (2) a \$400 bonus for vocational teachers.<sup>50</sup> A third recommendation—for a higher teachers' salary scale—was enacted, but only after the Texas State Teachers Association (TSTA) had lobbied successfully for increasing the size of the mandated increments.<sup>51</sup> This new TSTA-sponsored pay scale would cost hundreds of millions of incremental dollars each biennium throughout the following decade.<sup>52</sup> Practically every other recommendation of the Governor's Committee for improving the system was shunted aside by the Texas legislature, usually because of the active opposition of TSTA.

As a result of these events, there was considerable resentment against TSTA both in the Governor's Committee staff and in the legislature. Some legislators had simply been defeated at the polls by TSTA, and many others felt deceived because they had not been aware of the enormity of the costs when they had voted for the pay scale. Consequently, the legislature began requiring official long-term forecasts of costs for proposed spending bills.<sup>53</sup> The

<sup>47</sup> *Id.* at 67.

<sup>48</sup> *Id.* at 48.

<sup>49</sup> TEX. EDUC. CODE ANN. § 21.131 (as amended 1971).

<sup>50</sup> *Id.* § 16.304 (as amended 1969).

<sup>51</sup> *Id.* ch. 16, subch. D (1969).

<sup>52</sup> TEXAS RESEARCH LEAGUE, TEXAS PUBLIC SCHOOL FINANCE: FEWER STUDENTS, MORE MONEY 3 (1973). Compare TEXAS EDUCATION AGENCY, A SPECIAL SUPPLEMENT TO RECOMMENDATIONS FOR LEGISLATIVE CONSIDERATION ON PUBLIC EDUCATION IN TEXAS: PUBLIC SCHOOL FINANCE PLAN 4 (1973).

<sup>53</sup> TEX. REV. CIV. STAT. ANN. art. 5429c-1 (Supp. 1974).



altercation was also to have its subsequent repercussions in a loss of legislative power for TSTA. The effect was also felt by those who later urged school financing reforms, since the mandated pay scale increases for the remainder of the seventies appeared staggering when combined with the costs of equalization proposals.

### III

#### RODRIGUEZ V. SAN ANTONIO INDEPENDENT SCHOOL DISTRICT IN THE DISTRICT COURT

##### A. Background and Decision

The most important event in the history of American school financing began to unfold in the spring of 1968 when a group of distraught parents from the Edgewood Independent School District contacted Arthur Gochman, a noted civil rights lawyer. The parents complained bitterly of the inadequate education afforded their children in the predominantly (90 per cent) Mexican-American district. The poor physical facilities, the tremendously overcrowded classrooms, the shortage of classroom teachers, and the lack of basic instructional materials all stemmed from lack of funds. Edgewood, with the highest ad valorem property tax rate in the San Antonio metropolitan area, raised only \$26 per student in 1967-1968.<sup>54</sup> Edgewood had the lowest property value per student, the lowest per capita income, and the highest proportion of minority students of any district in the San Antonio area.<sup>55</sup> Yet, under the Foundation School Program, the state contributed roughly the same amount of money to Edgewood as it did to the wealthiest school district in San Antonio, the Alamo Heights Independent School District.<sup>56</sup>

Mr. Gochman, aware of the then recent decision in *Hobson v. Hansen*,<sup>57</sup> which dealt with the disparities in school resources among schools within a single district, advised the parents that they might have a claim of constitutional deprivation under the equal protection clause of the fourteenth amendment.<sup>58</sup> In July, 1968, a suit was filed in the United States District Court for the Western District of Texas on behalf of seven parents and eight children in the Edgewood District, alleging an unconstitutional denial of equal educational opportunity.

The *Rodriguez* complaint initially named seven school districts in the

<sup>54</sup> San Antonio Independent School Dist. v. Rodriguez, 411 U.S. at 12.

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

<sup>56</sup> *Id.* at 12-13.

<sup>57</sup> 269 F. Supp. 401 (D.D.C. 1967), *aff'd sub nom.* Smuck v. Hobson, 408 F.2d 175 (D.C. Cir. 1969). See generally Hornby & Holmes, *Equalization of Resources Within Districts*, 58 VA. L. REV. 1119 (1972).

<sup>58</sup> Mr. Gochman's initial action was to submit a legal memorandum on the issues to the Mexican-American Legal Defense and Educational Fund (MALDEF), knowing full well that the parents could not afford the costs of litigation and hoping that that organization would take responsibility for the recommended suit. MALDEF ultimately refused to become involved, and without any financial support whatsoever, Mr. Gochman agreed to press the matter at his own expense in the federal courts.

San Antonio area and the Attorney General of Texas as defendants. It soon became apparent to both the litigants and the three-judge federal district court that the suit had ramifications which were not limited to a single part of the state for, in reality, the whole statewide system of financing education was under attack. The Commissioner of Education and the State Board of Education were therefore added as defendants. Six of the school districts moved to be dismissed as defendants, claiming that no individual school district should bear the costs of defending the entire state scheme.<sup>59</sup>

In September, 1969, the court denied defendants' motion to dismiss the complaint, but stayed further proceedings in order to give the Texas legislature an opportunity to address itself to the school finance problem. The legislature convened in January, 1971, but no progress was made on the finance issue. After the termination of the legislative session in June, 1971, Gochman, now assisted by other counsel, including one of the authors, began final preparations for the trial.

At this point the strategy of the plaintiffs was simple: in order to prevail, the strongest factual showing possible must be made to convince the court of the magnitude of the discrimination against poor and minority children. The state's strategy was even simpler: expose the frivolous nature of the lawsuit and the unsavory motives of plaintiffs' attorneys and expert witnesses.<sup>60</sup> The most important evidence for the plaintiffs was provided by Professor Joel S. Berke of the Policy Institute at Syracuse University. At the urging of the Lawyers' Committee for Civil Rights and without compensation, Professor Berke and his staff collected the existing data on school financing in Texas and analyzed it with the aid of computer techniques. Berke testified that the most affluent districts in the state (above \$100,000 in taxable property per pupil) spent an average of \$815 per pupil at an equalized tax rate of \$.31 per \$100 of assessed valuation, including \$205 in funds provided by the state. In contrast, the poorest districts (below \$10,000 in taxable property per pupil) spent only \$305 per pupil at an equal-

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<sup>59</sup> Many months later, after a decision by the California Supreme Court declaring unconstitutional that state's school financing system, *Serrano v. Priest*, 5 Cal. 3d 584, 487 P.2d 1241, 96 Cal. Rptr. 601 (1971), these same districts would reverse their position and plead with the court for permission to re-enter the case. Ironically, having been dismissed as defendants at their own request, the court would deny such permission. For an analysis of the *Serrano* decision, see generally Karst, *Serrano v. Priest: A State Court's Responsibilities and Opportunities in the Development of Federal Constitutional Law*, 60 CALIF. L. REV. 720 (1972).

<sup>60</sup> Prior to the trial, the testimony of a number of witnesses was taken. Dr. Jose Cardenas, Superintendent of the Edgewood School District, testified as to the high aspirations of the children and parents in his district and the impact of the district's financial plight on educational opportunity. The deposition ended abruptly. Cardenas advocated an egalitarian model for school financing; the Assistant Attorney General replied somewhat dramatically: "There is a name for that. I have no further questions." Deposition of Jose Cardenas, Oct. 20, 1971, *Rodriguez v. San Antonio Independent School Dist.*, 337 F. Supp. 280 (W.D. Tex. 1971).

Richard Avena, Southwest Regional Director for the United States Civil Rights Commission, testified on the history of racial discrimination in Texas. Defense counsel, ignoring the more immediate issues, compelled Avena to reveal that he had been to South America in his youth. Circling for the kill, he suspiciously demanded to know what Avena was "doing" in South America and with whom he had been "associating." Avena dryly replied that he had been a Mormon missionary. Deposition of Richard Avena, *id.*

ized tax rate of \$.70 per \$100, including \$243 from the state.<sup>61</sup> While there was some mixing between the two extremes, the overall result was a substantial correlation between district wealth and educational expenditures. Moreover, Berke asserted that property-poor districts also had the lowest median family income, so the financing system ultimately discriminated against the poor.<sup>62</sup>

At trial, lawyers for the state argued that Texas provided an adequate minimum education, and that the plaintiffs were seeking "socialized education." They asserted that the present financing scheme had been developed through historical experience, and that its invalidation would lead to years of searching for another solution. For the plaintiffs, Mr. Gochman emphasized the failure of the state to commit itself to the principle of equality of educational opportunity in the distribution of state resources. He argued that education was a fundamental interest and poverty a suspect classification such that the state must demonstrate a compelling state interest for its discrimination. Since the state had demonstrated no such interest, the plaintiffs argued it should be ordered to formulate a new financing system which did not discriminate on the basis of wealth other than the wealth of the state as a whole. The state's attorneys left the courtroom confident of victory. The consensus among courtroom observers and reporters was that the state would win hands down.

On December 23, 1971, the three-judge court, in a per curiam opinion, unanimously held that the Texas financing scheme violated the fourteenth amendment.<sup>63</sup> It accepted the plaintiffs' position, concluding that the scheme failed both the compelling state interest test and the less stringent rational basis test for governmental classifications under the fourteenth amendment. The state was given two years in which to remedy the defects of the education financing system.

## B. Aftermath

The initial reaction in Texas was one of surprise, bordering on shock. Part of this reaction can be explained by the fact that the decision seemed to come from out of nowhere; it was almost totally unexpected. The Attorney General's office had been spreading the word that the *Rodriguez* suit was frivolous and need not concern educators or politicians.

### 1. *The General Public*

Early public reaction in most quarters was hostile. The tradition in Texas—at least among the more powerful political groups—is to detest interference by the federal courts in local school matters. This sentiment was articulated by the long-time dean of Texas education finance, State Senator

<sup>61</sup> *San Antonio Independent School Dist. v. Rodriguez*, 411 U.S. at 15.

<sup>62</sup> *Id.* Compare Clune, *Wealth Discrimination in School Finance*, 68 *Nw. U.L. Rev.* 651 (1973); Note, *A Statistical Analysis of the School Finance Decisions: On Winning Battles and Losing Wars*, 81 *YALE L.J.* 1303 (1972). See generally J. COONS, W. CLUNE & S. SUGARMAN, *PRIVATE WEALTH AND PUBLIC EDUCATION* (1970).

<sup>63</sup> 337 F. Supp. 280 (W.D. Tex. 1971), *rev'd*, 411 U.S. 1 (1973).

A. M. Aiken (co-author of the Gilmer-Aiken Bill), when he said in essence that he was not going to participate in the hearings dealing with modification of the finance system. As he expressed it, if the federal courts had all the answers about how the schools should be financed and run, then let *them* provide them. This was, of course, grandstanding on Aiken's part, and later he did participate in Senate Education Committee hearings. But such grandstanding reflects Texas' xenophobic hostility to what is perceived as outside interference.

A much larger number of Texans, relying on misleading newspaper stories, incorrectly believed that the *Rodriguez* decision implied an end to quality education—a future of statewide mediocrity which would be brought about by the necessity of consolidating districts or of leveling expenditures between districts. Special programs for children with special needs, whether handicapped, gifted, or whatever, were thought to be unconstitutional. The decision was also thought to imply an end to school property taxes or, at a minimum, require equalized assessments.<sup>64</sup> Gradually, the public came to understand that the property tax per se was not under attack, that there were two years for compliance, and that the lower court's decision had a fair chance of being reversed by the Supreme Court.<sup>65</sup>

## 2. *The Education Community*

The education community was more reserved and more divided in its judgment than the general public, but they were less enthusiastic than the casual observer might have anticipated. School administrators, viewing any structural change in public education with alarm, responded more like bank executives than educators: their anxiety derived mainly from their uncertainty as to the validity of approximately \$2 billion in outstanding school bonds.<sup>66</sup> Although those fears had been removed by an unnecessary revision of the *Rodriguez* court's original opinion,<sup>67</sup> school administrators in Texas have continued to be hostile to fiscal neutrality and equal ed-

<sup>64</sup> Examples of these reactions abound:

State school board member Herbert O. Willborn of Amarillo expressed concern [sic] the decision "could lead ultimately to nationalization of all public schools." . . . Willborn contended [sic] the concept of share-and-share-alike school funding could result in "the same level of mediocrity" throughout all schools.

Fort Worth Star-Telegram, Dec. 25, 1971, at 2, col. 6. "Pat Holmes, superintendent of East Central District, said the decision would mean the state must find new sources of revenue and the eventual abolition of the property tax." San Antonio Express & News, Dec. 25, 1971, at 2, col. 3. "Equal Pupil Spending Ordered: School Financing Voided." *Id.* at 1, col. 2. "Earl Luna, attorney representing four school districts adjacent to Dallas, . . . said the action represents another 'move by the federal government into control of local schools.'" Dallas Morning News, Dec. 25, 1971, at 1, col. 6. "One top Texas official . . . said the San Antonio decision virtually guarantees that the next regular session of the Legislature will have to enact personal and corporate income taxes. . . ." Houston Post, Dec. 25, 1971, at 1, col. 7. *Compare Public School Financing* 103-06.

<sup>65</sup> See, e.g., Austin American, Dec. 28, 1971, at 1, col. 4; Texas Observer, Dec. 15, 1972, at 1, col. 1.

<sup>66</sup> See generally Heffernan, *The School Tax Issue*, N.Y. Times, Jan. 16, 1972, § F, at 14, col. 3.

<sup>67</sup> The clarification of the December 23, 1971, judgment was entered on January 26, 1972. The language, in relevant part, was as follows: "This order shall in no way effect [sic] the validity, incontestibility, obligation to pay, source of payment or enforceability of any presently outstanding bond, note or other security issued . . . by a school district in Texas for public school purposes. . . ." 337 F. Supp. at 286.

ucational opportunity. The State Board of Education appeared simply incapable of comprehending the implications of the decision for finance reform, pinning its hope on successful appeal to the Supreme Court.<sup>68</sup>

On the other hand, the 150,000 member Texas State Teachers Association saw the decision as an opportunity, not so much to end wealth discrimination, as to recoup its fading political power and to increase the number of teaching positions in the state. This was a period of frightful job shortages brought about by an oversupply of teachers and relatively stable pupil enrollment. Despite the economics of the situation, TSTA members were pressuring for still higher salaries than those programmed earlier. *Rodriguez* was a god-send to the TSTA leadership: it might create conditions comparable to those generated by the Governor's Committee Report in the legislative session of 1969, permitting salary gains for teachers in the guise of school financing reform.

### 3. *The Politicians*

The reaction of politicians to *Rodriguez* was almost unanimous non-commitment and postponement.<sup>69</sup> Commitment was foolish before the Supreme Court had ruled and before the legislature met. Even after the legislature met in January, 1973, it was difficult to predict what would happen. The voters had elected a new and inexperienced Governor, Lieutenant Governor, Speaker of the House, and two of the "greenest" legislative bodies in Texas history. Most elected officials did not understand the problem, much less advance solutions. Perhaps more important, the Governor, the Lieutenant Governor, and many legislators had run on promises of no new taxes, and it was widely believed that school financing reform would require additional revenues for poor districts. To split the pie more equitably, the pie would have to be enlarged.

The most critical body for new education legislation in Texas is the state Senate. Privately both Lieutenant Governor William Hobby (the presiding officer in the Senate) and Senate Education Committee Chairman Oscar Mauzy anticipated affirmation by the Supreme Court of the lower court's decision in *Rodriguez*, reinforcing the prevailing policy of short-run postponement. The Lieutenant Governor could not appear to be crossing the Governor from the moment of joint assumption of office. And Senator Mauzy, an avowed Texas liberal, was operating in a very conservative chamber, so he hesitated to push the Senate, or even his committee, before securing more leverage from the Supreme Court. Even if one thought *Rodriguez* would be affirmed, it was not clear what action should be taken for reform since both the Court's guidelines and the response of various political interest groups in the state were indeterminate.

Similarly, the House of Representatives did not commit itself. The prevailing view was that despite the Governor's opposition to a special session

<sup>68</sup> See Texas State Board of Education, Statement of Principles for the Development of a School Finance Plan (mimeo, Feb. 12, 1972).

<sup>69</sup> See generally M. COHEN, B. LEVIN & R. BEAVER, THE POLITICAL LIMITS TO SCHOOL FINANCE REFORM 2 (1973).

for education finance, such a session would soon be compelled. There was no sense of urgency regarding reform for there would be ample time to consider the problem later.

If one asks what Governor Briscoe was thinking about *Rodriguez* in the period elapsing between the two decisions, the answer is that he was not. He seemed to be hoping or believing that it would simply go away. Some observers would qualify this assessment by saying that Briscoe was receiving advice that the Supreme Court would reverse the lower court's decision. In any event, Briscoe never veered from his resolve not to support any school financing plan which would require a tax increase during his first two years in office.

#### 4. *The Study Groups*

Following the three-judge decision, a dozen or so studies were launched. Only three groups ultimately presented school resource allocation plans (as distinguished from tax reform proposals) with a serious chance for public debate. These were groups with both political power and presumably competent research staffs: (1) the State Board of Education, (2) the Texas State Teachers Association, and (3) Peat, Marwick, Mitchell & Co., a consulting firm retained by the state Senate.

##### a. The State Board of Education Recommendations

On Columbus Day, 1972, ten months after the San Antonio decision, the State Board unveiled its school financing proposals. Incredibly, the Board's recommendations totally ignored the no-wealth discrimination principle of *Rodriguez*,<sup>70</sup> leaving intact the immense disparities in property wealth and expenditures per pupil.<sup>71</sup> Three months later, in response to the urgings of some members of its staff, the Board recanted and recommended the following:<sup>72</sup>

1. Slight increases in staffing formulas under the existing Foundation School Program (FSP) (formerly the Minimum Foundation Program).
2. Allotment increases under FSP for maintenance and operation which would average to \$120 per pupil, as compared with the existing \$30 per pupil.
3. An incremental \$100 per pupil in poor districts receiving Title I funds.
4. Use of market values of property (rather than the existing Economic Index) in computing local shares under FSP.
5. "[T]he level of tax enrichment funds available to school districts should be expanded to a maximum of \$300 per ADA [Average Daily

<sup>70</sup> TEXAS EDUCATION AGENCY, RECOMMENDATIONS FOR LEGISLATIVE CONSIDERATION ON PUBLIC EDUCATION IN TEXAS: PUBLIC SCHOOL FINANCE PLAN (1972).

<sup>71</sup> See Texas Observer, Dec. 15, 1972, at 1, 3.

<sup>72</sup> TEXAS EDUCATION AGENCY, A SPECIAL SUPPLEMENT TO RECOMMENDATIONS FOR LEGISLATIVE CONSIDERATION ON PUBLIC EDUCATION IN TEXAS: PUBLIC SCHOOL FINANCE PLAN (1973).

Attendance], except that those districts currently providing more local funds may remain at current levels.

For up to the first \$100 per ADA of such revenue, the district would levy the equivalent of a tax rate not to exceed \$.10 per \$100 of the market value of taxable property in the district. Guaranteed state aid would be supplied to those districts unable to raise \$100 per ADA by the application of such a rate.

For up to the second \$200 per ADA of such revenue, the district would levy the equivalent of a tax rate not to exceed \$.30 per \$100 of the market value of taxable property in the district. Guaranteed state aid would be supplied to those districts unable to raise \$200 per ADA by the application of such a rate.

Districts with high concentrations of local wealth would fund up to the entire \$300 per ADA from local funds at a reduced tax rate."<sup>73</sup>

This recantation was an immense improvement, although not without its problems. The key to the proposal was the limitation of local enrichment (beyond the Foundation School Program) to a maximum of \$300 per pupil with the state guaranteeing that amount to any district taxing itself at the required tax rate—a limited form of district power equalizing.<sup>74</sup> Districts enriching beyond \$300 at the present time were permitted to maintain their current level of funding, but were not permitted to enrich further.<sup>75</sup> In other words, the existing levels of expenditure of affluent districts were to be frozen, while the state over time would raise the effective minimum in all other districts willing to meet a specified tax obligation. Eventually equalization, or at least limited district power equalization, would prevail. Given the political power of the rich districts, this part of the plan was widely viewed as impractical, and it was quickly dropped after presentation to the legislature. Moreover, the goals of the plan would be rather slow to come to fruition. Nonetheless, many observers feel that the State Board's proposals will form the basis of political compromise at the next regular session of the legislature in 1975.

<sup>73</sup> *Id.* at 11.

<sup>74</sup> The goal of *pure* district power equalization is to insure that a district's expenditure level is a function only of its taxing *effort* rather than its property wealth. This is accomplished by having the state set various expenditure levels according to the local tax rate chosen by the district. If a particular district's property value is too low to produce the revenues called for under the state's guaranteed expenditure level for the specific tax rate selected, the state makes up the difference between what the district raises at that tax rate and the guaranteed expenditure level. If, on the other hand, local wealth is so high that the tax levy produces more than the state guaranteed expenditure level, the district must remit the surplus to the state. See generally J. COONS, W. CLUNE & S. SUGARMAN, *PRIVATE WEALTH AND PUBLIC EDUCATION* 200-44 (1970). We describe the State Board's plan as a *limited* form of district power equalizing for two reasons. First, the plan is operative only for the first \$300 above the Foundation School Program minimum. Affluent districts were permitted to maintain expenditure levels beyond this sum. Second, if a district taxes at the minimum required by the state for a \$300 supplement and raises more than that sum, there is no provision for recapture, that is, turning the additional dollars back to the state for redistribution to poor districts.

<sup>75</sup> There is no discussion of this vital point in the State Board's report other than the cryptic language quoted in the text accompanying note 73 *supra*.

b. The Texas State Teachers Association Plan<sup>76</sup>

The Teachers Association followed the logrolling principle of providing something for everyone. But it also provided something for the taxpayers: an extra tax bill of a billion dollars or so, an incredible increase given the political climate of Texas in 1972-1973. The heart of the TSTA plan in terms of program cost was, predictably, job creation and salary increases.<sup>77</sup> TSTA proposed lower pupil/teacher ratios, additional special duty teachers, acceleration of the scheduled kindergarten program, and more jobs for supervisors, counselors, and principals. Only a small percentage of recommended expenditures would go toward equalization of per pupil expenditures among school districts. There was no program at all for district power equalization beyond the proposed new Foundation Program. While TSTA appeared to have something for everyone, there was really very little for the plaintiffs in the *Rodriguez* suit or for others living in property-poor districts.<sup>78</sup>

c. The Peat, Marwick, Mitchell & Co. Study<sup>79</sup>

The Peat, Marwick, Mitchell & Co. Study was prepared for the Joint Interim Senate Committee to Study School Finance, an amalgamation of three Senate interim committees.<sup>80</sup> We refer to the study by this name partly because it was staffed by the consulting firm of Peat, Marwick, Mitchell & Co., but more importantly because it was a study for which virtually no one wished to claim responsibility. The study paid close attention to *Rodriguez's* prohibition against discrimination on the basis of wealth and attempted to formulate a satisfactory response to the lower court's ruling—a procedure which won it no champions in the political leadership of the state.

The report was not formally delivered until March 20, 1973, but most of the Committee's ideas were out by December, 1972. It presented twelve recommended schemes, derived from three revenue plans and four distributional approaches. Its preferred plan put a severe limitation on local enrichment, although it did not advocate district power equalization beyond the proposed new Foundation Program.<sup>81</sup> It recommended increased support levels for most districts with minimum as well as maximum rates of

<sup>76</sup> TEXAS STATE TEACHERS ASSOCIATION, RECOMMENDATIONS OF THE TSTA COMMITTEE TO STUDY PUBLIC SCHOOL PROGRAM AND FINANCE (1972).

<sup>77</sup> Texas Observer, Dec. 15, 1972, at 1, 4.

<sup>78</sup> Address by Daniel C. Morgan, Conference on School Financing Reform in Texas, Trinity University, San Antonio, Texas, Nov. 30, 1972.

<sup>79</sup> JOINT SENATE INTERIM COMM., REPORT ON PUBLIC SCHOOL FINANCE (1973).

<sup>80</sup> These committees were: the Senate Interim Committee to Study Urban Education, the Senate Interim Committee on Occupational Education, and the Senate Interim Committee to Study Tax Revenue to Fund Rising Costs of Education. *Id.* at 1.

<sup>81</sup> *Id.* at iv. Limitation of local enrichment was to be accomplished by setting a maximum tax rate applicable to equalized assessment values, thereby controlling both variables in the enrichment equation. Note, however, that at least the most affluent districts (depending on the maximum tax rate adopted), would still be able to raise substantial local revenues. *Id.* ch. VI. In this sense, the plan did more for taxpayers (by equalizing tax burdens) than it did for school children. *See id.* at iii.



local property taxation. Significantly, the preferred plan provided that local districts could spend their state funds as they pleased, whereas the TSTA plan had involved inflexible categorical grants.<sup>82</sup> By no means did it recommend reducing local property taxation; in fact, it recommended an increase in the local share of the state's program (from 20 to 40 per cent),<sup>83</sup> and in Texas this implies added property taxes. Like the proposals of the other two major groups, this one urged the adoption of a state-equalized true market valuation system for purposes of both taxation and local share determination. The Peat, Marwick recommendations never received serious consideration, however, because the Supreme Court reversed the three-judge court only one day after the official release of its proposals.

#### IV

##### *SAN ANTONIO INDEPENDENT SCHOOL DISTRICT v. RODRIGUEZ*:<sup>84</sup> REVERSAL IN THE SUPREME COURT AND AFTERMATH

##### A. Reversal

On October 12, 1972, the Supreme Court heard the oral arguments in *Rodriguez*. At last, recognizing the gravity of the case, the State of Texas had secured the services of Charles Alan Wright, a renowned constitutional scholar and professor of law at the University of Texas. The plaintiffs were again represented by Arthur Gochman. Not taking part in the oral argument, but speaking through dozens of amicus briefs, were such organizations as the National Education Association, the NAACP Legal Defense and Education Fund, Inc., the American Association of School Administrators, the AFL-CIO, and the Governors of Minnesota, Maine, South Dakota, Wisconsin, and Michigan.<sup>85</sup> All of these organizations and officials sought affirmance of the lower court decision. The San Antonio Independent School District, realizing that it stood to gain from school finance reform and despite its nominal designation as a defendant, also urged affirmance. On the other side, Attorneys General for thirty-one states, the Superintendent of Schools for Los Angeles County, seven school districts in Los Angeles County, and some of the most affluent suburban school districts in the country filed amicus briefs seeking reversal.<sup>86</sup> On the sidelines, more than fifty attorneys, representing the cream of American law firms, filed amicus briefs seeking

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<sup>82</sup> *Id.* at vii. The current Foundation School Program in Texas requires a district to hire specified personnel in order to qualify for its minimum entitlement: "No district will be required to employ professional personnel for the full number of professional units for which it is eligible, but where a fewer number are employed, grants shall be based upon the number actually employed during the current school year. . . ." TEX. EDUC. CODE ANN. § 16.11(c) (1969). In other words, if particular personnel are unavailable, if a district cannot afford to supplement a professional's salary, if the district cannot afford the necessary physical facilities for particular personnel, or if the district prefers some other category of educational expenditures, it loses its entitlement to Foundation School Program funds.

<sup>83</sup> JOINT SENATE INTERIM COMM., REPORT ON PUBLIC SCHOOL FINANCE v (1973).

<sup>84</sup> 411 U.S. at 1. See generally Comment, *San Antonio Independent School District v. Rodriguez: A Retreat From Equal Protection*, 22 CLEV. ST. L. REV. 585 (1973).

<sup>85</sup> 411 U.S. at 3-5.

<sup>86</sup> *Id.*

to protect the interests of bondholders, while urging neither affirmance nor reversal.<sup>87</sup>

The basic strategy of the state was to demonstrate the lack of constitutional support for the proposition that education was a fundamental interest and poverty a suspect classification.<sup>88</sup> The state virtually conceded that if either of these propositions were adopted, the Texas school financing laws could not withstand the strict scrutiny given classifications under the required compelling state interest test. The state also challenged the data submitted to the lower court, asserting that the plaintiffs had failed to prove that the poor were uniquely injured by the financing plan. Discrimination against poor districts did not mean discrimination against poor people.<sup>89</sup>

Professor Wright, both in his brief and in the oral argument, further attempted to persuade the Court that if *Rodriguez* were affirmed, it would be confronted with an avalanche of litigation challenging the distribution of noneducational state and municipal services.<sup>90</sup> In addition, he argued that the principle of fiscal neutrality might spawn any number of legislative responses, most of which were inconsistent with local control of schools, and most or all of which might not benefit poor or minority children. By the latter argument, counsel invoked the provocative and complex literature on the question of whether increments in school expenditures produce gains in student achievement.<sup>91</sup> Finally the state did concede that it was required to furnish a minimum education to each child, but argued that Texas law already so provided under the Foundation School Program.

Mr. Gochman relied upon the traditional emphasis which American society places upon education as a means of socioeconomic advancement and of inculcating democratic values. He asserted that there was a strong relationship between education and the exercise of first amendment rights and informed voting.<sup>92</sup> Counsel sought to show that the Texas financing scheme primarily injured poor children who depended most on public schooling.<sup>93</sup> Conditions in school districts such as Edgewood were inferior to those in more affluent districts in terms of class sizes, adequacy of facilities, ratio of counselors to students, and qualifications of teachers.<sup>94</sup> He denied that Texas provided even an adequate minimum education, citing the fact that no school district was able to support its educational program exclusively from the Foundation School Program.<sup>95</sup> Responding to the argument that dollars do not make a difference in educational achievement, Gochman asserted that the burden of proof should be on the state to show that resource discrimination was harmless, since the premise of the Texas school financing system was that the quality of education was related to

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<sup>87</sup> *Id.*

<sup>88</sup> Brief for Appellant at 25-39.

<sup>89</sup> *Id.* at 20-25.

<sup>90</sup> *Id.* at 28-29.

<sup>91</sup> *Id.* at 39-42, 18-20.

<sup>92</sup> Brief for Appellee at 31-35.

<sup>93</sup> *Id.* at 38-44.

<sup>94</sup> *Id.* at 20-22.

<sup>95</sup> *Id.* at 17-18.

the level of expenditures. Plaintiff's counsel also urged the Court to take into account the powerlessness of children, their peculiar political vulnerability, and their lack of responsibility for their economic status or place of residence.<sup>96</sup>

Finally Gochman attempted to demonstrate that fiscal neutrality would enhance, rather than diminish, local control of public schools. He argued that it was a hoax to contend that poor districts like Edgewood had the ability to make meaningful choices among competing educational policies. Choice implied the fiscal capacity to fund various alternatives, and Edgewood simply was too poor for this. The present system permitted local control only in affluent districts, while fiscal neutrality would extend that power to all districts.<sup>97</sup>

The Court responded to the oral arguments with a great number of questions.<sup>98</sup> Chief Justice Burger appeared concerned with the difficulties in limiting the fiscal neutrality doctrine to education, fearing that the Court would become enmeshed with a whole array of services. Justice Rehnquist expanded on this point by asking how education could be distinguished from welfare, declared in *Dandridge v. Williams* not to be constitutionally fundamental. If the state had no constitutional obligation to feed and clothe children in accordance with their needs or with some standard of equality, how could it be held so responsible with respect to their education? Justice Blackmun challenged the asserted correlation between district poverty and personal poverty, citing examples in his own state of Minnesota of poor children living in affluent districts with great mineral deposits. Justice Rehnquist, on the other hand, questioned Professor Wright on the relevancy of wealth statistics from other states to the constitutionality of the Texas financing system.

Justices Brennan and White seemed quite concerned with the constitutionality of district power equalizing under the standard proposed by the plaintiffs. If each school district were guaranteed the same revenues at each level of taxation, districts which placed a high value on education might choose to spend more money on public schools than other districts. Why should the preferences of the adult population of a district be a more legitimate criterion for distributing education funds than its wealth? Mr. Gochman replied that local control of the schools was a compelling state interest, but the Justices seemed unsatisfied.

Justice Douglas asked only one question, relating to the impact of the Texas plan on Mexican-Americans. Justices Stewart and Powell, widely perceived as the decisive votes, largely remained silent. Justice Marshall was absent for the oral argument, but reserved the right to participate in the final decision.

On March 21, 1973, the Supreme Court reversed the lower court's decision by a five to four vote. Justice Powell, writing for the majority, largely

<sup>96</sup> *Id.* at 52-55.

<sup>97</sup> *Id.* at 47-51.

<sup>98</sup> In the absence of a written transcript, the description of the *Rodriguez* oral argument is taken from the notes and recollections of the authors.

adopted the arguments advanced by Professor Wright.<sup>99</sup> He applied the rational basis test and held that the Texas school financing system was rationally related to a legitimate state purpose, the provision of a minimum education to every child while preserving the right of local districts to enrich beyond the guaranteed level.<sup>100</sup> The system was far from perfect, but it was not unconstitutional. Reform must be left to the legislative processes.<sup>101</sup>

The majority even asserted that Texas had progressively moved toward the equalization of educational opportunity:

Texas has acknowledged its [school financing plan's] shortcomings and has persistently endeavored—not without some success—to ameliorate the differences in levels of expenditure without sacrificing the benefits of local participation.<sup>102</sup>

Regrettably, the truth of the matter is that equality of expenditures between rich and poor districts had never been studied or proposed, let alone implemented, in Texas before judicial intervention. The stillborn report of the Governor's Committee in the mid-1960's is the only exception.<sup>103</sup>

Justice Stewart concurred in the result.<sup>104</sup> He described the Texas system as chaotic and unjust, but denied that it was unconstitutional. Justices White, Brennan, Marshall, and Douglas dissented largely on grounds advanced by the plaintiffs in their brief and oral argument, with varying degrees of reliance on the compelling state interest test.<sup>105</sup> Perhaps Justice Marshall best summarized the feelings of the dissenters when he stated:

The Court's suggestions of legislative redress and experimentation will doubtless be of great comfort to the school children of Texas' disadvantaged districts, but considering the vested interests of wealthy school districts in the preservation of the status quo, they are worth little more. The possibility of legislative action is, in all events, no answer to this Court's duty under the Constitution to eliminate unjustified state discrimination. In this case we have been presented with an instance of such discrimination, in a particularly invidious form, against an individual interest of large constitutional and practical importance. To support the demonstrated discrimination in the provision of educational opportunity the State has offered a justification which, on analysis, takes on at best an ephemeral character.<sup>106</sup>

### B. Aftermath

After the Supreme Court's decision it was inevitable that the fiscal neutrality principle would not be adopted in Texas during the 1973 legislative session. Governor Briscoe was insistent that there was not enough time in this session for the requisite study, that property tax reform must precede or accompany school finance reform, and that taxes must not be raised during the current session or at any special session. Thus, no serious

<sup>99</sup> 411 U.S. at 1. See generally Yudof, *supra* note 19, at 500-04.

<sup>100</sup> 411 U.S. at 49.

<sup>101</sup> *Id.* at 59.

<sup>102</sup> *Id.* at 55.

<sup>103</sup> See the text at pp. 389-90 *supra*.

<sup>104</sup> 411 U.S. at 59.

<sup>105</sup> *Id.* at 62, 63, 70.

<sup>106</sup> *Id.* at 132-33.

effort at reform legislation appeared likely before the next biennial legislative session two years hence.<sup>107</sup> Amazingly, however, the leadership of the House of Representatives opted to push for some form of compromise reform during the legislative session. Such behavior is puzzling because ultimate defeat by gubernatorial veto appeared certain. The explanation for this development may, however, offer some encouragement for future reform efforts.

Before *Rodriguez*, scarcely a handful of people in Texas had understood the state's system of school finance, which is without doubt one of the nation's most complex. But because of the publicity surrounding *Rodriguez*, the level of consciousness of the body politic had been raised, and there was general awareness of the financing system's severe deficiencies.<sup>108</sup> Leading politicians had affirmed publicly the necessity of reform despite the ruling of the Supreme Court.<sup>109</sup> People now seemed to expect or even desire reform, in numbers greater than our analysis to this point would probably lead the reader to predict.

On May 2, 1973, between 1,500 and 4,000 (depending on whose estimates one accepts) Mexican-American children and adults, organized by the People's Lobby for Equal Education (PLEE),<sup>110</sup> descended on the Capitol building in Austin, Texas, demanding that measures be taken to assure equality of educational opportunity. Governor Briscoe, politically nervous at this time, opted to speak to the crowd on the Capitol's steps. At the outset the crowd booed Briscoe, but in the course of his speech, as he promised relief and solution, they cheered him. Later the same day the Governor deliberated with a handful of representatives from the group. He offered an emergency plan which would give money to only the poorest quartile of districts, but the quantity of money was practically nil. His offer was rejected, and the PLEE representatives were insulted by its tender. As they saw it, the Governor had thought them too stupid to recognize that his plan gave them nothing. More charitably, the rapidity of developments and the complexities of the problem may have taken their toll: it was never clear that the Governor himself understood the limited effect of his own proposal.

Partly as a consequence of the PLEE march, partly as a consequence of public expectations, but more significantly because of the unexpected entry of the Texas State Teachers Association into the current reform movement, the House leadership decided that they just had the votes to pass their own Briscoe-defiant legislation. That bill, H.B. 946, was not a no-wealth discrimination bill, but it had equalization features plus something for the teachers.<sup>111</sup> For equalization purposes, it would establish a funding system

<sup>107</sup> See Troutt, *Many Chafe at School Finance Delay*, Houston Post, July 26, 1973, § BB, at 1, col. 1.

<sup>108</sup> See, e.g., R. HOOKER, *ISSUES IN SCHOOL FINANCE: A TEXAS PRIMER* (1972); LEAGUE OF WOMEN VOTERS OF TEXAS, *TEXAS SCHOOL FINANCE* (1972); Houston Post, July 26, 1973, § BB, at 2, col. 1.

<sup>109</sup> See Houston Post, Mar. 25, 1973, at 1, col. 1.

<sup>110</sup> See Dallas Morning News, May 3, 1973, at 1, col. 1; San Antonio Light, May 3, 1973, at 1, col. 1.

<sup>111</sup> See Houston Post, July 26, 1973, § BB, at 2, col. 1.

whereby any district willing to impose an incremental property tax of \$.40 per \$100 property value could obtain funds from the state government (in addition to the Foundation School Program minimum) to make up the difference between the tax's yield and \$300 per student. On the critical vote to shut off debate, H.B. 946 passed by a margin of one vote, 71-70. For the record, however, the votes became 83-50 and 95-47 on successive readings.<sup>112</sup> Whether this success was due to popular support for finance reform, fear of the still politically potent TSTA (despite the fact that its power has considerably diminished), fear of the Speaker, or the presence of a new urban-minority-labor-liberal-poor district coalition which might hold power for reform in the future was unclear.

In the Senate, H.B. 946 never had a chance, though at times it looked more potent than the seasoned observer would have expected, probably because of the pressure of TSTA. In high drama the legislature debated school finance down to its closing moments. Nothing was passed, the Governor was embarrassed, TSTA had publicly failed to get its way, and the poor districts and minorities gained no money but retained some hope.

Subsequent to legislative adjournment, numerous study groups have continued to prepare for the regular session of the legislature in 1975. The Governor's Office has a study group, the Senate has one, the House has several, the State Board continues its work, the Texas Education Agency is heavily involved, the Texas Research League remains in the game, along with the Legislative Property Tax Committee and the Texas Advisory Commission on Intergovernmental Relations. A new group called Texans for Educational Excellence (TEE), headed by the former superintendent of the Edgewood District, has also entered the field on behalf of the poorest districts.<sup>113</sup>

But the group that most eyes of Texas are upon is the creation of Governor Briscoe, who appears likely to be re-elected for four years after the expiration of his first term in 1974. The Governor's study group takes the title of Governor's Office of Educational Research and Planning, headed by Special Assistant to the Governor, Dr. Richard Hooker. To date, Hooker's group has set itself an ambitious research agenda, and has gone to great lengths to establish good relations with all concerned groups. This is a manifestation of Dr. Hooker's conviction that in the end conventional Texas politics will decide the outcome. Hooker's group has decided that capital and debt service expenditure must remain the sole responsibility of local districts. In addition, it has rejected fiscal neutrality by favoring the retention of the power of school districts to vote any local enrichment funds they desire in addition to the state's Foundation Program. No effort to equalize the fiscal capacities of districts is contemplated.

In contrast to the Governor's study group, the Senate Education Committee's study group appears dedicated to genuine structural reform to

<sup>112</sup> 63D LEGISLATURE OF THE STATE OF TEXAS, HOUSE JOURNAL 3765, 3766 (May 15, 1973) (Record Nos. 10, 11).

<sup>113</sup> Texas Observer, Dec. 15, 1972, at 1, 5-6.

guarantee an equitable distribution of school resources. But whether the Committee will be willing to adopt such reform is not yet known.

## V

## IMMEDIATE PROSPECTS FOR REFORM

The possibility of no-wealth discrimination reform by the 1975 legislature is still problematical. Dr. Hooker and his staff seem to be giving away most of the bargaining chips in advance of the game. To reform-minded groups Hooker says that he will achieve the maximum of equalization consistent with political reality. But even the limited degree of equalization Hooker espouses faces political difficulties. First, many other groups have Governor Briscoe's ear, so Dr. Hooker is not yet free to proceed as he pleases. Second, the Hooker group's potential equalization proposals, weak as they are, appear to be in conflict with the traditionally powerful forces in Texas education policy and finance.

One of these forces is TSTA, which is continuing to fight for its life as a professional organization. As a result, equalization is apt to receive low priority among its goals for the next session of the legislature. More important goals are: (1) higher salaries through a further increase in the state minimum salary scale, (2) contracts which permit limited collective bargaining, (3) higher retirement benefits, and (4) creation of new jobs. TSTA will also be urging a concept of staff inflexibility which will prohibit school administrators from diverting funds to categories other than teacher salaries. The new TSTA position is evidenced by the fact that Dewitt Hale, the House's "education dean" who traditionally carries TSTA's education bills, has already let it be known that the salary bill will be separated from other education legislation in the next session of the legislature. Thus, last session's coalition of urban areas, minorities, the poor, organized teachers, and the House leadership is by no means certain to be reorganized.

The greatest hope for meaningful reform lies with constitutional revision. At the time this article is being written, the legislature sits as a Constitutional Convention. The proposed draft from which they work, *A New Constitution for Texas*,<sup>114</sup> is the product of nearly a year's work by a Constitutional Revision Commission (CRC). A reform education article for the new constitution was adopted by this Commission, largely representative of the political power in the state, with surprisingly little opposition. The CRC article was more progressive than that of any existing state constitution:

*Article VII**Education*

## Section 1. Equitable Support of Free Public Schools

(a) 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 to establish and make suitable provision for the equitable support and maintenance of an

<sup>114</sup> TEXAS CONSTITUTIONAL REVISION COMMISSION, *A NEW CONSTITUTION FOR TEXAS* (1973).

efficient system of free public schools and to provide equal educational opportunity for each person in this State.

(b) In distributing State resources in support of the free public schools, the Legislature shall ensure that the quality of education made available shall not be based on wealth other than the wealth of the State as a whole and that State supported educational programs shall recognize variations in the backgrounds, needs, and abilities of all students. In distributing State resources, the Legislature may take into account the variations in local tax burden to support other local government services.<sup>115</sup>

This education clause has since become one of the three or four most controversial sections of the proposed new draft, with both the Governor and the State Board of Education opposing its adoption.<sup>116</sup> But the prestigious Chairman of the Revision Commission and the Commissioner of Education have defended its underlying no-wealth principle, if not the specific CRC language. On February 11, 1974, the Education Committee of the Convention approved a modified form of section 1 of the CRC education article by the lop-sided margin of 13-7:

A general diffusion of knowledge being essential to the preservation of the liberties and rights of the people, the legislature shall provide for a system of free public schools through the secondary level that will furnish each individual equal educational opportunity.

In distributing state support of the free public schools, the legislature shall ensure that the quality of education made available shall not be based on wealth other than the wealth of the state as a whole.<sup>117</sup>

The Committee's provision was nearly as ambiguous as the CRC draft. The key phrase, "state support," may refer to all revenues spent on education, whether raised by the state or locally, or it may refer only to funds provided by the legislature. Obviously, the latter interpretation would be the death-knell of equalization efforts since most of the disparities among school districts arise from variations in local taxpaying capacity and not from discriminatory allocations of Foundation School Program funds. If, however, the second paragraph were read in the light of the "equal educational opportunity" language of the first paragraph, it appeared as if the no-wealth discrimination principle had been adopted. Local enrichment was permitted, but it must not be based on local affluence; rather, educationally relevant criteria must be utilized.<sup>118</sup>

<sup>115</sup> *Id.* at 27.

<sup>116</sup> TEXAS STATE BOARD OF EDUCATION, RECOMMENDATIONS OF THE STATE BOARD OF EDUCATION REGARDING CERTAIN PROVISIONS OF THE PROPOSED CONSTITUTION AS SUBMITTED BY THE CONSTITUTIONAL REVISION COMMISSION 1 (1973).

<sup>117</sup> TEXAS CONSTITUTIONAL CONVENTION, REPORT OF THE COMMITTEE ON EDUCATION 1 (1974).

<sup>118</sup> The comments in the Education Committee's report suggest this interpretation:

Equal educational opportunity is assured by requiring the state to guarantee that the quality of a person's education be dependent on the wealth of the state as a whole, rather than the tax resources of the local school districts. The inclusion of this provision results primarily from two elements which contribute greatly to the inequities in public school financing: (a) disparities in local spending per pupil caused by the differences in taxable wealth of school districts, and (b) the failure of the Minimum School Foundation Program to compensate for the differences in the taxable wealth of school districts. There is no intent in the language proposed by the committee to prohibit local enrichment by individual school districts.



This ambiguity was ultimately carried over into the education provisions tentatively adopted by the whole Convention. The Education Committee's proposal for section 1 was quickly defeated on the convention floor, but an alternative—which would have permitted local enrichment—also failed of passage.<sup>119</sup> When it appeared that divisions over the “hottest section of the most controversial article”<sup>120</sup> might frustrate the entire constitutional revision, the Convention leadership worked out a compromise in two parts. First, the Convention adopted the first paragraph of section 1 as it had been originally proposed by the Education Committee.<sup>121</sup> Second, without public announcement, arrangements were made to amend section 5 of the education article (which previously had only dealt with the power of the legislature to create school districts and junior college districts) as follows: “The legislature by general law shall provide for school districts and community junior college districts; and these districts may provide local enrichment of educational programs consistent with general law.”<sup>122</sup>

Through the miracle of indecisiveness and political compromise, the Convention thus managed to accomplish the near impossible: two inconsistent theories of school financing had been approved. Section 1 would require the state to furnish each child with an equal educational opportunity. This means that inequalities based upon educationally irrelevant criteria such as local wealth would not be permitted. Local enrichment, as traditionally practiced, would be unconstitutional. At the same time, however, section 5 approves inequalities in the distribution of school resources by allowing local districts to enrich their programs in accordance with their fiscal capacity. This would imply that the words “equal educational opportunity” in section 1 require only an “equal minimum” state support level since equality could not be determined with reference to what children in other districts were receiving from local sources. Or it may mean that the state must provide an equal educational opportunity, something more than a minimum, under standards which are not readily apparent from the face of the constitutional provisions. A more complete muddling of the issues is difficult to imagine.

If the proposed education provisions are ultimately approved by the Convention and voters, as a part of the new constitution, we believe that there is a way to harmonize sections 1 and 5. The emphasis should be placed on the words “consistent with general law” in section 5, thereby permitting local enrichment which does not conflict with the equal educational opportunity phrase in section 1, presumably a part of the general law. Local enrichment would be lawful if premised on educationally relevant criteria or, possibly, on tax effort under a district power equalization

*Id.* at 14. Compare *Blase v. State*, No. 45273 (Ill. Sup. Ct., Sept. 25, 1973).

<sup>119</sup> Austin American-Statesman, Feb. 20, 1974, at 17, col. 1. But see Kamin, *The School Finance Language of the Education Article: The Chimerical Mandate*, 6 JOHN MARSHALL J. PRAC. & PROC. 331 (1973).

<sup>120</sup> Austin American-Statesman, Feb. 20, 1974, at 6, col. 1.

<sup>121</sup> *Id.*

<sup>122</sup> TEXAS CONSTITUTIONAL CONVENTION REPORTS, THE CONVENTION IN PLENARY SESSION, Day No. 32, Feb. 21, 1974, at 101.

scheme.<sup>123</sup> It would not be lawful if tied to district wealth. While it might be argued that section 1 by itself would achieve this result (and therefore section 5 must mean something else), the purpose of section 5 would be to make it abundantly clear that some forms of local enrichment are permissible, notwithstanding disagreements over the meaning of the phrase "equal educational opportunity." If the Texas Supreme Court were to adopt this interpretation, the children of Texas would have been afforded the very rights that the United States Supreme Court denied them in the *Rodriguez* litigation.<sup>123a</sup>

## VI

### LONG-TERM PROSPECTS

The long-term prospects for school financing reform in Texas are also uncertain. If a progressive constitutional provision on education is approved by the Constitutional Convention and the voters, the pace of reform is bound to accelerate. But even then the precise nature and timing of reform is not readily predictable. Much will depend on the interpretation of the education clause by the state courts, the willingness of politicians to carry out the constitutional mandate, and the economic health of the state. If there is no constitutional revision or the pace of reform after constitutional revision is slow, reform groups probably will bring suit in state court seeking to repeat the victory in *Robinson v. Cahill*<sup>124</sup> in New Jersey. The outcome of such litigation is by no means clear, and the state may experience many years of struggle both in the courts and in the legislature.

While the precise outcome is not apparent, it is possible to identify those factors which will be critical to the ultimate resolution of the school financing problem. The most important factor is the development of a public consensus that each child must have equal access to the public schools—at least to the extent that the distribution of dollars determines access.<sup>125</sup> It must be emphasized that school financing reform is in the interest of all the people of the state and is not simply an issue for the poor and minorities. Those advantaged by the system today may be disadvantaged tomorrow. Every citizen has a substantial interest in efficient and rational governmental allocation decisions. In short, a politics of consensus must be substituted for the politics of federal intervention. Reform groups must recognize that the President, the Congress, and the federal courts are unlikely to come to their rescue if they fail. At the most basic level, this requires the raising of the collective consciousness of the state, making the public in general, and educators and

<sup>123</sup> See Yudof, *supra* note 19, at 494-97.

<sup>123a</sup> Subsequently, the Style and Drafting Committee combined sections 1 and 5 in a manner calculated to make clear the superiority of the local enrichment principle. For this and other reasons, the entire proposed constitution failed to muster the necessary majority and as this article went to press, the Constitutional Convention disbanded.

<sup>124</sup> 62 N.J. 473, 303 A.2d 273 (1973). See Ruvoldt, *Educational Financing in New Jersey: Robinson v. Cahill and Beyond*, 5 SETON HALL L. REV. 1 (1973); Tractenberg, *Robinson v. Cahill: The "Thorough and Efficient" Clause*, 38 LAW & CONTEMP. PROB. 312 (1974). But see Kamin, *supra* note 119.

<sup>125</sup> See Yudof, *supra* note 19, at 411.

legislators in particular, more aware of the deficiencies and irrationalities of the current financing scheme.

The popular realization that the present Texas financing scheme for public education is inequitable, standing alone, is a necessary but not sufficient condition for reform. The same legislators and educators who decry the lack of an equal educational opportunity for many children in the state will rise to the support of local enrichment by school districts. It is not, as some have thought, that they are concerned that increased state support for education will lead to centralization of authority and the demise of local control. Most are already aware of the limited curricular and personnel choices available to local districts under state law.<sup>126</sup> Rather their position evolves from a strong belief that the marketplace should allocate educational resources. Affluent people buy more Mercedes, expensive houses, and piano lessons than the less affluent. Why should they not be free to buy more public education? To forego a vacation in order to pay higher taxes for a new school gym or language laboratory? Making the logical, if simplistic, transition from affluent persons to affluent school districts, the wealth of these political subdivisions, operating in a free market, should be determinative of the pricing and allocation of educational services. Those who choose to pay more, and have the economic capacity to do so, should capture the lion's share of the educational goodies.

These arguments are not easily overturned. Professor Michelman has noted the difficulty in perceiving inequalities based upon ability to pay when public or private goods are priced equally to all.<sup>127</sup> Professor Tiebout and others have argued that a free market approach to the pricing and allocation of local public services may be entirely in order.<sup>128</sup> Although this is not the place to take up these arguments, we are confident they can be refuted. The political fact is that the public must be persuaded of the philosophy that public education, whatever the rights of parents to secure a private education, should not be allocated on an ability to pay basis, and that inequalities between children must be related to their educational needs, or at a minimum, to the willingness of parents to tax themselves for educational purposes. In short, the philosophy underlying the Minimum Foundation Program, the philosophy of economic competition for public school resources beyond a state guaranteed floor, must be rejected. At the present moment, both of these philosophies are competing for public favor, and thus the anomolous result achieved by the Constitutional Convention, the affirmation of both philosophies, is readily understandable. However, if basic structural reform of the financing system is to take place, if the desired direction of reform is toward

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<sup>126</sup> *San Antonio Independent School Dist. v. Rodriguez*, 411 U.S. at 126-30 (Marshall, J., dissenting).

<sup>127</sup> Michelman, *Foreword: On Protecting the Poor Through the Fourteenth Amendment*, 83 HARV. L. REV. 7 (1969).

<sup>128</sup> See Ostrom, Tiebout & Warren, *The Organization of Government in Metropolitan Areas: A Theoretical Inquiry*, 55 AM. POL. SCI. REV. 831 (1961); Tiebout, *An Economic Theory of Decentralization*, in NATIONAL BUREAU OF ECONOMIC RESEARCH, *PUBLIC FINANCES: NEEDS, SOURCES AND UTILIZATION: A CONFERENCE 79* (1961); Tiebout, *A Pure Theory of Local Expenditures*, 64 J. POL. ECON. 416 (1956). *But see* Netzer, *Federal, State, and Local Finance in a Metropolitan Context*, in *ISSUES IN URBAN ECONOMICS* 435 (H. Perloff & L. Wingo eds. 1968).

the achievement of equality of educational opportunity for all children, a consensus as to the inappropriateness of the market model is essential.

If the necessary consensus is to be created, educators must also act. They must seek to reverse the trend of public distrust and lack of support for the public education system.<sup>129</sup> In part, this trend emanates from the excesses of young people in the 1960's, but in larger part, it reflects a growing feeling that educators do not perform their job efficiently. In the *Rodriguez* opinion itself, Justice Powell referred time and again to the debate over whether additional school resources will improve the plight of low income children.<sup>130</sup> Despite the creation of compensatory education programs, rising teacher salaries, and huge increases in per pupil expenditures, there is a pervasive feeling that educators do not know how to teach the poor. If a fairer division of educational resources means a larger education budget, the public must be convinced that educators will perform the task assigned them and spend the money wisely. Platitudes about the dedication of teachers, the lack of receptivity of the pupils, or the necessity of changes outside the school system will not suffice. If indeed the poor are unteachable—whether the cause is genetic, cultural, or political—the long-term prospects for school financing reform are bleak. We prefer to think that creative and ingenious educators will meet the challenge and persuade the public that they are worthy of public support.<sup>131</sup>

Consensus also requires cooperation with those dissatisfied with the property tax. Heretofore, the strategy among lawyers has been to distinguish sharply between tax issues and education issues; for the probability of success in the courts, given their traditional hands-off attitude in tax matters, increases to the extent that the latter characterization may be invoked. The politics of consensus demands the reversal of this approach. Those who support financing reform must come to see that property tax reform is a necessary concomitant. There are no signs that Texas will abandon the local property tax, and if the decision is made to pour dollars into poor districts, an accurate method of determining the relative property wealth of all districts must be adopted. This means a system of equalized assessments—something tax reformers have sought for years—although the equalized values need not necessarily be used for strictly local purposes.<sup>132</sup>

Many of the plans for altering the current financing system call for some measure of district power equalizing, guaranteeing a particular level of revenues to each district at each rate of taxation. While power equalizing would probably yield more education dollars to poor districts, its overall and unavoidable effect is to equalize tax burdens among school districts. A taxpayer

<sup>129</sup> Cf. M. COHEN, B. LEVIN & R. BEAVER, *supra* note 69, at 28.

<sup>130</sup> 411 U.S. at 42-43, 46 n.101. See generally Yudof, *The Politics of Futility*, 2 J. LAW & EDUC. 467 (1973).

<sup>131</sup> Of course, to the extent that teachers perceive school financing reform as an effort to make them accountable for the learning difficulties of their students, such reform may become the object of opposition by teacher organizations. See M. COHEN, B. LEVIN & R. BEAVER, *supra* note 69, at 29.

<sup>132</sup> See generally Yudof, *The Property Tax in Texas Under State and Federal Law*, 51 TEXAS L. REV. 885 (1973).

in a poor community, who presently pays at a higher tax rate than those in neighboring districts in order to support a particular expenditure level per pupil, will find his tax rate and tax burden somewhat reduced as a result of power equalizing. To be sure, the state must find the revenues somewhere to subsidize those poor districts who do not raise the guaranteed minimum at the required tax rate, but these funds, raised on a statewide basis, are likely to come from sales or other taxes which tax reformers find less objectionable than the local property tax.

The point is that school reformers and tax reformers have many of the same items on their respective agendas. If they combine forces, they may increase the likelihood of changes in both areas. There is, however, a danger for those whose primary interest is non-discrimination in the allocation of school resources. There is a great fear among powerful industrial and mineral interests in Texas that equalized assessments, in some ill-defined manner, will lead to higher taxes or introduction of a corporate income tax. Many private citizens also fear the imposition of a state income tax. To the extent that school financing reform is tied to tax reform, the opponents of the former will multiply in numbers and strength. Voters in four states have recently refused to endorse proposed restrictions on property taxation.<sup>133</sup> Perhaps, however, the tail of property tax administration is already wagging the dog of school financing, and little is lost by entering into the obvious political alliance.

Forceful and committed gubernatorial leadership is another significant variable in the school financing reform equation. Such leadership has been apparent in virtually every state that has moved away from a wealth-determined allocation scheme.<sup>134</sup> It is important to the creation of the necessary consensus because of the extraordinary position of the governor as moral leader and educator of the people. It is important in a more immediate and pragmatic sense in that the governor has tremendous influence over the legislature, the body charged with formulating new financing plans. Thus far, Texas Governor Dolph Briscoe has not demonstrated such leadership, and this inevitably decreases the prospects for change.

Apart from gubernatorial leadership, the composition of the Texas legislature will be vitally important to school financing reform efforts. Texas, like most states, has experienced tremendous growth in urban areas,<sup>135</sup> and with the advent of court-ordered reapportionment,<sup>136</sup> the balance of power in the legislature is shifting from rural to urban and suburban areas of the

<sup>133</sup> M. COHEN, B. LEVIN & R. BEAVER, *supra* note 69, at 2 n.2. The availability of federal revenue sharing funds may also contribute to legislative inaction with respect to improving the administration of the property tax since such funds will permit some tax relief without reform of state laws. *Id.* at 3. *But see* ADVISORY COMMISSION ON INTERGOVERNMENTAL RELATIONS, FINANCING SCHOOLS AND PROPERTY TAX RELIEF—A STATE RESPONSIBILITY: THE REPORT IN BRIEF (1973).

<sup>134</sup> Reuben Askew of Florida is a good example of a forceful and progressive governor, acting in a politically conservative climate, who has successfully led school financing reform efforts. *See* M. COHEN, B. LEVIN & R. BEAVER, *supra* note 69, at 31-32.

<sup>135</sup> TEXAS ALMANAC AND STATE INDUSTRIAL GUIDE 1974-1975, at 177 (1973).

<sup>136</sup> *See, e.g.,* White v. Regester, 412 U.S. 755 (1973); Kirkpatrick v. Preisler, 394 U.S. 526 (1969); Reynolds v. Sims, 377 U.S. 533 (1964).

state. In 1972, fully sixty per cent of Texas' population lived in the seven most populous standard metropolitan statistical areas,<sup>137</sup> ranging in population from 352,000 to 2,536,900.<sup>138</sup> The ultimate results of this shift in terms of reform of the school financing structure may be contradictory. On the one hand, urban legislators are likely to be sympathetic to such changes, not because their districts are low in property wealth (indeed, most are at or above the state average), but because they contain concentrations of educationally deprived children. To the extent that Texas adopts allocation criteria based upon educational need, their districts are likely to benefit. Thus, reapportionment may lead to increased urban representation and in turn to increasing sentiment for reform.

On the other hand, representation of suburban districts will increase. Indeed, suburban growth appears to be greater than urban growth. Suburban legislators are not at all likely to be sympathetic to school financing measures which reduce the importance of the local property tax base,<sup>139</sup> since they often represent socioeconomically homogeneous districts with high concentrations of property wealth.<sup>140</sup> If there is any hope for school financing reform in reapportionment, it must lie in the as yet unsubstantiated hope that the new breed of suburban legislators will be less parochial and more sophisticated in dealing with fiscal matters than their rural predecessors.

Another factor which will determine the success of the school finance reform movement is, not surprisingly, money. The state, in theory, could take dollars away from the most affluent districts, or reduce expenditures on highways, universities, welfare, or other staples of state government in order to make available funds for equalization among school districts. But this is unlikely. History demonstrates that once a program works its way into the state budget, it is difficult to dislodge. Each program has its own powerful adherents, aided by those whose jobs are dependent on the program. Moreover, increased expenditures on the program become necessary simply to maintain the current level of services as inflation takes its toll. Thus new priorities are created out of tax surpluses, clearly limiting the ability of the

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<sup>137</sup> These areas are Austin, Beaumont-Port Arthur-Orange, Corpus Christi, Dallas-Fort Worth, El Paso, Houston, and San Antonio. See TEXAS ALMANAC AND STATE INDUSTRIAL GUIDE 1974-1975, at 171, 207 (1973).

<sup>138</sup> *Id.* at 207.

<sup>139</sup> It is noteworthy that school financing reform, along district power equalizing lines, recently took place in Kansas, a state with few suburban areas. Apparently the suburban bloc of legislators was not sufficiently numerous to counteract the influence of poor or average wealth urban and rural districts. Interview with Tom Young, President of Wichita, Kansas, Chapter of the National Education Association, Mar. 6, 1974.

<sup>140</sup> Of course, if there were fewer and larger school districts, each member of the legislature might represent a more heterogeneous population, and the prospects for reform would increase. This appears to be the case in Florida where county-wide school districts are the rule and a progressive school financing plan was adopted. See V. FLEMING, THE COST OF NEGLECT, THE VALUE OF EQUITY: A GUIDEBOOK FOR SCHOOL FINANCE REFORM IN THE SOUTH 33-34 (1974). In Texas, however, this reduces itself to a chicken and egg problem since school district consolidation and reorganization would probably generate even more opposition than school financing reform. Thus, if these predictions are valid, what is gained by increased urban representation in the legislature is likely to be more than offset by similar or greater gains in suburban representation. See generally M. COHEN, B. LEVIN & R. BEAVER, *supra* note 69, at 23-28.

executive or legislature to refashion the priorities of government. This analysis also applies to school financing, as almost all of the states that have revamped their allocation criteria have been the beneficiaries of tax surpluses.

In Texas, conditions may be ripe for such a tax surplus. The Comptroller reported a \$315 million surplus in the last biennial budget period.<sup>141</sup> This may not be enough to do the entire job, even assuming that all the money were allocated to public schools, but it is a substantial start. For the long run, however, three factors will be decisive as to the existence of a surplus. First, Texas is one of the wealthier states in the nation, and yet it ranks quite low in tax effort.<sup>142</sup> Eventually the state will have to expand its tax base by taxing corporate or individual incomes, and certainly this may result in the necessary revenue surplus. Until this happens, however, surpluses are not likely to be large enough to permit the establishment of new priorities for education. Second, much will depend upon the health of the national economy. If the energy crisis, high interest rates, and governmental mismanagement of the economy lead to a prolonged recession, the state will be hardpressed to meet its current commitments, much less pour hundreds of millions of dollars into the public schools. Third, enrollments in the public schools may remain constant or decline, teacher salaries may not rise as rapidly as in the past due to the teacher surplus, bringing more flexibility to the education budget for equalization purposes.

Finally, the role of teacher organizations is also critical to school financing reform, for such organizations have historically had a significant influence on the financing of public education. Indeed, it would not be inaccurate to suggest that the Texas State Teachers Association was the single most influential interest group in the formulation of the Gilmer-Aiken proposals of 1949. For the present, however, TSTA is considerably weakened, and there may be great merit in the suggestion that both TSTA and school finance reformers can gain much from a political alliance. The only politically acceptable method of redressing inequalities between rich and poor districts in the short run is to expand education budgets to allow higher state subventions to the latter. This, in turn, means higher salaries, smaller class sizes, and more job opportunities for teachers. At a time when there is a surplus of teachers and some degree of public hostility toward them, the joinder of equal educational opportunity issues with teacher issues may be the only feasible way of improving the status and working conditions of teachers. In the long run, however, teachers and school finance reformers may not be able to remain good bedfellows. To the extent that financing reform leads to greater dependence on state funds, uniformity in salaries and working conditions across the state may become a reality. Thus, teachers who have won better salaries and working conditions in areas of affluence or short teacher supply may find themselves

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<sup>141</sup> Dallas Morning News, Jan. 17, 1974, at 1, col. 6.

<sup>142</sup> See, e.g., ADVISORY COMMISSION ON INTERGOVERNMENTAL RELATIONS, STATE-LOCAL FINANCES: SIGNIFICANT FEATURES AND SUGGESTED LEGISLATION (1972); ADVISORY COMMISSION ON INTERGOVERNMENTAL RELATIONS, *supra* note 133; TEXAS INDUSTRIAL COMMISSION, AN ANALYSIS OF THE TEXAS BUSINESS TAX STRUCTURE (forthcoming 1974).

inexorably drawn down to the levels of less fortunate teachers elsewhere in the state.

#### CONCLUSION

Given the history of school financing reform efforts in Texas over the last hundred years, perhaps we may be excused for not being more optimistic as to the prospects for the adoption of a no-wealth discrimination plan in the next few years. To be sure, we are somewhat pleased by developments in the Texas Constitutional Convention, the recent Supreme Court opinion in *Lau v. Nichols*<sup>143</sup>—which will probably mean more state aid to poor, predominantly Mexican-American districts—and the general public awareness of the deficiencies of the current school financing system. We remember well when school financing reform was a subject for a few professional malcontents, competing with the latest chili contest for space in Texas newspapers. That day has clearly ended, and perhaps we are on the verge of a historical shift which will result in equality of educational opportunity for all the children of Texas, and not simply the privileged. But only concrete actions and not optimistic prognostications will tell the story.

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<sup>143</sup> 414 U.S. 563 (1974). In this case, the Court upheld an HEW guideline requiring some form of compensatory education for non-English speaking children under the Civil Rights Act of 1964. See 42 U.S.C. § 2000d (1970); 35 Fed. Reg. 11595 (1970).