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ABSTRACT

Contrasting Portraits: San Antonio v. Rodriguez and the Emergent Equal Protection Ideal

by

Barbara L.S. Finch

"Contrasting Portraits" is the history of Rodriguez, the Texas school finance case from 1968 to 1973. The thesis places the case within three contexts: Texas education, Mexican-American rights, and equal protection. Rodriguez concluded one stream of Supreme Court equal protection analysis and launched another interpretation, reflective of societal change. An analysis of the Rodriguez briefs and court opinions revealed two conflicting ideals: equality and liberty. School finance cases pit constituencies representing these ideals against each other: advocates of equal educational opportunity and advocates of local control, each searching to provide the best education for America's children. The study, which includes a chronology chart of Rodriguez from 1968 to 1995, suggests that school finance reformers should continue to search for new, simple, moderate standards that will both foster equality and liberty and still strengthen all schools.
Acknowledgments

I am indebted to the James Madison Foundation whose fellowship grant made possible my history studies at Rice University. Dr. James Banner, Dr. Roger Brown, and Dr. Rosemarie Zagarri at the Foundation’s American University Summer Institute introduced the inaugural fellows to a world of constitutional scholarship and challenge. Best wishes go to those James Madison fellows who follow under the leadership of Dr. Herman Belz: may their research experience on the Constitution be as rewarding as mine.

Special recognition is owed to Professor Edward L. Cox. While enrolled in his class on civil rights at Rice, I received support and assistance in my James Madison fellowship application. His advice, editing, and interest in this thesis was invaluable.

All history students at Rice are aware of the generosity and scholarship of Professor Ira D. Gruber, a specialist in Colonial and American Revolutionary history. This student spent many enjoyable and informative hours in his seminars. Many thanks for his encouragement, advice, and editing.

This Rodriguez study would not have been possible without the help and guidance of my thesis supervisor, Dr. Harold M. Hyman. The originator of a research graduate writing seminar in Constitutional History, Dr. Hyman is known for his mentorship and consideration. These pages benefited from his attention and editing. I also owe a special debt to the members of his ongoing seminar: Steve Wilson, Nancy Lopez, and Maria Anderson, all constitutional historians of excellence. The comments of seminar members were always critical, instructive, and beneficial, although the mistakes in the paper are mine.

Finally, a special remembrance for Dr. Francis L. Loewenheim, who invited this teacher to attend his evening seminar in Contemporary History at Rice University and recommended that if this graduate student ever attempted a thesis it should concern an issue that was vital and would never “gather dust on the shelf.” This Rodriguez study, it is hoped, will not.

Barbara L.S. Finch
Houston, May 1998.
Contrasting Portraits: *San Antonio v. Rodriguez* and
the Emergent Equal Protection Ideal

Introduction and Historical Overview of *Rodriguez*

There was an old saying, “The kids is where the money ain’t,” which summed up one of the major problems confronting the American educational system when I became President. Educators and national leaders had for years been watching our great public school system become overwhelmed by the country’s growing requirements. By the 1960’s the public schools were in a state of crisis, beset by problems that had been multiplying since World War II...It was obvious that federal aid was urgently needed to avert disaster.¹

The first years following World War II were heady times for education reformers, concerned legislators, and activist judges. Until 1945, education was primarily a local and state matter—schools were financed by local property taxes and federal interference in education was minimal. The Tenth Amendment to the Bill of Rights reserved to the states power over schools and this tradition of local control had not successfully been challenged in federal court.² Before World War II, when federal judges intervened in education, it was primarily to protect fundamental rights such as freedom of expression or the free exercise of religion—liberties that were viewed as the natural rights of the individual citizen. After World War II, the focus of federal education cases shifted from

²In three landmark cases of the 1920’s, *Meyer v. Nebraska* 262 U.S. 390 (1923), *Pierce v. Society of Sisters* 252 U.S.510 (1925), and *Farrington v. Tukushigeta* 273 U.S. 284 (1927), the Supreme Court agreed that states could compel attendance in public or private school. Private schools were protected by the “Pierce compromise”: parents could choose a private school of their choice for religious or educational reasons, but the state was still allowed to regulate the curriculum. These cases rested on the standard of substantive due process. The judges concern during this “formalist era” (1873-1937) according to William M. Wiecek was to “strike a balance” between the powers necessary for the state to govern and the liberty of the individual. See, William M. Wiecek, *Liberty Under Law, The Supreme Court in American Life*
questions of personal liberty to issues concerned with equality, such as the right of
African Americans and minorities to "equal educational opportunity."3

The Fourteenth Amendment, passed in 1868, and its equal protection clause for
many years constituted the "last resort" of civil rights lawyers.4 The frequent use of the
equal protection clause to foster educational equity came in 1954 with Brown v. Board of
Education.5 Brown initiated a period of "new" equal protection interpretation and for
almost twenty years Congress, the Presidency, the Supreme Court, countless scholars,
interest groups, and lawyers sought to desegregate the schools, provide federal aid to
students, and improve the education of the disadvantaged. From 1961 to 1973, "quality
and equality" rather than "liberty" and "local control," became touchstones of concern in
the first phase of the school finance reform movement.

This thesis investigates the role the Texas school finance case, San Antonio
Independent School District v. Rodriguez, the only proceeding of its kind to reach the
Supreme Court, played in the "new" equal protection revolution.6 The "longest running"
school finance litigation in the United States, Rodriguez began in San Antonio in March
1968, when four hundred students at Edgewood High School, about a third of the student
body, walked out of classes and marched to the school district administration building to

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3 Leonard W. Levy, Kenneth L. Karst, and Dennis J. Mahoney, Encyclopedia of the American Constitution
(New York: MacMillan, 1986), 643. "The political movement for racial equality," these authors maintain,
"took on a new vitality" after Brown. Other "egalitarian movements" such as school finance reform also
drew "encouragement" from its example. "the equal protection clause became the cutting edge of the
Warren Court's active intervention into realms that previously had been left to legislative choice."

4 See Buck v. Bell, 274 U.S. 200, 208 (1927). Justice Oliver Wendell Holmes in this case characterized the
concept of equal protection in the late 1920s as only "the last resort of constitutional arguments."


of the Supreme Court October 12, 1972 and decided in a majority opinion by Justice Lewis F. Powell Jr. on
March 21, 1973. The United States District Court case was entitled Rodriguez v. San Antonio Independent
petition for better schools. Demetrio P. Rodriguez, a high school dropout and son of migrant farm workers, later in the year filed a class-action lawsuit that claimed the Texas school finance system for public elementary and secondary schools discriminated against the state's children on the basis of wealth. Mark Yudof, who served as co-counsel for the plaintiffs when the Rodriguez case reached the Supreme Court, pointed out that "Texas relied extensively on local property taxes to support public education, and students from poor districts, with low property values, alleged that the resultant distribution of funds discriminated against them in violation of the equal protection clause." 

A bitter fight that stands out among the other multitudinous school finance cases, Rodriguez occupied the administrations of six Texas Governors and consumed numerous regular and special sessions of the Texas legislature. Serrano v. Priest, the first successful state school finance case, was filed in California the same year as Rodriguez. It was this California suit that supplied the Rodriguez lawyers with the judicial standard of "fiscal neutrality" that they would utilize in their argument before the Supreme Court. On March 21, 1973 Justice Powell, in a 5-4 decision, overruled the U.S. District Court and found the Texas school finance system constitutional. For proponents of school finance equity the "drive to equalize the public education system through the federal courts" came to a close.

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11 Jonathan Kozol, Savage Inequalities: Children in America's Schools (New York: Crown Publishing, 1991), 214. Yudof, Encyclopedia, 169. See Plyler v. Doe, 457 U.S. 202 (1982). In the 1973 Rodriguez decision Powell ruled that poverty was not a "suspect" classification. In the Court's previous decisions on racial inequality, indigent criminals, and voter equality some court observers viewed the court as following in the direction of eliminating differences in wealth in all kinds of areas. Even though before Rodriguez,
After *Rodriguez*, and with few exceptions outside the realms of race and alienage (e.g., *Plyler v. Doe*, 1982), educational opportunity claims were litigated under federal statutes enacted to protect particular classes of students (for example, the handicapped, students with limited English proficiency, and women) and under state constitutional provisions.

*Plyler v. Doe* came, then, as a surprise to school reformers after the *Rodriguez* decision. In a 5 to 4 decision, Justice Brennan held that Texas could not deny undocumented school-age children the free public education it provides to children who are citizens or legally admitted aliens. Justice Powell concurred with the opinion:12

...here, however the State has undertaken to provide an education to most of the children residing within its borders. And, in contrast to the situation in *Rodriguez*, it does not take an advanced degree to predict the effects of a complete denial of education upon those children targeted by the State's classification. In such circumstances, the voting decisions suggest that the state must offer something more than a rational basis for its classification.

The five separate opinions in the 1982 *Plyler* case appeared to reopen the question of "the constitutional status of "equal access to public education and of qualitative differences among schools." According to the *Plyler* Court, although education was still not a fundamental right, and undocumented aliens were not a "suspect class," denial of a basic education to the Mexican school children deprived them of "the ability to live within the structure of our civil institutions" and foreclosed their chance to contribute to the "progress of our nation."13

Following the Court's 1973 decision, *Rodriguez* was refiled in Texas on May 23, 1984 under the title *Edgewood Independent School District v. Bynam*. This case is

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labeled "Edgewood zero" because it never reached trial since the Texas Legislature was in the midst of school finance reform. In July 1984, it enacted House Bill 72 which, although it made some equity improvements, to property-poor school districts the bill was inadequate and Edgewood was refiled on March 5, 1985 as Edgewood Independent School District v. Kirby. The resurrected case challenged House Bill 72 as a denial of "equal protection" and an "efficient system for public free schools" under the Texas Constitution. From 1989 to 1995, the Texas Supreme Court wrestled with the constitutionality of the Texas school finance system under Article VII, section 1 of the 1876 Texas Constitution. After finally declaring three state funding bills unconstitutional and a voter rejection of a proposed Constitutional amendment, a Republican Texas Supreme Court, on January 30, 1995 upheld Senate Finance Bill 7.14

The disparity in available school funds between rich districts and poor in 1984 when Edgewood I was filed was 700 to 1. Senate Bill 7 closed the school funding gap 28 to 1. Ninety-six out of 1,045 school districts were then ordered by the Texas legislature to either become partners with property-poor school districts or return any property taxes over $280,000 raised per student to the state. By 1995 Texas was spending $16.5 billion dollars on education with about 45% coming from state coffers.15

14 Edgewood I.S.D. v. Kirby, 777 S.W. 2d 391 (Tex. 1989) (Edgewood I). The education clause was revised in 1876 when at the end of Reconstruction a new state constitution was written. After 120 years, Article VII, section 1 still reads: "A general diffusion of knowledge being essential to the preservation of the liberties and rights of people, it shall be the duty of the Legislature of the State to establish and make suitable provision for the support and maintenance of an efficient system of public free schools." The 1876 Texas Constitution also provided for "separate schools"...for white and colored races, without discrimination." C.E. Evans, The Story of Texas Schools (Austin: The Steck Company, 1955), 1.
The 1995 Texas school finance case, which finally upheld the state funding system was entitled Edgewood v. Meno 893 S.W. 2d 450 (Tex. 1995) (Edgewood IV).
15 The Texas Supreme Court at the time of the decision was the first Republican Court in modern Texas history. Justice John Coryn III wrote the majority opinion. He held that a "share-the-wealth finance system provided for by Senate Finance Bill 7 met the constitutional test for an "efficient" system of public education required under the 1876 Texas Constitution. There were strong dissents from the three most
Texas Governor George W. Bush praised the long-awaited decision: "The Supreme Court's ruling makes it more important than ever that the state act to relieve pressure on local property taxes by making education funding our number one priority and by gradually increasing the state's share of funding for our schools." Judge Cornyn warned that the Texas school finance case might continue: "Our judgment in this case should not be interpreted as a signal that the school finance crisis in Texas has ended."16 The Governor, however, appointed a "tax reform work group to analyze alternatives to the state's property-tax system for funding public education. As of January 1996 the Governor's budget staff was recommending "a broad new business tax." Such a change in taxation might require a drastic increase in the tax burden on some major industries—a choice that could prove to be "economically" and "politically" controversial. Replacing $9 billion in local school property taxes was the challenge facing the Governor and the Legislature.17

An in-depth look at the importance of Rodriguez within the historical development of "the new equal protection" after Brown is a central focus of this study. The reasons why school finance cases crowded court agendas in the 1960s and 1970s are

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17 "Study by Governor's Staff Lays Out Options for Replacing Property Tax," Wall Street Journal, 31 January 1996, T1. By September 16, 1996, the Houston Chronicle reported the cost had risen to $10 billion. Texas has an "inelastic" tax base; the state has refused to pass an income tax and current Governor Bush is also pledged against it. See "Texas Our Taxes," Houston Chronicle, 15 September 1996, sec. C.
explored, as are the tactics, theories, and strategies employed by school finance litigators and reformers.

Placing the Texas school finance case in the context of the long-term Chicano fight for an equal education opportunity in Texas presents a striking parallel with the NAACP’s attack on school segregation during the Brown egalitarian revolution. The Rodriguez amicus curiae briefs provide further insight into the role that public interest groups and lawyers played in the Texas school finance case. They are also an expression of the school finance literature of the period, and the contrasting arguments of articulate opposing sides.¹⁸

Many reform groups, lawyers, and judges around the United States and in Texas were, and still are actively involved in school finance reform. Their letters, briefs, oral arguments provide a rich insight into the continuing conversation over the issues of race, equality, and the emergent equal educational opportunity ideal during the 1960s and 1970s.

The equal protection arguments advanced by the lawyers for the poor school districts of Texas, and the defendants, representing the State of Texas and rich school districts under challenge continue the conversation. Justice Powell’s and Justice Marshall’s Rodriguez majority and dissenting opinions were landmarks in equal protection law. Each Justice brought different experience and judicial insight to the case. Marshall hoped to further the Warren Court egalitarian revolution by declaring education a fundamental right and poverty a suspect class. He knew if this occurred the Burger Court would be making new law, a “new” new equal protection. Powell sought a

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¹⁸ *Amicus Curiae* is a person or group with a strong interest in a suit, usually a case that involves a civil rights matter. A "friend of the court" may file a brief with the court's permission.
compromise. *Rodriguez* brought to a close the expansion of suspect classes and fundamental rights by the Supreme Court. But all the remnants of the Warren Court egalitarian revolution were not lost. Powell, Marshall and the Court continued and continues to modify equal protection review to meet the new challenges of everyday American life.

Chapter One

The Rise of the New Equal Protection and the Precursors of *Rodriguez*

1954–1968

Brown and the Rise of the New Egalitarianism—1954

A Threat to Liberty or the Beginning of Equal Educational Opportunity for All?

The story of the Texas school finance case begins with Chief Justice Earl Warren's decision in the 1954 case, *Brown v. Board of Education*. In a unanimous, but intentionally brief opinion, Warren attempted to define the meaning of equal educational opportunity:

Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an
education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms.\textsuperscript{19}

Up until 1938, \textit{Plessy v. Ferguson}'s (1896) "separate but equal" doctrine set the standard for equality in educational facilities. The \textit{Plessy} Supreme Court upheld a Louisiana state statute that allowed "all railway companies carrying passengers in their coaches," to "provide equal but separate accommodations for the white, and colored races, by providing two or more passenger coaches for each passenger train, or by dividing the passenger coaches by partition so as to secure separate accommodations."\textsuperscript{20} Later this equality standard of "separate but equal" facilities was applied to public schools.

In \textit{Plessy}, Justice Henry Billings Brown took a relativist view of equality. Brown maintained that although the objective of the Fourteenth Amendment was originally to "enforce the absolute equality of the two races before the law," "it could not have intended to abolish distinctions based upon color." Equal protection did not mean the enforcement of "social, as distinguished from political equality, or a commingling of the two races upon terms unsatisfactory to either." Justice Brown justified his order of race separation in Louisiana railroad cars by pointing to the previous 1849 precedent, \textit{Roberts v. the City of Boston}, which held separate but equal elementary schools for black and white children constitutional.\textsuperscript{21} \textit{Roberts}, however, was a weak foundation on which to

\textsuperscript{19} \textit{Brown v. Board of Education} 347 U.S. 483 (1954).
\textsuperscript{20} \textit{Plessy v. Ferguson} 163 U.S. 537 (1896). Homer Plessy, a mulatto, was charged with sitting in a railroad car for "whites only." He sought a writ of prohibition from prosecution in New Orleans parish. Plessy was a "test case," an attempt to stop the beginning of Jim Crow, or segregation between blacks and whites in Louisiana.
\textsuperscript{21} Urofsky, \textit{A March of Liberty}, vol. 1, 355. The case cited by Judge Brown in the \textit{Plessy} case was \textit{Roberts v. the City of Boston}, 5 Cush. (59 Mass. 198 (1849)). Sarah Roberts was five years of age and had to pass by five "whites only" schools on the way to an all black grade school created not by state statute or Boston ordinance, but by the primary school board. From the decision, it can be deduced that Sarah's lawyer, Charles Sumner, who was later elected U.S. Senator and became a leading supporter for black rights before the Civil War, claimed that the school board had abrogated the laws and Constitution of Massachusetts,
base the equal protection standard of "separate but equal." *Roberts* was tried before the Civil War and the passage of the 13th, 14th, and 15th Amendments. Also, the Massachusetts Constitution contained no equal protection clause similar to that in the Fourteenth Amendment, and by 1855, the Massachusetts legislature had already banned segregation in public schools.\(^{22}\)

Justice John Marshall Harlan's eloquent dissent in the *Plessy* case was a harbinger of the "new" equal protection standard that the Supreme Court later applied in many education, voting, and criminal rights cases following *Brown*. Although it expressed a certain degree of white paternalism, it provides insight into the Justice's firm belief that the key to the future race relations lay in fostering more social contact. Even though the races were not yet equal, Harlan believed that everyone's legal rights needed to be protected:\(^{23}\)

The white race deems itself to be the dominant race in this country. And so it is, in prestige, in achievements, in education, in wealth and in power. So, I doubt not, it will continue to be for all time, if it remains true to its great heritage and holds fast to the principles of constitutional liberty. But in view of the Constitution, in the eyes of the law, there is in this country no superior, dominant, ruling class of citizens. There is not cast here. Our Constitution is color-blind, and neither knows nor tolerates classes among citizens. In respect of civil rights, all citizens are equal before the law. The humblest is the peer of the most powerful.

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Many ground-breaking segregation cases preceded the *Brown* "new" equal protection decision. "Until 1938, litigation concerned with (the separate-but-equal) doctrine emphasized the 'separate' component. From 1938, the Supreme Court began to define the 'equal component.""\(^{24}\) Steps toward greater equal educational opportunity for blacks began with Chief Justice Charles Evans Hughes' 1938 opinion in *Missouri ex. rel. Gaines v. Canada*.\(^{25}\) Lloyd Gaines, a black, was denied admission to the University of Missouri School of Law and offered free tuition to any public law school outside the state. Justice Hughes decided that if the standard of separate-but-equal schools was to be met, Missouri did not have to integrate its law schools, but the Constitution required Gaines be provided with a legal education within the state.

In a similar case, *Sipuel v. Board of Regents of the University of Oklahoma* (1948), Thurgood Marshall, a black lawyer trained in civil rights litigation at Howard University under its dean, Charles H. Houston, defended Ada Sipuel, who was refused admittance to the University of Oklahoma Law School, the only law school in the state.\(^{26}\) Four days after hearing Marshall's arguments, the Supreme Court issued an order directing that Oklahoma provide Ms. Sipuel with a legal education "in conformity with the equal protection clause of the Fourteen Amendment and to provide it as soon as it does for applicants of any other group." In response, Oklahoma created a law school overnight, roped off a section of the state capital, and assigned three teachers to instruct Sipuel and "others similarly situated." Marshall appealed to the Supreme Court, but the

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\(^{26}\) *Sipuel v. Board of Regents of the University of Oklahoma* 332 U.S. 631 (1948).
Justices refused to consider the issue of the quality of Sipuel's legal education. She accessed a legal education, but was still constitutionally segregated.

When Marshall defended sixty-eight-year old George W. McLaurin's right to earn a doctorate in education, the NAACP litigator finally succeeded in desegregating graduate schools. In 1950, the same year as McLaurin, Marshall also convinced the court that the University of Texas had not provided Herman Marion Sweatt with a proper legal education when it established a law school at all-black Prairie View University.

Chief Justice Frederick Moore Vinson agreed with Marshall that it was not likely that a hastily constructed law program was on an equal par with the University of Texas. This time, the Court found, it was the quality of the education that counted:

"Whether the University of Texas Law School is compared with the original or the new law school for Negroes, we cannot find substantially equality in the educational opportunities offered white and Negro law students by the State. In terms of number of the faculty, variety of courses, and opportunity for specialization, size of the student body, scope of the library, availability of law review and similar activities, the University of Texas Law School is superior."

By the time of Sweatt, graduate professional schools began to be judged not only for tangible, but intangible resources. The Court stopped short of nullifying the Plessy

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27Urofsky, A March of Liberty, vol. 2, 765. See McLaurin v. Oklahoma State Regents for Higher Education, 339 U.S. 637 (1950). In 1939 Marshall became special counsel for the NAACP succeeding Charles Houston. He argued thirty-two cases in front of the Supreme Court and won twenty-nine. His most famous case was Brown v. the Board of Education of Topeka (1954). As solicitor general under President Lyndon B. Johnson, Marshall argued the Miranda v. Arizona (1966) case and Harper v. Virginia State Board of Elections (1966) in which he attacked the poll tax as a denial of the equal protection clause of the Fourteenth Amendment. In its decision the Court said: "the interest of the State when it comes to voting, is limited to the power to fix qualifications. Wealth, like race, creed, or color, is not germane to one's ability to participate intelligently in the electoral process. 383 U.S. 663 (1966). This is one of the cases cited by Wise that lead school finance reformers to believe that the Court was ready to declare poverty a "suspect" class, equal to race in the late 1960s and early 70s. Wise, 87-88. Marshall was later named to the Supreme Court by Johnson and became its first black jurist. He would write a long dissent in the Rodriguez case, and was joined in his opinion by Justices Byron R. White, William O. Douglas, and William J. Brennan Jr. All five Republicans on the court, four appointed by President Nixon voted to sustain the Texas school finance system. Voting with Justice Powell were Chief Justice Warren E. Burger, Associate Justices Potter Stewart, Harry A. Blackman, and William H. Rehnquist."
"separate but equal doctrine," but the Justices appeared ready to go further, possibly to even consider "the sociological and psychological consequences of segregated educational facilities."\(^{29}\)

The strategy undertaken by the NAACP Legal Defense and Education Fund (the LDF or "Ink Fund"), the major source for funds for the school desegregation cases, proved to be successful. First, LDF recommended that lawsuits be brought to desegregate separate but essentially equal schools. The cost to maintain a dual system of education would eventually prove too prohibitive for a state. Next, LDF lawyers attacked segregation at the university level where the least resistance on the part of whites would be encountered, and finally, the separate but equal doctrine was to be challenged directly in the segregated elementary and secondary schools where there would be the most resistance.\(^{30}\) Thurgood Marshall later commented on the NAACP strategy and the reaction of die-hard Southerners to it: "Those racial supremacy boys somehow think that little kids of six or seven are going to get funny ideas about sex and marriage just from going to school together, but for some equally funny reasons youngsters in law school aren't supposed to feel that way." He continued: "We didn't get it but we decided that if that was what the South believed, then the best thing for the moment was to go along..."\(^{31}\)

_Brown_ was a class action suit that consolidated four cases from the states of Kansas, South Carolina, Virginia, and Delaware.\(^{32}\) In _Brown_, Warren ruled that "in the

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31From David L. Kirp, Mark G. Yudof, _Education Policy and the Law: Cases and Materials_ (Berkeley: McCutchan, 1974) 290. (Quote taken from Berman, _It is So Ordered_, 32-33.)
32_Brown v. Board of Education_ 347 U.S. 483 (1954). Footnote #1 in the Warren opinion has a detailed explanation of the plaintiffs. It was from the Kansas case that Brown took its name. The plaintiffs were
field of public education the doctrine of 'separate but equal' has no place." The Court in 1954 essentially ruled that legal separation of the races inherently constituted inequality of opportunity. After the desegregation case, supporters of the verdict argued over what equal educational opportunity meant. For some, the Brown decision meant that all future resources in education should be equally distributed. School reformers in the early 1960s may have read a great deal more into Brown than the Warren Court intended. Even though Brown overthrew a fifty-year old doctrine, with few citations or precedents, to its supporters, the Court had done the "humane," the "moral" thing.

On the same day Brown was decided, in Bolling v. Sharpe the Court invalidated the segregation of the District of Columbia schools on the basis of the due process clause of the Fifth Amendment. In this companion case, the Court found that segregated schools deprived the plaintiff of "liberty under law." Bolling involved schools in the District of Columbia, and the decision, therefore, rested on the due process clause in the Fifth Amendment, rather than the Fourteenth Amendment, which applied only to state action. The federal government could not be permitted to operate segregated schools when the

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Negro children of elementary school age residing in Topeka. Kansas state law allowed cities of more than 15,000 to maintain separate schools for Negro and white students. Under the law Topeka was operating only segregated elementary schools. The plaintiffs in Kansas were denied relief by the District Court because the schools were "substantially equal." The South Carolina case joined with Brown was entitled Briggs v. Elliott. Negro children in Clarendon County sought to end segregation in public schools. The district court found black schools to be inferior and ordered equalization of facilities, but denied permission for black children to attend white schools in the interim. The Virginia case, Davis v. County School Board was brought by black high school students in Prince Edward County. The Negro schools were found by the district court to be inferior in "physical plant, curricula, and transportation" and were ordered to rectify the inequality. The plaintiffs were denied admission to white schools in the interim. The fourth case, Gebhart v. Belton, was from Delaware New Castle County. The chancellor of the Delaware Court ordered the immediate admission of the plaintiffs to white public schools because Negro schools were inferior in regard to "teacher training, pupil-teacher ratio, extracurricular activities, physical plant, and transportation." The Delaware court also found segregation resulted in a inferior education for blacks, but the case did not rest on this finding.

Court forbade states to do so. Liberty, like equality is an imprecise term, but since
*Bolling*, the Court has accepted that the Fifth Amendment also imposed an equal
protection guarantee on the federal government.\textsuperscript{36} Equality in education, or rather, the
new standard of equal educational opportunity, continued to develop following *Brown*,
and laid the basis for the expansion of the federal government's role in the field of
education.

Depending upon the observer, the new standard of equal educational opportunity
as expressed in *Brown*, augured a different future for educational reform. Philip B.
Kurland of the Chicago Law School, a critic of *Brown*, "found it awful," and had doubts
about the future meaning and implementation of the principle of equal educational
opportunity in education. In his view, *Brown* was "in keeping with the spirit of the
times...thoroughly in accord with...the Court's general drive toward egalitarianism,
toward the centralization of government authority, and toward the expansion of judicial
power in realms theretofore foreclosed to it."

This expansion of judicial power into the field of education was worrisome to
Warren Court critics for fear it might lead to the application of a nebulous "equity"
standard to other forms of state action such as the collection of taxes and a host of other
local services such as health, police, water supply, public housing, parks and recreational
facilities, transportation, and welfare services. "Statewide equality is not consistent with
local authority; national equality" would "not be consistent with state power." The
expansion of equal educational opportunity, beginning with the desegregation cases

would doom its early success—the pursuit of equality later came into conflict with the supporters of local control and the power of the legislatures.\textsuperscript{37}

Kurland also forecast future complications in school financial equity cases that he predicted would be the natural result of Brown. The standard of equal educational opportunity did not match the complexity of the problems in education and it would eventually be impossible to enforce. Warren's announcement met one of Kurland's requirements for an effective constitutional standard—simplicity. In fact, for such an epochal decision, the Brown opinion, only eleven pages long, was "deceptively" brief. But the "simplicity" of the equity standard in Brown, might come at the expense of a citizen's liberty. "It has long been recognized, Kurland pointed out, "that the cost of egalitarianism is the suppression of individualism." One person's equality could later prove to be another's deprivation.\textsuperscript{38}

Also, how would the Court actually measure equality in education? If the guide for the judges to apply was equal per pupil expenditures, a standard that met the simplicity criteria, and could be easily enforced, did this not mean that the worst schools were "denied the inundation of the...best resources that society can marshal?" Did this not mean that state legislatures would equalize from the top down, rather than the bottom up—that resources would be taken from the best schools and shared? Did Brown not mean that the taxing power and the spending power would have to be transferred from local to state control? Since it was unlikely that the Pierce compromise over public and


\textsuperscript{38}Court observers believe that Warren kept the decision short, "so that the nation's newspapers could run it in its entirety." Urofsky, A March of Liberty vol. 2, 770. Kurland, 593. Kluger points out that Warren did not want dissents or concurrences. "He wanted a single, unequivocating opinion that could leave no doubt that the Court had put Jim Crow to the sword." Richard Kluger, Simple Justice, 683.
private education would be repealed, what was to prevent Catholic families, or the more affluent, from escaping into private enclaves?

Critics of Brown maintained that the new equal protection standard in education should be "quality, not equality."39 What urban school districts needed was not an equal distribution of resources but "preferential treatment." The proper standard for the courts to apply was not equal protection but "substantive due process—"that is, the establishment of those minimum standards that are worthy of our society or the society of which we aspire." As Justice Frankfurter pointed out in Griffin v. Illinois, "[A] State need not equalize economic conditions. A man of means may be able to afford the retention of an expensive, able counsel not within reach of a poor man's purse. Those are contingencies of life which are hardly within the power, let alone the duty, of a State to correct or cushion." While Brown was an inspiration to advocates of school reform, and viewed as a precedent for the justification of the equalization of resources, its critics worried that, in the future, it would prevent any unequal provision of necessary resources to the poor.40

Strict constructionists pointed out that the Warren Court made the Brown decision without regard to the "intent" of the original framers of the Fourteenth Amendment: 41

In approaching this problem, we cannot turn the clock back to 1868 when the amendment was adopted, or even to 1896 when Plessy v. Ferguson was written. We must consider public education in the light of its full development and its present place in American life throughout the nation. Only in this way can it be determined if segregation in public schools deprives these plaintiffs of the equal protection of the laws.

39Kurland, 591. In his article about equal educational opportunity Kurland asks if "the elimination of excellence is an appropriate price to pay for the symbol of equality [?]"
41 Brown, 347 U.S. 489.
In their oral argument, the NAACP attorneys argued that the contemporary congressional debates revealed that the framers of the Constitution intended to prevent racial classifications regarding civil rights. Lawyers for the southern school districts argued that the goal of the abolitionists was to abolish slavery; the amendment did not touch on the question of mixed or segregated schools. The Warren Court, however, found the legislative history of the Fourteenth Amendment inclusive on this question. Since the role of government in late 19th century public schooling was limited, the intent of the framers had little application to the segregation question. During the Reconstruction debates, there was little evidence to indicate that the framers of the Fourteenth Amendment predicted the end of segregation. The justices found truth on both sides of the original intent question. With such an ambiguous history, the Court refused to speculate on the Jim Crow philosophy of the amendment's framers.\footnote{Kirp and Yudof, \textit{Educational Policy and the Law}, 1st ed., 296. See Alexander Bickel, "The Original Understanding and the Segregation Decision," \textit{Harvard Law Review} 69 (Nov. 1955), 1-65. The oral argument for \textit{Brown} was unusual. Instead of the customary one or two hours, the Justices listened to ten hours over three days. The Court may have been influenced by the \textit{amicus} brief submitted in \textit{Brown} by the Justice Department. In the brief, the two drafters, Philip Elman and Robert Stern asked for an abandonment of "separate but equal" but suggested not overruling \textit{Plessy}. The Court, they recommended, should simply declare segregated schooling unequal per se. Implementation of the decision could be the province of the lower courts and a "reasonable period of time will obviously be required to permit formulation of new provisions." Urofsky, \textit{A March of Liberty}, vol. 2, 768.}


Footnote 11, drawn from a Brandies style brief submitted by the NAACP, cited social science research, much of it from Dr. Kenneth B. Clark, that sought to prove segregated schools were detrimental.
to the learning and self-esteem of black children. The Court found that separating the
races denoted the inferiority of black Americans, "and ... {a} sense of inferiority
affect[ed] the motivation of a child to learn." Clark later commented that:

By providing such evidence, the social scientists made it possible to avoid the
need to obtain proof of individual damage and to avoid assessment of the equality
of facilities in each individual school situation. The assumption of inequality
could now be made wherever segregation existed.44

Supporters of Brown believed that the social science evidence, now in disrepute, was not
essential to the findings in the case. The reasoning behind the decision was not precedent,
not empirical evidence, but basic ethical principles or social ideals of a democratic
society . . . "because ethical principles are not necessarily dependent on empirical
verification, they can operate as standards that relieve courts of the obligation to reweigh
social science data in every case." Admitting that the social science evidence in the case
would be unpersuasive in the light of contemporary research, advocates still believe this
is beside the point, "if desegregation decisions" were to be "stable, consistent, and
manageable, courts have little choice but to rely on ethical principles."45

In his influential book Rich Schools Poor Schools: The Promise of Equal
Educational Opportunity, Arthur Wise, graduate student at Chicago's Department of
Education and an advisee of law professor Philip Kurland, stated that Brown launched a
new, important judicial standard on education, "fathered by the equal-protection clause
and brought forth by the United States judiciary"—the doctrine of equality of educational

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opportunity. "The climax of the {Brown} story was the decision that the very fact of separateness implied inequality." In the late 50s and early 60s, those interested in reforming American education asked how far would the revolution in equal educational opportunity in American go, and would it eventually come into conflict with the individual liberty of others as predicted by Kurland? 46

We have tended to identify liberty with the absence of government; we have sought it in the intertices of the law. What happens, then, when government becomes more ubiquitous? Whenever an area of activity is brought within the control or regulation of government to that extent equality supplants liberty as the dominance ideal and constitutional demand.

When equal educational opportunity conflicted with the liberty of the taxpayer, the Brown revolution in equal protection could prove to have its limits. Writing in 1970, John Coons, William H. Clune, and Stephen D. Sugarman, the authors of the new judicial standard of "fiscal neutrality" in the Serrano case predicted that the implementation of Brown would require future "heroic judicial measures." In other words, the first school finance revolution, from 1961-1973, would be a time for heroes.47

47 John Coons, William H. Clune, and Stephen D. Sugarman. Private Wealth and Public Education. (Boston: Harvard U. Press, 1970) xvii-xxii. By fiscal neutrality, Coons, Clune, and Sugarman meant the "quality of public education may not be a function of wealth other than that of the wealth of the state as a whole." The property wealth of all school districts would be the same. In essence, the local property base, would become a state-wide property tax. Local control would be a factor because the school district would then decide what rate to tax itself. This device was labeled DPE or District Power Equalizing. The fiscal neutrality formula was creative and it met the Kurland recipe for success. It was, for example, a simple standard. It also appealed to school equity reformers because it emphasized fairness and equality. It also succeeded because it considered local control, and it prevented the judiciary from micromanaging school funds.
The National Educational Precursors of the Texas School Finance Case: 1961-1965

With his personal feelings so thoroughly involved, President Johnson's arm twisting particularly took the form of the emotional patriotic appeal, 'as your President, to give these American kids what they deserve.' He talked to congressmen a great deal about his own school teaching days, like the year when he was the principal in Cotulla, Texas, and it was 'pathetic what those kids got. They were almost all Mexican-Americans. They went and smoked during recess. I said, 'Let's have volleyball,' and I bought a ball for them, and we got together some old musical instruments. We taught them to sing and we organized a band, and I had a debating team, although I couldn't talk Spanish and they couldn't speak English, and we debated whether the jury system was good. They were so grateful at this little bit of nothing that the Mexican people have been voting for me ever since.'  

It was the Brown v. the Board of Education case, as stated above, that first expressed the right of American school children to "equal educational opportunity." In spite of the fact that few educators or legal experts knew the true scope and meaning of the 1954 decision, Brown marked the beginning of an expansion of the federal role in education. Up until World War II, schooling had been the main province of local and state authorities; now, with the entry of the Supreme Court and the national government into the educational arena, school reformers and politicians became active in four basic areas of contemporary educational concern: desegregation, technical training, research development, and the schooling of the disadvantaged—those who suffered from different kinds of social, cultural, or physical deprivations.  

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50 For a discussion of the expansion of the federal role in educational policymaking during this period see Mark G. Yudof, David L. Kirp, and Betsy Levin. Educational Policy and the Law, 3d ed. (St. Paul: West Publishing Company, 1992), 673. Mark Yudof was a Professor of Law at the University of Texas at the time of the Texas school finance case, Rodríguez v. San Antonio Independent School District. (337 F. supp. 280 (W.D. Tex., 1971, rev'd 411 U.S. 1 (1973). He served as co-counsel for the plaintiffs when the
Brown was a "major catalyst" to the educational reform movement of the 1950s and early 1960s. The case "made visible the condition of Negro education in America and thereby highlighted the social and economic costs and consequences of prejudice, cultural deprivation, and poverty." The equal educational opportunity ramifications of the decision was of particular importance to the millions of "miserably" educated blacks who, because of a revolution in agriculture, were leaving rural southern farms, and migrating north. In the urban ghetto they found themselves segregated and without jobs. "Negro children constituted the largest percentage of "drop-outs" in the inner city schools. Educators had to cope with " an influx of pupils from a tragic sub-culture" largely unfamiliar with middle-class culture and values.51

The problems of segregated, urban blacks were exacerbated by federal post-war housing policies designed to help the American G. I. Encouraged and supported by the Federal Housing Authority and the Veteran Administration's home-loan guarantees and tax deductions, middle-class white families migrated out of the cities into the suburbs, leaving behind impoverished blacks and segregated schools. It was evident to school reformers that something more than desegregation would be needed to solve a post-war educational crisis.52

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51 Yudof, Kirp, and Levin, Educational Policy and the Law, 3d ed., 678-679. By 1960, one in every four Americans lived in the suburbs, today the number has risen to over 50%. The "middle-class" in the 1950s was defined as a household earning between $3,000 and $10,000 a year, this included 60% of the population. The rise of suburbia and its schools left the urban city core behind with the problem of educating the poor and minorities with few financial resources.

52 The G.I. bill, for twelve years provided educational assistance for 7.8 million veterans, most went to technical school, but 2.2 million did go to college; the total spent was 14.5 billion. The federal highway construction program following the war was another government subsidy program for suburbanites. The American post-war economy boomed because of federal spending, but blacks were barred from suburban areas because of low income and prejudice. In 1950, the "suburban population was 20,872,000, of whom
The Depression and World War II delayed capital spending and amplified school problems in the early 1960s throughout the country. A post-war baby boom contributed to the education crisis by adding 50 million new teething babies to the elementary classroom. In the 1950s, an age of migrating families and loosening filial ties, Dr. Benjamin Spock's *The Common Sense Book of Baby and Child Care* was the most popular book.\(^{53}\) During the war, over 40 per cent of the teaching force had been diverted to the armed services or had left the profession. The overcrowded, understaffed, dilapidated school system put fiscal pressure on state governments and local school districts to raise their property-taxes, design new schools, and train new staff. Leading educators became convinced that to meet the post-war school crisis, the Federal government would have to play an increased role in the funding of education.

The post-war education crisis also happened to occur in a period of spectacular technological and scientific innovation. In 1957, Russia orbited the first Sputnik satellite and critics like Vice Admiral Hyman G. Rickover, the founder of the nuclear navy, charged that the poor quality of American education would be a detriment to national security.

During the late 1940s, Congress began to play an important, if minor role in attacking the education crisis. Besides passing the G. I. Bill, federal lawmakers created the National Science Foundation (NSF) which, though it mainly benefited colleges, did have some impact on elementary and secondary education with its provision of federal funds for teacher training and development of new science curriculum. The NSF was a

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forerunner of the National Defense Education Act (NDEA) passed in 1958, which provided federal grants for quality science, engineering, mathematics, and language programs in colleges and secondary schools. NDEA, although later criticized because of its emphasis on science and its dismissal of the humanities, set a precedent for further federal aid to public education. Its inclusion of "religious affiliated institutions" in its programs also had implications for the future. This set a precedent that federal aid might in the future be provided to parochial schools. "Poorer schools in the countryside and in the urban ghettos were left largely untouched" by NDEA. These first federal steps in education following the war were far from the "new equal protection" education reform criteria begun by Brown. NDEA forecast solutions that reformers and politicians would seek to lessen the impact of unequal resources available to property-poor schools in the 1960s. 54

From the late 1940s to the early 1960s, the main source of school funding was the local property tax—the cost of "expanding and improving {education} devolved for the most part upon home owners." School expenditures per student in public education rose by 370 per cent between 1940 and 1960; "more than three and a half times the rate at which consumer prices increased." Private citizens rose to the challenge posed by post-war education problems. The provision of higher education for the American G. I. and the country's improvement of technical and scientific education under the NDEA were also post WWII success stories, but by 1961, the "education gap" in spending between rich and poor schools became as much of a news story as the so-called 50's "missile gap."55

At least two factors fed into a growing dissatisfaction with the public schools in the 1960s

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and early 1970s, despite the progress made—the publication of scholarly books criticizing
the state of American education (books that received wide circulation), and a spreading
taxpayers revolt against higher spending on the local level.  

Two writers in the early 60s who awakened Americans to concerns about the poor
and the inadequacy of their educational prospects were Michael Harrington and Dr. James
B. Conant. Using a variety of statistical sources, Harrington estimated that there were
somewhere between 40 million and 50 million Americans living in poverty—this
amounted to 20 to 25 per cent of the population with incomes of around $4,000 a year.
The poor tended to be "increasingly invisible," live "off the beaten track," were
segregated within an affluent society, and were poor for reasons beyond their control.
Poverty in the United States in the early 1960's, according to Harrington, was a "culture,"
"an institution," and a "way of life":

As the society became more technological, more skilled, those who learn to work
the machines, who get the expanding education, move up... The good jobs require
much more academic preparation, much more skill from the very onset. Those
who lack a high school education tend to be condemned to the economic
underworld—to low-paying service industries, to backward factories, to sweeping
and janitorial duties. If the fathers and mothers of the contemporary poor were
penalized a generation ago for their lack of schooling, their children will suffer all

55O'Neill, 34.
direct correlation between the amount of a district's taxable property and its level of per-pupil expenditure"...

the more. The very rise in productivity that created more money and better working conditions for the rest of the society can be a menace to the poor.

To solve the problems of the "invisible" poor, especially black Americans, would require an "assault" upon the entire culture of poverty, a restoration of the vote, an ending to housing discrimination, and access to the equal educational opportunity suggested by Brown.

The major concern of Conant was the newly arrived impoverished black from the South who settled in the former slum tenements of earlier immigrants. Between "1950 and 1966, the black population in the central cities nearly doubled, from 6.5 million to 12.1 million," comprising "from 43 to 56 per cent of the nations blacks." By 1966 the number of whites in the central cities "had dropped from 34 to only 27 percent" of the white population in the U.S. Arriving with poor educational skills and at a time when jobs for unskilled labor were scarce, slum neighborhood schools struggled with low achievement scores, gangs, drug addiction, truancy, and "high teacher turnover." One administrative response to the urban school crisis in the newly desegregated schools in Washington, D.C. was to distribute black and white students among four ability tracks—special academic (retarded students), general (average), the regular track (college-preparatory), and honors (gifted).58 Educators viewed the tracking system as a way to

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58 Judge Skelly Wright sitting as a specially designated Circuit Court Judge decided in 1967 in Hobson v. Hansen 269 F. Supp. 401 (D.D.C. 1967) aff'd sub. nom. Smuck v. Hobson, 408 F. 2d 175 (D.C. Cir. 1969) that this tracking system in the District of Columbia was a denial of equal educational opportunity under the Fifth Amendment. The Fifth Amendment and Due Process was the proper standard to employ by the plaintiffs in this case because the District of Columbia is a creature of the federal government and the Fourteenth Amendment applies only to the states. Equal protection has been applied as a standard of behavior for federal action as well as state action, but through the Fifth Amendment due process clause rather than the Fourteenth Amendment equal protection and due process admonition. Justice Wright wrote: "As to the remedy with respect to the tracking system, the track system simply must be abolished. In practice, if not in concept, it discriminates against the disadvantaged child, particularly the Negro. Designed in 1955 as a means of protecting the school system against the ill effects of integrating with white children the Negro victims of de jure separate but unequal education, it has survived to stigmatize the disadvantaged child of whatever race relegated to its lower tracks—from which tracks the possibility of
reassure white parents that high educational standards would be maintained in newly desegregated schools.59

Conant's work in the late 1950s and early 1960s, was undertaken at the behest of John W. Gardner of the Carnegie Corporation. In his research, Conant was not only responding to the Soviet cold war challenge but to a deep concern among educators, parents, and leaders over the quality of American education. Reformers were especially concerned that urban ghetto schools were not meeting the Supreme Court's dictum of equal educational opportunity to all.

Gardner, in the forward to Conant's study on the state of the American high school, pointed out that comparisons to Soviet education were to be avoided. The answer to better public schools in America was not to be found in a totalitarian system:60

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60John W. Gardner's comments in the foreword to James B. Conant's *The American High School Today* (New York: McGraw-Hill Company, 1959), xi. Conant received a PhD. in chemistry from Harvard in 1916 and became president of the school at the age of 40 in 1933. During his tenure as president, Harvard admitted a more socially diverse student body and opened all departments to women. During World War II Conant was chairman of the National Defense Research Committee from 1941-1946. In *The American High School today*, Conant made twenty-one recommendations that included: more individualized instruction, a basic minimum education required for graduation that required four years of English, three to four years of social studies, one year of mathematics and one year of science. The academically talented would be expected to take four years of math, four years of one foreign language, three years of science, four years of English, and three years of social studies. Fifteen hours of homework per week would be expected. All seniors should be required to take a course in American problems or American government with material in economics. Conant was in favor of ability grouping in most classes, i.e. advanced or "able" student, average, and slow readers. Each student would be placed in each subject according to his ability. Ability grouping was considered by educators to be different than tracking. The senior
The surge of publicity about Soviet schools has produced more false impressions and foolish conclusions than almost any other element in current discussions of education. . . . The future direction of Russian education is not clear. And even if we knew exactly where Soviet education was going, the information would be of limited relevance. It is impossible to evaluate an educational system apart from the society which it both reflects and serves. Mr. Conant understands this, and he has repeatedly emphasized that American education must keep its eye on its own goals and be strong in its own terms.

According to Conant, American education differed from the European model in that it emphasized equality of opportunity. Jefferson, when speaking about equality in the Declaration, meant political equality, not equality of opportunity, or equality of results. The experience of the American frontier expanded the idea of equality, to mean "equality of opportunity—an equal start in the competitive struggle." "This aspect of equality acted like a magnet on inhabitants of other lands. . . and "placed on our tax-supported schools many educational tasks of a special nature."61 The twin ideals of equality of opportunity and the equality of status, education reformers believed, had become a part of the American dream. They were achievable mainly through access to more education.

In his 1961 work, *Slums and Suburbs*, Conant awakened the public to the unequal state of resources available to schools in America's slums.62

The contrast in money available to the schools in wealthy suburbs and to the schools in a large city jolts one's notions of the meaning of equality of opportunity. The pedagogic tasks which confront the teachers in the slum schools are far more difficult than those with their colleagues in the wealthy suburbs face. Yet the expenditure per pupil in the wealthy suburban schools is as high as $1,000 per year. The expenditure in a big city school is less than half that amount. In the suburb there is likely to be a spacious modern school staffed by as many as 70 professionals per 1,000 pupils; in the slum one finds a crowded, often dilapidated and unattractive school staffed by 40 or fewer professionals per 1,000 pupils.

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Conant also took a strong stand against busing of black children to white schools and vice versa—"The lesson is that to a considerable degree what a school should do and can do is determined by the status and ambitions of the families being served." The poor achievement of black and white students in inner city slum schools was not one of "potential ability, but "their depressing cultural and socio-economic backgrounds." For reformers to insist that the only acceptable solution was for black Americans to be in the same classroom with white children was "to take an extremely defeatist view of Negro education in the large cities." 63

The answer to improving schooling in the inner city was to "spend more money," "upgrade Negro schools," pay teachers in the inner city more than teachers in the wealthy suburbs, provide specialized training for those teaching the disadvantaged, and decentralize school administration "in order to bring the schools closer to the needs of the people in each neighborhood." Harrington and Conant, as well as the Black Muslims and Malcolm X, contributed to an "urban crisis atmosphere" concerning public education in policy-making spheres in Washington, and laid the foundations for the school finance reform movement in the late 1960s which concluded on the national level with the Rodriguez case.64

After a 1964 landslide victory and the largest Democratic majority in Congress since the New Deal, Lyndon Johnson was determined to change the history of federal aid to education and respond to the problems of minority students in education. Johnson was instrumental in passing the first federal law to provide schools with general aid. The President pointed out his intentions in his memoirs: "Other Presidents and advocates had

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63 Conant, *Slums and Suburbs*, 1, 30, 29, 146.
been trying to provide federal aid to schools since the days of Andrew Jackson." There had been three stumbling blocks to success: the opposition to granting federal aid to segregated schools, the "fear of government control of the schools," and the opposition of Catholics to federal funding of public schools. Johnson was able to overcome all three hurdles.\(^6\)

The Johnson program actually began in 1961, with a legislative proposal John F. Kennedy denominated "the most important piece of domestic legislation of the year." Kennedy asked Congress for federal aid for teachers' salaries, construction loans for public schools and colleges, and student scholarships for public and private institutions. Opposed by Catholics because it did not include aid to private elementary and secondary schools, the Kennedy bill was defeated—a Catholic president proved politically unable to overcome the religious hurdle.\(^6\)

The ultimate passage of the 1965 Elementary and Secondary Education Act (ESEA) became possible not only because the political conditions of the Johnson administration were conducive, but because the new, accidental teacher-President, at the


\(^{65}\) After the election of 1964, Johnson had a 68 to 32 Democratic majority in the Senate and a 295 majority in the House. In the election he secured the white vote, the Negro vote, organized labor, big-business, urban voters, suburbanites, and farmers. He carried the North, the Midwest, and the Far West. Senator Goldwater from Arizona, his opponent won only six states for a total of 52 electoral votes to Johnson's 486. Goldwater won his own state of Arizona, and five states in the old Confederacy: Alabama, Georgia, Louisiana, Mississippi, and South Carolina. Lyndon Baines Johnson, *The Vantage Point: Perspectives of the Presidency 1963-1969* (New York: Holt, Rinehart and Winston, 1971), 206.

\(^{66}\) Supreme Court precedents cited by those proposing and those opposed to federal aid to private schools were: *Everson v. Board of Education* 330 U.S. 1 (1947) (a New Jersey statute that authorizes local school districts to pay transportation expenses of private school children as well as public school children is constitutional), *McCollum v. Board of Education* 33 U.S. 203 (1948) (the use of public school classrooms in Champaign County, Illinois for religious instruction for 30 minutes a week is unconstitutional), and *Zorach v. Clauson* 343 U.S. 306 (1952) Released time for religious instruction from public school in New York City is constitutional if the classes are on private property, such as churches or synagogues. Justice William O. Douglas in *Zorach* said: "The First Amendment...does not say that in every and all respects there shall be a separation of church and state. Rather, it studiously defines the manner, the specific ways, in which there shall be no concert or union or dependency, one on the other...that is the common sense
onset of his administration, set equal educational opportunity as the centerpiece of his "Great Society." In a special message to the Eighty-ninth Congress on January 12, 1965 entitled "Full Educational Opportunity" Johnson said: "Every child must be encouraged to get as much education as he has the ability to take." Educational opportunity and emphasis on the "culturally deprived" and "underprivileged", the bywords of Harrington and Conant and other reformers of the early 1960s were ideas that now became a part of the Great Society rhetoric. "Nothing matters more to the future of our country: not our military preparedness—for armed might is worthless if we lack the brain power to build a world of peace; not our productive power; not our democratic system of government—for freedom is fragile if citizens are ignorant." At the end of his address, Johnson quoted Mirabeau B. Lamar, the second President of the Republic of Texas, the "father of Texas education": "The cultivated mind is the guardian genius of democracy. It is the only dictator that free man acknowledges. It is the only security that free man desires." The real purpose of ESEA was to provide federal funds primarily to schools which served the nation's neediest children. The 1964 Economic Opportunity Act had already set the new administration on this course by launching the Head Start program for pre-school children, work-training programs for low-income youth, and English language programs for adults. The education bill had to override tenacious opposition to an expansion of the federal role in education by the National Education Association and the National Catholic Welfare Conference. The NEA, which represented the opposition of the public schools, feared a loss of local control over education and curriculum. The

of the matter."


NCWC maintained that Catholics, who paid property taxes and took the responsibility for educating 14 percent of the nation's children, deserved something in return for their investment. In the early 1960s, both groups also worried over the condition of their schools and were "convinced that federal aid was the only salvation." By insisting on nothing for religious schools, the NEA was guaranteeing that neither public nor private schools would receive anything from Washington. The Catholics had enough clout in Congress to block any legislation.\textsuperscript{69}

The legislative structure for ESEA came from a report prepared by a Johnson task force on education headed by John W. Gardner, then still president of the Carnegie Corporation.\textsuperscript{70} With the anti-poverty theories of previous reformers in mind, aided by Francis Keppel, a former dean of Harvard, and the current Commissioner of Education, Gardner joined John Kenneth Galbraith, Wilbur Cohen, the Assistant Secretary of HEW, Anthony Celebrezze, the Secretary of Health, Education, and Welfare, in drafting a law that would solve the church-state problem. Federal funds in the Johnson bill were to be granted according to a "child-benefit" formula, the same formula used in granting federal aid to "impacted areas" since the 1940s.\textsuperscript{71}

\textsuperscript{69} Goldman, 208. In the Eighty-ninth Congressional House for the first time Catholics were the most predominate religious affiliation. (Catholics numbered 107 to the next most numerous sect—Methodist, numbering 88.)

\textsuperscript{70} John W. Gardner, as president of the Carnegie Corporation, as discussed above, had funded Conant's work in the late 50s and early 60s. Gardner later was named President Johnson's Secretary of Health, Education and Welfare. Following the passage of ESEA, Gardner chaired a White House Conference on Education, the first in 10 years. The Conference recommended more leadership on racial integration, more money and better teaching techniques for educating the "underprivileged" and "the culturally deprived." Congressional Quarterly, Congress and the Nation, vol. II, 1965-1968, 721.

\textsuperscript{71} The "impacted aid" formula was devised in 1940 with the passage of the Lanham Act which authorized federal funds for the construction, maintenance, and operation of facilities, including schools which had been impacted by "swollen" population by military and defense personnel. From 1946-1950 the federal government continued to provide education funds for areas impacted by federal action, or areas with less taxable property. Impacted aid took the form of school construction, building maintenance, and teachers' salaries. Those opposed to impacted aid feared that aid for salaries would bring federal control over what to teach and construction aid would end federal aid once the building was completed. Congressional
According to this "child-benefit" formula, across the board aid for school construction and teacher's salaries would not be given to all public schools, instead federal aid, under ESEA's Title I, would be allocated to public school districts "impacted" with low-income families. Private schools would be allowed to participate in special, federally-funded programs such as educational television and "shared time" classes. The Gardner task force also recommended that aid be allocated for innovative programs that would upgrade the quality of education. For example, community-wide programs could offer special services in music, art, foreign languages, science, and aid to the handicapped. These services would be available to private as well as public schools. To quell worries about federal control, grants were to be made directly to the states which would in turn allocate funds to local school districts. Local districts would then be allowed to spend federal money in any way approved by state and national agencies.\textsuperscript{72}

The Elementary and Secondary Education Act passed April 9, 1965 without any major changes in the Gardner task force recommendations. Johnson heard about its passage on his way in Houston to watch the Astros play the Dodgers. The President said, "I will never do anything in my entire life, now or in the future, that excites me more, or benefits the nation I serve more, or makes the land and all its people better and wiser and

\textsuperscript{72}ESEA, passed in 1965 by the 89th Congress was one of two historic education bills in 1965. ESEA (PL 89-10) was actually an amendment to the "impacted area" school law of 1950, an outgrowth of the Lanham Act of 1941. It is now considered to be a separate law. It was accompanied by the Higher Education Act (PL 89-329) which provided federal scholarships for needy students, helped finance college libraries and established a Teacher Corps to help send young college graduates to work in city sums and impoverished rural areas. The program was the idea of Senators Edward Kennedy and Gaylord Nelson. Kennedy had been impressed with volunteers who had helped black students in Prince Edward County Virginia when the public schools were closed to avoid integration. For a full discussion of ESEA see Congressional Quarterly Service, Congress and the Nation, vol. 2, 1965-1968, A Review of Government and Politics (Washington: Congressional Quarterly Service, 1969), 710. See also Philip Meranto, The Politics of Federal Aid to Education in 1965 (1967); Eugene Eidenberg and Roy D. Morey, An Act of Congress (1969); and Julie Roy Jeffrey, Education for the Children of the Poor (1978), ch. 3 for information on the preparation and passage of the bill.
stronger, or anything that I think means more to freedom and justice in the world than what we have done with this education bill. "This is the most important bill I will ever sign." ESEA became the law on April 11th in a one-room schoolhouse near Stonewall, Texas where the President first attended elementary classes. His teacher, later Mrs. Kathryn Deadrich Loney—"Miss Katie"—was present as well as several of Johnson's first Texas pupils.\(^{73}\)

In the first years of ESEA, appropriations for Title I of the Act, which allocated funds to local school districts based on the "child benefit" formula, were approximately the original intent of the bill—around $1 billion. Nine million public school children participated every year in Title I programs—also 500,000 from private schools. Poor children covered by ESEA went from 5,600,000 to 6,670,000 between 1966 and 1968, while the amount spent per child declined from $210 to $173.

The number of children served by the act became controversial because children attending schools with the poor also benefited from Title I programs. Title I funds were generally used for such educational benefits as reducing class size, remedial reading teachers, and school breakfasts. Title III funds, intended under ESEA for culturally innovative programs began with an authorization of $100 million, rose to $528 million by 1969, but, in the early 1970s, dropped in authorizations to $165 million—an indication of growing congressional dissatisfaction with program results.\(^{74}\)

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\(^{73}\)Johnson's first school was a one-room schoolhouse in which "Miss Katie" taught grades one through eight. Johnson's mother, burdened with five children had put Lyndon in school at age four, asking Miss Katie to "keep him busy and teach him something, anything worthwhile." Goldman, 308.

\(^{74}\)See Congressional Quarterly, Congress and the Nation, Vol. II, 1963-1968, 713. Five-sixths of all ESEA funds were allocated to Title I by Congress. It was expected that federal money would be primarily used for "compensatory programs to improve the achievement of poor children." But the program was popular politically for the opposite reason that it provided federal money to almost every district in the country. See Ravitch, The Troubled Crusade: American Education, 1945-1980, 160.
Many equal educational opportunity reformers of the 1960s were disappointed with the achievements of Title I: 75

Most of the local districts charged with administering Title I were singularly lacking in sympathy for its objectives. Power in most local systems resided either in school boards dominated by middle-class conservatives or in bureaucrats wedded to routine and the status quo. For them, reorienting schools to the needs of the poor meant losing middle-class support, disrupting established procedures, and summoning imagination for which they were hardly famous. Seventy percent of district superintendents polled in 1966 opposed allocating Title I funds on the basis of poverty. Accordingly, in the early years, local districts siphoned off uncounted millions of program dollars into regular school budgets and away from compensatory education.

Even as the future effectiveness of compensatory education under Title I was brought into question in congressional hearings over ESEA, Johnson called for a further expansion of equal educational opportunity and a new interpretation of equality in a speech at Howard University on June 4, 1965. Echoing the ideas of his assistant secretary of labor Daniel P. Moynihan and his speechwriter, Richard Goodwin, Johnson told an enthusiastic crowd that the freedom to vote, hold a job, enter a public place, or go to school would not be enough to meet the Great Society standards of equality: 76

You do not wipe away the scars of centuries by saying: Now your are free to go where you want... You do not take a person who for years has been hobbled by chains and liberate him, bring him up to the starting line of a race and then say,

75 Allen J. Matusow, The Unraveling of America: A History of Liberalism in the 1960s (New York: Harper Torchbooks, 1984), 223. Matusow explains that Robert Kennedy had anticipated problems with Title I in the Senate hearings on the bill. Questioning Keppel, Kennedy asked if putting funds in the hands of local boards was a good policy, "are we not just in fact wasting the money of the Federal Government...?" Weren't school districts themselves creating educational deprivation? Keppel assured Congress that educators "were undergoing a rapid change in attitude," and would conscientiously use Title money for social reform." Kennedy also asked Keppel to explain what was an educationally deprived child? Keppel's interpretation of Conant's original idea was that cultural deprivation was the problem of poor children and that this lead to educational deprivation. Administrators chose to equate low achievement as the same thing as educational deprivation. Low-achieving, not necessarily poor students, therefore qualified for federal funds on Title I. By 1977, Matusow reports that two-thirds of the students in Title I programs were not poor, half were not even low achievers. See Decima Research, The Participation Study: An Assessment of Who Is and Who Is Not Selected for Compensatory Education (1977). See also "Elementary and Secondary Education Act of 1965," Committee on Labor and Public Welfare, Senate hearings (1965), 511-512. Cited in Matusow, 484.

76 Gettleman and Mermelstein, eds., The Great Society Reader. 254.
"you are free to compete with all the others"... Thus it is not enough just to open the gates of opportunity. All our citizens must have the ability to walk through those gates...This is the next and the more profound stage of the battle for civil rights. We seek not just freedom but opportunity. We seek not just legal equity, but human ability, not just equality as a right and a theory but equality as a fact and equality as a result.

Equality of result was not the political equality of Jefferson, or even the equality of opportunity of Brown, but a new definition of equality. Johnson in the Howard University speech showed that his administration was willing to take equality of opportunity a step beyond, to equality of result and is an example of the optimism of the 1960s. At the end of his speech, Johnson called for the strengthening of the black American family. Citing the family as the cornerstone of American society, Johnson listed the dismal facts of black family failure: only a minority of black children lived with both parents, a majority received public assistance sometime during their lives, most blacks were brought up in slums, isolated, with little contact with whites. Johnson's speech drew heavily on a secret report prepared by Moynihan on the state of the black family entitled: The Negro Family: the Case for National Action. Moynihan called for new federal policies on unemployment, poverty, discrimination, housing and health, the "root causes of the black family "instability." The Great Society was ready for an all-out attack on poverty and discrimination of wealth.

While Johnson's speech was well-received by black leaders, Moynihan's report was not. Instead of blaming ghetto social problems on the disintegration of the black family, critics of the report claimed it was racism and injustice in American society that caused the problems. Civil rights advocates dedicated to "community action programs" created by the earlier Economic Opportunity Act, in their work to empower the poor,
found it "tasteless" and "awkward" to refer to the "cultural deprivation" of the poor rather than their "cultural strengths." The compensatory theory of equal educational opportunity behind Head Start and Title I, and the Johnson initiative for equality of results, found itself in conflict with the empowerment theories behind community action. The implementation of Title I was a disappointment also to school finance reformers. This disillusionment with the Johnson administration began to take equal educational opportunity theorists as well as civil rights reformers in new directions.

The compensatory equity theories behind Title I and the work of Conant received another blow in the summer of 1966 with the publication by the Office of Education of a study entitled *Equality of Educational Opportunity*, more commonly known as the Coleman Report. Produced by a team of researchers under the guidance of James S. Coleman of Johns Hopkins University, the Coleman report was the "second largest social science research project in history"—570,000 pupils, 60,000 teachers, and facilities in 4,000 schools were surveyed and tabulated. Commissioned by the Civil Rights Act of 1964, the purpose of the report was to ascertain the availability of equal educational resources for "individuals by reason of race, color, religion, or national origin in public institutions at all levels in the United States." The research team counted the availability of such educational resource inputs such as laboratories, textbooks, class size, teacher background and training and also attempted to measure how these resources affected pupil achievement. The conclusions of the survey came as a surprise to educators and reformers and challenged compensatory educational theory. The Coleman Report found

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that resource differences between black and white schools were small: "In 1966 the nation had come much closer to achieving [the]classical notion of equality of educational opportunity [equality of resources] than most of us realized then or realize now."79

Secondly, the Coleman Report found little relationship between variations in student achievement and school resources. The research team discovered that "a pupil's achievement is strongly related to the educational backgrounds and aspirations of the other students in the school....it turns out that the composition of the student bodies has a strong relationship to the achievement of Negro and other minority pupils."80 None of the usual input measures of educational resources such as access to libraries, teacher background and training, access to science laboratories was found to account for differences in academic achievement between minorities and whites. The study revealed instead that a student's family background had the greatest impact. The primary influences on a student's academic success were his socioeconomic status, his ethnic group, and the region in which he lived.

The controversial findings of the Coleman Report seemed to indicate that reformers should not expect federal efforts to provide funds for compensatory education to eliminate differences in white and minority student achievement. Also, the more radical equity advocates, who believed that equality in educational opportunity also required equality in educational results, by 1965, sought to find an alternative course of action. Title I and compensatory education was not the answer. Christopher Jencks, a

Harvard social scientist, suggested that advocates of the impoverished "should give up the effort to reduce inequality indirectly through education and agitate instead for a more efficient mechanism to take money from the rich and give it to the poor."\(^{81}\)

Armed with the *Coleman Report* and another succeeding study by the U.S. Commission on Civil Rights called *Racial Isolation in the Public Schools*, the NAACP in the middle sixties pressed for integration of public schools affected by de facto, as well as de jure segregation.\(^{82}\) *Racial Isolation*, written in response to a request from President Johnson to "lay the groundwork for federal action..." on de facto segregation provided ammunition for this approach. The 1967 study found that black Americans were racially isolated and that those attending majority-black schools were disadvantaged. The longer blacks attended desegregated schools, "the better their achievement and attitudes."\(^{83}\)

What followed from the *Coleman Report* and *Racial Isolation* was a new series of Supreme Court cases on de facto integration that challenged the earlier, and more moderate equity standards of *Brown*. Newer judicial standards sought to implement a certain racial balance in schools or forced integration, particularly in the school districts in the north, which were more affected by de facto segregation. School choice and busing cases reflected the influence of the new social science evidence advocated in the *Coleman Report and Racial Isolation*.\(^{84}\)

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\(^{81}\)Matusow, *The Unraveling of America*, 226.

\(^{82}\)De jure segregation is considered to separation of the races by law, or some purposeful act by government authorities. De facto segregation, segregation caused by "the facts" is caused by housing or migration. The Supreme Court has ruled if de jure segregation is involved, the school system is unconstitutional. The court will then intervene. If the school district is unintentionally segregated, the system is not unconstitutional and the court will not intervene. John E. Nowak and Ronald D. Rotunda, *Constitutional Law*, 4th ed. (St. Paul : West Publishing, 1991), 635.

\(^{83}\)See Ravitch, *The Troubled Crusade*, 172.

\(^{84}\)Ibid., 173-174.
Later school de facto integration cases occurred at a time when *Brown*
intellectuals like Kenneth Clark and later, even James Coleman, became disillusioned
with the policy of "racial redistribution." Divisions began to appear among equal
opportunity advocates. Instead of forced integration of schools, Clark and Coleman began
to favor more black control of schools and communities and the use of "voluntary
inducements" rather than court orders "to desegregate." For Coleman, "the courts” would
become probably the worst instrument of social policy."85

Most school finance reformers in the middle 1960s, however, did not agree with
Coleman’s assessment of the ineffectiveness of court reform. Just as the more radical
equal educational opportunity advocates, such as Jencks, were becoming disillusioned
with the ability of the government to institute real equity reforms, Arthur Wise, in 1965,
the “father of school finance reform” suggested a new way to implement equal
educational opportunity—by launching an attack on state school finance systems through
the Warren Court. In 1954, the *Brown* decision had called attention to the fact that
“children in nearly every state in the nation face significant differences in educational
opportunity.” The Elementary and Secondary Education Act of 1965, was a beginning.
It had allocated “needed” federal funds to poor families who lived in urban and rural
areas. But the implementation experience of Title I, and the revelation in the current
research that compensatory education was ineffective, showed that possibly a “revolution
in equality cannot be consummated without the aid of the judiciary.” Wise believed that

85It was the Dolls test, developed by sociologist Kenneth Clark, that was used as evidence of feelings of
black inferiority among black school children that proved decisive in the *Brown* case. James Coleman in
April 1975 released a new study in which he concluded that court-ordered desegregation was contributing
to white flight from the schools. While Coleman in the late 1970s preferred "voluntary inducements to
desegregate, integrationist scholars advocated the creation of metropolitan districts so that whites could not
flee to suburban schools to avoid desegregate.” Ravitch, 179. See also James S. Coleman, Sara D. Kelley,
"the self-interest of privileged parents...militates against the achievement of the goal of equality of educational opportunity." The solution was to litigate school finance cases that would ask for equalization of educational resources.  

It is clear that a serious effort to launch cases attacking inequality of educational opportunity would generate as much heat as light. If however, one of these cases should reach the Supreme Court and be decided favorably, one conclusion is painfully clear. Differences in per-pupil expenditure could not be based on the accident of location, as is now the practice in most states. Undoubtedly, this conclusion will not meet with the favor of wealthier communities. But if we are to heed the equal protection clause of the Constitution, it seems that the state cannot deny to some what it grants to others.

The historical roots of the *Rodriguez* case and its attack on the inequity of school finance systems in the courts began in February 1965 with the publication by Wise of an article in *Administrator's Notebook* entitled: "Is Denial of Equal Educational Opportunity Constitutional?" According, to the *Rodriguez* Appellants' brief, school finance reform was "in the air" at the time, and Wise's work was followed by, what later critics of the school finance movement would call a "wave of consciously activist scholarship, written with an avowed bias, and aimed at producing specific legal results." They planned to present their argument before the Warren Court which during the same period had already begun an expansion of fundamental rights after *Brown*.

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The Warren Court and Wealth Discrimination—1956 to 1969

Supreme Court Equal Protection Precedents to the 1973 Texas School Finance Case

Underlying the cases involving an alleged denial of equal protection by ostensibly private action is a clash of competing constitutional claims of a high order: liberty and equality. Freedom of the individual to choose his associates or his neighbors, to use and dispose of his property as he sees fit, to be irrational, arbitrary, capricious, even unjust in his personal relations are things all entitled to a large measure of protection from governmental interference. This liberty would be over-ridden, in the name of equality, if the strictures of the Amendment were applied to governmental and private action without distinction. Also inherent in the concept of state action are values of federalism, a recognition that there are areas of private rights upon which federal power should not lay a heavy hand and which should properly be left to the more precise instruments of local authority.\(^\text{88}\)

During the 1950s and the 1960s, the Warren Court, through a "new" application of the Equal Protection Clause of the Fourteenth Amendment, began a "massive" expansion in the civil rights of racial and other disadvantaged minorities in American society. Beginning with Brown v. Board of Education (1954) and ending with his last

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\(^{88}\) From Justice John Marshall Harlan's dissent in Lombard v. Louisiana, 373 U.S. 267 (1963). Lombard was one of several civil rights sit-in cases that the Warren Court (1953-1969) decided in 1962 and 1963. The defendants in Lombard were charged with "criminal mischief" under a state statute for their refusal to leave a segregated lunch counter in a private restaurant in New Orleans. There was no city ordinance that mandated segregated restaurants. But the mayor and the chief of police had announced that they would not condone sit-ins. Some of the more "activist" members of the Court such as Justice William O. Douglas, appointed by Franklin Roosevelt, were ready to end private discrimination in public accommodations through the equal protection clause of the Fourteenth Amendment. Justice Harlan, an Eisenhower appointee who joined the Supreme Court in 1955 and stayed two years beyond Chief Justice Earl Warren, not only dissented in Lombard but in several of the Court's other equal protection cases such as Baker v. Carr 369 U.S. 186 (1962) and Griffin v. Illinois 352 U.S. 12 (1956). Griffin according to Barbara Brudno was the first wealth discrimination case decided by the Supreme Court. See Barbara Brudno, Poverty, Inequality, and the Law (St. Paul: West Publishing Company, 1976). One of Harlan's major concerns in the Lombard case was that the restaurant was not located in a state building or on state property. State coercion, in his view, was not involved—there was no action of Louisiana to declare unconstitutional. Harlan also believed that the Court had used inappropriate, convoluted reasoning in its application of Section I of the Fourteenth Amendment to this case. Section I of the Fourteenth Amendment reads: "All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny any person within its jurisdiction the equal protection of the laws." To conservative judges on the Warren Court, many of its decisions were inconsistent with a "healthy federalism." For more information on Harlan and the sit-in cases see Philip B. Kurland, Politics, the Constitution, and the Warren Court (Chicago: University of Chicago Press, 1970), 127-137.
case, *Powell v. McCormack* (1969), Chief Justice Earl Warren, and a majority of activists on the Court, advanced the principle of equality of opportunity in a variety of legal areas: education, race relations, voting, and the rights of the accused.\(^{89}\) After 1954, not only did the Warren Court continue to stand by desegregation, by per curiam decision, the *Brown* principle of desegregation was extended to other public areas such as beaches, restaurants, public housing, and hospitals. The Warren Court also reapportioned state legislative seats to the benefit of suburban voters, extended the legal rights of criminal defendants and the indigent, eliminated public school prayer, and declared a new fundamental "right to privacy" for married couples.\(^{90}\)

Warren Court equal protection cases concerning the fundamental rights of the poor were of particular interest to school finance reformers and their lawyers. Beginning with *Griffin v. Illinois* (1956), it appeared to Court observers that the federal judiciary


\(^{90}\) Many Warren Court decisions created social upheaval and encountered massive resistance. Mob violence at Central High School in Little Rock, Arkansas in the fall of 1957 forced President Eisenhower to protect Negro students by ordering a thousand paratroopers and ten thousand Arkansas national guardsmen into the city. Eisenhower placed the national guard under Presidential command. The opening of public beaches, parks, and restaurants was achieved by a series of per curiam opinions. Per curiam is Latin for "by the court." It is an unsigned opinion or one written by the entire Court. Some of the Court's landmark decisions that made the work of the Warren controversial were: *Baker v. Carr* 369 U.S. 186 (1962) (Malapportionment voting issues are justiciable and no longer only the province of the state legislatures.) (Brennan, 6-2), *Engel v. Vitale*, 370 U.S. 421 (1962) (Prayer in public school is a form of religious establishment.) (Black, 6-1), *Mapp v. Ohio* 367 U.S. 643 (1961) (Illegally secured evidence shall be excluded in state court.) *Miranda v. Arizona* 385 U.S. 436 (1966) (A person in custody has to be informed of his constitutional right to remain silent, that testimony could be used in court, and the right to a lawyer.) (Warren 5-4), *Griswold v. Connecticut* 381 U.S. 419 (1965) (There is a constitutional right to privacy which can be said to "emanate" from the Bill of Rights.) (Douglas). For criticism of the Warren Court's activism consult Raoul Berger, *Government by Judiciary: The Transformation of the Fourteenth Amendment* (1977). Berger claims the Warren Court incorrectly interpreted the Fourteenth Amendment. Also, see Alexander Bickel's *The Least Dangerous Branch* (1962). Bickel, a professor at Yale and a former law clerk of Felix Frankfurter, is a critic of the activism of the Warren Court. Both Bickel and Frankfurter
might be ready to declare poverty a "suspect" class, equal to that of race. Inequality of
school financial resources and maldistribution of public wealth would be the central equal
protection question in the multitudinous school finance cases to be tried in the late 1960s.

Warren Court "wealth" precedents became an essential part of the litigator's briefs
in the school finance cases. The first stage of the school finance reform movement
culminated nineteen years after Brown when the Supreme Court decided, in a class action
suit, on the constitutionality of all state school finance systems in San Antonio
Court, would decide if a state's reliance on the local ad valorem property tax, which often
resulted in disparities in educational funds available to school districts, amounted to a
denial of equal educational opportunity. School finance lawyers argued their cases in the
language of the Warren Court's "new" equal protection standards. There was, in addition,
uncertainty among reformers as to whether the Burger Court would follow previously
evolving wealth precedents.

Chief Justice Earl Warren made "practical politics and morality" major
components of his Supreme Court's decisions; he tended to place principle above
"technical reasoning." The Chief Justice's major strength was his ability to marshal
support for his opinions among his fellow "brethren" and his willingness to challenge

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91 Some of the cases before Rodriguez in which the Supreme Court "implicitly" held that wealth was a
"suspect" class were: Harper v. Virginia State Board of Elections, 383 U.S. 663 (1966), McDonald v.
Osser, 409 U.S. 512 (1973). All these preceding cases struck down "monetary barriers to the exercise of
the right to vote." Cases striking down wealth barriers to the right of criminal appeal were: Griffin v.
Illinois, 351 U.S. 12 (1956) and Douglas v. California, 372 U.S. 353 (1963). Details of a few of these
cases are discussed below in light of their importance to school finance reformers and the Rodriguez case.
William E. Thro, "The Third Wave: The Impact of the Montana, Kentucky, and Texas Decisions on the
Future of Public School Finance Reform Litigation, "Journal of Law and Education 19, no. 2 (Spring
previous "twentieth-century canonized restraints on the Court." Dwight Eisenhower's foremost contribution to the civil rights movement, according to Richard Kluger, was his appointment of Chief Justice Earl Warren, a decision the President would later regret.

Justices, then, were generalists in the law, not specialists in torturing it to avoid discomforting decisions. The law was there to be used, not simply saluted, and it fell to the Court to declare how broadly it could be applied. Warren's frame of reference had little to do with the long-standing dispute between Black and Frankfurter over judicial restraint. His frame of reference was the backrooms of police stations, the pressing needs of pensioners, the thirst of arid valleys, the health of the bodies and minds of the people. All his life, he had been a man of action, and he did not swerve from that upon donning the robes of Chief Justice.

The "liberal" or "real" Warren Court did not come into existence until 1962 when Justice Charles Whittaker, "a relatively conservative Republican," resigned and Felix Frankfurter, "the most articulate proponent of judicial restraint on the Court," retired after suffering a stroke. President Kennedy appointed deputy attorney general Byron White—an important actor in the Kennedy 1960 campaign and a believer in "using national legislative power to advance racial equality" to replace Whittaker. To take the

92 San Antonio v. Rodriguez, 411 U.S. 1 (1973)
93 G. Edward White, "Earl Warren's Influence on the Warren Court," in The Warren Court in Historical and Political Perspective, ed. Mark Tushnet (Charlottesville: University Press of Virginia, 1993), 44-45. Warren's father was a poor Norwegian immigrant who had come to America as a infant after the Civil War. Attending Berkeley as an undergraduate, Warren also received a law degree there and a doctorate in jurisprudence. He acquired a reputation for honesty and hardwork as the District Attorney of Alameda County, Attorney General of California, and governor of California. He won a "national reputation as both a highly effective enforcer of the law and a humanitarian who understood that it could not be used as a club to extract good behavior from troubled souls." Richard Kluger, Simple Justice. (New York: Vintage Books, 1977) 661.
94Kluger, Simple Justice, 666-667.
95Felix Frankfurter proved to be a disappointment to civil rights leaders on the Court. A former Harvard law professor, founder and leading counsel to the American Civil Liberties Union, Frankfurter had been a protegé of Louis Brandeis, the first Jewish Supreme Court Justice. Frankfurter, a defender of Sacco and Vanzetti during the 1920's, was called by Brandeis the most useful lawyer in America. On the Court, however, Frankfurter became a conservative voice for judicial restraint and legislative prerogative. "Only when legislatures exceed the bounds of common decency did Frankfurter believe courts should interfere directly." See Urofsky, A March of Liberty, vol. II, 711. White's views changed over time. His long career on the Court revealed a drift to the right. In the 1960s he voted most regularly with Justice Brennan, but by the 1980s he voted most regularly with Chief Justice Burger. John C. Jeffries, Justice
Frankfurter position, Kennedy nominated Arthur Goldberg, his Secretary of Labor. Goldberg's arrival "created a solid liberal majority" on the Warren Court. From 1958 to 1961, Earl Warren, Hugo Black, William O. Douglas, and William Brennan were the "liberal core" of the court and they were often outvoted. A number of national security cases decided between 1959 and 1961 are examples. The departures of Whittaker and Frankfurter added White and Goldberg to the liberal majority, and even though three years later Goldberg was transferred by President Johnson to the United Nations, the President named Abe Fortas, another "reliable liberal," to the bench. In 1967, Johnson again added to the Warren Court's liberal majority when he appointed Thurgood Marshall, the NAACP counsel who triumphed in the Brown case.


Many of the Burger court's decisions (1969-1986) reflect a 2-5-2 pattern, with Burger and Rehnquist forming the conservative wing. Marshall and Brennan, a holdover

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96 See Communist Party v. Subversive Activities Control Board, 367 U.S. 1 (1961). In a five to four vote, the Warren court upheld the McCarran Subversive Activities Control Act of 1950 and held that it was constitutional for Congress to require the Communist party to register with the government as a subversive organization." Mark Tushnet, The Warren Court in Historical and Political Perspective (Charlottesville: University Press of Virginia, 1993), 6.
97 Thurgood Marshall argued many landmark civil rights cases in front of the Supreme Court before Brown. See Smith v. Allwright, 321 U.S. 649 (1944) (Exclusion of blacks from a party primary is a violation of the Fifteenth Amendment) and Shelley v. Kraemer, 334 U.S. 398 (1963), (state courts may not enforce real estate covenants that deny blacks access to housing.) Marshall commuted from Baltimore to attend Howard University law school which was then being "upgraded" under its Dean Charles Houston. Houston was the first black man ever to serve on the Harvard Law Review, received a doctorate in law from Harvard, and was also a student of Felix Frankfurter. See Kluger, Simple Justice, Chapter Eight for
from the Warren years, found themselves many times on the same side of the issues. The remaining five justices took the central ground with Justice Potter Stewart, an Eisenhower appointee, sometimes gravitating toward the Brennan-Marshall side.98

The Burger Court did not advance the same equal protection agenda as the Warren Court, argues law professor Mark Tushnet. Rather, it shifted emphasis “in subtle but important ways.” Two cases decided in early 1973 provided an interesting contrast. “In January the Court decided the abortion cases. In March it decided San Antonio
Independent School District v. Rodriguez, rejecting a challenge to the Texas’s system of school finance.” “Some political liberals,” Tushnet argued, “criticized the financing decisions” as creating a two-tier system for abortion and education, “one for the poor and a better one for the middle class.”99

School finance reformers had no crystal ball to predict the retirement of Chief Justice Earl Warren in 1969. It was obligatory for public interest lawyers to structure their briefs to reflect their understanding of the Warren Court’s "new equal protection." In the early 1960s, the Warren Court had applied a two-tier standard of equal protection review. Constitutional questions involving "suspect" or "insular" and "discrete" classes such as race, or actions concerning "fundamental rights" triggered a "stricter judicial scrutiny" by the Court. If either a “suspect class” or “fundamental right” were not present, the plaintiffs received a lower standard of judicial consideration or, rather, a "traditional" lower tier standard of judicial review. In traditional review, if the Justices can find a "rational relationship" between a state action and the classification created by the

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99Mark Tushnet, "The Warren Court in Historical and Political Perspective," 32. The two abortion cases
legislation, there will invariably be a finding of constitutionality. If the facts demanded "strict scrutiny," the defendant had to present proof that the state action or statute served a "compelling interest."\footnote{100}

During the 19\textsuperscript{th} century, the equal protection clause, later so successfully employed by Earl Warren to end racial division, was utilized by the Court primarily to restrict state regulation of business; seldom was it used to declare state laws unconstitutional. The racism of Nazi Germany and the fight for the survival of the democracies during the World War II, led to a renewed interest by the Court in the Equal Protection clause as protection of minorities in America. As early as 1938, Justice Harlan Fiske Stone appended the "most famous footnote in American constitutional law" to a non-civil liberties case, \textit{United States v. Carolene Products Company}. Stone's Footnote Four suggested that while the Court might defer to the legislative branch in areas of economic public policy, when the rights of "discrete and insular minorities" were involved, the Justices would require a "more exacting judicial scrutiny under the general prohibitions of the Fourteenth Amendment."\footnote{101}

\footnotesize{\textit{were Maher v. Roe, 432 U.S. 464 (1977) and Harris v. McRae, 448 U.S. 297 (1980).}}
\footnotesize{\textit{101} United States v. Carolene Products Co, 304 U.S. 144, 152 n. 4 (1938).}}

Robert M. Cover, a Professor of Law at Yale, and a student of Louis Lusky, finds it ironic that "the terms of the modern debates on judicial activism were...spawned in the context of both the New Deal at home and totalitarianism abroad." The rise of two-tier review of legislation was born because a New Deal court wished to approve necessary economic legislation during a time of great depression. In the case of economic legislation, which is a product of the political process, the court believed it should be careful not to interfere with the majoritarian process. In the case of other rights however, the court should apply more exacting review. At the same time, Footnote Four, paragraphs two and three were supposedly written by Louis Lasky, Justice Harlan Fiske Stone's law clerk. Professor Lasky, later at Yale, never denied writing the footnote, but also insisted that whatever Justice Stone accepted as part of an opinion, should be ascribed to him. \textit{Carolene Products} was not a civil rights case, it upheld the right of Congress to regulate the interstate shipment of "filled milk" but set the stage for the Warren Court's "new equal protection," the principles of which school finance reformers hoped the Court would apply in the \textit{Rodriguez} case. Robert M. Cover, "The Origins of Judicial Activism in the Protection of Minorities," \textit{Yale Law Journal} 91 (June 1982): 1290-1291. Footnote Four reads as follows:
The suggestion by Justice Stone of an "upper tier" of equal protection review was clarified by the Court in the 1944 Japanese Internment case, *Korematsu v. United States*. Justice Black, in a six to three opinion, upheld the exclusion and the eventual detention of Japanese-Americans. At the same time the country implemented the "most serious invasion of individual rights by the federal government in the history of the country," *Korematsu* also started a "revolution" in the constitutional analysis of the equal protection clause of the Fourteenth Amendment. In his majority opinion, although he upheld the internment of Japanese Americans, Justice Black again suggested a new standard of judicial review for cases involving racial classifications: 102

It should noted, to begin with, that all legal restrictions which curtail the civil rights of a single racial group are immediately suspect. That is not to say that all such restrictions are unconstitutional. It is to say that courts must subject them to the most rigid scrutiny. Pressing public necessity may sometimes justify the existence of such restrictions; racial antagonism never can.

During World War II, the Supreme Court, therefore, justified "legalized racism" at the same time it eloquently forged a new tool that could be effectively employed later to

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"There may be narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution such as those of the first ten Amendments, which are deemed equal specific when held to be embraced within the Fourteenth. *See Stromberg v. California,* 283 U.S. 359, 369-370; *Lovell v. Griffin,* 303 U.S. 444, 452.

It is unnecessary to consider now whether legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation, is to be subjected to more exacting judicial scrutiny under the general prohibitions of the Fourteenth Amendment than are most other types of legislation. On restrictions upon the right to vote, see *Nixon v. Herndon,* 273 U.S. 536; *Nixon v. Condon,* 286 U.S. 73; on restraints upon the dissemination of information, see *Near v. Minnesota ex rel. Olson,* 283 U.S. 697, 713-714, 718-720, 722; *Grosjean v. American Press Co.,* 297 U.S. 233; *Lovell v. Griffin,* supra; on interferences with political organizations see *Stromberg v. California,* supra, 369; *Fiske v. Kansas,* 274 U.S. 380; *Whitney v. California,* 274 U.S. 357, 373-378; *Herndon v. Lowry,* 301 U.S. 242; and see *Holmes, J., in Gitlow v. New York,* 268 U.S. 652, 673; as to prohibition of peaceable assembly, see *De Jonge v. Oregon,* 299 U.S. 533, 365.

Nor need we enquire whether similar considerations enter into the review of statutes directed at particular religious, *Pierce v. Society of Sisters,* 268 U.S. 404; *Farrington v. Tokushige,* 272 U.S. 484 [sic]; or racial minorities, *Nixon v. Herndon,* supra; *Nixon v. Condon,* supra; whether prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry. Compare *McCulloch v. Maryland,* 4 Wheat. 316, 428; *South Carolina v. Barnwell Bros.,* 303 U.S. 177, 184 n.2 and cases cited. 304 U.S. 152-3."
attack institutionalized discrimination during the Warren Court era. After *Korematsu*, if a
classification in a state's legislation was "suspect," it was to be subjected to the "rigid
scrutiny" of the Court, and the discrimination declared constitutional only if it was a
creation of public necessity.

Another stage in the development of the "new" Warren Court theory of equal
protection was "foreshadowed" in the 1942 case of *Skinner v. Oklahoma*. An Oklahoma
statute that provided for the compulsory sterilization of "habitual criminals" was declared
unconstitutional in *Skinner* because it affected "one of the basic civil rights"—marriage
and procreation. The Oklahoma legislature had authorized the sterilization of felons
convicted two or more times of crimes involving "moral turpitude." The Court found an
unconstitutional classification in *Skinner* because other persons, convicted of "offenses
arising out of the violation of the prohibitory laws, revenue acts, embezzlement, or
political offenses" were not subject to sterilization. After the *Skinner* case, if the
Supreme Court finds "one of the basic civil rights," a fundamental right, affected by state
interference, the traditional "rational relationship" standard of review no longer applies.
A fundamental right, of necessity, required a litigation issue to subjected to "strict
scrutiny." After *Skinner*, "strict scrutiny" might be triggered by the Supreme Court if a
case involved either a "fundamental" right or a "suspect" class.103

Stanford law professor Gerald Gunther explained the impact that the emergence of
the "new" Warren Court equal protection had on judicial review:104

The emergence of the "new" equal protection during the Warren Court's last
decade brought a dramatic change. Strict scrutiny of selected types of legislation

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104 Gerald Gunther, "The Supreme Court 1971 Term. Foreword: In Search of Evolving Doctrine on a
proliferated. The familiar signals of "suspect classification" and "fundamental interest" came to trigger the occasions for the new interventionist stance. The Warren Court embraced a rigid two-tier attitude. Some situations evoked the aggressive "new" equal protection with scrutiny that was "strict" in theory and fatal in fact; in other contexts, the deferential "old" equal protection reigned with minimal scrutiny in theory and virtually none in fact.

The Warren Court new equal protection was "dynamic," the ramifications of its decisions encouraged legal speculation as to how far the Court might go in future cases to equalize conditions. The list of rights found to be fundamental by the Warren Court was "quite modest"—voting, criminal appeals, and the right of interstate travel were the foremost examples. Social reformers and litigators, however, suggested that the Court should expand this laundry list to welfare benefits, exclusionary zoning, municipal services, and school finance. The first phase of school finance reform was over. Brown expanded the development of the "new equal protection." It was up to school finance advocates to continue and concretize the revolution.

The second phase in the equal educational opportunity revolution began in 1965 when Arthur E. Wise, a graduate of the University of Chicago Department of Education and a doctoral student of Philip B. Kurland, a Professor at the Chicago School of Law, published an article in the Administrator's Notebook entitled "Is Denial of Equal Educational Opportunity Constitutional?" Wise's article was the first published

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105 Gunther points out that many of the litigators in front of the Warren Court over these equal protection issues were also publishing analytical tracts on how to attack their own lawsuits. For example, Professors John E. Coons, William H. Clune III, and Stephen D. Sugarman, were not only authors of Private Wealth and Public Education (1970) in which the authors developed a new, judicial standard of fiscal neutrality to apply in school finance cases. But, they were also active in the Serrano v. Priest litigation in California 487 P. 2d 1241 (1971), the first real victory in a state case for school finance reform. Serving as an amicus curiae in the Serrano case was Mark G. Yudof, the former Provost of the University of Texas, who was a central partner on the team that argued the Rodriguez case in front of the Supreme Court. The other attorneys for the appellees in Rodriguez were Arthur Gochman, Warren Weir, Mario Obledo, and Manuel Montez. See Gunther, 9.
contention that unequal per-pupil expenditures within a state were evidence of a denial of equal educational opportunity. Wise repeated his claim in a widely disseminated book among school finance reformers, *Rich Schools Poor Schools: The Promise of Equal Educational Opportunity* published in 1968.\(^{106}\)

The concept of equality of educational opportunity, long a promise of American education, received renewed attention with the Supreme Court's decision in *Brown v. Board of Education* in 1954. . . That momentous decision in 1954 has had a twofold impact: it has given impetus to the struggle for equal rights for Negroes—in schools and elsewhere; and it has created a focus for judicial interpretations of equality in other spheres.

*Brown* was viewed by school reformers as the first step in providing an equal education for the poor, particularly black Americans, in "large cities." The school desegregation decision, however, had proven to be a disappointment. In Wise's opinion, and of others concerned with the quality of American education, *Brown* not only had failed to desegregate the schools, it had "called attention to the fact that children in nearly every state in the nation [faced] significant differences in educational opportunity."\(^{107}\)

The *New York Times* annual educational survey for 1968, thirteen and one-half years after Brown, revealed little progress in the desegregation of schools. Kurland, suggested that "the American public whatever it's pious declarations," was "not prepared to accept the Supreme Court's notions of its constitutional obligations." The cause for the lack of compliance was a fear that "integration would lead to a lowering of the quality of an already inadequate educational system." Parents with means managed to either move to "areas where integration was not feasible," or retreat " to private schools."

The effects of Judge Skelly Wright's *Hobson v. Hansen* decision in the District of

Columbia, Kurland predicted, would have no better success. "All that he can accomplish is to assure that the brighter students receive no better education within the system than the other students." Absent a reversal of Pierce v. Society of Sisters, the Supreme Court case that established the right of parents and their children to a private education, the continued escape to private schools could not be legally closed. Religious and suburban political clout would also be able to prevent it.  

Since Brown could fail, Wise and other reformers proposed a "second wave" of equal educational opportunity cases. If education was a fundamental interest as indicated by the court, inequalities in school finance could be challenged on the grounds of the Fourteenth Amendment's Equal Protection clause, as proposed by Wise. In the same year as the publication of Rich Schools Poor Schools, Harold W. Horowitz, Professor of Law at the University of California, later a lawyer for the plaintiffs in the California case, agreed with Wise that "an inequality in educational opportunity arises when, due primarily to differing financial resources available for public education, children in one school district receive a lower-quality educational experience than do children in other districts." Methods of financing public education, based on local tax revenues and state funds, created "considerable differences in the financial resources of school districts." These differences resulted in "varying class size, teacher quality, curricular offerings,

107 Wise, 3.
109 Pierce v. Society of Sisters, 268 U.S. 510 (1925). In Pierce the Supreme Court held that while the government may demand that all children attend school, parents have a constitutional right to choose a private school. Wisconsin v. Yoder, 406 U.S. 205 (1972) qualified Pierce. Amish parents were not required to send their children to high school because the socialization process there might interfere in their free exercise of religion. The values taught in American public high school, the defendants claimed were contrary to the Amish way of life. The Court found no "compelling" state interest to require the public
length of school day, availability of compensatory programs for children with special educational needs, and the like."\textsuperscript{110}

Revenue receipts for the 1968-1969 school year were estimated to have been 33.7 billion dollars. Local government provided 52\% of school funding, while states provided 40.7\%, and the federal government 7.3\%.\textsuperscript{111} Inequalities in per pupil expenditure that same year ranged from New York's $1,140 per student in average daily attendance to $432 in Alabama.\textsuperscript{112}

Wise and other school finance reformers recognized that the passage of the 1965 Elementary and Secondary Education Act had made an attempt at some differential financing. The Act "allocates federal funds as they are 'needed.' States with a large number of poor families receive more funds than those with a smaller number." It was possible that federal funding might equalize school expenditures before school finance litigation could get underway, but finance experts considered that highly unlikely: "One might speculate that it is a question of which event takes place first—federal equalization, or a court case concerned with state equalization. At present it would seem that the latter is more likely to occur."\textsuperscript{113}


\textsuperscript{113}Wise, 207. Title One of the Elementary and Secondary Education Act of 1965 reads as follows: "to local educational agencies serving areas with concentrations of children from low-income families to expand and improve their educational programs by various means...which contribute particularly to meeting the special educational needs of educationally deprived children." 20 U.S. C. Section 241 a (1970) Title One is now called Chapter One. Under Chapter One, as well as the former Title One, the federal
Based on the findings of the Coleman Report and other later research, educators had their doubts that Title One "compensatory" education programs would ever make a difference in the lives of poor, urban, minority children. A report prepared for the Regents of the University of the State of New York in December 1969, conducted by Dr. O'Reilly the Chief of the Bureau of School and Cultural Research found that, "[c]urrent large-scale applications of compensatory education," so far "have failed to show any real promise in reducing the intellectual and achievement deficits of disadvantaged children." It was time to turn back to the Courts to restore the equal educational opportunity ideals of Brown.

If school finance reform was accomplished, it would forever change the way state legislatures funded American schools and the way federal judges viewed wealth classifications and equal protection. Taking a clue from the Warren Court's two-tier system of judicial review, school finance litigators selectively looked for Warren Court precedents that would prove their case in court—that the funding of American public education was in itself a denial of equal educational opportunity.

School finance experts uncovered several categories of Warren Court decisions on which they based their Equal Protection briefs. Criminal law was the first area in which the Warren Court considered poverty to be a possible unconstitutional classification. The first case that paralleled the arguments of education reformers was Griffin v. Illinois (1956). In Griffin, Justice Black in a five to four decision found that the state's failure to provide an indigent criminal defendant with a free transcript for purposes of appeal was

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114 Division of Research Office of Research and Evaluation, New York State Education Department.
unconstitutional. The Illinois law provided free transcripts in capital cases, and for appellate review of constitutional questions, but not for other alleged trial errors. The defendants, convicted of armed robbery, claimed their rights of due process and equal protection had been denied, and requested that they be provided a certified copy of their trial record without cost.

Citing the Magna Carta, Justice Black wrote eloquently that the poor deserved equal protection in criminal trial procedures: 115

Providing equal justice for poor and rich, weak and powerful alike is an age-old problem... our constitutional guaranties of due process and equal protection both call for procedures in criminal trials which allow no invidious discriminations between persons and different groups of persons. Both equal protection and due process emphasize the central aim of our entire judicial system—all people charged with crime, so far as the law is concerned, "Stand on an equality before the bar of justice in every American court." Chambers v. Florida, 309 U.S. 227, 241. See also Yick Wo v. Hopkins, 118 U.S. 356, 369.

Justice Black not only found the "invidious" classification in Griffin to be poverty, but he declared that a fundamental right was involved: "There can be no equal justice where the kind of trial a man gets depends on the amount of money he has. Destitute defendants must be afforded as adequate appellate review as defendants who have money enough to buy transcripts."116

Justice Frankfurter, in Griffin, concurred with Black but for different reasons. In a famous comment that would be later used by defense lawyers to deny that wealth was as "invidious" a classification as race. Frankfurter spoke for judicial self-restraint: 117

... a State need not equalize economic conditions. A man of means may be able to afford the retention of an expensive, able counsel not within reach of a poor

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man's purse. Those are contingencies of life which are hardly within the power, let alone the duty, of a State to correct or cushion.

Frankfurter agreed with Black that the state did not have to equalize all trial conditions for indigents—but to deny the poor a chance for a full review of a criminal trial was unjust: "The State cannot keep the word of promise to the ear of those illegally convicted and break it to their hope." The State could, however, keep financial concerns in mind: . . . "in order to avoid or minimize abuse and waste, a State may appropriately hedge about the opportunity to prove a conviction wrong... it may protect itself so that frivolous appeals are not subsidized and public moneys not needlessly spent." For Frankfurter there needed to be a balance between the rights of the State and the rights of the poor—the end of government should be "that the State will neither bolt the door to equal justice nor support a wasteful abuse of the appellate process."

Justice Harlan in his dissent caught the attention of school finance lawyers when he compared the issues in *Griffin* to public funding of a college education; the dissenting Justice found poverty not to be an "invidious" classification: 119

But no economic burden attendant upon the exercise of a privilege bears equally upon all, and in other circumstances the resulting differentiation is not treated as an invidious classification by the State, even though discrimination against "indigents" by name would be unconstitutional. Thus, while the exclusion of "indigents" from a free state university would deny them equal protection, requiring the payment of tuition fees surely would not, despite the resulting exclusion of those who could not afford to pay the fees. And if imposing a condition of payment is not the equivalent of a classification by the State in one case, I fail to see why it should be regarded in another.

119 *Griffin v. Illinois* 351 U.S. 35.
In *Rich Schools Poor Schools*, Wise speculated that the Warren Court in 1968, if faced with an equal protection case involving the poor and tuition fees to a state university, might be ready to create a right of access to higher education. Wise believed there were three major ties between the equal protection rights of indigent criminal defendants and the rights of black and poor children to equal educational opportunity. School finance cases were similar to the cases of indigent criminal defendants because, first, "[t]he Supreme Court's attempt[ed] to ensure equality in the administration of one of a state's services", and second, both sets of contentions confronted "discrimination between rich and the poor in the application of state laws. Finally, *Griffin* indicated that "once the equal-protection clause was applied to this sphere of governmental activity, it... continued to be applied to a point which is approaching equality in fact."\(^{120}\)

The standards of *Griffin v. Illinois* began to be extended by the Warren Court, as Wise indicated. In 1963, the rights of the poor to counsel for an appeal was considered in the *Douglas v. California*. In a six to three decision, Justice Douglas and the majority found that the denial of counsel on appeal to the indigent was as "invidious" as the denial of a full court transcript.\(^{121}\)

The present case, where counsel was denied petitioners on appeal, shows that the discrimination is not between "possibly good and obviously bad cases," but between cases where the rich man can require the court to listen to argument of counsel before deciding on the merits, but a poor man cannot. There is lacking that equality demanded by the Fourteenth Amendment where the rich man, who appeals as of right, enjoys the benefit of counsel's examination into the record, research of the law, and marshaling of arguments on his behalf, while the indigent, already burdened by a preliminary determination that his case is without merit, is forced to shift for himself. The indigent, where the record is unclear or the errors are hidden, has only the right to a meaningless ritual, while the rich man has a meaningful appeal.

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\(^{120}\) Wise, *Rich Schools Poor Schools*, 48.

Justice Harlan again dissented in *Douglas*, finding the Warren Court's "New" Equal Protection analysis lacking. Referring to his own dissent in *Griffin*, Harlan denied that the Equal Protection Clause imposed on the States "an affirmative duty to lift the handicaps flowing from differences in economic circumstances." 122

Every financial exaction which the State imposes on a uniform basis is more easily satisfied by the well-to-do than by the indigent. Yet I take it that no one would dispute the constitutional power of the State to levy a uniform sales tax, to charge tuition at a state university, to fix rates for the purchase of water from a municipal corporation, to impose a standard fine for criminal violations, or to establish minimum bail for various categories of offenses.

School finance reformers, like Wise, continued to take heart that the Court in *Douglas*, as well as other criminal rights cases, would continue to expand the rights of the poor and their access to equal opportunity under the Fourteenth Amendment. Future litigators also took notice of the frequent mention and worry by dissenting justices about equalization of education and taxation.

Further evidence that the Warren Court was ready to rule that states could not distribute public goods indiscriminately between the rich and the poor was provided in 1969 with *Harper v. Virginia Board of Elections*. 123 At issue in *Harper* was the constitutionality of a $1.50 poll tax required for voting in state elections. Installed as a device to originally disenfranchise black voters, the Court's decision rested on the issue of the wealth of the voter, rather than his race: Justice Douglas, again writing for the majority stated: 124

To introduce wealth or payment of a fee as a measure of a voter's qualification is to introduce a capricious or irrelevant factor. The degree of discrimination is irrelevant. In this context—that is, as a condition of obtaining a ballot—the requirement of fee pay causes an "invidious" discrimination. . . that runs afoul of the Equal Protection Clause.

The meaning of the equal protection clause is not set in stone, Douglas instructed, the notion of what a judge means by equality changes over time: 125

The Equal Protection Clause is not shackled to the political theory of a particular era. In determining what lines are unconstitutionally discriminatory, we have never been confined to historic notions of equality. . .Notions of what constitutes equal treatment for purposes of the Equal Protection Clause do change.

It was just this aspect of the Warren Court's new equal protection standard that worried Justice Harlan. More conservative court observers warned that "[c]onformity and uniformity" were both parts of equality. . ."even if we were to accept the egalitarian goal as contemporarily stated, we should be wary of making it our prime value." "Democracy depends on a multiplicity of values; if only a single value is emphasized democracy cannot survive."  The "new" equal protection of the Warren Court brought two central republican values into conflict—liberty and equality. One person's individual freedom could interfere with another citizen's equal opportunity.126

The Warren Court's decision to protect the voting rights of the poor reappeared again in 1968 in McDonald v. Board of Election Commissioners of Chicago.127 The complainants in McDonald were unsentenced inmates awaiting trial in the Chicago Cook County jail. The prisoners claimed their rights under the Equal Protection Clause had been denied because, although they were qualified voters, they were unable to vote—

126 Philip B. Kurland, Politics, the Constitution, and the Warren Court (Chicago: The University of Chicago Press, 1970), 168-169. Kurland at times was quoting the ideas of Geoffrey Gorer.
they were unable to post bail, or were charged with nonbailable offenses. The state of Illinois had not provided the prisoners with absentee ballots, and thus the appellants claimed that they should be treated as a "suspect" class. The state provided absentee ballots to the medically incapacitated and should also, therefore supply ballots to the "judicially" incapacitated. The state classification was "arbitrary" and should be subject to strict scrutiny because a fundamental right was involved.128

Chief Justice Warren, with Justice Harlan and the rest of the Court concurring, found that there was not a fundamental right involved in the case: . . . "there is nothing in the record to indicate that the Illinois statutory scheme has an impact on appellants' ability to exercise the fundamental right to vote. It is thus not the right to vote that is at stake here but a claimed right to receive absentee ballots."129 Despite the far-fetched reasoning on this point, the Court foreshadowed a important conflict in the application of equal protection: Illinois had made an effort to reach many incapacitated voters, and just because the state failed to reach other groups, this did not make its regulations concerning absentee ballots unreasonable.130 Just how far should equality of opportunity go under the Fourteenth Amendment?

What made McDonald of particular interest to school finance reformers was Warren's comparison of race and poverty as similarity situated classifications. The prisoners in the case were essentially denied the right to vote because the Court found

128 McDonald 394 U.S. 806.
129 McDonald 394 U.S. 807.
130 Other "identifiable" groups that did not receive absentee ballots were "mothers with children who cannot afford a baby sitter, persons attending ill relations within their own county, servicemen stationed in their own counties, doctors who are often called on to do emergency work, and businessmen called away from their precincts on business." 394 U.S. 810. To grant qualified prisoners absentee ballots under the Equal Protection clause would open new claims for many other groups.
that neither race nor wealth was present in the facts of the case, but the Court clearly implied it considered race and poverty to be equally "invidious:"

And a careful examination on our part is especially warranted where lines are drawn on the basis of wealth or race, Harper v. Virginia Board of Elections. . .two factors which would independently render a classification highly suspect and thereby demand a more exacting judicial scrutiny.

With no "suspect" class and no involvement of a fundamental right, the standards of even the Warren Court's new equal protection required that the traditional, deferential equal protection standards apply in McDonald. The Illinois state law was upheld. Harlan may have concurred with the opinion, but McDonald seemed to equal protection reformers to set a new, expanding view of "suspect" classes. If poverty were a "suspect" class, then why should the quality of education received by a poor, urban child have to be a function of the wealth of his school district? School reform litigators acquired another powerful weapon in their litigation arsenal.

In one of its final decisions, the Warren Court continued to develop its "new" equal protection standard that poverty was a "suspect" class, or if a fundamental right was involved, the justices would place the egalitarian ideal over the majoritarian. This equity standard was continued in the 1969 landmark Warren Court decision concerning a citizen's right to travel, Shapiro v. Thompson. The issue in Shapiro was whether, the District of Columbia, Connecticut, and Pennsylvania could deny welfare benefits to residents who had not resided within the state for a year. In Shapiro, the Court found a denial of equal protection because the welfare residency requirement limited the fundamental right of the poor to interstate travel. The defense argued that the purpose of

131 McDonald 394 US. 807.
the welfare residency requirement was rational: to discourage an influx of indigents searching for higher welfare benefits. The Court did not accept this view. There was no evidence that the State had taken a census of new residents seeking welfare and there was, also, no proof that any data was available to support their argument. Justice Brennan maintained that the Constitution gave "all citizens" the right to "be free to travel throughout the length and breath of our land uninhibited by statutes, roles, or regulations which unreasonably burden or restrict this movement." Implicit in the government's argument was an unacceptable discrimination against the poor. . . [133]

. . . the notion that indigents who enter a State with the hope of securing higher welfare benefits are somehow less deserving than indigents who do not take this consideration into account. But we do not perceive why a mother who is seeking to make a new life for herself and her children should be regarded as less deserving because she considers, among other factors, the level of a State's public assistance. Surely such a mother is no less deserving than a mother who moves into a particular State in order to take advantage of its better educational facilities.

Brennan argued that a State could logically "bar new residents from schools, parks, and libraries or deprive them of police and fire protection." The Equal Protection clause prohibits a State from apportioning benefits and services according to the past tax contributions of its citizens. This argument in Shapiro, drawing a parallel between distribution of State services and benefits deriving from taxation seemed to be directly applicable to the ideal of equal education opportunity and school finance. Surely, the Warren Court would be ready to declare school finance systems which discriminated against the poor unconstitutional in the light of Shapiro.

Education seemed close to becoming a fundamental right with the equal educational opportunity ideal declared in Brown. It also seemed that poverty, as well as

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race, was close to be declared a "suspect" class. The "new" Warren Court equal protection would be the standard under which school finance civil rights advocates and litigators would argue their cases. They also kept in mind Justice Harlan's ringing dissent in Shapiro:134

I think that this branch of the "compelling interest" doctrine is sound when applied to racial classifications, for historically the Equal Protection Clause was largely a product of the desire to eradicate legal distinctions found upon race. However, I believe that the more recent extensions have been unwise. For the reasons stated in my dissenting opinion in Harper v. Virginia Bd. of Elections, supra, at 680, 683-686, I do not consider wealth a "suspect" statutory criterion. . . I think this branch of the "compelling interest" doctrine is particularly unfortunate and unnecessary. It is unfortunate because it creates an exception which threatens to swallow the standard equal protection rule. Virtually every state statute affects important rights.

By the late 1960s, school finance cases were in preparation. The first challenges were ready to be taken to the Supreme Court. Which equal protection standard would hold sway was the question. Would it be the deferential "traditional" standard or the "new" equal protection of "strict scrutiny"? Which egalitarian ideal would the Justices hold must dear in the school finance cases, liberty or equality? And who would benefit? Parents who desired to retain the tradition of local control over education or reformers who wished to improve the lot of the poor and disenfranchised?

From Hobson to Serrano: The First State School Finance Cases:

Educational Needs versus Fiscal Neutrality 1967-1971

It is illuminating to compare in importance the right to an education with the rights of defendants in criminal cases and the right to vote—two "fundamental interests: which the Supreme Court has already protected against discrimination

133 Shapiro v. Thompson, 394 U.S. 631 and 632.
134 Shapiro 394 U.S. 659 and 661.
based on wealth. Although an individual's interest in his freedom is unique, we think that from a larger perspective, education may have far greater social significance than a free transcript or a court-appointed lawyer. "Education not only affects directly a vastly greater number of persons than the criminal law, but if affects them in ways which—to the state—have an enormous and much more varied significance. Aside from reducing the crime rate (the inverse relation is strong), education also supports each and every other value of a democratic society—participation, communication, and social mobility, to name but a few."  

In 1971, two years before the Supreme Court's decision in the Texas school finance case, San Antonio Independent School District v. Rodriguez, school finance reformers won their first victory when the California Supreme Court, in Serrano v. Priest, applied the standards of the "new" equal protection to the state's school finance system and found it unconstitutional. In his opinion for the majority, Justice Sullivan declared education to be a fundamental interest that required the "strict scrutiny" of the Courts. The state's school finance system created a "suspect" wealth-based classification when it made school expenditures a function of a school district's property wealth.  

Serrano was a state equal protection decision that went much further than Brown. The case's coupling of fundamental interest with wealth instead of race discrimination, as well as Justice Sullivan's adoption of a new equity standard of "fiscal neutrality" drew the attention of school finance reformers around the country. Although the Court's decision was binding only on the state of California, Serrano launched a series of new school finance lawsuits in thirty-eight states. Only one of these fiscal neutrality suits,

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136 The California Supreme Court, in what was later called Serrano I, found that the California school finance system was unconstitutional because it relied "heavily on local property taxes" and caused "substantial disparities among individual schools districts." The "amount of revenue available per pupil..."invidiously discriminates against the poor and violates the Equal Protection clause of the Fourteenth Amendment," Serrano v. Priest 487 P. 2d 1241(1971).
137 Kenneth L. Karst, "Serrano v. Priest: A State Court's Responsibilities and Opportunities in the
Rodriguez, would reach the Supreme Court. The history of Serrano parallels the history of the Texas school finance case—both utilized the same equal protection arguments and Warren Court precedents.

These first two school finance cases tested how far the courts were willing to extend the umbrella of equal protection. Would the Supreme Court follow the California Supreme Court and declare education to be as fundamental as the right to counsel? School finance reform in the late 1960s was also an affair of the heart. Education reform required judges and lawyers to do some "straightforward moral" as well as "constitutional arithmetic." Serrano made a "crucial contribution to the progressive extension of equal protection doctrine to new subject areas," a contribution that school finance reformers hoped "would bear fruit" when Rodriguez, the first school finance case reached the Supreme Court.

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138 Time magazine called Serrano "the most far-reaching court ruling on school since Brown v. Board of Education in 1954... Time, September 13, 1971, 43. Quoted in Karst, Serrano v. Priest, 720. For a list of lawsuits launched by Serrano see the New York Times, January 19, 1972, p. 34 M, col. 8. Most of the state actions were decided in agreement with the Serrano opinion. Two of the foremost examples besides Rodriguez were Van Dusarz v. Hatfield, 334 F. Supp. 870 (D. Minn. 1971) and Robinson v. Cahill, Civ. No. L-18704-69 (Sup. Ct., N. J., Jan. 19, 1972). The plaintiffs' counsel in these cases was "partly coordinated by the Lawyers' Committee for Civil Rights Under Law." Harold Horowitz, a counsel for the Serrano plaintiffs, called this group the "Serranoisseurs." See Karst, Serrano v. Priest, 721.

139 As Circuit Judge J. Skelly Wright said in Hobson v. Hansen 327 F. Supp. 859 (D.D.C. 1971): "the studies by both experts are tainted by a vice well known in the statistical trade—date shopping and scanning to reach a preconceived result... the Court has been forced back to its own common sense approach to a problem which, though admittedly complex, has certainly been made more obscure than was necessary. The conclusion that I reach is based upon burden of proof, and upon straightforward moral and constitutional arithmetic."

140 Karst, Serrano v. Priest, 729. Karst did not participate in the Serrano litigation, but his fellow colleague at the University of California law school in Los Angeles, Harold W. Horowitz was counsel for the defense along with David A. Binder, Michael H. Shapiro, William T. Rintala, and Sidney M. Wolinsky. Acting as amici curiae on behalf of the plaintiffs and appellants in Serrano were also Stephen Sugarman, John Coons, David L. Kirp, and Mark G. Yudof. Yudof, as stated previously, was later counsel for the plaintiffs and the respondents in the Rodriguez case.
Justice Sullivan, writing for the California majority, recognized that Serrano was breaking new equal protection ground, when, for the first time, education was coupled with wealth discrimination and declared a fundamental right:141

Until the present time wealth classifications have been invalidated only in conjunction with a limited number of fundamental interests—rights of defendants in criminal cases... and voting rights. Plaintiffs' contention—that education is a fundamental interest which may not be conditioned on wealth—is not supported by any direct authority.

Sullivan first appealed to moral reasoning to prove that education is a critical right of the American citizen. The judge declared education to be the crucial player in the "modern industrial state," a determiner of "the individual's chances for economic and social success," and "a unique influence on a child's development as a citizen and his participation in political and community life."

Citing Brown as the "classic expression of this position," the judge strove to demonstrate that education is essential to "the free enterprise economy" and the "bright hope for entry of the poor and oppressed into the mainstream of American society."

Education fosters citizenship, it prevents poverty, and affects children "universally" over a lengthy period (between ten and thirteen years.) Schools mold the personality of the youth of society and the fact that the state makes it compulsory is further evidence of its importance.142

The Warren Court applied "strict scrutiny" to state statutes that impinged on the "fundamental" rights of citizens or adversely affected "suspect" classifications. To find the California school finance system unconstitutional, Judge Sullivan was required by new equal protection interpretation to declare education a fundamental right. Unless the

state could prove the school finance statute served a "compelling" or "overriding" state interest, the state's school finance system would eventually be found unconstitutional by the California Supreme Court.

If a law did not impinge upon either on a "suspect classification" or a fundamental interest, then a state court, following the Supreme Court's two-tier equal protection review, would apply only "minimum scrutiny" to the statute. "Social and economic legislation" was traditionally subjected to minimum scrutiny. Minimum scrutiny required the state to show a "rational relationship" to some legitimate purpose, a much lesser test than "compelling interest." Few state statutes survived "strict scrutiny." Almost all legislation could survive a court's minimum scrutiny. The California Supreme Court would have to consider strictures of equal protection review when it decided the Serrano case.

Serrano was argued at a time when the Warren Court was expanding a citizen's fundamental rights under the equal protection mantle. Justice John M. Harlan believed the "compelling interest" doctrine was "sound when applied to racial classifications because" historically the Equal Protection Clause was largely a product of the desire to eradicate legal distinctions founded upon race." The Warren Court's extension of "strict scrutiny" to voting, political allegiance, interstate travel, and wealth cases was, he believed, unjustified: "there was no need for any resort to the Equal Protection Clause. . .in such instances this Court may properly and straightforwardly invalidate any undue burden upon those rights under the Fourteenth Amendment's Due Process Clause." The

142 Serrano 1256-1259.
143 A. Thomas Stubbs, "Note: After Rodriguez, Recent Developments in School Finance Reform," The Tax Lawyer 44, no. 1 (Fall 1990): 317-318. Stubbs' analysis of equal protection is taken from Stone, Seidman, Sunstein, and Tushnet, Constitutional Law, 495-839 (1986) and Tribe, American Constitutional Law (2nd
new equal protection standard of strict scrutiny if carried far enough might be applicable
to any state regulation. This expansion of rights was "unfortunate" because it threatened
to swallow the standard of traditional equal protection review, and "[v]irtually every
state statute affects important rights." 144 If Serrano extended equal educational
opportunity to all poor children in California, it would cause a revolution in state school
finance systems throughout the country. The upset of local control over school
expenditure became an important consideration in the school finance cases. Also, school
finance litigators would have to overcome the opposition of conservative justices
following in the footsteps of such dissenters as Justice Harlan.

Serrano was the beginning of "the first wave" of school finance litigation. Both
Serrano, and later Rodriguez, were based on the equal educational opportunity theories of
Sugarman. Wise, Coons and associates based their claim of equal educational opportunity
on the ground that failure to distribute state education resources equally results in serious
negative consequences for individuals and society. They argued also that local
property wealth was a suspect classification that no state could sustain under the "new"
equal protection's compelling interest requirement. 145

To declare education a fundamental right of citizens, Judge J. Skelly Wright in
Hobson v. Hansen had relied on "moral arithmetic" and the Warren Court on equal

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144 Shapiro v. Thompson, 394 U.S. 658, 661 (1969). (Strict scrutiny test invalidated residency
requirements for obtaining welfare benefits as an infringement of the right to interstate travel.) Harlan
dissented in many cases while on the Warren Court—see for example Harper v. Virginia Board of
Elections 383 U.S. 663 (1966) (the Virginia poll tax was declared unconstitutional) and Williams v. Rhodes
393 U.S. 23 (1968) (state power to appoint presidential electors is subject to the Fourteenth Amendment.
Also, a state law that makes it difficult for third parties to be placed on the ballot, violates a citizen's right
to exercise the vote.)
protection precedent. The inquiry of Wise and other school finance reformers into equal protection history bore fruit in 1971 when the California Supreme Court in *Serrano* agreed there was a direct link between the rights of defendants in criminal cases and equal educational opportunity: "Although an individual's interest in his freedom is unique, we think that from a larger perspective, education may have a greater social significance than a free transcript or a court-appointed lawyer." Quoting the work of Coons and his colleagues, Justice Sullivan pointed out in *Serrano* that education affected more citizens than the criminal justice system. Education also tended to "reduce the crime rate" and "support[ed] all the other values of a democratic society" such as "participation, communication, and social mobility." 146

As further proof that education was a fundamental right and should be protected against any "discrimination based on wealth," the California Supreme Court equated the right to an education with the right to vote. The Warren Court's reapportionment decisions, according to Wise and other reformers, were relevant to the development of equal educational opportunity. First, they were examples of the Warren Court's emphasis on egalitarianism and equal protection during the 1960s. Second, the voting cases were an attempt to develop a definition of equality, a standard that reformers planned to create for education. Lastly, voting districts and school districts were parallel examples of

146 *Serrano v. Priest*, 487 P. 2d 1258. See also, John E. Coons, William H. Clune III, and Stephen D. Sugarman, "Educational Opportunity: A Workable Constitutional Test For State Financial Structures," *57 California Law Review* (April 1969 no. 2): 362-363. Coons, Clune, and Sugarman pointed out that, in the Supreme Court equal protection criminal appeals cases, the rights of the criminal defendant might appear to be more significant than those of school children. The "threatened deprivation is immediate, personal and decisive" in a criminal case. But the authors asked if "children" as a class were not as a class as deserving as the class of criminal defendants. They are the "innocent" and while it is not certain that a transcript to Mr. Griffin or a lawyer to Mr. Douglas would "effect any difference in the outcome of their appeals," in properly planned school finance litigation it will be possible to pinpoint plaintiffs whose academic profile strongly suggests a causal nexus with the poverty of his school."
geographic discrimination by the state legislatures. In Wise’s view, “the language and reasoning” of the reapportionment decisions were the same — “with a few alterations in language, the Court might as readily have been discussing the malapportionment of school funds within a state.”

Chief Justice Warren’s opinion in *Reynolds v. Sims* (1964), a case which challenged the malapportionment of the Alabama State legislature, was cited in the *Serrano* decision. Justice Sullivan viewed the voting cases as an example of the judicial branch’s willingness to enter into a mathmathetical and political legislative quagmire, not unlike school finance. Also, the Warren Court had applied an equality standard that indicated not only a concern with equality of opportunity but equality of condition. This was also a feature of *Serrano*.

We are told that the matter of apportioning representation in a state legislature is a complex and many-faceted one. We are advised that States can rationally

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148 *Reynolds v. Sims*, 377 U.S. 566. In *Colgrove v. Green* 328 U.S. 552-54. (1946) voters maintained that Illinois congressional districts were unconstitutional because they were not equal in population. Justice Frankfurter, writing for the majority found that reapportionment of voting districts was a political question not a legal question: "It is hostile to a democratic system to involve the judiciary in the politics of the people." By 1962, the Warren Court was ready to intervene in the reapportionment cases. In *Baker v. Carr* 369 U.S. 186, 254, 226 (1962), Justice Brennan, writing for a 6 to 2 majority, ruled that apportionment issues were justiciable and citizens had standing to bring suit in federal district court. *Carr* was a suit brought by urban voters in Tennessee who protested the fact that the state legislative had not redrawn their districts since 1901. In his concurring opinion, Justice Clark described Tennessee’s voting system "a crazy quilt without rational basis." Both Frankfurter and Harlan dissented in *Baker*. Brennan did not set any judicial standard in *Baker* but suggested that they existed: "Nor need the appellants, in order to succeed in this action, ask the court to enter upon policy determinations for which judicially manageable standards are lacking. Judicial standards under the Equal Protection Clause are well developed and familiar..." In *Gray v. Sanders* 372 U.S. 368, 380 (1963) the Court invalidated Georgia’s "weighted" county unit voting system in state primary elections; a system that favored rural over urban voters. This voting case was important for the following apportionment cases because it created the equal protection standard of "one voter, one vote." After *Gray*, geography would not be a suitable basis to value one vote over another. To support the new standard "meant upholding democracy and the Constitution; to oppose it seemed mean and petty." In June 1964, the Warren Court decided six apportionment cases for Alabama, Colorado, New York, Maryland, Virginia, and Delaware. *Reynolds v. Sims* was the lead case and Justice Harlan dissented in all six. He favored a pluralistic American society and suggested that apportionment formulas should legally consider such factors as history, geography, economics, urban-rural balance, and majoritarianism. Chief Justice Warren disagreed: "Citizens not history or economic interests cast votes; people, not land or trees or pastures vote." Urofsky, *A March of Liberty*, vol. II, 833-834.
consider factors other than population in apportioning legislative representation. We are admonished not to restrict the power of the States to impose differing views as to political philosophy on their citizens. We are cautioned about the dangers of entering into political thickets and mathematical quagmires. Our answer is this: a denial of constitutionally protected rights demands judicial protection; our oath and our office require no less of us.

The apportionment cases were examples of the expansion of a citizen's fundamental rights under the Warren Court and its determination to protect the rights of minorities and criminal defendants. For school finance reformers, these voting cases had a particular resonance. The rights of a school child to equal school funds, school finance lawyers argued, should not depend on the geographical accident of where a student lived.

Also, just as voting is related to good citizenship, so is education. The student who receives an inferior education, like the voter whose franchise is diluted, becomes a less productive citizen.\textsuperscript{149} To be successful in school finance reform cases, litigators sought an educational equity standard that was as simple and appealing to the public and judges as one-man, one vote. Judge Sullivan recognized the importance of \textit{Reynolds} to the fundamental rights argument. In \textit{Serrano}, he stated that both voting and education were the mainstays of citizenship. The judge also noted that it is not just the right to vote that is fundamental, but the right of a citizen not to have "his ballot diminished by unequal electoral apportionment." This indicated that, to fulfill the Warren Court two-tier standard of equal protection, a plaintiff needed to have his right to equal school funding declared constitutional.\textsuperscript{150}

\textsuperscript{149}Wise has a thought provoking discussion of the meaning of the Warren Court's apportionment cases to school finance reform. See \textit{Rich Schools, Poor Schools}, 66-94.

\textsuperscript{150}\textit{Serrano v. Priest} 487 P. 2d 1257-1258. Wise's work on the reapportionment cases is specifically cited by Judge Sullivan on page 1261 of \textit{Serrano}. In the voting cases, the California Supreme Court believed that the Warren Court had held that "accidents of geography and arbitrary boundary lines of local government can afford no ground for discrimination among citizens." It is interesting that this language was lifted from Philip Kurland's 1968 University of Chicago Law Review article, "Equal Educational Opportunity: The Limits of Constitutional Jurisprudence Undefined." Kurland, however, although
In addition to the voting cases, another line of Warren Court legal precedents, appear in the *Serrano* decision in support of the judge's reasoning that education was a fundamental right. Harold Horowitz, a lawyer for the plaintiffs (and later the appellants), proposed that school finance litigators in *Serrano* use two school closing cases, *Griffin v. County School Board* and *Hall v. St. Helena Parish School Board*, to support the contention that differences in wealth between school districts were unconstitutional. Horowitz also maintained that funding schools from mainly local sources "does not lessen the magnitude of injury to a child denied educational opportunity." Local control and choice were not enough justification for a "compelling" state interest argument in an equal educational opportunity suit. Sullivan inserted these school closing cases in his *Serrano* opinion, as suggested by Horowitz, to show that "a state's general freedom to discriminate on a geographical basis will be significantly curtailed by the equal protection clause."

In *Griffin v. County School Board*, one of the school closing cases cited in *Serrano*, the Warren Court struck down the decision of Prince Edward County, Virginia to shut its public schools rather than comply with *Brown*. Although the case was clearly more relevant to racial discrimination than wealth, *Griffin* was cited for its more "sweeping proposition" that a State may not unequally distribute government resources to

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attributed as an intellectual source in the *Serrano* decision, came to the opposite conclusion of Judge Sullivan: "Complex problems—and the deficiencies of our educational system are certainly those—do not lend themselves to ready solution by judicial fiat. Unless equality is an end in itself, regardless of the diminution in educational values, the question of the desirability of a Supreme Court edict on this grave issue is certainly dubious." See Kurland, "Equal Educational Opportunity," 508.


some citizens and not to others.\textsuperscript{153} Disparity in school district wealth was viewed as a similar maldistribution of important state benefits, and also a denial of a child's equal protection. In effect, a school child was being discriminated against because of an accident of geography—the quality of his education became a function of where he happened to live.

In another school closing case, \textit{Hall v. St. Helena Parish School Board}, a three-judge district court in Louisiana concluded that the closing of the parish public schools to avoid integration was unconstitutional. This denial of a student's access to a public education, however, was not considered by the District Court to be solely a denial of minority rights—it "would unfairly discriminate against the residents of that parish, irrespective of race."\textsuperscript{154} \textit{Hall} was an important precedent to the school finance cases because it pointed out that "at some stage territorial differences in law within a state can become a denial of equal protection." School finance inequity resulted from differences in residence, not race. If, according to \textit{Hall}, it was unconstitutional for a county to close its public schools in one area, but still keep its schools open with public funds in another, was it not also unconstitutional for the state to create a finance system that unequally funded its schools districts? Horowitz thought that \textit{Serrano} and the school closing cases were parallel, and so did Judge Sullivan.\textsuperscript{155}

The \textit{Serrano} defense team argued that if the California Supreme Court forced the state to provide relatively the same wealth to every school district, then, in the future, the Courts would be required to apply a similar remedy for all governmental services. Such a

\textsuperscript{155}For Judge Sullivan's discussion of the \textit{Hall} case see \textit{Serrano v. Priest}, 487 P.Ed. 1261(1971).
judicial principle "would spell the destruction of local government." Judge Sullivan "unhesitatingly" rejected this point. 156

We cannot share defendant's unreasoned apprehensions of such dire consequences from our holding today. Although we intimate no views on other governmental services, we are satisfied. . .that its uniqueness among public activities clearly demonstrates that education must respond to the command of the equal protection clause.

The California Justices spent little time worrying about the implications of the extension of equal protection to education and the poor. The courts might be pressed to invalidate wealth discrimination in the provision of other municipal services such as garbage collection, street paving, and lighting, but this problem loomed in the future. The Serrano Court was a "court breaking new ground: sufficient unto the day was the task immediately at hand." 157

Law Professor Frank Michelman proposed at this time a theory of "minimum protection" in order to resolve the problem of the unbridled extension of equal opportunity into new constitutional areas. 158 Eventually, how could wealth discrimination claims be logically limited? Should all school children, for example, have equal access to violin lessons and swimming pools? "Why education and not golf?" is the way that Michelman framed the question. Minimum protectionists argued that judges should distinguish between the rights and needs that are fundamental, and those that are nonessential. Equality in physical living conditions could be solved by the state providing a minimum level of public services for all. But as Archibald Cox wrote, "the idea of Equality is not easily cabined," and as Serrano suggests, if the standard of equal

educational opportunity was accepted by the Supreme Court, this new standard would be difficult to contain. What are the future civil rights of the child who has equal access to school district funds but "leaves the schoolground to walk down a sidewalk that is dangerous because it is broken, unlighted, filthy, and unpatrolled." Equal protectionists, after Serrano, anticipated a further extension of wealth discrimination into new areas of the law. The spirit and intention of equal educational opportunity reformers to continue expansion of the new equal protection is reflected in the Serrano decision.\footnote{Karst, "Serrano v. Priest," 728.}

David Kirp, who served as one of the many amici curiae on behalf of the plaintiffs (and appellants) in Serrano, earlier pointed out the importance of Hobson v. Hansen, a 1967 Washington, D.C. case, to school finance litigation. Black and poor white plaintiffs, in Hobson, claimed that D.C. schools with a majority of economically disadvantaged minorities were subject to overcrowding, poor physical plants, fewer library books and facilities, less-experienced teachers, fewer supplies, higher dropout rates, and lower per-pupil expenditures.\footnote{In footnote 31, Sullivan cited a case that supported just such an extension of municipal services. In Hawkins v. Town of Shaw, Mississippi 437 F.2d 1286, the Fifth Circuit Court of Appeals held that the town of Shaw had the duty to equalize such municipal services as street paving, lighting, surface water drainage, water mains and fire hydrants. The District Court in applying the traditional equal protection test found for the city, the Circuit Court, applying the "strict scrutiny" test found for the appellants. Although in District Court, the plaintiffs charged discrimination on the basis of wealth, this charge was dropped on appeal, and the Circuit Court based its decision on racial discrimination. See Serrano v. Priest 487 P.2d 1262-1263. (1971).}

Circuit Judge J. Skelly Wright found these inequalities were in violation of the equal protection clause and ordered the school board to integrate the faculties, abolish the track system, and bus volunteer black pupils from predominantly

\footnote{Hobson v. Hansen 269 F. Supp. 401 (D.D.C. 1967), aff'd en banc sub nom. Smuck v. Hobson, 408 F. 2d 175 (D.C. Cir. 1969) At the time of Hobson, the median per-pupil expenditure for schools with 85 to 100 percent black students was $292 and the median per-pupil expenditure for schools with 0 - 15 percent black students was $362. Kirp points out, however, that at the time of the case D.C. schools were atypical—in 1967 the city schools were 90.2 percent Negro, and the percentage was increasing. See David L. Kirp, "The Poor, the Schools, and Equal Protection," Harvard Education Review: Education and the Legal Structure, Reprint Series No. 6 (1971): 24.}
segregated schools east of Rock Creek Park to predominately white schools west of the Park to relieve overcrowding.

*Hobson* was of particular interest to *Serrano* because it recognized that the rights of black Americans and the rights of the poor were similar and each merited the strict scrutiny of the courts:¹⁶²

If the situation were one involving racial imbalance but in some facility other than the public schools, or unequal educational opportunity but without any Negro or poverty aspects. . .it might be pardonable to uphold the practice on a minimal showing of rational basis. But the fusion of these two elements in de facto segregation in public schools irresistibly calls for additional justification. What supports this call is our horror at inflicting any further injury on the Negro, the degree to which the poor and the Negro must rely on the public schools in rescuing themselves from their depressed cultural and economic condition, and also our common need for the schools to serve as the public agency for neutralizing and normalizing race relations in this country.

In Washington, D.C., the interests of the poor and the black were "reconcilable." The Court did not need to distinguish between the two—the poor were "almost entirely Negro." A 1967 survey by the D.C. School District, conducted at the time of *Hobson*, found that even if the Circuit Court could equalize to some degree educational inputs within the district, minority school children would remain racially isolated "until enough Marylanders, Virginians, Washingtonians, and Americans are convinced that their interests will be better served by making the national capital area a well-integrated metropolitan community than by keeping it the white-encircle black ghetto that it is now."¹⁶³

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In 1970, Hobson plaintiffs filed a motion for further relief and asked that the
District Court's original decision be enforced.\textsuperscript{164} Facts presented to the Court revealed
that inequalities between the black and white schools east and west of Rock Creek Park
had continued to widen. Despite voluntary busing, the schools west of the Park were now
74 percent white and remained favored in pupil-teacher ratios, teacher salaries, and per-
pupil expenditures. The schools east of the Park by 1971 were 98% black. The
defendants argued that school differentials were random, were beyond the correction of
the school district or the court, and also, according to current educational research,
essentially unrelated to equal educational opportunity.\textsuperscript{165}

The Hobson II Court rejected the plaintiffs' request that total expenditures per
pupil be equalized across the district. The Court was of the opinion that this remedy
would "sweep too broadly and would require the school administration to equalize some
inputs which have little or nothing to do with educational opportunity."\textsuperscript{166} The Judge did
order, excepting expenditures for compensatory education and special students such as
the handicapped, funds for teacher's salaries in any single D.C. elementary school should
not deviate more than 5% from the mean for all elementary schools.\textsuperscript{167}

In Footnote 22 to Hobson II, the court characterized Hobson I as setting a
"minimum" standard of equal protection in the D.C. schools: "the court did not wish to
preclude the school administration from focusing, if it saw fit, on equality of output in
terms of giving each student an equal opportunity to attain his own unique potential,
rather than an equality of inputs. . .the minimum required was that there be an equality of

\textsuperscript{165} Mark G. Yudof, David, L Kirp, and Betsy Levin, Educational Policy and the Law, 3d ed. (New York:
\textsuperscript{166} Ibid., 663.
inputs in terms of objective rescues.” Court-mandated minimum protection proved elusive in the D.C. school system. The equalization effects of the first Hobson decision on schools east of the park was negligible because few students volunteered for the busing program and no effort was made by the school system to redistribute high salaried teachers.168

Hobson II focused primarily on the equalization of teacher expenditures between black and white schools as a solution to equity problems. This decision proved to be an even more "minimum" equity decision than Hobson I. The D.C. school board had a negative reaction to the decision but did not appeal. School board president, Anita F. Allen, was "disappointed and astounded" that a judge felt it wise to transfer teachers at will between schools because they were "either too old or too young." Since the most easily moved teachers within the district were special subject teachers, this was the tactic devised by the school district to satisfy the court mandate. Although resource teachers became more equitably distributed between schools as a result of the court’s decision, Hobson II ultimately had the adverse impact of increasing the pupil load of resource teachers. Complicating the problem was the fact that enrollments within the district continued to drop after Hobson II and the district hired fewer, rather than more resource teachers to meet equalization goals.169

Court observers asked whether the Hobson decisions converted the "the difference principle" of philosopher John Rawls into a constitutional doctrine. The primary social goods, according to Rawls—liberty and opportunity, income and wealth should be

169 Ibid., 666.
distributed equally; if there was unequal distribution, it must be to the advantage of the least favored in society.

The attraction of the *Hobson* decisions to Justice Sullivan, author of *Serrano*, was their insistence on the importance of the social role of the public schools in elevating the black American and the poor. Quoting from *Hobson*, Sullivan held that it was the public schools "on which the poor and the Negro must rely" . . . to rescue "themselves from their depressed cultural and economic conditions."170

The *Hobson* decisions were an important litigation bridge to the school finance cases of the later 1960s. Viewed primarily as in keeping with the *Brown* "new" equal protection tradition, school finance reformers interpreted them as more than that. The D. C. interdistrict school cases coupled education with racial and wealth discrimination, and this was a radical step in the history of equal educational opportunity. Circuit Judge Skelly Wright set the constitutional standard that within a school district there should be an equality of inputs between advantaged and disadvantaged schools, and not just for schools with a legacy of racial discrimination. The *Hobson* cases, however, also raised the Kurland constitutional question—was the federal judiciary the proper venue in which to institute equal educational opportunity? Just what did equity in education entail? How can an institution which has for so long been under state and local control be made to respond to the orders of a federal court? Also, how responsive would a taxpayer be when a judge decided to interfere with the most personal question of all—the education of a child?

The "opening skirmishes" in the school finance cases began before Serrano. In February 1968, the Detroit school board, along with individual school children, filed a complaint attacking the Michigan school finance system in state court.171 Following the Detroit lead, school litigation cases were started in Illinois, Texas, West Virginia, and California.172 In order to reach an equal protection resolution for California schools, the Serrano lawyers asked Judge Sullivan to ignore these early school finance precedents. The situation was particularly difficult for the plaintiffs in each of the first cases before Serrano because the District Courts and the Supreme Court had already rejected the argument that education was a fundamental right and poverty a suspect classification.

Brought in Detroit in 1968, Board of Education v. Michigan, the first state school finance case involved a "questionable" litigation strategy, according to school finance scholars. The Detroit school district had two problems of proof—the district was not poor in comparison with the rest of the county and state, also the plaintiffs sought a court imposed equality standard that would legislate a more expensive education for the urban child, not an "equalized" education. To reach its decision, the defense asked the court to take into account the "educational needs" of each child.173 The Detroit case sought also to have the courts take over the role of the legislature in managing the state's contribution to local taxes. As a result of the plaintiffs' strategy, the state might instead end all

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173 For more information about the Detroit case, see the proceedings and papers presented at an academic conference it inspired: The Quality of Inequality, Suburban and Urban School (C. Daly ed. 1968) Referred to in Coons, Clune, and Sugarman, Educational Opportunity, 308.
equalization contributions to education and the schools would be left to rely on local tax expenditures—a situation which finance reformers viewed as "intolerable."

_McInnis v. Shapiro_ (1968), a Chicago case styled after the Michigan litigation, became the first major case to challenge the constitutionality of a state's school finance system. Poverty lawyers, representing plaintiffs from Chicago and several Cook County suburbs, filed _McInnis_ in mid-April 1968 and asked a three-judge district court to find the Illinois school finance system unconstitutional. Illinois, they argued, permitted a wide variation in the expenditures per student from district to district, and although it provided "some students with a good education, it deprived others "who have equal or greater educational needs."^{174}

School finance reformers were not surprised when the District Court found the Illinois school finance system a "rational policy consistent with the mandate of the Illinois Constitution." The Court found that unequal educational expenditures per student had not created an "invidious" class therefore "strict scrutiny" did not apply because the requirements of the Warren Court "new" equal protection standards had not been met.

The "nebulous" standard of "educational needs" did not provide the Illinois judges with a "discoverable and manageable standard" by which it could be determined "when the Constitution is satisfied and when it is violated." In a crucial footnote, Judge Decker complained that "educational needs" had not been defined:^{175}

Presumably, "educational need" is a conclusory term, reflecting the interaction of several factors such as the quality of teachers, the students' potential, prior education, environmental and parental upbringing, and the school's physical plant.


^{175} _McInnis v. Shapiro_ 293 F. Supp. 329 (1968)
Evaluation of these variables necessarily requires detailed research and study, with concomitant decentralization so each school and pupil may be individually evaluated.

It wasn't just that *McInnis* presented the judges with no justiciable standard; the judges came down hard on the side of local control. Citing *McGowan v. Maryland* and *Metropolis Theater Co. v. City of Chicago*, the court commended the state legislature for its continuing educational efforts and declared "the allocation of public revenues" to be "a basic policy decision more appropriately handled by a legislature than a court."\(^{176}\)

The *McInnis* court dismissed the plaintiff's contention that *Hobson I* applied to this particular case, *Hobson*, according to the judge, struck down variations in school expenditures because they were an example of racial discrimination, not wealth discrimination. *Reynolds v. Sims* did not apply to school finance cases because, unlike education, the franchise was specifically recognized as a fundamental right by the Constitution. *Reynolds* also should not be interpreted to mean that the Supreme Court had a "general antipathy to historical geographical divisions."\(^{177}\)

The first school finance cases had no easy standard like one-man, one vote, to help federal judges find for the plaintiffs. A Virginia school finance case, *Burrus v. Wilkerson*, which was argued in the same vein as *McInnis* the following year, met the same fate. A three-judge district court found that the Constitution did not require that school finance expenditures should be made on the basis of a student's educational


needs.  Both McInnis and Burris dubbed the "educational needs cases" reached the
Supreme Court and were affirmed in per curiam opinions.

The record of school finance reform at the time of Serrano was less than stellar.
The school finance precedents that were directly applicable to the California school
finance case had failed to supply the one necessary ingredient that was needed to win in
court—a simple, easy to comprehend standard of equal educational opportunity. If this
could be developed, then possibly the other arguments linking education to wealth
through the Warren Court new equal protection cases, might bring litigation success.

Professors Coons, Clune, and Sugarman offered the Serrano lawyers just such a
standard with the publication of their California Law Review article in April 1969. These
school finance reformers argued that McInnis and Burrrus rested on an unmanageable
judicial standard—a pupil's educational needs. This simplistic, utopian theory was
properly rejected and was but a "temporary setback." Judge Sullivan was able, because
of their intervening article and later book, to dismiss the defendants' contention that the
Supreme Court's summary affirmance of McInnis and Burrrus should be controlling in
Serrano. 179

The plaintiffs' argument in Serrano, according to Judge Sullivan, was different
than these previous cases: "discrimination on the basis of wealth is an inherently suspect
classification which may be justified only on the basis of a compelling state interest." In
McInnis, the plaintiffs "repeatedly emphasized 'educational needs' as the proper standard
for measuring school financing against the equal procession clause." Sullivan found the

"nonjusticiability of the 'educational needs' standard" to be the basis of *McInnis* by the Supreme Court and accepted in its place, the alternative "fiscal neutrality" standard suggested by Coons and friends: "the quality of education may not be a function of wealth, other than the wealth of the state as a whole." In arguing for this standard, the authors pointed to its "flexibility," its "relative simplicity," and its ability to meet the demands of the judicial role.\(^{180}\)

In August 1971, the California Supreme Court accepted the "fiscal neutrality" standard as one of the final links in declaring the state's school finance system unconstitutional. It had been a long road for equal educational opportunity reformers since *Brown*. The U.S. Commissioner of Education called the *Serrano* ruling a "very fundamental breakthrough in the concept of state educational systems." New York and Wisconsin established commissions to study the school finance problem. Assisted by the Lawyers' Committee for Civil Rights under Law, public interest litigators in over thirty-eight states began similar lawsuits. *San Antonio Independent School District v. Rodriguez* would be the first "fiscal neutrality" lawsuit to reach the Supreme Court.\(^{181}\)

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Chapter Two

Rodriguez v. San Antonio Independent School District and
the Texas Historical Context

1968–1973

In a period of violent social, economic and political upheaval, education has come to be regarded as mankind's best hope for survival. There is a grim reality about H.G Well's prediction that civilization would rest on a fateful race between education and catastrophe. The crisis of the cities offers perhaps the most dramatic current test of education as a dual agent of change and stability. Social and economic disruptions following mass migrations of ethnic minorities from rural communities to central city core areas, and the flight of the middle class to suburbs, have become one of the most crucial problems in America's history... Responsible citizens, politicians and the victims of urban blight are convinced that public education offers the most promising solutions in the city crisis. But it is clear that traditional forms and methods have failed to equip the disadvantaged for constructive citizenship in modern complex society. The failure has contributed heavily to such crucial problems as delinquency, unemployment and soaring welfare costs... Most Texans recognize the role of public schools in building socially acceptable behavior among their students, but the majority still place slightly more emphasis on the continuing responsibility of the home.¹

The school finance reform battle moved to Texas in the late 1960s. The same social, economic, and political forces that led to the Warren Court's equal protection revolution from 1954 to 1969 were present in Texas and laid the foundation for the Edgewood school district challenge in 1968 to overturn the state's school finance system.

In 1965, as recommended by Governor John Connally, the Texas legislature established a Governor's Committee on Public School Education, under the Chairmanship of Houston attorney Leon Jaworski. It was to "conduct an inquiry" into the "status of public school education" in regard to "organization" and "philosophy" and to deliver a "long-range plan" to make Texas a national leader in "educational aspiration,

¹ Report of the Governor's Committee on Public School Education. The Challenge and the Chance. (Austin, Texas August 31, 1968), 8. (hereinafter cited as Governor's Committee Report.)
commitment and achievement.” This committee, according to Mark Yudof, later co-counsel for the children and parents of the Edgewood school district before the Supreme Court, 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 Committee selected 128 sample school districts for analysis. This sample was considered to be adequately representative of the entire state, although only 10% of the state’s districts were analyzed. Nevertheless, thirty large school districts with more than 12,000 students in average daily attendance (ADA) were included in the study.

The state legislature viewed the creation of the Governor’s Committee as a continuation of its constitutional mandate to support and maintain a free public school system in Texas. Section One, Article 7 of the 1876 Texas Constitution, still in effect, reads:

A general diffusion of knowledge being essential to the preservation of the liberties and rights of the people, it shall be the duty of the Legislature of the State to establish and make suitable provision or the support and maintenance of an efficient system of public free schools.

The Governor’s Committee focused its 1965 study on five “basic” problem areas: the goals of the Texas public education system, the programs and services necessary to

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2 Ibid.
4 Each decade since the 1920s, the Texas Legislature has created a special committee of lay-citizens and educators to evaluate the public school system. Each study produced change in public school organization. The Texas Educational Survey Commission of 1925, the 1938 Texas Statewide School Adequacy Survey,
achieve these goals, the provision of proper staffing and professional personnel, the most “efficient” organization, and the financing necessary to “underwrite the costs of a long-range plan for national leadership.” The Committee's final report, published in 1968, entitled The Challenge and the Chance, recommended that Texas further consolidate school districts, finance a kindergarten program for all school children, allocate additional funds for personnel, operations, textbooks, and materials, grant the State Board of Education the necessary power continually to press for educational quality, equalize school finance differences between rich and poor districts by bringing all major current expenditures under a state-local funding plan, base the calculation of school district wealth on the amount of taxable property in each district instead of an outdated economic index, and guarantee a teacher salary increase over the next ten years.6

When the report finally reached print it was “too late to have much chance of success,” according to Rodriguez co-counsel Mark Yudof. Governor Connally’s successor, Preston Smith, was little interested in school finance reform. The state legislature adopted only two of the panel’s recommendations: state-financed kindergartens and a pay bonus for vocational teachers. The Texas State Teachers Association (TSTA) “lobbied successfully” for an incremental salary increase during the following decade, while opposing the other recommended changes. TSTA’s position frustrated the state legislature and disappointed the dedicated staff of the Governor’s Committee. Instigated by the teacher's union, the “staggering” cost for salary increases,

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the 1948 Gilmer-Aikin Committee Study, and the 1958 Hale-Aikin Committee Study are examples. Governor's Committee Report, 2.  
5 Governor's Committee Report, 3.  
combined with funds necessary for equalization proposals, made much needed school finance reform by the legislative branch, at any time in Texas, highly unlikely. 7

The Texas School Finance Case Begins

In Texas, as in the country at large, the definition of equal educational opportunity among scholars and litigators was in "a considerable fluidity during the 1960s." 8 The

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7 Ibid., at 390-391. The legislature, unaware of the "enormity" of the costs associated with teacher salary increases began to order budget forecasts for future spending bills.

8 In 1968 the term equality of opportunity had many different meanings depending on the litigation and the scholar. Some of the suggested judicial standards were the following:

1. The education needs argument of Melhnis v. Ogilvie which failed on appeal from Illinois in the Supreme Court: "classification upon which students will receive the benefits of a certain level of per-pupil educational expenditures are not related to the educational needs of these students are therefore arbitrary, capricious, and unreasonable." The court also in the same case dismissed the "equal dollars for each student" standard. Melhnis v. Shapiro 293 F. Supp. 329 (N.D. Ill. 1968), aff'd sub nom. mem., Melhnis v. Ogilvie U.S. 322 (1969). In the first state school finance cases the courts found the "needs" equity standard was not a manageable yardstick by which to determine equal educational opportunity.

2. The outcomes test for equality of opportunity: "The socialist model views schooling as a process designed to sever what is deemed to be an illegitimate relationship between family background—race and class—and economic success... A properly functioning educational system is one in which failure—poor achievement and lack of access of further schooling—cannot be correlated with race, class, or wealth." Mark Yudof, "Equal Educational Opportunity and the Courts," Texas Law Review 51(1973): 411. Arthur Wise labels this definition the "full-opportunity definition" of equality. Resources would be inducted until the individual can no longer profit from them. This standard, therefore, is the ideal standard of equal educational opportunity, and since educational resources are limited, this particular standard is unobtainable.

3. "Equality of educational opportunity exists when a child’s educational opportunity does not depend upon either his parents’ economic circumstances of his location within the state." Arthur Wise, Rich Schools Poor Schools: The Promise of Equal Educational Opportunity (Chicago: University of Chicago Press, 1968), 146. Wise calls this the negative definition of equal educational opportunity and cites Francis Keppel and Charles Benson as supporters. In 1968, Wise predicted when the school finance cases reached the Supreme Court it would adopt this negative definition of equal educational opportunity since this was closest to the Warren Court decisions on voting, criminal rights and reapportionment.

4. The minimum foundation definition: every child has the equal opportunity to a prescribed minimum level of education. George Strayer and Robert Haig developed the model for the foundation program in 1923. "The...concept embodies the ideal that all pupils throughout each state, regardless of their geographical location, should be entitled to participate and receive a minimum level of educational services...Unfortunately, all too often state legislatures have focused on the term minimum which has resulted in minimal programs that have failed to achieve either adequacy or a high level of fiscal equalization." Kern Alexander and Richard G. Salmon, Public School Finance, 5th ed. (Boston: Allyn and Bacon, 1995), 200-201. Another inequity results from the plan because rich districts are free to spend above the minimum and are able to command the services of superior teachers and can supply them with superior facilities.

5. The minimum-attainment definition of equality—resources should be allocated until every student attains a certain level of achievement. This approach would require a variable level of resource inputs into school finance systems.

6. The leveling definition of equality: resources should be inputted in inverse relation to the ability and wealth of the student. This concept is attributed to Patricia Cayo Sexton. See her work,
Texas Governor’s Committee’s report reflected the national concern with the
deteriorating conditions in urban schools as evidenced in the work of Dr. James Conant.
The Texas school system, like those of the rest of the United States, did not provide its
poor and minorities with equal access to school services and dollars. This same concern
with the educational needs of low-income and disadvantaged children had also motivated
the Great Society Congress to approve federal compensatory education funds under Title

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*Education and Income* (New York: Viking Press, 1964) 253. The richer the income area, the greater
expenditure on education. Sexton believed that in a democratic society, it should be the opposite.

7. The competition definition of equal educational opportunity: “the more able the student the
greater should be his access to society’s scarce educational resources.” Ernest Van den Haag held that
“equality of opportunity means the distribution of educational resources to students according to their
talent.”

8. The Maximum-Variance-Ratio Definition: since full equalization of school expenditures
between districts would require an enormous expense, the courts might accept “an approximation of
equality” as they had in the reapportionment cases. The courts might set a variation in average per-pupil
expenditure at a certain ratio, such as one and a half to one

9. The Classification Definition of equality. Students would be placed in categories such as
college-bound and equal funds would be expended within each category.

10. The Equal-Dollars-Per Pupil Definition: each individual in a democratic society is entitled to
an equal amount of educational dollars or resources. Dollars should not be distributed according to ability.
This definition, according to Jacobus ten Broek, was close to the “one-man, one vote” standard adopted by
the Warren Court in its reapportionment cases. See Joseph Tussman and Jacobus ten Broek, “The Equal
Johnson White House Conference on Education, *To Fulfill These Rights*, recommended that the
expenditure should be $1,000 per pupil. Held July 20-21, the conference, the first in ten years, was chaired
by John W. Gardner, President of the Carnegie Corporation. As explained in Chapter One, Gardner later
became Secretary of Health, Education, and Welfare. In 1965 Congress also passed the Elementary and
Secondary Education Act, the first general school aid bill in history and the first federal scholarships for
college students. As described in Chapter One, religious, racial, and partisanship has prevented the
implementation of these national programs.

10. In an answer to what they called the “baroque” theories of equal educational opportunity being
advanced during the school finance revolution, Coons, Clune and Sugarman suggested another approach
to equal educational opportunity, a standard that would be simple, flexible, and easy for the courts to apply,
the equity principle of “fiscal neutrality.” In their view, “the quality of public education may not be a
function of wealth other than the wealth of the state as a whole.” The standard first met success in the
339-340. *San Antonio Independent School District v. Rodriguez* was the first state fiscal neutrality school
finance case to reach the Supreme Court.

See Arthur Wise, *Rich Schools, Poor Schools*, 143-159 for a description of most of these
definitions of equal educational opportunity, with the exception of fiscal neutrality which he did not
include. Other works which describe the problem of defining the term are James Coleman, “The Concept
I of the 1965 Elementary and Secondary Education Act for “meeting the needs of educationally deprived children.”

The Texas Governor’s Committee labored at the same time that Dr. James Coleman completed his survey of U.S. schools and the Johnson administration formulated its Head Start commitment. Support for school finance reform came from the whites as well as blacks who were disappointed in the effectiveness of desegregation decisions and court orders. Blacks hoped that equalization of educational resources would eventually improve schools, particularly in urban areas where prospects of school integration were beginning to dim. Whites, in contrast, believed that support for school finance reform would relieve minority pressure for forced integration.

People Power Tex-Mex Style

Following World War II, the economic, social, and political conditions that influenced the black minority to fight for desegregation of the nation’s schools, likewise caused Texas’s Mexican-Americans, long impoverished and neglected in Texas, to seek improvement in their own segregated schools and communities. The Rodriguez lawsuit began in 1968, the same year the Governor’s Committee released its report. Chicano activists, one a graduate of Edgewood High School in San Antonio, formed MAYO, the Mexican American Youth Organization, whose purpose was to advance the needs of the Chicano community in Texas through direct political action.

One of MAYO’s first targets was the “local control of all facets of education: administration, curriculum, community relations, and financing.” MAYO concentrated

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11 Yudof, “Gathering the Ayes of Texas,” 388.
on organizing student walkouts in local schools and coordinated concerned parents' political activities. Early efforts bore fruit in the Edgewood District, the poorest in Bexar County where ninety-percent of the student body were Mexican American and six percent were black. At the end of the 1960s, the Edgewood School District spent only $332 per student, two thirds of the statewide average of $504.\textsuperscript{12}

On Thursday, May 16, 1968, Willie Velasquez, one of the founders of MAYO, organized a walkout of 400 students from Edgewood High School:\textsuperscript{13}

The protest began in the morning and included an on campus demonstration by students and concerned parents, a five block march to the Edgewood ISD’s administration office, and a boycott of classes for that day. The grievances presented to members of the district’s Board of Trustees criticized the lack of qualified teachers in the district, inadequate access to district financial records, the existence of too few academic courses, inadequate teaching facilities, and fundamental disciplinary problems in the classroom.

Dr. Jose Cardenas, the Superintendent of the Edgewood School District, enumerated the financial problems in the Edgewood schools. Although residents paid the highest ad valorem property tax rate in San Antonio, Edgewood School District lacked adequate classroom space, could not repair buildings, had limited library books, maintained few small classes in courses such as language and experimental science, and lost experienced teachers to richer schools who would afford higher salaries.\textsuperscript{14} By contrast, Alamo Heights, the wealthiest school district in San Antonio, provided a counselor for every


\textsuperscript{13} Ibid., 22.

\textsuperscript{14} In 1967-1968 Alamo Heights had a daily attendance of 4,846, Edgewood 19,895, San Antonio: 70,162. The racial makeup of the districts was very different. Alamo Heights (1968-1969) was majority white, with 14\% Mexican-Americans, less than 1\% Negro. Edgewood was 90\% Mexican-American, over 6\% Negro, San Antonio was 27\% White, 59\% Mexican-American, and 15\% Negro. The total market value of property in Edgewood ISD (1967-68) was $124,127,000. For Alamo Heights: $244,960,000. Market value of property per student for Alamo Heights was $50,549, for Edgewood $6,239. In 1967-1978 Edgewood spent $334.05 per pupil and Alamo Heights spent $576.62 per pupil. Data from \textit{Appendix in the Supreme Court of the United States}, October Term, 1971 No. 71-1332, 76, 79, and 107, hereinafter \textit{Appendix}. The \textit{Appendix} is the lower Court record that is in the Supreme Court documents on \textit{Rodriguez}.\hfill\hfill
1,319 children; Edgewood had a counselor for every 5,672 children. Lack of adequate funds also prevented Edgewood from participation in state and federal programs that required matching grants.\footnote{Affidavit of Dr. Jose Cardenas, Rodriguez Appendix, 236-238. During his deposition prior to the trial, Cardenas supported the "egalitarian" model of equal educational opportunity. The Assistant Attorney General responded, "There is a name for that. I have no further questions." The State of Texas was essentially accusing the Edgewood plaintiffs of being Socialists. See Deposition of Jose Cardenas, Oct. 20, 1971, Rodriguez v. San Antonio Independent School Dist. 337 F. Supp 280 (W.D. Tex. 1971). Quoted in Yudof, "The Ayes of Texas," 392.}

In the wake of the student walkout, a Concerned Parents Association of Edgewood was formed to petition the school board and the superintendent to improve the quality of the district’s schools. MAYO arranged for the Association to meet with Arthur Gochman, a San Antonio civil rights lawyer. He reviewed the recent success of \textit{Hobson v. Hansen} in the District of Columbia courts. Although \textit{Hansen} dealt with intradistrict and not interdistrict inequalities, Gochman still concluded that Edgewood could claim a similar denial of constitutional rights under the Equal Protection clause of the Fourteenth Amendment.\footnote{Yudof, "Gathering the Ayes of Texas." 391. \textit{Hobson} concerned intradistrict disparities in school resources, the tracking system, and the segregation of students in the District of Columbia. 269 F. supp. 401 (D.D.C. 1967), aff’d en banc sub nom., Smuck v. Hobson, 408 F. 2d 175 (D.C. Cir. 1969).} Gochman submitted a legal memorandum to MALDEF, the recently formed Mexican American Legal Defense and Educational Fund, suggesting financial support, but the organization decided, at first, not to support the case.\footnote{When in 1984 the Edgewood school district decided to take the Texas school finance case back to state court again, Edgewood school officials, lead by a new Superintendent, James Vasquez, and school trustee, David Garza, were now represented by MALDEF lawyer Al Kauffman. MALDEF had by this time successfully argued the \textit{Plyler v. Doe} case 457 U.S. 202 (1982). In Plyler, in a 5 to 4 decision, Justice Brennan, speaking for the majority held that Texas had to provide an education for illegal aliens in its public schools. Alienage had long been considered by the Court to be a suspect classification, so Brennan applied a heightened scrutiny to the case but denied that education was a fundamental right. "Nor is education a fundamental right; a State need not justify by compelling necessity every variation in the manner in which education is provided to its population...But more is involved in this case than the abstract question as to whether Section 21.031 discriminates against a suspect class, or whether education is a fundamental right. Section 21.031 imposes a lifetime hardship on a discrete class of children not accountable for their disabling status. The stigma of illiteracy will mark them for the rest of their lives." \textit{Plyler} was a major educational victory for Mexican Americans in the Supreme Court after \textit{Rodriguez}. \textit{Rodriguez} was not.} Gochman, then,
at his own expense, prepared what became the first phase of the *Rodriguez* school
finance litigation.

The first lawsuit to challenge the Texas school finance system was filed in the
United States District Court for the Western District of Texas on July 30, 1968. The case
took its title from concerned parent, Demetrio Rodriguez, a sheet metal worker at the
Kelly Air Force Base. His children attended Edgewood Elementary School in Bexar
County. Joining in the suit were four other parents and a fifth couple whose children
attended private school because of the “conditions” in the Edgewood schools. The
plaintiffs filed both on their own behalf, and of all Mexican American school children
and other pupils in the Edgewood District, as well as “all other persons in Texas who
have school children in independent school districts who are members of minority groups
or are poor and have been deprived of the equal protection of the law under the
Fourteenth Amendment. . .because of the low value of [their] property.”\(^{18}\)

Defendants in the case were the State Board of Education, the Commissioner of
Schools, J.W. Edgar, the Attorney General of Texas, the Bexar County Board of Trustees,
and the school districts of the wider metropolitan area: San Antonio, Harlandale,
Edgewood, Northside, Northeast, Alamo Heights, and South San Antonio. The plaintiffs
maintained that these other independent school districts collected and spent
“substantially more money per student for their education” and were therefore “able to
provide a substantially higher quality of education for their students than Edgewood.”\(^{19}\)

As Rodriguez was the first name on the list of plaintiffs and San Antonio ISD first on the

\(^{18}\) *Rodriguez Appendix*, 16-17.

\(^{19}\) Ibid., at 18.
list of the defendants, the lawsuit became known as *Rodriguez et. al. v. San Antonio Independent School District et. al.*

On December 23, 1971, *Rodriguez* was tried in front of United States Circuit Judge Irving L. Goldberg, Chief United States District Judge Adrian A. Spears and District Judge Jack Roberts. Most federal district court cases are tried before a single judge, but in important constitutional conflicts, federal law provides for a three-judge panel. The federal district court in San Antonio denied the defendant’s motion to dismiss *Rodriguez* in September 1969, and delayed trial proceedings to allow for action on the part of the Texas legislature. When the state legislature adjourned in June 1971 without making progress on the issue, *Rodriguez* began its long procession.

The *Rodriguez* lawsuit needs to be conceived within three diverse streams of history that converge in the Texas school finance narrative: the Texas public school system’s constant struggle to provide adequate funds and effective education; second, the plight of Mexican Americans and their struggle to provide a decent education for their children; and third, the revolution in equal protection rights that began in the 1950s. Today’s problems of an adequate provision of state funds for a minimal or even, eventually, an equitable education for all Texas school children are not new. The debate

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20 337 F. Supp. 280 (W.D. Tex. 1971). The Commissioner of Education and the State Board of Education were later added as defendants when the lawyers and the federal district court judges became aware that the *Rodriguez* case was in reality an attack on the entire Texas school finance system. Before the trial, six of the seven school districts were dismissed as defendants because they convinced the court that no single district should pay the expense of defending the state’s school finance system. In October 1971, after the stunning success of the first state school finance case, *Serrano v. Priest*, the defendant school districts asked for permission to re-enter the case, but the request was denied by the Court. When the case went to the Supreme Court, San Antonio ISD, also a property poor school district filed an amicus brief in favor of *Rodriguez*, even though the school district’s name still remained on the case as the defendant.

21 Decisions of three-judge district courts can be appealed directly to the Supreme Court, a technicality that the State of Texas would take advantage of at the end of the trial.
over the role of public versus private schools also has deep philosophical and political roots in the past history of the state.

The Seven Texas Constitutions and the Evolution of Texas Public School Finance

Rodriguez and the many other state finance cases were a second revolutionary wave in the school desegregation movement that began with Brown. Mexican-Americans grasped the tools created by blacks and utilized them forcefully to enhance their own condition. Past political decisions and legislative “accidents” created the present school finance system and its accompanying inequalities. There is historical rhyme and reason to the prevailing financial inequities. Much of the legal precedent for the current school funding crisis can be found in the continual redefinition of what constitutes a constitutional education for Texas school children under the state’s many constitutions.

Seven Texas constitutions evidence the dedication the state has had to the principle of public education, and, concurrently, its “difficulty in finding the funds to meet [these] educational aspirations.” The 1827 Constitution of the Mexican state of Coahuila and Texas, the first constitution of Texas, granted freedom of speech and press and contained this directive concerning education:22

In all of the towns of the States, there shall be established a competent number of common schools in which there shall be taught, reading, writing, and cyphering; the catechism of the Christian religion; a short and simple explanation of this Constitution, and the general one of the Republic; and the rights and duties of man in society, and that which can most conduce to the better education of youth.

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Mexico, which patterned its 1824 federal constitution after that of the United States, created nineteen states after the revolution, of which Coahuila-Texas was one. Each state elected its governor, adopted a constitution, and was responsible for its own internal affairs. Education was a responsibility reserved to the Mexican states. But from the beginning, there was scarce funding for Texas schools. 23

The education clause of the Coahuila and Texas constitution, cited above, required each town to establish a primary school; the curriculum was the basics of reading, writing, and arithmetic, observance of the Catholic religion, and the political indoctrination of citizens. The state was also to begin the development of secondary schools in the arts and sciences. Nothing was said in this first Texas constitution about the financing of public schools. The Mexican government, after the revolution, lacked the necessary resources, and, therefore, had transferred the responsibility for the establishment and management of education to the states. The states, in turn, shifted the responsibility to the ayuntamientos, the municipal governments, which were equally ill-prepared for such a taxing duty. Texas towns in the 1820s suffered from Indian raids, disease, lack of qualified teachers and books, but, primarily a lack of interested clientele. Mexican officials while, in general, men of learning with a genuine interest in public education, had to deal with Texans, who were a motley lot:

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23 Texas has had eight constitutions if you count the 1824 constitution Mexico wrote after it revolted from Spain, Texas, or Tejas, was then a province of Mexico. By 1828, Coahuila and Texas, as directed by the 1824 constitution, wrote its state constitution. In the Mexican federal system, the state was to be independent in local affairs, including education. Texas was divided into three departments: Bexar, Brazos, and Nacogdoches. Their capitals were respectively: San Antonio, San Felipe de Austin, and Nacogdoches. Local government was controlled by the departments. According to political scientist Donald S. Lutz, each new constitution reflects a "significant change in values, circumstances, or political power—sometimes all three." See Donald S. Lutz, "The Texas Constitution" in Kent L. Tedin, Donald S. Lutz, and Edward P. Fuchs, Perspectives on American and Texas Politics, 4th ed. (Dubuque: Kendall/Hunt Publishing, 1994), 34.
For the most part they are small in stature and of feeble frames. They are mostly uneducated in letters, and without ambition to excel in any of the arts or accomplishments of civilized life. Most of them are expert horsemen, and skillful in throwing the lazo or noose by which to catch wild horses or cattle. In their habits they are idle and averse to exertion choosing rather to endure cold and wet, than by industry to erect comfortable cabins. In many respects they seem to resemble the savages, from whom most of them are descendants. 

By 1828, there were three schools operating in San Felipe de Austin with only 51 pupils attending out of a scholastic population of 434. By 1830, only 77 out of 959 attended.

The first Texas schools were private elementary schools which attracted a minimal number of children. Poor attendance can be attributed to either a lack of parental resources or interest.

In a Declaration of Independence drafted at Washington-on-the Brazos March 2, 1836, white Texans demanded separation from Mexico and among the many charges against Mexico was the neglect of public education:

It [the Mexican government] has failed to establish any public system of education, although possessed of almost boundless resources [the public domain] and, although it is an axiom, in political science, that unless a people are educated and enlightened, it is idle to expect the continuance of civil liberty, or the capacity for self-government.

Historian Frederick Eby concluded that the education clause of the Declaration was an unfair indictment of the Mexican government. During the colonial period, the Texas settlers, not Mexican officials, were to blame for the early failure to establish public schools. Texas immigrants, migrating mainly from the South, brought with them a less than adequate model of schooling: “The tradition of a permanent fund, preferably land for schools” and “the adoption of the academy with its cultural and practical training; and

25 Id., 79.
poor, old-fashioned equipment, along with incompetent teachers were transmitted to Texas” from its surrounding southern sisters.\textsuperscript{26} Public school funds, generated from land grants and often mismanaged, paid for the education of the indigent. Academies were supported by parental tuition and, in some cases, such as Georgia, with land endowments from the state.

In 1836, on the eve of the separation of Texas from Mexico, the Anglo population numbered between 24,000 and 35,000; Tejanos, or Texas Mexicans, numbered approximately 3,500. Tejanos became a powerless political minority in the new republic. From the inception of the state to the end of the Civil War, education was considered to apply only to “whites, a category that originally included those of Mexican descent.” No funds were appropriated for the education of black slaves.\textsuperscript{27}

The first constitution of the Texas Republic, adopted during the war and also modeled on the federal constitution, called for the state legislature to create a system of education “as soon as circumstances permit.” On January 26, 1839, at the urging of President Mirabeau B. Lamar, the Texas Congress set aside three leagues of land (13, 284 acres) in every county for the support of a “primary school or academy.” The education bill also set aside fifty leagues of land (221,400 acres) for the establishment and endowment of two colleges and universities.\textsuperscript{28} A county chief justice and two associate

\textsuperscript{26} C.E. Evans, The Story of Texas Schools (Austin: The Steck Company, 1955) 33-34. Evans bases a good deal of his early educational Texas history on the work of Eby.

\textsuperscript{27} The earliest Catholic school attend by Tejanos was probably the Incarnate Word of Brownsville, established in 1853. Enrollment was limited to girls, but not necessarily Catholics. Tuition was fifteen dollars a month for boarders and fifty cents to three dollars a month for day students. Guadalupe San Miguel, Jr.,Let all of Them Take Heed: Mexican Americans and the Campaign for Educational Equality in Texas, 1910-1981 (Austin: University of Texas Press, 1987), 2, 8, and 9. See also C.E. Evans, The Story of Texas Schools, 33 and Rocha and Webking, Politics and Public Education, 10.

\textsuperscript{28} In his first message Lamar made an inspirational statement on the benefits of a strong educational system for the new republic:

Education is a subject in which every citizen and especially every parent, feels a deep and lively concern. It is one in which no jarring interests are involved, and no acrimonious political feelings excited;
justices were given the responsibility to survey the appropriated land and organize public school districts. But the Congress failed to appropriate administrative funds for the establishment of public schools and land grants remained unsurveyed. One hundred-thirty-two private schools, most with religious affiliations, were the mainstays of Texas education. "There was no sentiment in the Republic of Texas for school taxation, and outside of cities, no machinery for the levying of taxes for schools." An establishment of a twentieth-century style public school system would have been "condemned as tyranny."\textsuperscript{29}

After Texas annexation by the United States in 1845, the third constitution established a free public school system and instructed the legislature to reserve ten percent of the State’s tax revenues for a perpetual school fund for public education:

Section 1. A general diffusion of knowledge being essential to the preservation of the rights and the liberties of the people, it shall be the duty of the Legislature of this State to make suitable provisions for the support and maintenance of public schools.

Section 2. The Legislature shall as early as practicable establish free schools throughout the State, and shall furnish means for their support, by taxation on property; and it shall be the duty of the Legislature to set apart not less than one-tenth of the annual revenue of the State derivation from taxation, as a perpetual fund, which funds shall be appropriate to the support of free public schools, and no law shall even be made diverting said fund to any other use; and until said time as the Legislature shall provide for the establishment of such schools in the several Districts of the State, the fund thus created shall remain as a charge against the State passed to the credit of the free common school fund.\textsuperscript{30}

The Northwest Ordinance of 1787, the first federal document to contain a bill of rights, also set educational standards for newly admitted states. Each state was required for its benefits are so universal that all parties can cordially unite in advancing it. It is admitted by all that cultivated mind is the guardian genius of Democracy, and while guided and controlled by virtue, the noblest attribute of man. . . The present is a propitious moment to lay the foundation of a great moral and intellectual edifice, which will in after ages be hailed as the chief ornament and blessing of Texas. Quoted in Evans, \textit{The Story of Texas Schools}, 46.

\textsuperscript{29} Ibid., 52.
to establish a republican form of government that recognized the importance of morality and literacy in a democracy: "[r]eligion, morality, and knowledge being necessary to good government and the happiness of mankind, schools and the means of education shall be forever encouraged." New states were mandated to provide free education for all citizens, and to prove compliance, every new state constitution had to include an education clause which called for a "thorough and efficient" or "uniform" system of public schools. The phrasing of the education clause in the 1845 Texas constitution reflected this uniform language required by the Northwest Ordinance for the admittance of territories northwest of the Ohio into the federal union.

In 1845, Eby asserted, "public schools" meant state-supported private schools that were open to the public. Private schools charged tuition and received support from the state in a per capita payment for each attending child. Also, tuition grants were provided from state revenue for orphan and indigent children to attend private schools.

In the early Texas state, as in the rest of the nation, nineteenth century education was considered to be a "purely private concern to be left to the decision of the parents to train their offspring to their own ideals and habits of life." Education was seen as "the

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10 Texas Constitution 1845, Article X, Sections 1 and 2.
11 Evans, The Story of Texas Schools, 1.
12 Jonathan Walters, "School Funding: Should affluent districts be forced to aid poorer neighbors?" *CQ Researcher* 3, no. 32 (August 27, 1993): 751. It was these uniform education clauses mandated by the Northwest Ordinance that became the central issue in the state school finance cases after Justice Powell and the Supreme Court returned the issue of equal protection in the education of school children back to the states in 1973.
14 Texas settlers from the North at the 1845 Constitutional Convention tended to favor free public schools, such as those established in New England, supported by state funds. Education of the poor was viewed as a matter of charity. This concept came from sixteenth-century England where a tax on property, or poor rates, took care of the education of paupers. Education of orphans and indigent children was popular in Texas because it was often a way for the state to repay families of men who had died fighting to free Texas
primary duty of parents,” “a duty imposed at once by divine command and by the order of nature.” Education was “no business of the state.”35 For the state to interfere was “impertinence and subversive of the inherent rights of parenthood.” Education also had a religious function or component. The early tradition of American education had emphasized the socialization of the young, and in 1845, Texans also believed that education provided “training in and the development of Christian truth and character as the true and only culture.” Schools were to train an educated ministry.36

Nineteenth century “public” schools were mandated to provide only a minimum level of education to the young. The first public school law was passed in Massachusetts in 1642, but it was not until two hundred years later that the state required compulsory attendance for children between eight and fourteen, and then it was only for twelve weeks a year.37 Texas was to provide for the “minimum educational opportunity necessary to achieve socialization,” it was not expected, in twentieth century equal protection terms, to

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36 Ibid.
37 Texas did not enact a compulsory attendance law until 1915. See Chapter 49 (1915) Texas General Laws 92. The Massachusetts School Law of 1642 directed “certain chosen men of each town to ascertain from time to time, if parents and masters were attending to their education duties; if the children were being trained in learning and labor and other employments . . . profitable to the state; and if children were being taught to read and understand the principles of religion and the capital laws of the country . . . This was the first time, according to education historian Ellwood P. Cubberley, that legislation which required children to read was enacted in the English-speaking world. In 1647, the General Court, the Massachusetts legislature, enacted the “ye old deluder law” which directed the teaching of literacy as a defense against Satan, who benefited from ignorance of the Bible. Every town composed of fifty families was required to appoint a teacher and provide for his pay; every town of a hundred was to provide a grammar school. The New England school laws set the precedent for state regulation of education and gave taxation authority to local government. School laws in other New England colonies closely resembled those of Massachusetts. Kern Alexander and Richard G. Salmon, Public School Finance, 5th ed. (Boston: Allyn and Bacon), 7.
help school children maximize their human potential or to even equitably distribute the state’s resources between its public schools.\footnote{Mark G. Yudof, David L. Kirp, and Betsy Levin, *Education Policy and the Law*, 3d ed. (St. Paul: West Publishing Company, 1992), 1.}

Entitled “An Act to Establish a System of Common Schools,” the 1854 School Law established a Permanent Public School Fund with two million of a ten million dollar settlement realized from the Annexation agreement. Invested in United States bonds at six per cent interest, the generated revenue was placed in a Special School Fund and distributed on a per capita basis.\footnote{The first distribution under the fund was made in 1854-1855 and was sixty-two cents per capita. Evans, *The Story of Texas Schools*, 61.} Schools were directed to spend state funds for only two purposes—teacher salaries and tuition for the poor. Debate between supporters of free public schools and proponents of private education accounted for the nine-year delay between the passage of the third Texas constitution and the comprehensive school law.

The 1854 School Law provided Texas with its first formal system of public education. It established local school districts and asked that railroad companies survey alternate sections of land to be added to the new public school endowment. Subsequent acts, amendments, and constitutions eventually deposited in the permanent fund proceeds from the sale and rental of more than 52 million acres of public land, as well as mineral production rights to seven million acres of land. The state was prohibited from spending the fund’s principle and the proceeds were managed by the State Board of Education.

After 1854, the primary source of public school funds in Texas, for over one hundred years, was the income from the Permanent School Fund, combined with revenue from various other taxes, such as proceeds from a state ad valorem property tax, occupation taxes and income from a state poll tax. From the late 1800s to the 1950s,
money from the Permanent School Fund was allocated to the counties and disbursed from a spending arm created by the legislature—the Available School Fund. Funds were distributed on a flat per pupil basis. In 1854, this was first interpreted to mean “a child of school age who resides in a given school district, without reference to school attendance.”

The parent-run school was continued by the 1854 School Law. The local community built and paid for its schools. Parents selected the teachers, paid tuition, decided the length of the school year, and the salaries for the teachers. The school was open to all comers, but attendance was not required. A private school could also be chosen to be the “public” school of the district and private schools were the predominate choice of most parents. “When the two were allowed to compete side by side,” according to law professor Allan Parker, “most parents choose private schools.” The majority of Texas schools in existence at this time were private academies that were partly reimbursed with public funds. Free public education, in the modern sense, was assured solely to orphans and the poor.

In two other school acts before the Civil War, tuition payments continued to children attending any private or public school. But state money was still allocated on a per student basis, but now only according to the student’s annual attendance. Education for the poor again received the priority of state funds, and only the remainder was allocated to tuition-paying students. Funding, also, was not given to schools “unless the English language is taught therein.” Section 5 of the 1858 School Law set state funding

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at a maximum of ten cents a day per student.\textsuperscript{43} Before the Civil War, public schools in Texas were essentially poorly funded, private institutions which seldom experienced state interference in their affairs. Although the state required teachers to be certified and take a oath, Texas assumed no responsibility for the quality or quantity of the education of its children, that was considered to be the duty of the parent. With the exception of the poor and the orphaned, education was a family affair, and it was connected to the religious preference of the parent.\textsuperscript{44}

Schooling in Texas received a blow during the Civil War. At the Texas Secession Convention in January 1861, a fourth state constitution was adopted, which was essentially the previous constitution with amendments. Although no changes were made in the education clauses in the new constitution, school revenues were diverted for military purposes and the public schools were closed. The railroads were loaned \$1,753,317 from the Special School Fund, but the loss of revenue during the war caused the companies to default. Another \$1.28 million, loaned for military use, contributed to

\textsuperscript{43} Id. at 841-842. The 1858 School Act reads:

\begin{quote}
All Schools which avail themselves of the benefits of this Act, are declared to be Public Schools, and the County Court of each county shall annually apportion the School Fund among the children of scholastic age, who attend such Public Schools in the following manner: They shall first pay the tuition of all children whose parents or guardians are unable to pay the same; of orphans whose tuition has not been paid, and of the children of widows who have no greater amount of property than is secured by the Constitution and laws of the State, from forced sale, and who choose to avail themselves of the benefits of this Act.

After paying as aforesaid, the tuition of those classes of children, the balance of the fund shall be apportioned among the paying patrons of the several Public Schools, in proportion to the time each child has attended Schools without regard to the amount which may have been paid to the teachers by each paying patron.
\end{quote}

\textsuperscript{44} "Any group of people anywhere were permitted to set up a school, large or small, and to employ a teacher at such a price and length of service as they pleased. They drew the state per capita for each child who attended the school. The result of this policy was the complete triumph of the private school interests, with the state doling out a public bounty for the maintenance of private enterprises. This plan of operation was the extreme of educational individualism. No state system of public schools was possible under these conditions." State funds were not paid until the end of the school year, when attendance was finalized. Parents had to pay the teacher's salary in advance. Frederick Eby, The Development of Education in Texas (New York: The Macmillan Company), 107, 125.
the depletion of the fund—no state money was appropriated for education from 1861 to 1870.\textsuperscript{45}

In order to be readmitted to the union, Texas wrote a fifth constitution in 1866. Slavery, guaranteed by the Civil War constitution, was now abolished and the legislature was directed, as in the 1845 constitution, to support and maintain public schools. Article X, Section 7, of the 1866 constitution was the first piece of segregation legislation in Texas. It directed that "taxes collected from Africans or persons of African descent to be exclusively appropriated for the maintenance of a system of public schools for Africans and their children" and instructed the legislature to "encourage schools among these people."\textsuperscript{46}

Congress nullified the 1866 Texas Constitution when it passed the Reconstruction Act of 1867 and the state was placed under the military command of General Philip H. Sheridan, commander of the fifth military district, which included Louisiana. A second Reconstruction Constitution, the sixth constitution of Texas, was adopted in 1869 to meet congressional conditions for readmission to the Union. The strong centralized state government, created by the imposed document, was reflected in the new education article—Article IX. As might be expected, Texas education historians tend to see this period of public schooling as a premeditated Yankee plot.\textsuperscript{47} The Article’s nine sections created a state-controlled, highly centralized school system on the northern model that

\textsuperscript{45}Texas, according to the 1860 census, had a population of 604,215 on the eve of the Civil War. There were 1,218 schools with 1,274 teachers and 34,711 pupils. Overall school income was $414,108, 80% coming from parents. Academies numbered 87, with 236 teachers, and 5,916 students. Tuition ranged from $1.25 to $1.50 per month. Evans, The Story of Texas, 74.

\textsuperscript{46}From 1866 to 1870, Negro schools increased from 975 to 2,677. Black students attending school increased from 90,778 to 149,581. In 1869, according to historian Henry L. Swint, there were 9,503 freedmen's schools in the South, with 9,503 teachers, with approximately 5,000 teachers from Northern climes. See Evans, The Story of Texas Schools, 81 and Henry L. Swint’s, The Northern Teacher in the South, 1862-1870 (Nashville: Vanderbilt University Press, 1942) 175-200.
imposed "extravagant" taxes at a time when the state was recovering from the hardships of war.

The hated Article IX of the Reconstruction document created the first uniform system of public free schools; school attendance was made compulsory, and the office of state superintendent of public instruction was instituted. When military rule ended in 1870, Governor Edmund Davis, a former Civil War General, with northern sympathies, appointed another military officer, Jacob C. DeGress, as the first superintendent, even though the office was later intended to be elective. The superintendent was given absolute control of the schools, and all other education officials, including local school boards, were appointed by the state. When education became a state monopoly, school jobs became a form of patronage and political corruption.

The state legislature, dominated by Radical Republicans, also reformed the funding of schools. General taxes added one-fourth of the annual revenue to the permanent fund, in addition income from a $1.00 poll tax, and school levies were placed on certain authorized districts for the building and instruction of "all scholastic inhabitants". The 1870 school law, which ordered school districts to levy a property tax of one percent, proved so unpopular it fueled a taxpayers revolt. In September 1871, a "TaxPayers Convention" met in Austin to challenge the state budget and corruption in the Davis administration. The convention charged that governor had appointed some 8,538 persons in places of "trust, honor, or profit" who were receiving $1,842,685. Taxpayers were willing to pay a property tax of only one-third of one per cent, and recommended a state budget of $1,046,431 in comparison to the Davis program which called for

47 Ibid., at 82.
$5,361,000 in funding. The taxpayers were willing to appropriate $538,098 of their proposed budget for the public schools.\textsuperscript{48}

Public disapproval of the Yankee-imposed system of education, and the perceived corruption of the Davis administration led to a Democratic take-over of the legislature in 1872. Democrat Richard Coke defeated Republican Governor Davis in the 1873 election, 42,663 to 85,549. The Texas Supreme Court, “infamously known as the semicolon court,” invalidated the election and troops supporting Davis seized the floor of the House. When President Grant refused to “invade Texas in behalf of Davis,” the Republican governor finally relinquished his office. A new constitutional convention was called in 1875 to rewrite the Reconstruction document.\textsuperscript{49}

The seventh and current constitution of Texas, adopted in 1876, represents a commitment to education, but also a retreat from state centralized control and the northern model of schooling. The present education article, Article VII, is a compromise clause arrived at by contending forces. E.I. Dohoney, former Chairman of the Senate Education Committee, was an advocate of free public education on the northern model. Dohoney argued that a strong system of public education would eliminate crime. Opponents to free public schools argued that education was the parents’ duty and it should be done at private, not public expense. Public education meant state control of children and compulsory attendance—it posed a danger to religious liberty. Advocates

\textsuperscript{48} Ibid., at 87.
\textsuperscript{49} Represented at the convention were ninety delegates, three from each senatorial district. Thirty-eight were members of the Grange, seventy-six were Democrats, and fourteen were Republicans. Six of the Republicans were blacks. One of the blacks was considered to be “insane” by the Democratic members and resigned. Seventy-two were immigrants from southern states. They preferred the previous structure of public education for Texas—private schools supported with state reimbursement for tuition. Eight members of the Constitutional Convention had been delegates to the Texas secession convention and twenty were members of high rank in the Confederate army. See Allan E. Parker, Jr., “Public Free
of free schools fought for a Massachusetts model, the state that disbursed the most resources on education. But, opponents identified Massachusetts schooling with the Reconstruction, Yankee-imposed model, and argued that Texas was too poor to provide the necessary funds and would never bear such a heavy tax burden.\footnote{Mr. Flournoy said he was opposed to any system of public free schools supported by taxation. He contended that no free government could levy tribute on the citizens to force education on the children. Massachusetts and other states had been held up as having magnificent schools sustained by their respective states. Were those people any happier, wiser, or more virtuous than those of Texas? Nay. He would venture the assertion that there lived no more virtuous, intelligent, and prosperous people than Texans. They were the peers of any people. They had no right to invade the mansion of the parent and take from him and her their bright-eyed child, and turn him over to the State. Whenever they should do that they could do anything. When that was done the science of free government was trodden under foot; the liberties of the country gone.}

When it became clear that neither supporters of free public schools nor advocates of the early Texas model (a private school system, partially funded by state money) had enough votes to carry the education article, the convention devised a mid-way compromise. The constitution devised a system of “public free schools” in which the state retained a private school system, that was only partially funded, but more liberally than before.

The present education article reflects the mood of the people of Texas after Reconstruction. At first, it created a school system that emphasized local control and avoided local property taxes. These trends retain powerful force in Texas today.

Section one of Article VII expressed the purpose of the educational system in Texas: \footnote{A general diffusion of knowledge being essential to the preservation of Schools: A Constitutional Right to Educational Choice in Texas,” 847-848 and Ralph W. Steen, The Texas News: A Miscellany of Texas History in Newspaper Style (Austin: Steck Company, 1955) 117. Mr. Flournoy was the delegate from Galveston. H.W. Wade responded that ignorance was the mother of nearly all crime in the country; and that vice versa, education tended to make one all that was noble and pure. Flournoy labeled those opposed to free public education “old fogeys.” Seth Shepard McKay, Debates in the Texas Constitutional Convention of 1875 (Austin: University of Texas, 1930) 225. See also Parker, “Public Free Schools: A Constitutional Right to Education Choice in Texas,” 862, 864. Parker, “Public Free Schools: A Constitutional Right to Education Choice in Texas,” 866-867.}
the liberties and rights of the people, it shall be the duty of the Legislature of the State to establish and make suitable provision for the support and maintenance of an efficient system of public free schools.

As explained by Parker, "public free schools" replaced the phrase public schools in the opening clause of the 1845 constitution and was a carefully chosen term of compromise. The founders of the post-reconstruction school system wanted to make sure that the new school system was not an expensive, centrally controlled public school system, but a continuation of the pre-Civil War private schools, with state tuition payments for the poor and orphaned. Separate schools were mandated by the seventh constitution for white and black children, with "impartial provision" to be made for both. Funding for education derived, not from the hated property tax, but from the Permanent School Fund, a poll tax of $1.00, and one-fourth of the state's general revenue. The term "public free schools" in the education article was a compromise between those forces that preferred a Northern, centrally controlled model of public education, and those delegates who preferred a return to local, private, parent-controlled education. The Texas Constitution of 1876 took the form expected from a defeated people who finally regained control of their lives and property. This last constitution, some observers believe, placed Texas in a "tight straitjacket," binding the state to a "simple rural economy."

After Reconstruction, Texas became a state of "populist attacks on corporations," "horrible race relations," "grinding poverty," and "insular, colonial attitudes." Without

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52 The Permanent School Fund consisted of "all funds, lands, and other property heretofore set apart and appropriated for the support of public schools, all the alternate sections of land reserved by the State out of grants heretofore made, or that may hereafter be made, to railroad or other corporations, of any nature whatsoever, one-half of the public domain of the State, and all sums of money that may come to the State from the sale of any portion of the same." The Available School Fund, received its income from the Permanent School Fund and during the late 1800s and early 1900s it disbursed most of the state's education funds. Neither fund could be appropriated for any other purpose but education. Ibid., at 866-867. See also Justice Powell's majority opinion, San Antonio School District v. Rodriguez, 411 U.S. 7 (1973).
frequent amendment, the state constitution would not have withstood the test of time to meet the expanding needs of education in the 19th and 20th centuries. New forms of funding would have be to found and expansion of the public free school system would continue to place demands on the citizens and politicians of Texas.\textsuperscript{53}

\textbf{Toward More Perfect Schools: Change and the Education Article (1883-1968)}

Within three years, it became apparent that the funding of public free schools under the 1876 Constitution was inadequate. Despite an increasing student population, a vast, rural state to serve, and an inadequately trained teacher pool, the legislature in 1879 lowered the portion of state general revenue dedicated to education from one-fourth to one-sixth. Cities, but not rural areas, had been permitted by the 1876 Constitution to form school districts and were allowed by law to levy additional taxes for education, if two-thirds of the taxpayers agreed. By 1878, seventeen cities including San Antonio, Houston, Fort Worth, and Dallas, assumed control of their schools. To makeup for needed funds in the rural counties, the state constitution was amended in 1883 to sanction the creation of rural school districts with their own power to levy property taxes if they so desired.\textsuperscript{54}


\textsuperscript{54} In 1883, property taxes in rural districts were not to exceed twenty cents per one hundred dollars evaluation and would be used to support public free schools for not less than six months. Taxes in cities and towns were not limited. The state property tax was also not to exceed twenty cents on one hundred dollars evaluation. Parker, "Public Free Schools: A Constitutional Right to Educational Choice In Texas," 895-895.
The 1883 amendment to the education article, besides fashioning a local property tax option for rural districts, also mandated a state-wide local property tax. Texas was a predominantly rural State with evenly distributed population and property wealth. In was not until Texas industrialized and urbanized that the location of commercial and industrial property led to a disparity in property wealth between districts. The growing reliance of Texas on the property tax to fund education in the late 1880s therefore, did not constitute a serious equity problem for the state until the 1940s.

The 1884 School Law, passed by the legislature to implement the 1883 Education Amendment, granted local Boards of Trustees the power to form school district boundaries. Section 72 of the law stated that:

> It shall be lawful for the parents, guardians or other person having control of any children residing in any county residing in the foregoing section, who may be within the scholastic age, to unite and organize themselves into free school communities, entitled to share in the benefits of the available school fund belonging to such county, upon complying with the conditions hereinafter prescribed.

The new law, in effect, crafted a two-tier system of school district structure. Independent Schools Districts were first created in areas with valuable property, mainly in cities, and, since citizens drew the district lines, poorer neighborhoods tended to be excluded. The majority of Texas students resided in Common School Districts (CSDs), which were formed and managed by county commissioners. The law revised the Permanent School Fund to include one-fourth of the State’s general revenue, monies from the Available School Fund, and the poll tax. State support was denied to any religious school, and

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55 In 1940 only one half of the state lived in areas classified by the Census Bureau as Standard Metropolitan Areas. By 1970s, the time Rodriguez reached the Supreme Court, the urban population reached three-fourths of the state, by the 1980s it was four-fifths. In 1960 there were 750,000 school age children in non-urban areas and 1,642,000 in cities. Governor's Committee Report, vol. I, 35.

separate schools were continued for white and black students, with each race being funded equally.\(^5^7\)

Education historian Frederick Eby sees the 1883 constitutional amendment and the 1884 School Law as a renewed commitment on the part of Texas citizens to public education. Property taxes were authorized for the education of all school children, and rural school districts were now on a more equal footing with metropolitan areas.

Few localities choose to levy the permitted property tax—a super-majority of two-thirds of the voters was required, and only property owners were entitled to vote in the elections.\(^5^8\) Also the ingrained antipathy of Texas voters to big government and spending prevented strong local funding of districts. In the 1885-1886 school year there were 3,299 districts and only 79 (two percent) authorized local taxation. By 1910, only half of all school districts collected the local property tax.

Because of the reluctance of rural districts to tax, the distrust of governmental authority, and the lack of taxable property wealth within many districts, the disparity between the quality and funding of rural and urban education became evident to the legislature by the early 1900s. Under the leadership of Governor James E. "Pa" Ferguson, the legislature in 1915, in a two-year period, appropriated a million dollars for rural schools. This equalization school aid was the first important departure from the formula of per-pupil flat grants to schools under the Texas Constitution of 1876. To qualify for aid, a rural district was expected to tax itself at a new maximum rate of 50 cents per one hundred dollars of property value. Some 1,300 schools eventually qualified

\(^5^7\)There would be no more than two white and two black schools in communities of less than 1500. The county judge could make assignments to the appropriate school. Parker “Public Free Schools: A Constitutional Right to Educational Choice in Texas,” 900. See also Rocha and Webking, Politics and Public Education, 7.
for aid and the average grant-in-aid was $350 per school. The legislature in 1915 also passed the first compulsory school attendance law.

From 1918 to 1947, Texas continued to change the constitution to improve public education, but the basic school finance structure remained in place. School funds were distributed on a per capita basis, and the differences between wealthy urban districts and poor rural schools continued to widen. The state did significantly raise its contributions to education; it expanded its reliance on an increase in local property taxes to support the expanding costs in education. In 1918, the state-wide property tax also was increased fifteen cents to provision public schools with state adopted texts. In 1920, a constitutional amendment abolished the limit on the local property tax, and left the rate to the discretion of the state legislature. It appeared that the state intended to shift more of the financial burden of education to the local school districts.

A Texas Educational Survey Commission was created by the legislature in 1923 to make an evaluation of all the schools. The Commission, headed by Dr. George A. Works, of Cornell University, published its findings in eight volumes in 1925, and recommended an overhaul of the state’s school finance system. The survey found that, in 1920, Texas ranked 44th in per capita state and local expenditures on education. The primary problem was not lack of support for education by the state—Texas spent more central treasury funds on elementary and secondary education than any other state. There was, instead, a lack of local support for public schools. To bring Texas into the

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58 The Texas Constitution was amended in 1907 to increase the local tax maximum and reduced the super-majority to a majority of voters to pass a local property tax.

top rank of school expenditure, the state would have to increase its funding by two and one half. 60

The Texas Educational Survey defined equal educational opportunity, "as usually interpreted" in the 1920s, as "the existence of approximately equal school facilities up to certain minimal standards." Apportioning the available school fund on a per capita basis was found to be a denial of equality. Property-rich districts were able to provide their children with a longer school year at a lower tax rate. With a per-capita formula for dispensing funds, rural schools which had fewer students were at a disadvantage in receiving state funds. Not only did dispensation of state funds fail to take into account the willingness of a community to tax itself for schools, but expenditures did not vary according to the cost of the kind education required. For example, the state did not differentiate between the cost of providing a high school education, which was expensive, and an elementary education, which was less. 61 Also, basing expenditure on a per capita basis, proved too tenuous; per pupil receipts of a district radically fluctuated and denied school districts the ability to ascertain what resources to expect from the state each year. To restructure the inadequate state finance system, the survey recommended that the state guarantee school boards enough funds to provide a minimum education for each child. The distribution of state funds should be based upon the differences in the ability of the district to raise taxes, and also, on the willingness of property owners to support their own schools.

60 In 1921-1922 Texas was expending $30.77 per child (5-18) and the average expenditure of the ten leading states was $73.51. George A. Works, ed., Texas Educational Survey Report, vol. 8, General Report (Austin:Texas Educational Survey Commission, 1925), 106.
The Texas survey's financial recommendations were influenced by the seminal works on school finance published in the early 1920's by Harlan Updegraff, George D. Strayer, Robert M. Haig, and Paul R. Mort. One way to equalize educational funds, Updegraff suggested, would be to grant each school district a "guaranteed yield" of state and local funds for each unit of local tax effort. State aid to a district should reflect a district's wealth as well as its tax effort. Strayer, Haig, and Mort proposed that each student should be guaranteed the state funds necessary for "minimally adequate educational opportunity." In their foundation plan, the tax mandated by the state for each district would be levied at a rate that would yield the necessary funds for a minimum education in the richest district. The rate would yield only the necessary funds in the wealthiest district and the state would then make up any deficiencies in poorer districts. If a rich district generated funds above the minimum foundation, these funds were to be used to experiment with innovative programs. Such schools would become "lighthouse districts" and would provide educational leadership.62

The survey staff also took note of the inequality between white schools and those for minorities.63

In a village of about 1500 there was found a fairly good pubic school for the English-speaking children. "Across the tracks" was the Mexican school. It was a dilapidated two or three-room building, the toilets were unscreened, and the grounds poorly kept. The Mexican school was limited to the elementary grades, and in spite of the fact that there were pupils enough in it to require the services of two or three teachers. The visitor was told on good authority that no Mexican child in the village had ever gone to the high school.

The survey cited the difficulty in finding capable teachers to serve in inferior, minority, schools, and in providing an adequate education for a mobile, non-English speaking community and in reaching parents, that at times, did not regularly send their children to school. The staff suggested a better apportionment of school funds, experimentation with portable schools, and the creation of a “sane, reasonable, non extremist” approach to the enforcement of truancy laws.

The provision of a proper education to Mexican children would require federal as well as state intervention, according to the survey staff: “If it were possible to control the movements of Mexicans across the border, as is done with foreigners from other countries, it would do much to relieve the school situation in many communities in Texas. This is a question to be dealt with by national rather than State authorities.” Legislation for better schools for Mexican children was not the only solution, Texans needed to be informed as to how different communities were meeting the challenge. 54

Education, for blacks as well as Mexicans, also would require an improvement in their economic condition. In a letter sent to the Survey Staff, a trustee of a county school board explained, “we have so many large plantations with their pernicious rent systems, here we find not only Negroes and Mexicans but also many white people. Many of them live in shacks that are hardly fit to shelter goats. . .Here among the weeds the children grow up like weeds. . .Laws are passed and enforced which prohibit men from abusing their horses and mules. Are not children worth more than colts?”

Although the survey found improvement in the education of blacks in Texas, progress was marred by the poor conditions of school structures, a shortened school year, and a lack of relevant instruction necessary to meet the economic demands of poverty.
While the illiteracy rate among blacks ten years of age and older had dropped from 38.7 per cent in 1900 to 17.5 per cent in 1920, the school year for black children was significantly shortened in several school districts. Also, out of 109,405 black children in common schools and small independent districts in 1922-23, the state provided 57,715, only one-half the number of seats as pupils. This figure was an indication of the physical conditions in black schools. The survey reported on the condition of such a school in a rich section of the Brazos Valley:

The house was a wretched cabin of two rooms, located on a triangular strip of land between a public road and a small branch. The school was taught by two teachers. Each room would have accommodated comfortably 12 pupils seated at patented desks, although the light was so poor that those at some distance from it would have been greatly handicapped in their efforts to read or write. As it was, 40 pupils were huddled together in the principal's room, some sitting three or four at roughly made double desks, and some on wooden benches. In the other room, no larger, were 65 children. No desks at all were in this room, but only long wooden benches. Twenty-five children sat on the floor. The two teachers were not well qualified for their work, but even the best qualified teacher could have accomplished little under the circumstances.

There were many common schools and independent school districts where the survey staff found equal conditions between black and white students. But, it was recommended that the state not leave the education of black children to the whims of the local community. The goal was for each child to reach his "maximum productive capacity"; failure would result in an increase in crime.

The staff also complained that teachers of black children placed too much emphasis on "formal education" such as Latin, algebra, geometry, medieval history, and English composition. Because of "social and economic conditions," they recommended a greater emphasis on "science and civics, American history, and other functional

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64 Ibid., 215.
65 Ibid., 222-223.
subjects,” such as vocational education, industrial courses, physiology and hygiene.

These recommendations express not only the curriculum biases of the time, but also the lack of knowledge of the intellectual capabilities of all school children. When the survey team disparaged “formal subjects” for black students, it was also not sure of the efficacy of algebra for certain white children: “It should be said further, regardless of what further research may reveal concerning the intelligence of colored chidden, that there are social and economic factors pointing to the needs for modification of what is taught to the children of the two races even in the elementary school. When one accepts the point of view that growth is the end sought and recognizes that the child’s needs as a child should be a factor in determining what the schools teach, he is forced to accept its conclusion.”

The “dumbing down” of educational standards began early in the century, but it was with the best intentions, to further the “growth” of each child and to provide him with only that amount of information he or she “needed.”

In accordance with the recommendation from the education survey, a nine-member Texas Board of Education was created in 1928 by constitutional amendment. It replaced the previous Board composed of the Governor, Secretary of State, and the State Comptroller. In 1929, Texas revised its funding to rural schools, and the new equalization was upheld in the 1931 case, Mumme v. Marris, as a suitable way to aid financially weak schools. The Court declared increased aid to rural schools in agreement with the constitutional directive to the state legislature to “establish and make suitable provision for the support and maintenance of an efficient system of public free schools.

State funding of education was equalized again in 1937 when the state funding

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66 Ibid., 224-225.
formula was revised to reflect teacher units, instead of student attendance; monies were now allocated on the number of teachers on staff in a district and their salaries.

As technology advanced and the goals of education shifted from the socialization of children from diverse backgrounds to the development of each individual’s potential, state monies appropriated in Texas for a satisfactory, “minimum” of education rose. In the years 1940-1941, the Available School Fund provided about $40 per child, in 1948-1949 the figure rose to $101. The remaining school funds were raised by local property taxes, and by 1948-1949 local revenues had reached an additional $85 per child.68

Problems of equality in the Texas school finance system become evident to school reformers again by the 1940s. Communities with substantial property wealth and only a minimum tax rate were able to provide their schools with educational resources way beyond a “minimum” level. Other districts were not school communities at all, but constituted hastily drawn entities which levied no taxes and existed as tax havens for the affluent. Predictions of a baby boom following World War II was also causing concern among educators, and there was a fear that spending on education could not keep pace with post-war inflation.69

To meet the growing problems in the equitable funding of Texas schools, the Fiftieth legislature, in 1947, formed the Gilmer-Aikin Committee which it charged with the task of finding the most efficient way to provide each student with a basic minimum

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69 Ibid., 385. The Consumer Price Index (1947-1949 = 100) went from 60.5 in 1940-1941 to 103.1 in 1948-1949, approximately a 70 per cent increase. Education spending in Texas did keep pace with a 150 per cent increase in state per capita educational expenditures from $3 in 1940-41 to $101 in 1948-1949. Yudof’s figures here are from the Texas Research League’s 1956 report, The Road We Are Traveling, 29.
education.\textsuperscript{70} In February 1948, Committee’s report, \textit{To Have What We Must}, made thirty-three proposals of educational change to the state legislature. The Committee suggested that Texas adopt a Minimum Foundation Program (MFP) that would guarantee twelve years of schooling, nine months a year, with no classes exceeding 25 pupils in average daily attendance. The MFP placed a “floor under the kind and quantity of public school services”, and at the same time, prevented the placement of a ceiling over what any district might want to spend above the minimum.

The Minimum Foundation School Program, later enacted as Senate Bill 116, intended to supply every school-age child in Texas with an “equal minimal educational opportunity.”\textsuperscript{71} State funds in the foundation were earmarked for teacher salaries, school operating expenses, and transportation. By the time \textit{Rodriguez} reached the Supreme Court, the state was providing 80% of the funds for the minimum program and the local school districts came up with the rest. The district share, entitled the Local Fund Assignment, was equalized to reflect each district’s wealth. Certain economic activities within each county: mining, manufacturing, or agriculture went into the state’s funding formula. This complicated economic index also took into consideration payroll income and property values. Each county tax assignment was then divided between its school districts. The school district’s Gilmer-Aiken Minimum allocation was based on the value

\textsuperscript{70} The Gilmer-Aiken committee was named after two members: Senator A. M. Aiken of Paris, Texas and Representative Claud Gilmer of Rocksprings. Gilmer, a former speaker of the House was considered to be an enemy of the Texas public school teacher. The representative had sponsored a bill in 1947 that would have raised a beginning teacher’s salary with a B.A. to $2,000, but would guarantee extra tax dollars only to schools who could show need. Senator Aiken, however, was “one of the best friends of education in the Texas Senate.” See Rae Files Still, \textit{The Gilmer-Aiken Bills: A Study in the Legislative Process} (Austin: The Steck Company, 1950) 12. Still, a classroom teacher in Waxahachie High School and chairman of the House Education Committee, was well-acquainted with the development and passage of the Gilmer-Aiken school reform bills in 1949. She attended all the committee meetings, served on two subcommittees, was cosponsor of the bills, and was a leader in the floor debate in the House. Justice Powell refers to her book in his 1973 \textit{Rodriguez} opinion.
of its assessable property relative to the rest of the county, and it was paid out of local
property tax revenue. 72

The Minimum Foundation Program “proved to be the salvation for thousands of
Texas school districts on the verge of fiscal chaos.” By 1955-56, the State of Texas was
contributing $242 million in school aid to local school districts which accounted for 60
percent of their operating costs. Funding per child rose from $101 in 1948-1949, the last
year under the old state finance plan, to $174 in 1957-1958. From 1949 to 1967, state
and local expenditures on education increased 500%. During the same period, per-pupil
expenditures rose from $206 to $463. Capital expenditures increased from $44 to $102
per pupil. According to figures from the Texas Research League, from 1957 to 1967, the
total public school expenditure rose from $750 million to $2.1 billion.73

By the late 1960s, the time of the initiation of the Texas school finance case,
education reformers believed that although the Gilmer-Aiken Bills had “saved the public
school system from collapse,” they ultimately failed to provide a “quality education to
each child in Texas” and to “supplement the efforts of the poorest districts in the state.”
Tax havens remained, the complicated economic index was an “inaccurate mechanism”
for determining district wealth, and more importantly, the state never supplied adequate
funds in the budget for a sufficient minimum education for the school children of Texas.

When in 1968, Governor John Connally’s blue ribbon commission’s report, The
Challenge and The Chance, failed to spur the Texas Legislature into action, a group of

71 Gilmer-Aiken Committee, To Have What We Must 15 (1948). Texas Research League, “Texas Public
Schools Under the Minimum Foundation Program”: 1-3 (1954).
72 This is Justice Powell’s description of the operation of the program. See San Antonio School District v.
Rodriguez 422 US 8-10, 36 L. Ed. 2d 28-30.
73 Yudof, The Ayes of Texas, 386. Rodriguez, 411 U.S. 11 (1973). Justice Powell took these figures from
distracted parents in the San Antonio Edgewood Independent School District, a property-poor district, decided to resort to the courts.
Chapter Three

Race, Reasonableness, and Reward

1968

The Rodriguez Equal Educational Opportunity Case reaches Texas Federal District Court

I think it is a little disconcerting to a Court, when it abstains and does it on specific grounds that it wishes for the Legislature to do something about it, and with education as important as it is to the citizenry of our State and our Nation, for the Legislature to completely ignore it, it makes you feel that it just does no good for a court to do anything other than, if it feels these law are suspect, declare them unconstitutional; then make the Legislature take action, which they don’t seem to want to do unless they are forced to do it.

Judge Adrian Spears, United States District Court for the Western District of Texas

The Texas school finance case, Demetrio P. Rodriguez et al v. San Antonio ISD et al. was filed in United States District Court for the Western District of Texas on July 30, 1968 by civil rights lawyer, Arthur Gochman, on behalf of seven parents and eight children. Ultimately a landmark case in which three streams of history merged—race relations, equal protection, and school finance—Rodriguez was a continuous legal struggle from its inception and remains one even at the present time.

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1 Brief for Appellees, San Antonio Independent School District, et al., No. 71-1332, 5. The defendants in the Rodriguez case, the members of the State Board of Education, the Commissioner of Education, the Attorney General of the State of Texas, and the Bexar Count School Board of Trustees assured the Trial Court that the state legislature would address itself to the school finance problem. At a hearing before the trial, October 2, 1969, the plaintiffs sought immediate relief, expressing their doubts concerning legislative action, citing the failure of the 1968 Governor’s Committee on Public School Education to inspire educational change in the 1969 legislative session. The defendants suggested the suit be delayed because the Legislature had an “obligation and duty” to act. The Court postponed, anticipating some action on the part of Austin, but reform failed to materialize: the 62nd Legislature convened in January, 1971, adjourned in May 1971, without taking action. This situation prompted Judge Spear’s remarks. The plaintiffs contended there had been no meaningful educational reform in Texas since the passage of the Gilmer-Aiken Act in 1949. The key provision in that legislation was the establishment of the Minimum Foundation Program, the school finance system under contention in Rodriguez. The original intent of the Program was to ensure that each child in Texas received a good, but only basic education. Districts were free to add to the state minimum through local property taxes. In 1969 the name of this program was changed to the Foundation School Program.

An attempt to establish equal educational opportunity for Texas school children, *Rodriguez* reached the Supreme Court in 1973 as one of several similar equally serious challenges brought by activists in an attempt to continue the egalitarian promise of *Brown.* During the late 1960s and 1970s, a new generation of reformers, academics, and civil rights lawyers concluded that the Supreme Court was ready to encompass within the parameters of the equal protection clause of the Fourteenth Amendment the right to equal funding of public schools within a state. The "new" equal protection cases decided by the Warren Court hinted that the justices, for the first time, were on the brink of declaring poverty a "suspect" class equivalent to race, and education a fundamental right. The "temptation" of the *Brown* decision, political scientist Mary Cornelia Porter asserted, pointed the way to a new litigation path for education reformers. Differences persisted among experts about the meaning of the term equal educational opportunity. But there was agreement that school funding reform was a new way to sustain school desegregation and to invigorate the public schooling of minorities and the poor, particularly in the central cities.

In a legal strategy analogous to that developed by black Americans during the 1950s, the Lawyers Committee for Civil Rights, assisted by the Mexican-American Legal Defense Fund (MALDEF) and the N.A.A.C.P Legal Defense and Education Fund (LDF), in the early 1970s, coordinated an equal educational opportunity assault on state school finance systems. The *Rodriguez* case was an extension, expansion, and continuation of

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4 *Brown v. Board of Education* 347 U.S. 493. In a unanimous decision, education reformers argued, the Warren court appeared not only to recognize the importance of public education for all citizens but to be leaning toward eventually declaring it a fundamental right: "In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity to an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms."
the civil rights revolution in education that began with Brown in 1954. It was, in addition, a fight for a different form of educational equality. Lawyers' Rodriguez briefs evidence a sophisticated legal strategy by which public interest law firms challenged recalcitrant state legislatures to invigorate their antiquated school finance systems. If federal funding and court decisions ultimately failed to equalize, integrate, and upgrade the public schools, the declaration of public school finance laws unconstitutional was another alternative.5

The joining of two powerful public interest action groups representing Mexican Americans and blacks did not originate with Rodriguez. Attorneys representing LDF recognized that black Americans would be best served by the elimination of all racial and ethnic discrimination. The LDF in 1962, for example, joined forces with MALDEF to help desegregate schools in Austin, Texas.6 Similarly, while pursuing the Rodriguez litigation, fund attorneys worked in tandem with Mexican-American plaintiffs in Keyes v. School District Number One to reverse segregation of white, black, and Hispanics in the Denver schools.7

5 Amicus Curiae Brief for the Appellees at 1-2. The N.A.A.C.P Legal and Defense and Educational Fund is a non-profit corporation founded in New York in 1939 to secure Negroes their constitutional rights through the prosecution of lawsuits. The Fund has been primarily interested in pursuing educational suits because "...the failure to provide adequately for the preparation of minority group children condemn them as adults to continue the cycle of poverty and discrimination, but the contrast between the programs made available to them and those afforded children of the dominant racial and ethnic groups affects young minds in a particularly stringing way to produce bitterness and strife."


7 413 U.S. 189, 93 S.Ct. 2696, 37 L.Ed. 2d 548 (1973) Keyes filled suit to desegregate the Park Hill Schools, a white area and a small part of the Denver system. Gerrymandered attendance zones created the segregation in this case. In a divided opinion, the Court decided the plaintiffs did not have to demonstrate a de jure showing of segregation throughout the system, and ordered the Denver system to integrate. "A finding of intentional school segregation in a meaningful part of a school district," the Court held, "created a strong presumption that segregated schooling throughout the district had been similarly motivated." Keyes was the first instance of court ordered busing in a city outside the South. See J. Harvie Wilkinson, From Brown to Bakke: The Supreme Court and School Integration: 1954-1978 (New York: Oxford University Press, 1976), 198. The Burger Court acted as energetically as the Warren court when it found evidence of state-sponsored discrimination. Melvin L. Urofsky, A March Of Liberty: A Constitutional History of the United States, vol. 2, Since 1865 (New York: McGraw-Hill, 1988) 892.
The First School Finance Cases Fail to Provide an Equal Educational Opportunity

Standard and Precedent

Prior to Rodriguez, two early school funding cases reached the Supreme Court in the latter 1960s, but provided civil rights advocates with little solace. One, McInnis v. Ogilvie (1969), was a class action suit brought by poverty lawyers on behalf of disadvantaged Chicago children. In a per curiam opinion, the Supreme Court upheld the federal district court’s ruling that “the allocation of public revenues is a basic policy decision more appropriately handled by a legislature than a court.” The federal district court had found that “the inequalities of the existing arrangement are readily apparent.” But it granted the states’ motion to dismiss the case because the court concluded the school funding system had some rational basis. Illinois District Judges Bernard Decker,

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8 A per curiam or “by the court” opinion is an unsigned opinion that represents the views of all the Court, not just one Justice. It sometimes is an opinion written by the Chief Justice or presiding judge, or can be only a brief announcement of the deposition of a case.

9 The Fourteenth Amendment in its section one commands that “No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.” Although the Fourteenth Amendment was ratified in 1868, cases after the Civil War were rarely won by plaintiffs that based their claims on a denial of equal protection, or rather, an unconstitutional legislative classification of citizens. As explained by legal historian William M. Wiencek, when the American economy underwent an industrial revolution after the Civil War, judges clung to a theory of judicial interpretation that sought to protect human liberty, rather than to foster equality because it was a time when interest groups put great pressure on government. Laissez-faire judges saw themselves as reformers, curbing the undue influence of rich and poor alike. The American Revolution had taught the dangers of intrusion of governmental power into economic affairs. By the turn of the century, the Supreme Court employed the due process clause, rather than the equal protection guarantee, to void economic or social legislation that they believed infringed on the liberty of citizens to contract. Under this new interpretation of due process, judges tended to declare unconstitutional any law that restricted individual freedom—due process contained a “substantive” as well as a fair legal procedure guarantee to citizens. In Mugler v. Kansas 123 U.S. 623 (1887) the Court, for example, upheld a statute that prohibited the sale of alcohol, but at the same time indicated it would examine the content of the law to determine if the statute had a substantial relation to a legitimate purpose. John E. Nowak and Ronald D. Rotunda, Constitutional Law, 4th ed. St. Paul: West Publishing, 1991), 360-375, 573-583.

In the period from 1900 to 1936, if judges did not believe a law or regulation was related to a legitimate end of government, it was declared void because freedom of contract and economic liberty were seen as protected by due process. Substantive due process analysis was employed by the courts to review cases involving the natural rights of all citizens. Equal protection analysis was applied when a
Abraham Lincoln Marovitz, and Circuit Judge John Hastings agreed with the defendants that the Illinois school finance statutes were designed by the legislature to foster local community control of schools and voter determination of district tax burdens, and that no acceptable justiciable standard of equal educational opportunity was proposed in the case. On the latter point, the *McInnis* plaintiffs maintained that the Constitution required equal state school funding on the basis of the “educational needs” of the student. The federal district court found this standard of educational equity too nebulous a declaration on which to rest future court administration, and dismissed the case.\(^\text{10}\) The *McInnis* court governmental action separated or placed citizens into classifications. In both substantive due process and equal protection cases, judges are asked to review the substance or content of a law.

By the 1930s, the era of corporate evasion of state regulation under claims of substantive due process came to a close. In response to majoritarian demands and necessitated by the Depression, in *United States v. Carologne Products Co.* Supreme Court Justice Harlan F. Stone and his colleagues upheld a congressional prohibition on the interstate shipment of “filled” milk. The Court found sufficient public health reasons for the bill’s passage. *Carologne Products* was the beginning of traditional equal protection and due process review. Since the New Deal, “traditional” equal protection means that the judiciary will defer to federal, state, and local legislators when it reviews economic and social welfare legislation. Statutes or classifications will not be overturned unless “the law has no rational relationship to any legitimate interest of government.”

In the famous “footnote 4”, Justice Stone suggested a second tier of judicial review, or “more searching judicial scrutiny” if the legislation touches on a “fundamental” right guaranteed by the Bill of Rights, if the legislation “restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation” or affects “discrete and insular minorities.” *U.S. v. Carologne Products Co.* 304 U.S. at 152-53 n. 4. As noted constitutional scholar William M. Wiecek noted: “The Carologne Products’ paradigm and its implicit equal protection agenda have guided the work of the Court for the past fifty years. Despite Frankfurter’s strenuous objections, the Court has observed the double standard consistently, providing only the most minimal review of laws that infringe or control property interests, while subjecting laws that fall within one of the three Carologne Products’ categories to a heightened and usually fatal scrutiny.” See William M. Wiecek, *Liberty Under Law: The Supreme Court in American Life* (Baltimore: The John Hopkins University Press, 1988), 157.

\(^{10}\) *McInnis v. Shapiro*, 293 F. Supp. at 331 (N.D. Ill. 1968). *McInnis* was heard by a three-judge district court that was convened pursuant to 28 U.S.C. Sections 2281 and 2284. Most cases in federal courts are heard and decided by a single judge. Congress, however, provides for a three-judge panel in certain cases that require special attention. Direct appeal is then made to the Supreme Court. Three judge courts were required in the 1960s, for example, in certain constitutional actions brought under the 1964 Civil Rights and 1965 Voting Rights Acts. Three-judge courts were convened when plaintiffs sought to enjoin the enforcement of state and federal laws, or state administrative orders on claims of denial of constitutional rights. Congress later repealed these two sections of the federal code in 1976. Joseph R. Nolan and Jacqueline M. Nolan-Haley, *Black’s Law Dictionary*, 6th ed. (St. Paul: West Publishing, 1990), 1481. Judge Decker said in footnote four of *McInnis* that the plaintiffs did not offer a definition of the “nebulous concept” of educational needs. “Presumably ‘educational need’ is a conclusory term, reflecting the interaction of several factors such as the quality of teachers, the students’ potential, prior education, environmental and parental upbringing, and the school’s physical plant. Evaluation of these variables necessarily requires detailed research and study, with concomitant decentralization so each school and
also held that the Chicago plaintiffs’ argument relied too much on previous Supreme Court desegregation, voting rights, and criminal justice cases. *Brown*, the judges argued, was primarily a limited decision that desegregated racially imbalanced schools. Unlike *McInnis, Hobson v. Hansen*, another early school finance case struck down inequalities in expenditures based on race, not poverty. Other initial “new” equal protection rulings also did not qualify as precedents for *McInnis* because they dealt, not with education, a non fundamental right, but criminal justice and citizens’ voting rights, privileges guaranteed by the Bill of Rights. The Supreme Court agreed with the reasoning of the Illinois federal district court and confirmed the *McInnis* decision in a *per curiam* opinion based on a jurisdictional statement filed by the plaintiffs.¹¹

In the second school finance case to reach the Supreme Court, *Burruss v. Wilkerson* (1968), plaintiffs from a poor rural Virginia County school district claimed they had been denied an adequate education despite high property tax rates. Distinguishing the case from *McInnis*, reform advocates did not urge the Virginia federal district court to order the distribution of school funds according to a child’s “educational needs.” Rather they asked that “only a financing scheme which apportions funds in such a way as to provide equal educational opportunity to every child in the state, through equal facilities, satisfied the Fourteenth Amendment.”

After determining that an important “wealth” issue existed in the case, Chief Judge Ted Dalton of the federal district court in Virginia ordered a new trial before a three-judge court. “Poverty does appear to be a factor contributing to the conditions

¹¹pupil may be individually evaluated.” Supreme Court Justice William O. Douglas would have granted probable jurisdiction. 293 F. Supp. 329 (1968).
which give rise to the plaintiffs’ complaint,” Dalton stated, “It is clear beyond question that discrimination based on poverty is no more permissible than racial discrimination.”

By the time the three-judge court retried Burruss, however, the Supreme Court had handed down McInnis. The federal district court then dismissed the Illinois school finance case with the following reservation: “While we must and do deny the plaintiffs’ suit, we must notice their beseeching, earnest, and justified appeal for help.” The justices also recognized that “the courts have neither the knowledge nor the means, nor the power to tailor the public monies to fit the varying needs of these students throughout the state. We can only see to it that the outlays on one group are not invidiously greater, or less than of another.” The lower federal court found no “distinguishable” difference between McInnis and Burruss; the educational “needs” criterion proved to be an unacceptable judicial standard on which to rest beginning equal educational opportunity reform. In the Burruss appeal, the Supreme Court, reiterated its McInnis position when it affirmed in a per curiam decision the federal district court in Virginia.13

When in the late 1960s the “educational needs” standard failed in the lower federal courts and the Supreme Court, civil rights advocates around the country lost

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13Burruss v. Wilkerson 397 U.S. 44 (1970). Justice Douglas and Justice White would have granted probable jurisdiction. For a discussion of these two cases see Hershel Shanks, “Educational Financing and Equal Protection: Will The California Supreme Court’s Breakthrough Become the Law of the Land?” Journal of Law and Education 73 (1972). Shanks’ article appears in Appendix D of the Representatives for Thirty State Governments’ Amicus Curiae Brief for the Appellants. See Burton A. Weisbrot, Joel F. Handler, and Neil K. Komar, Public Interest Law: An Economic and Institutional Analysis (Berkeley: University of California Press, 1978), 335. Weisbrot suggested that the failure of McInnis and Burruss to bring about school finance reform revealed the plaintiffs’ inability to “document their assertions,” and affirmed the effectiveness of a “big case” strategy on the part of civil rights advocates. Success was more likely if a great amount of resources were devoted to a small number of “large-public-interest-ratio cases”; in short, public interest lawyers needed to practice economies of scale.
interest in school finance cases and lawsuits consequently diminished. Lawyer Hershel Shanks noted that...“the Harvard Center for Law and Education, one of whose top priorities at its inception only a short time earlier had been to press equal education lawsuits, now turned its primary focus elsewhere.”14 In the early 1970s school finance reform lawyers devised a new legal theory that was easier for the courts to grasp. This development led to a new “wave” of school finance cases in two-thirds of the states. Rodriguez would be the primary case in this “second wave.”

Both plaintiff and defendant lawyers in Rodriguez, however, still had to deal effectively with the “educational needs” precedents in their arguments. According to Gochman Rodriguez was readily distinguishable from McInnis and Burruss:15

Plaintiffs in McInnis sought to require that educational expenditures in Illinois be made solely on the basis of the pupils’ educational needs. Plaintiffs herein did not pray for such a declaration. An “educational needs” formula is “unworkable”, and involves the Court in “endless research and evaluation for which the judiciary is ill-suited.” The Fourteenth Amendment prohibits discrimination, but mandates no specific remedy. This Court need only declare the Texas schoolfinancing system, which discriminates against the poor, is unconstitutional.

Because the quality of education a Texas school child received depended upon the tax rate and the property values of his district, the complainants/plaintiffs in Rodriguez argued in the federal district court that the school funding system deprived Edgewood children of equal protection of the law under the Fourteenth Amendment. The quality of education in the Edgewood Independent School District was a function of the wealth of a

14Ibid., 44a. David L. Kirp and Mark G. Yudof were both associated with the Harvard Center for Law and Education and while in Boston were influenced by David Cohen, Christopher Jencks, and Nathan Glazer of the Graduate School of Education, Frank Michelman and Abram Chayes of the Law School, and Thomas Pettigrew of the Department of Social Relations. See introduction to David L. Kirp and Mark G. Yudof, Educational Policy and the Law: Cases and Materials (Berkeley: McCutchan Publishing Corporation, 1974), xxxviii and xxxix. In this first edition of a law school educational text, Kirp and Yudof sought to place the study of educational policy and law within the context of ‘other social sciences. In the authors' view, the law is not a disjointed, arbitrary entity, but a reflection of the institutional and social demands of the culture. Also, educational policy has inadvertent political and pedagogical consequences.
child's parents and his neighbors. These differences in wealth, argued the property-poor San Antonio parents, provided some school districts with inferior educational resources, fewer educational services, less equipment, and substandard facilities. The student plaintiffs, practically all Mexican-Americans, were therefore subjected to willful state discrimination in the form of an inadequate education, sub-standard housing, limited job opportunities, smaller incomes, and fewer civil and political rights.\textsuperscript{16}

\textit{McInnis} and \textit{Burruss} were crucial precedents for the state of Texas's defense in \textit{Rodriguez} as well. The defendants challenged the federal district judges to rule, in agreement with \textit{McInnis}, that the Texas finance scheme was consistent with the state constitution, that unequal educational expenditures per student did not amount to an invidious discrimination, and that unequal expenditures were not arbitrary or unreasonable. The allocation of funds according to a pupil's "educational needs", the \textit{Rodriguez} defense maintained, was not required by the United States Constitution, nor was it judicially manageable. The Equal Protection clause did not limit a state's power to allocate and distribute funds, and the disbursement of state school funds was a political, not a legal question. The state of Texas also planned to show that educational spending was not the sole yardstick of a child's educational "needs" or the quality of his education.\textsuperscript{17}

Some post-\textit{McInnis} Supreme Court rulings, however, did bode well for the second wave school finance litigation effort. In \textit{Shapiro v. Thompson} (1969) the Court moved

\textsuperscript{15} Brief for Appellees, 39.
toward a stricter standard of judicial review in certain equal protection cases. Reasonable justification would not be acceptable for a statute that classified. Differential treatment would be justified only if the Court was convinced the unequal treatment was necessary to promote a compelling governmental interest. This new standard become known as the "compelling interest" test. In *McDonald v. Board of Election Commissioners* (1969), the Warren Court made it clear that this new stricter standard would also apply to cases involving discrimination based on wealth.\(^{18}\)

School finance authorities did not relinquish the battle for a manageable judicial standard to replace the rejected equal opportunity "needs" approach. A new argument, developed in California, proved crucial to the plaintiffs in the approaching *Rodriguez* district court case. In 1970, law professors John Coons, William Clune and Stephen Sugarman proposed the now famous "fiscal neutrality" standard in their pathbreaking *Private Wealth and Public Education*. Focusing on "equity for taxpayers," rather than equal protection for school children, *Private Wealth* proffered a new definition for equal educational opportunity. It was Proposition One: "the quality of public education may not be a function of wealth other than the wealth of the state as a whole." Civil rights litigators recognized that the Coons "no-wealth" principle embodied all the necessary qualities of a successful, justiciable standard—it was modest, moderate, clear, flexible, and relatively simple.\(^{19}\) The new equity standard of "fiscal neutrality" replaced the

\(^{17}\) See Appendix, 74-76.
"educational needs" definition of equal educational opportunity in the lexicon of school finance lawyers; it would provide a new means for the federal district courts to invalidate state school finance systems. The strength of the new "fiscal neutrality" standard, or Proposition One, was that it did not mandate that a state legislature adopt a ruthlessly equal or, a "one kid, one buck" school funding plan to meet federal constitutional requirements. Instead *Private Wealth* suggested that as many as twelve different legislative school finance schemes met the requirements of fiscal neutrality and, in turn, fulfilled the equal educational opportunity demands of the federal Bill of Rights.

According to Coons and associates, district power equalizing, one state school finance scheme suggested by *Private Wealth*, satisfied the emerging wealth interpretation of the "new" equal protection. DPE maintained local control while at the same time equalizing school finances. It was therefore a middle-ground solution to the school finance quandary. Under DPE a school district could decide for itself what it wished to tax for education. The state would then guarantee a stated number of dollars per pupil for a given tax rate. A minimum or maximum tax rate, or both, might be set by the state and, if a property-poor district failed to generate the state-required yield at a particular tax rate, the state would make up the difference. Surplus tax dollars generated from a given tax rate in a rich district would be "recaptured" and returned to the state. The system was given the name DPE because each district had the same power to produce school funds, regardless of wealth.\textsuperscript{20} Although Coons proposed DPE as an alternative school funding

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\textsuperscript{20} Brief for Appellants: 15, Amicus Curiae Brief by Representatives of Thirty States for the Appellants: 32a-40a. Professor Betsy Levin created the following hypothetical model to explain D.P.E: Suppose the state guarantees an expenditure level of $550 per pupil for every school district that taxes itself at a rate of 1.10 per cent. Every district with a property base of $40,000 would raise $440 at this tax rate. The state
plan, *Private Wealth* did not actually challenge the state property tax or ask the courts to endorse any particular school finance scheme. It merely asked the judges to forbid the creation of government units with "similar tasks, but differing capacities to spend."\(^{21}\)

University of Texas Professor of Law Charles Alan Wright, renowned constitutional scholar, and lawyer for the state of Texas before the Supreme Court in *Rodriguez*, found one *Private Wealth* solution politically unfeasible—the redrawing of school district lines to include an equal amount of taxable property. Wright said, "fortunately no one takes this possibility—compared to which legislative reapportionment is child's play—seriously."\(^{22}\)

In response to inquiries from Senator Walter Mondale, Coons, later brought the future workability of DPE into question before the Senate Select Committee's hearings on Equal Educational Opportunity in 1972: \(^{23}\)

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would then add to district funds $110 per pupil, to raise spending to the guaranteed level of $550. A district with $60,000, that taxed itself at the same rate of 1.10 per cent, would yield $660 in property taxes. The extra $110 would be "recaptured" by the state. If the district with $40,000 property value per pupil decided to raise its rate to 1.65 per cent, it would be allowed by the state to spend more per pupil, at this rate the state would guarantee $825 per pupil and would contribute therefore $165 per pupil to district funds. A richer district, with $60,000 property value per pupil, taxing at 1.65 per cent would receive a yield of $990 per pupil, $110 would still have to be returned to state coffers. Mark G. Yudof, David L. Kirp, and Betsy Levin, *Educational Policy and the Law*, 3rd ed. (St. Paul: West Publishing, 1992) 603. Yudof referred to the Levin article, "Alternatives to the Present System of School Finance, Their Problems and Prospects," *Georgetown Law Review* 61 (1973): 879, 919-920.

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\(^{22}\) Brief for Appellants, 14. Mark G. Yudof and Daniel C. Morgan, "*Rodriguez v. San Antonio Independent School District*: Gathering The Ayes of Texas—the Politics of School Finance Reform," *Law and Contemporary Problems: Future Directions For School Finance Reform* 38, no. 3 (Winter-Spring 1974): 399. Texas hired Wright when the state was defeated in federal district court and finally realized the "gravity" of the case. The defense earlier held the position that the suit was frivolous and reporters at the *Rodriguez* federal district trial left the proceedings convinced the state had won. Yudof labeled Wright, his opponent in front of the Supreme Court, a "renowned constitutional scholar."

(Senator Mondale) But there is just the reverse incentive, however, for the rich district. Are the politicians there going to say, "Let's try harder so more of our money will go somewhere else." And how is that going to work?

(Dr. Coons) We have no idea.

(Senator Mondale) How would you like to try it?

(Dr. Coons) I would like very much to.

It seems to me, looking at today's pattern of spending, Senator, we see poorer districts trying much harder than rich districts. We see them willing to tax themselves to the bone in order to support spending at one-third or one-fourth of the level of the rich districts.

Rich districts are in the habit of saying, "look how much we care about education: we spent so much here." It would be interesting to find out whether they really do care and are willing to tax themselves at the same rate as the poor districts for that same level of expenditure.

Both Mondale and Coons recognized that the recapture of funds from richer districts, labeled by the opposition as "Robin Hood", might prove unpopular. For a property-rich district to raise $1,500 per pupil and, by law, to be allowed to spend only $1,000 in their own schools, was deemed by the Private Wealth author as "cosmetically bad politically." Mondale predicted "a big meeting the night you proposed that." Coons then offered other egalitarian solutions, including removing industrial and commercial property from the local tax base. He also suggested that states might replace dependence on property taxes with a state income tax—it was a "better reflection of wealth." In dealing with the disincentives of the fiscal neutrality standard for property-rich districts, Coons suggested that finance equalization could raise state taxation to the point where "most people would not be able to afford both the support of public education and private education": 24

A district could not simply drop out, as it were; it would have to stay in the system. Being in and paying for that system, people are going to use it—they are

24 Ibid., 6883. See Amicus Brief by Thirty State Governments for Appellants: 26a-27a.
going to have to carry the burden of that local system, and so there is a powerful incentive to stay in it and make it work as a public system.

For the defendants, Coons' statements were further proof that the new fiscal neutrality standard was untested in the political arena and spelled the death knell of the public schools.

In his brief, Wright admitted that Private Wealth was a "splendid scholarly achievement" . . . a "catalyst for wide scale rethinking of the problems of financing public education." But, the adoption of a fiscal neutrality solution would be disastrous:25

The alternative, centralized decisions on a statewide basis about spending levels, would destroy local autonomy, with all the values this brings to the system. It would discourage experimentation and promote uniform mediocrity. It would be a crippling blow to education at a time when it is already under heavy pressure from those who resist desegregation.

Rodriguez would be the first and only fiscal neutrality case to reach the Supreme Court.

"Rarely in the history of the Republic has a novel idea proceeded in such a short time from announcement by imaginative scholars to enshrinement in the Constitution of the United States", Wright later argued. It is not the "custom of courts" to let "assumptions substitute for proof when they are asked to decide great issues."26

**Fiscal Neutrality Provides Rodriguez Plaintiffs with a New Definition of Equal Educational Opportunity**

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25 Brief for Appellants: 8, 46.
26 Brief for Appellants: 8, 15-17. Wright points out in his brief that the equal protection attack on state school finance systems began with the publication of a short notice by Arthur E. Wise in the Administrator's Notebook in February 1965 entitled, "Is Denial of Equal Educational Opportunity Constitutional?" Wise thought the DPE standard of fiscal neutrality was unconstitutional and recommended the full state funding solution. Revenues would be raised by a statewide property tax, or some other state tax, and would then be distributed on a equal per-pupil basis, or some measure of educational need. Needs mentioned by Wise were differences in high school and elementary education costs, in transportation requirements, in provision for special education, and in cost of living. See Arthur Wise, "School Finance Equalization Lawsuits: A Model Legislative Response, Yale Review of Law and
The first victory for the theory of fiscal neutrality was the *Serrano v. Priest* decision by the California Supreme Court on August 30, 1971, the state where Coons taught and practiced law. The constitutional argument, accepted for the first time by any court, was that education is a "fundamental interest" and wealth a "suspect classification" equal to that of race. Since equal educational opportunity in California depended on the wealth of the district in which a child lived, the court decided that such a system was unconstitutional under the equal protection clause. To reach the *Serrano* finding, California judges applied the suspect classification/fundamental interest test

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*Soc. Action* 2 (1971): 123. The major arguments against the Wise solution were the loss of local control over education and the problem of judicial oversight.

27 *Serrano v. Priest*, 5 Ca. 3d 584, 487 P.2d 1241, 96 Cal. Rptr. 601 (1971). *Serrano* was first filed August 23, 1968 by a group of parents from a property-poor school district. They claimed they had been denied equal access to education because of the state’s reliance on the property tax. The trial court granted a demurrer in *Serrano*. This is a motion at the start of litigation which accepts as true all the factual allegations on the part of the plaintiff. The California Supreme Court reversed the granting of the demurrer and the case was remanded for retrial to establish factual accuracy. See Porter, "Rodriguez, The "Poor" and The Burger Court: A Prudent Prognosis," 204.

28 *Time* called *Serrano* "the most far-reaching court ruling on schooling since *Brown v. Board of Education* in 1954." *Time*, September 13, 1971, 43.

29 The California court based its decision on the Warren Court equal protection voting and criminal rights cases. See *Harper v. Virginia Board of Elections*, 383 U.S. 663 (1966) (the use of poll taxes in state elections is unconstitutional), and *Griffin v. Illinois* 351 U.S. 12 (1956) (transcripts must be provided the indigent on the first level of a criminal appeal). The California Supreme Court found education of "far greater social significance than a free transcript or a court-appointed lawyer." *Serrano v. Priest*, 487 P. 2d 124 (1971). District Judge Sullivan accepted the three-part formula of the Warren Court new equal protection doctrine: "if a legislative classification is based upon 'suspect' characteristics, and it concerns a 'fundamental' interest, then it is invalid in the absence of a countervailing state interest that is 'compelling.'" Kenneth L. Karst, *"Serrano v. Priest": A State Court's Responsibilities and Opportunities in the Development of Federal Constitutional Law," California Law Review 60 (1972) 721-722. The finding of education as fundamental was new law and Judge Sullivan recognized this in his decision but cited *Shapiro v. Thompson* 394 U.S. 618 (1969) as moving in that direction. "Plaintiffs' contention—that education is a fundamental interest which may not be conditioned on wealth—is not supported by any direct authority." But in a footnote quoting *Shapiro*, Sullivan found justification for his *Serrano* opinion: "We recognize that a State has a valid interest in preserving the fiscal integrity of its programs. It may legitimately attempt to limit its expenditures, whether for public assistance, public education, or any other program. But a State may not accomplish such a purpose by invidious distinctions between classes of its citizens. It could not, for example, reduce expenditures for education by barring indigent children from its schools." (In *Shapiro* the Supreme Court invalidated minimum state residency requirements for welfare,)
recently enunciated by the Supreme Court. The success of *Serrano* and its new fiscal neutrality litigation strategy inspired the “second wave” of school finance cases between 1971 and 1973, of which *Rodriguez* would be the only one to reach the Supreme Court. *Rodriguez*, therefore, is considered a post-*Serrano*, school finance litigation. *Serrano* was parallel to *Rodriguez* in three significant ways, it provided the “new equal protection” argument by which Gochman would argue the Texas case, it provided a new equal educational opportunity standard that was more convincing to judges than the “education needs” yardstick, and it was a public interest lawsuit managed a group of lawyers, whose intent was not necessarily to help the children of the plaintiff John Serrano, but to overturn the school finance system of California and help all the school children living in property-poor districts.

*Serrano* was a public interest lawsuit brought by UCLA law professor Harold Horowitz and Sidney Wolinsky, a lawyer who eventually joined the San Francisco Neighborhood Legal Assistance Center, supported by the Office of Economic Opportunity (OEO). “Two lawyers with a couple of ideas and no clients,” Wolinsky and Horowitz approached Derrick Bell, at the Western Center for Law and Poverty, the OEO

30 See *Shapiro v. Thompson* (394 US. 618 (1969). The California Supreme Court “wisely”, however, “refrained from committing the state to a specific funding program to equalize the resources available to each school district.” The question in the *Serrano* trial in December 1971 was, on remand to the lower court, what remedy would the judge recommend. Sugarman and Coons filed an amicus brief in *Serrano*, suggesting California adopt the fiscal neutrality standard. Civil libertarians felt the idea went too far and fell too short. Critics argued that Coons and company were wrong when they contended that the federal constitution prescribes equal tax dollars per pupil for equal tax effort. Likewise, the Coons attack on school finance might prove to be too narrow. There were other financial maldistributions of the state revenue that were equally significant and offensive. See Ferdinand P. Shoettle, “The Equal Protection Clause in Public Education,” *Columbia Law Review* 71. no. 8 (December 1971): 1411-1412.
regional center for southern California, to join in their effort for school finance reform.

Coons later joined in the suit.31

Plaintiff John Serrano was a social worker in East Los Angeles, a poor Chicano neighborhood. In order for his children to attend better schools, Serrano was forced to move to a wealthier neighborhood. After meeting Bell at a dinner party, Serrano agreed to be a part of a class-action suit (ten parents and twenty-seven children) on behalf of all California public school children. When the plaintiffs signed the papers at OEO regional center, “it was the lawyers’ case.”32 Public interest lawyers filed Serrano in state, rather than federal court because they hoped to win a favorable ruling there in order to garner public support. Also, the state courts, and the California Supreme Court in particular, they believed, would be more receptive to constitutional reform.

The Texas Supreme Court delayed its decision in the Rodriguez case until Christmas 1971, hoping the reluctant legislature would act, although this never happened. Serrano, in conjunction with a 1967 District of Columbia case, Hobson v. Hansen, became a landmark equal educational opportunity precedent for Arthur Gochman and his Mexican American clients. Also, the Private Wealth fiscal neutrality standard would

32 Id. at 335. In 1964, the Office of Economic Opportunity (OEO) began a legal assistance program for the poor. In the tradition of the “historic function of legal aid societies,” OEO gave legal advice to indigent clients and brought cases to bring about “law reform”, a condition of its charter. School finance reform was seen by OEO lawyers as a way to reduce poverty in the late 1960s and early 1970s. Besides neighborhood and local centers, OEO had two national centers: the Harvard Center for Law and Education of which both David L. Kirp and Mark G. Yudof, later Rodriguez plaintiff counsel were associated, and the Youth Law Center in San Francisco. When OEO funding for the Serrano case ran out, the Ford Foundation sponsored Public Advocates, Inc., which later became the chief counsel in the California case.
become the central argument of the plaintiffs in the Texas school finance case, as it did in other states such as Minnesota, Michigan, New Jersey, Arizona, and Kansas.33

After Serrano, between 1971 and 1973, nine lower district court fiscal neutrality decisions were handed down, of which Rodriguez was one; in many instances, the plaintiffs succeeded with the assistance of the Lawyers' Committee for Civil Rights Under Law, a public interest law firm.34 This "second wave" of school finance litigation followed Serrano's equal protection reasoning. The OEO continued to challenge school finance systems on the basis of a denial of equal protection rights under the Fourteenth Amendment. 35

33 Brief for Appellants: 13. See also Amicus Curiae Brief for Representatives of 30 States: 29a. Hobson v. Hansen 269 F. Supp. 491, 496 (DC 1967), aff'd en banc sub. nom, Smuck v. Hansen, 408 F2d 175 (DC Cir 1969). In this federal case, Judge Skelly Wright declared education a "critical personal right" and evaluated the fairness of such educational inputs as per pupil expenditures, teacher-pupil ratios, teacher assignments and student tracking. Wright found that poor black children in the District of Columbia had been denied equal educational opportunity. The case was considered to be a racial as well as a wealth precedent for Rodriguez. Judge Wright surprisingly cited Plessy as a precedent for the equalization of school funds and services for DC children: "To the extent that Plessy's separate but equal doctrine was merely a condition the Supreme Court attached to the states' power deliberately to segregate school children by race, its relevance does not survive Brown. Nevertheless, to the extent the Plessy rule, as strictly construed...is a reminder of the responsibility entrusted to the courts for insuring that disadvantaged minorities receive equal treatment when the crucial right to public education is concerned, it can validly claim ancestry for the modern rule the court here recognizes." Quoted in Amici Curiae Brief for American Civil Liberties Union, American Jewish Congress, Anti-Defamation League of B'Nai B'rith, National Coalition of American Nuns, National Catholic Conference for Interracial Justice, National Council of the Churches of Christ in the U.S., Scholarship, Education, and Defense Fund for Racial Equality, Inc., the Southwest Council of La Raza, and United Ministries in Public Education: 16. 34 The Lawyers' Committee for Civil Rights was formed in 1963 with the support of the American Bar Association in order to assist the NAACP with desegregation lawsuits. The Committee established a special project concerning the inequality of public school finance. It provided technical assistance and became a clearinghouse for litigation information. In a directory prepared by the Committee in 1972, 28 voluntary organizations, such as the Syracuse University Research Corporation Policy Institute, and the National Education Finance Project, were listed as active in the school finance reform movement. Nineteen organizations were involved in information gathering, nine in litigation, and twelve in research. The Ford Foundation also funded many projects in the finance reform movement such as training PhDs at Syracuse University in the economics and financing of education. Weisbrod, Handler, and Komesar, Public Interest Law, 331-333. 35 These "second wave" cases are: Parker v. Handel, 344 F. Supp. 1068 (D. Md.1972); Rodriguez v. San Antonio Indep. School Dist., 337 F. Supp. 280 (WD. Tex. 1071, rev'd 411 U.S. 1 (1973); Van Dusarz v. Hatfield, 334 F. Supp. 879 (D. Minn 1971); Hollins v. Shofstall, Civ. No. C-253652 (Ariz. Super. Ct. June 1, 1972) rev'd, 110 Ariz. 88, 515 P. 2d 590 (1973); Caldwell v. Kansas, Civ. No. 50616 (Johnson County Dist. Ct. Kan., Aug. 30, 1972); Milliken v. Green, 389 Mich. 1, 203 N.W. 2d 457 (1972), vacated, 390 Mich. 389, 212 N.W. 2d 711 (1973); Robinson v. Cahill, 118 N.J. Super. 223, 287 A. 2d 187 (1972),
In addition to *Serrano, Van Dusartz v. Hatfield*, decided in 1971, was the most frequently cited fiscal neutrality case in the Texas district court’s opinion.\(^{36}\) *Van Dusartz*, the Minnesota “second-wave” finance case, illuminates how public interest lawyers managed school finance litigation. Plaintiffs were tutored in the fine points of school finance law by the Lawyers’ Committee for Civil Rights Under Law, a public interest law firm in Washington, and by John Coons and Michael A. Wolff, the lead counsel in *Van Dusartz*. On October 29, 1971, the Committee circulated a detailed letter from Wolff to “all Attorneys Interested in School Finance Litigation” that became a blueprint in federal procedural strategy. Echoing the *Serrano* pattern, Wolff recommended that school funding cases be brought in state rather than federal court.\(^{37}\)

\[\ldots\] The *McInnis* Problem. \ldots he wrote, precludes cases brought that are based upon the educational needs of the children. \ldots However, it needs to be emphasized that.


\(^{36}\) *Van Dusartz v. Hatfield*, 334 F. Supp. 870 (D. Minn. 1971). Footnote one of *Rodriguez v. San Antonio ISD* 337 F. Supp. 281 (1971) reads: “*Serrano* convincingly analyzes discussions regarding the suspect nature of classifications based on wealth, and *Van Dusartz* points out that in this type case “the variations in wealth the State created. This is not the simple instance in which a poor man is injured by his lack of funds. Here the poverty is that of a governmental unit that the State itself has defined and commissioned.” The Texas district court also quotes from *Van Dusartz* as a precedent for *Rodriguez* in footnote seven: See *Rodriguez v. San Antonio Independent School District* 337 F. Supp. 284 (1971).

\(^{37}\) As the Court said in *Van Dusartz v. Hatfield*. \ldots By its own acts, the State has indicated that it is not primarily interested in local choice in school matters. In fact, rather than reposing in each school district, the economic power to fix its own level of per pupil expenditure, the State has so arranged the structure as to guarantee that some districts will spend low (with high taxes) while others will spend high (with low taxes.) To promote such an erratic dispersal or privilege and burden on a theory of local control of spending would be quite impossible.”

\(^{37}\) Amicus Curiae Brief by Thirty States for the Appellants, 6a, 1a-2a. The Wolff memo reveals that in 1971 there were two other school finance cases pending in Texas, *Fort Worth Independent School District v. Edgar*, and *Guerra v. Smith* (A-69-CA-9, July, 1971). In *Guerra*, the plaintiffs sought a declaratory judgment from the United States District Court of the Western District of Texas that the state school finance system violated their equal protection rights because the property poor districts received a lack of state funds and therefore, an inferior education. The plaintiffs also claimed that although they paid a higher tax rate, they still had less money per pupil to spend. U.S. District Judge Jack Roberts agreed that the Plaintiffs’ case was persuasive and indicated that the State was not providing substantial equal educational opportunities to all it citizens, but *McInnis* did not allow him to provide relief. The case was dismissed for failure of the plaintiffs to state a proper constitutional claim. The Fort Worth I.S.D. case was litigating the question of the validity of the state’s economic index.
despite the fact that the U.S. District Court in *Van Dusartz* ably distinguished *McInnis* and *Burruss*, the greatest dangers to cases brought in federal courts is that the courts will consider *McInnis* and *Burruss* to be binding precedent. Not every court will be willing, as the Minnesota federal court was, to draw the kind of fine line needed to distinguish *McInnis* and *Burruss*. For that reason alone, these cases generally should be kept in state courts.

Wolff also suggested that school finance lawyers stay out of federal court because of the “abstention problem” posed by a Florida second-wave finance case, *Askew v. Hargrave*. The Supreme Court might abstain from deciding school finance cases, particularly if a complaint was based on state laws and constitutions, the Justices would wait for the state courts to rule on the question first. It a case aimed at the higher court based its claim of denial of equal protection rights under the federal constitution, there might be some protection against abstention, but there was no guarantee that the high court might not intervene, even in these instances.

Wolff recommended bringing funding cases as declaratory relief actions instead. Lawyers would ask the judge to decide only that the constitutional rights of the plaintiff school children were being denied by the state’s system of school funding. Federal procedure required that appeals from three-judge district courts proceed directly to the Supreme Court. But he noted, “case law is nearly unanimous that where only declaratory relief is sought, a three-judge court cannot be convened.” If the relief were denied by the federal district court, the appeal went to the Court of Appeals, instead of the Supreme

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*Hargrave v. Kirk*, 313 F. Supp. 944 (N.D. Fla. 1970), vacated on other grounds, sub. nom. *Askew v. Hargrave*, 401 U.S. 476 (1971). This doctrine allowed federal courts to postpone proceedings in order to provide state courts the time to settle constitutional disputes involving state law. *Hargrave* was the first second wave school finance case won in lower court. The Florida federal district court found a Florida statute that set a property tax limit unconstitutional because it was a discrimination based on wealth. It prevented poor counties, which needed to tax more than the legal limit, the opportunity for an expensive public education.

Court. The disastrous result of a McInnis and Burruss summary affirmance could then be side-stepped.

Resort to declaratory relief was a modest civil rights proposal, Wolff asserted. In these situations lawyers ask a federal judge to enjoin the enforcement of a discriminatory state statute. The judge is, in essence, compelling the state legislature, rather than the court, to go to work. The alternative, forcing a reluctant judiciary to tangle with local school districts, a nonjusticiable problem as messy as reapportionment, was avoided.40 If the state legislature refused to act, it was better to amend the plaintiff’s complaint and then appeal to a three-judge federal court to enjoin the statutes than to “ask the court to bite off more than it probably feels it can chew.”41

The federal procedure strategy followed in Van Dusartz and Serrano, Wolff predicted, was the most effective for school funding litigation: 42

As the Van Dusartz case indicates, probably the best thing that can happen to your lawsuit is for the defendants to move to dismiss for failure to state a cause of action. Then the claims of the plaintiffs are in roughly the same posture as in Serrano which arose on a demurrer. In Van Dusartz, Judge Lord assumed the truth of plaintiffs’ allegations in testing the cause of action. Thus he in effect said that if plaintiffs’ allegations are true, the financing system is unconstitutional.

40 Legal scholars worried about the “justiciability” of the school finance cases. How could judges decide what equal educational opportunity was when even lawyers and education scholars could not agree. Critics of activist judges also questioned the propriety of judicial interference in local and state fiscal policies. Why, they asked, was education more important than other services which are provided government? Would not the equalization of public school funds lead to demands for “adequate police patrols, prompt responses to fire alarms, regular garbage pick-ups, mosquito abatement, neighborhood parks and playgrounds, and safe passage to schools?” In addition, if education was a fundamental right, was there not also a right to other life sustaining services, such as food, shelter, and health care? A federal judge in a Maryland second-wave school finance case refused to differentiate between education and other services. . . ”Public welfare. . . undoubtedly would be viewed by a large number of under-privileged and disable citizens as a matter of more fundamental and immediate concern than either health or education.” Parker v. Mandel 344 F. Supp. 1068, 1077 (D. Md. 1972). Quoted in Porter, “Rodriguez, the “Poor and the Burger Court: A Prudent Prognosis,” 209.
41 Amicus Curiae Brief by Thirty States for Appellants at 3a -9a.
42 Ibid., 8a.
The judge’s action in *Van Dusartz* became a nonappealable declaratory judgment and his opinion was the constitutional standard that must be followed by the state legislature. The district judge advised in the form of a memorandum and court order, denying the defendant’s motion to dismiss. No appeal was available from the order, unless the judge approved.\(^{43}\) Alternatively, civil rights litigants might ask a judge to retain jurisdiction of a case until the legislature acts. This retained jurisdiction would not ultimately deny defendants the right of appeal, Wolff advised, since federal law states that such declarations have the force and effect of a final judgment or decree, and are reviewable.\(^{44}\)

Sarah Carey, the Assistant Director of the Lawyers Committee for Civil Rights Under Law, testified before the 1972 Senate Select Committee on Equal Educational Opportunity. She provided further insight into the management of second-wave school finance cases by public interest law groups. In the early 1970s, the Lawyers Committee proposed to coordinate and stimulate lawsuits around the country and also, to furnish informed counsel for litigation. The *Serrano* success, explained Carey, was a “real mindblower.” It ushered in a new era of reform, but civil rights lawyers found themselves inadequately prepared for future suits. This could “prejudice the consideration of the issues before the Supreme Court.”\(^{45}\) She noted that suits were “outrageously expensive.” The follow-up suit in the District of Columbia to enforce the *Hobson* decision, for example, cost the appellant’s side between $200,000 to $300,000.

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\(^{43}\) Confirmation for this strategy can be found in *Moore’s Federal Practice*, Paragraph 12.14 note 16.

\(^{44}\) Ibid., at 9a. The Declaratory Judgment Statute 28 United States Code 2201.

\(^{45}\) Select Committee on Equal Educational Opportunity, United States 92nd Congress, 2nd Session., “The Financial Aspects of Equality of Educational Opportunity and Inequities in School Finance,” 6867. “Lawyers” were “difficult to control,” Carey complained, and often “hide behind their clients.” Senator Mondale commiserated, admitting that “I was once a lawyer myself.” See Amicus Curiae Brief by Thirty States for Appellants at 10a -22a.
Carey asked the Senate for more federal intervention in education to implement equal educational opportunity. *Serrano* did not require states to alter district boundaries as long as funding inequalities were corrected. The cardinal goals of school finance litigation were the merger of property-poor districts with their richer neighbors and the further integration of still racially segregated, and geographically isolated districts. Eventually, Carey anticipated, states would also have to devote greater resources to achieve equalization.

The federal government could foster salutary educational change by enacting enforcement tools to encourage states to comply with court decisions. Carey asked that federal funds be tied to state performance and that Title I allocations be dedicated both to the educational needs of the poor and directed to continuing research on compensatory education. What was required was new federal legislation along the lines of the Voting Rights Act—this would place enforcement of finance reform in the hands of the Attorney General.

With strategy set and powerful allies, plaintiff lawyers in “second-wave” finance cases around the country intended to avoid the conservative Burger Court and keep funding cases in state or lower courts. Arthur Gochman, however, “with a streak of Texas orneriness and only a slight acquaintance with the noted law school professors and civil rights attorneys involved in most of the other school cases,” did not pursue the Lawyers Committee’s recommended strategy and filed *Rodriguez* before a three-judge federal district court in San Antonio, a forum from which the appeal would go directly to the Supreme Court. Public interest lawyers, knowing of the previously plotted legal
strategy, worried over whether the Texas school case would become a "tombstone" or a "milestone" in the "second wave" of equal educational opportunity reform.\textsuperscript{46}

In June 1971, after a delay of two years Arthur Gochman, now assisted by Texas Professor of Law, Mark G. Yudof, prepared for trial. Gochman taking his arguments and equity standard from \textit{Serrano}, rested \textit{Rodriguez} on three major constitutional claims: education was a fundamental right requiring equal protection under the Fourteenth Amendment, the poor families of Texas constituted a "suspect class" requiring special judicial protection against discrimination, and Mexican Americans were a distinct racial and ethnic group, which should be included, like blacks, in the Supreme Court's "suspect class" category. If the federal district court accepted any one of these three claims, it was incumbent upon the state to prove a "compelling" reason to justify the Texas school finance system. Gochman knew, according to Peter Irons, that these constitutional claims rested on "shaky" precedent; he intended to support them, therefore, with "rock-solid" evidence. The plaintiffs were willing to accept any new school finance plan as long as it meant the parameters of the \textit{Private Wealth} standard of fiscal neutrality. The new system established by the Texas legislature should not discriminate on the basis of wealth other than the wealth of the state as a whole.\textsuperscript{47}

The lawyers for the state countered that Texas provided all its children with an adequate minimum education and that the kind of finance plan the plaintiffs sought was "socialized education."\textsuperscript{48} In the federal district court trial, Yudof recalls, it was the

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\textsuperscript{48}Yudof and Morgan, "\textit{Rodriguez} v. \textit{San Antonio Independent School District: Gathering the Ayes of Texas—The Politics of School Finance Reform."," 393. For example, prior to the trial, Dr. Jose Cardenas, Superintendent of the Edgewood School District, testified that the Edgewood parents and children had high
defendant's strategy to "expose the frivolous nature of the lawsuit and the unsavory motives of the plaintiffs' attorney and expert witnesses."\textsuperscript{49} The Constitution of the United States did not require that the states spend equal funds on their children, the defense contended. Inequality of wealth had always existed between the citizens of the various states and regions. The result was that higher taxes were levied and collected in some areas for all state purposes, including education.\textsuperscript{50}


The Battle of the Data

The most challenging problem for every civil rights lawyer involved in a school finance case was his necessary explanation, to an uncomprehending court, of the intricacies of the state's school finance system. During the school finance reform movement, state judges not only had to become versed in the Supreme Court's new equal protection decisions, but they also had to maneuver the labyrinth of state finance and tax systems. The first task of the Edgewood School District complainants was to prove to the federal district court that the Texas school funding system denied poor and minority educational aspirations but unequal educational opportunity because of a lack of resources. Yudof reports that the deposition ended "abruptly" when Cardenas proposed an "egalitarian" school finance model. The Assistant Attorney General responded: "There is a name for that. I have no further questions."\textsuperscript{49} Ibid., 392-393. Representing Texas in the District suit were Crawford C. Martin, then Attorney General of Texas and Pat Bailey, Assistant Attorney General. See Rodriguez Appendix at 231-233. In his deposition prior to the trial, Richard Avena, Southwestern Regional Director for the United States Civil Rights Commission, gave testimony on the history of racial discrimination in Texas: "In the field of education, in the past there have been segregated schools for Mexican-Americans in Texas. Wherever Mexican-Americans have lived in large numbers in Texas, there have been discriminatory practices in housing. At the time the school district lines that we are concerned with were being drawn, Texas courts were enforcing deed restrictions that barred Mexican-Americans from any but the poorest neighborhoods. And, in the field of employment, in Texas and throughout the Southwest, Mexican-Americans have been purposefully excluded from the better paying jobs in professional, technical, managerial, and craft occupations. The Defense counsel, observed Yudof, ignored the civil rights issues presented by Avena's testimony and asked what he had been doing in South American during his youth and with whom he had associated. "Avena dryly replied that he had been a Mormon missionary."\textsuperscript{50} Appendix to Brief for Appellees, 38.
school children their rights to equal education opportunity under the Fourteenth Amendment.

At the time of the Rodriguez trial, all public schools in Texas were dependent upon federal, state, and local sources for revenue. In the 1970-71 school year, the federal government contributed ten percent of overall expenditures—the rest derived from local property taxes and the two state foundation programs, the Available School Fund and the Minimum Foundation Program (MFP). In the same year, the Available School Fund allocated $296 million in the form of a flat grant to every school district based on the average daily per capita attendance figures from the previous year. This Available School Fund allotment was then subtracted from the funds it received from the Minimum Foundation Program. The total cost of the Minimum Foundation Program in Texas in 1970-1971 was in excess of one billion ($1,095,202,000); state coffers contributed $906,741,000 or 80 per cent of the program; local school districts contributed 20 per cent. The state’s contribution to the Minimum Foundation Program came from general revenue funds.

The Local Fund Assignment reflected the amount that each Texas school district was expected to contribute to the Minimum Foundation Program. It amounted to $188 million in the 1970-1971 school year. An economic index determined each county’s contribution, and the percentage varied with that county’s percent of statewide taxpaying ability. In turn, the percentage of the school district’s contribution to the county

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51 Federal funds are not distributed on a per capita basis but the Texas Constitution required that the Available School Fund be dispersed on a per capita basis. Most of the school finance data in this section is derived from Rodriguez v. San Antonio Independent School District 337 F. Supp 281-282.
allotment was based on the property value in the school district, compared to the value of property in the county.\textsuperscript{53}

Texas law allowed local districts to levy and collect ad valorem property taxes to provide for their share of the Minimum Foundation Program, to dispense with any bonded indebtedness for capital expenditures, and to pay for any spending above the minimum. All tax levies had to be approved by a majority of property-tax payers within each district, and the Texas Constitution guaranteed that all raised revenue would be spent within the district collected.\textsuperscript{54}

The strategy of the plaintiffs/complainants in the Texas district court case, according to Yudof, was to provide factual evidence that the state school funding system denied members of the particular class of poor and minority school children their rights to equal educational opportunity. The *Rodriguez* federal district court agreed with the plaintiffs that the Texas school finance system "discriminates on the basis of wealth by permitting citizens of affluent districts to provide a higher quality education for their children, while paying lower taxes." In finding for the plaintiffs, the three-judge panel directed the Texas legislature to adopt the principle of "fiscal neutrality"—"the quality of public education may not be a function of wealth, other than the wealth of the state as a whole." The *Serrano* judicial standard was appealing to the judges because it "does not involve the Court in the intricacies of affirmatively requiring that expenditures be made

\textsuperscript{53} Brief for Appellants at 3. The validity of the economic index was a point of dispute in the district court case. This was also the question litigated in *Fort Worth Independent School District v. J.W. Edgar* (N.D. Tex., Fort Worth Div.) See *The Challenge and the Chance, Report of the Governor’s Committee on Public School Education* (1968): 58-68 on this point.

in a certain manner or amount. " The state could adopt any funding scheme it desired, as long as "the program adopted does not make the quality of public education a function of wealth other than the wealth of the state as a whole, as required by the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution." The state legislature and education officials were granted two years to bring the Texas school finance system into compliance.\textsuperscript{55}

Lawyers for Texas pointed out that the state's Minimum Foundation Program provided an adequate minimum education. The MFP was in agreement with the Fourteenth Amendment because it was not "enacted for the purpose of denying to any person the equal protection of the laws or to abridge the privileges or immunities of any citizen." Each independent school district varied from the other in the amount of total funds available for school buildings and maintenance by "virtue of the respective will of the ability of their respective inhabitants to vote higher school taxes." Also, what the plaintiffs sought was "socialized education."\textsuperscript{56} The judges responded that "[e]ducation like the postal service has been socialized, or publicly financed and operated almost from its origin. The type of socialized education, not the question of its existence, is the only matter currently in dispute."

The federal district court did not consider whether the funds provided for education by the state for the year 1970-1971 were adequate—$296 million allocated on a per capita basis from the Available School Fund and $1 billion from the Minimum Foundation Program. State funds were being distributed unconstitutionally—that was all that was needed. True, the judges argued, the federal government provided ten per cent


\textsuperscript{56}Appendix: 37-38.
of the overall public school expenditure in Texas, and these funds had a moderately
equalizing effect. The Rodriguez court did not agree with the defendants that this federal
infusion substituted for the lack of state aid, instead, they declared, federal funds did not
compensate for "state discrimination," and "the acts of other governmental units" did not,
in turn, permit the state to discriminate.\textsuperscript{57}

Joel S. Berke, of the Policy Institute of Syracuse University, provided key
evidence for the property-poor Edgewood school district.\textsuperscript{58} Surveying 110 school
districts in Texas, he grouped them into categories of community wealth—the measure
used was the equalized per-pupil value of property in the district.\textsuperscript{59} Berke testified that
the wealthiest districts in the state (above $100,000 in taxable property per pupil) spend

\textsuperscript{57}The court pointed out that although the property-poor Edgewood school district received the highest
federal revenues per pupil of any San Antonio ISD ($108) and Alamo Heights, the richest district, received
only $36, Edgewood still had the lowest combined local-state-federal revenues per pupil ($356) and Alamo
Heights had the highest ($594). Quoting the District of Columbia case, Hobson v. Hansen, the judges
recognized that "federal funds were designed primarily to meet special needs in disadvantaged schools,
these funds cannot be employed as a substitute for state aid without violating the Congressional will." The
district court pointed to other state cases in which judges had interpreted Title I of the 1965 Elementary and
Secondary Education Act as not allowing reductions of state aid to "impacted" areas receiving federal
funds. In the preamble to Title I, Congress declared that it was the policy of the United States to provide
federal funds "to local educational agencies serving areas with concentrations of children from low-income
families to expand and improve their educational programs by various means (including preschool
programs) which contribute particularly to meeting the special educational needs of educationally deprived
children." (20 USC Section 241a). Texas federal education funds, the Rodriguez court concluded, were
therefore intended by Congress only to be used for "extraordinary services at the slum schools, not merely
to compensate for inequalities." "Performance of its constitutional obligations must be judged by the
state’s own behavior, not by the actions of the federal government." Rodriguez v. San Antonio Independent

\textsuperscript{58} Berke was an Adjunct Political Science Professor at Syracuse and serving as Director of the Educational
Finance and Governance Program at the Syracuse University Research Corporation, a nonprofit research
institute, affiliated but independent of Syracuse. For two years before Rodriguez, he was in charge of a
two-year study supported by the Ford Foundation that investigated allocation of federal and state aid in
education. He was executive director of a study for the United States President’s Commission on School
Finance, and a Guest Scholar at the Brookings Institution researching the political and economic aspect of
equal educational opportunity, also funded by the Ford Foundation. He also authored, for the United States
Senate Committee on Equal Educational Opportunity, a study on the "Financial Aspects of Equality of

\textsuperscript{59} Equalized tax rates are tax rates adjusted for the differences between assessed and market value. The
difference is expressed as a proportion of assessed value to full market value. The proportion is called the
assessment ratio. The assessment ratio is then multiplied by the tax rate, and the result is a tax rate that has
been equalized. See Berke, Carnevale, Morgan, and White, "The Texas School Finance Case: A Wrong in
an average of $815 in state and local revenues per pupil at the equalized tax rate of $.31 per $100 of assessed valuation, including $205 in funds from the state. This top school district category had a median family income in 1960 from $5900, with an attendance ratio of 8 per cent minorities. In contrast, the poorest districts (below $10,000 in taxable property per pupil) spent only $305 per pupil, but taxed themselves at a higher equalized tax rate ($.70 per $100). This included a mildly equalizing $243 payment from the state. The poorest districts also had the lowest median family income, $3,325 and the highest attendance of minority pupils (79%).

Gochman contended that the Berke findings confirmed that there was an almost “perfect state-wide correlation between the size of the tax base and the amount of educational dollars expended per child”, and similarly, that poor people generally resided in poor districts. The three-judge district court found the plaintiff’s argument based on the Berke research persuasive: “As might be expected, those districts most rich in property also have the highest median family income and the lowest percentage of minority pupils, while the poor property districts are poor in income and predominately minority in composition.” The Court also noted that in 1967-1968 the market value of the property per student in the San Antonio school districts varied from $5,429 in Edgewood to a high of $45,095 in the property-rich district of Alamo Heights. In accordance with the other state findings, taxes were the highest in Edgewood (1970 equalized rate of

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61 Brief for Appellee: 11-12. For the State as a whole Berke found that the ratio of the highest expenditure ($5,900) to the lowest ($264) was 20 to 1.
$1.05 per $100 valuation) and the lowest in Alamo Heights (1970 equalized rate of $. 85 per $100 valuation). 62

In its judgment the federal district court also found that the financial assistance from the combined state-local contributions did not equalize the great disparities between Edgewood and Alamo Heights ($543 per pupil to $231 per pupil). The judges maintained that “the current system tends to subsidize the rich at the expense of the poor, rather than the other way around.” The school finance system, the plaintiffs contended, was a “tax more spend less system;” it discriminated against the poor and triggered the primary “wealth” requirement of the Warren Court’s new equal protection. This finding, therefore, required the “strict scrutiny” by the federal judges. The state of Texas “in providing education draws distinction between groups of citizens depending upon the wealth of the district in which they live. More than mere rationality is required. . .to maintain a state classification which affects a ‘fundamental interest’, or which is based upon wealth.” Here, the court found both factors were involved. 63

The federal district court’s analysis of the Berke data later drew criticism from legal scholars. Law professor Stephen R. Goldstein claimed that Berke broke down his 110 Texas districts into five discretionary categories, of which only ten districts were in the highest percentile and four in the lowest. The remainder of the state’s 96 districts, fell

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62 The median income in Alamo Heights from the 1960 census was $8,184, with 14 per cent minority pupils, and $558 provided in State-Local funds. Edgewood school district received $248 in State and Local Revenue per pupil, had a $3,405 median family income (1960 Census) and was 75 percent minority in composition. Affidavit of Joel S. Berke, Plaintiffs’ Exhibit VIII, Rodriguez v. San Antonio Independent School District 337 F. Supp. 280 (1971).

63 Ibid., 282. The Texas federal district court was well aware of the new equal protection requirements: “Defendants urge this Court to find that there is a reasonable or rational relationship between these distinctions or classifications and a legitimate state purpose. The courts normally applied the rational basis test in reviewing state commercial or economic regulation. See, e.g. McGowan v. Maryland, 366 U.S. 420.. Williamson v. Lee Optical of Oklahoma, 348 U.S. 483 (1955). “More than mere rationality is required, however, to maintain a state classification which affects a “fundamental interest” or which is based upon wealth. Here both factors are involved.”
into three middle categories which actually exhibited an inverse relationship between property values and the median income of Texas families. For example, in 26 districts with a taxable property market value per pupil between $100,000 and $50,000, the median family income in 1960 was $4425, the percent of minority pupils 32%, and the revenues per pupil from state and local sources $544. But in the next lower percentile, thirty districts with property values between $50,000 and $30,000, the median family income in 1960 was higher—$4900, and in the forty districts with property values between $30,000 and $10,000, the median family income in 1960 was higher still—$5050. Goldstein concluded that the Berke data was not only arbitrary in its five category breakdown of school districts, but also, an examination of the middle categories proved that there was no correlation between poor school districts and poor people. In fact, there was an "apparent inverse relationship between property value and median income in the three middle districts, where 96 of the 110 districts fall."\(^{64}\)

Later Berke reconsidered the impact that an imposed equal funding standard would have on large urban school districts, which were facing the greatest educational crisis in the late 1960s and early 1970s:

Despite the widespread enthusiasm that the California, Minnesota and Texas cases have raised throughout the nation, it is our belief that finance reform of the type just described (change to a statewide property tax) will not result in removing the major inequities in American educational finance and on the contrary may well exacerbate the problems of a substantial proportion of urban schools. . . . Nearly twice as many central cities would receive lower expenditures from the states under equal statewide per-pupil distribution of funds than they presently receive under the existing revenue structure. . . . If the alternative selected for the distribution of educational services is the equal expenditure approach rather than some measure of educational need, since large city educational expenditure levels tend to be higher than the average for the entire state — although they are

\(^{64}\) The Amicus Curiae Brief by Representatives of Thirty State Governments for the Appellants: 83. The Berke data was filed extremely late in the litigation and precluded the state from making an effective reply to the findings.
generally lower than most of their suburbs—the results of a school finance case could result in no additional urban expenditures and perhaps even a lowering of them to a rigidly enforced state norm. 65

There were many studies in the early 1970s that placed the Berke findings in doubt. Lawyers for the Rodriguez appellants, for example, would later point to a 1972 study by the United States Office of Education, *Finances of Large City School Systems: A Comparative Analysis*, which surveyed twenty-five representative large city school systems and found that sixteen had an average or below average tax rate and above average assessed property valuations. Poor districts, in this case, were found to be actually rich. The study concluded that if an equal educational opportunity formula, such as fiscal neutrality, was demanded by the federal courts to redistribute local school funds equally on a per-pupil basis, as few as 29 out of 84 urban school districts would benefit.

William L. Taylor of the United States Civil Rights Commission also testified before the 1972 Senate Select Committee on Equal Educational Opportunity that a Serrano/Rodriguez equal funding standard would hurt more minority and poor children than it would help: 66

65Berke’s two monographs appear in Select Committee on Equal Educational Opportunity, United State Senate, The Financial Aspects of Equality of Educational Opportunity and Inequities in School Finance (January 1972) at 33-34, 66-69. Quoted in Amicus Curiae Brief by Representatives of Thirty State Governments for the Appellants: 85, 89. The California case Berke refers to is *Serrano v. Priest*, 5 Cal. 3d 584 (1971); the Minnesota case is *Van Dusatz v. Hatfield*, 334 F. Supp. 870 (D. Minn. 1971). In Serrano the Supreme Court of California held that the California public school finance system, with its dependence on the property tax and resulting disparities in school revenues, violated the equal protection clause of the Fourteenth Amendment. The Court employed the new equal protection analysis of the Warren Court when it found that the California school finance system “discriminates against the poor because it makes the quality of a child’s education a function of the wealth of its parents and neighbors.” *Serrano* 5 Cal. 3d at 589. *Serrano* is known as the first fiscal neutrality case. The California justices accepted the fiscal neutrality standard or Proposition I proposed by Coons, Clune & Sugarman in *Private Wealth and Public Education*. Professor Goldstein maintained that *Serrano* never directly quoted Proposition I, but the federal court in *Van Dusatz* explicitly accepted it as the constitutional standard. See *Van Dusatz*, 334 F. Supp. 870 (D. Minn. 1971). In *Rodriguez*, the three-judge district court adopted Proposition I “somewhat less clearly.” See Stephen R. Goldstein, “Interdistrict Inequalities in School Financing: A Critical Analysis of *Serrano v. Priest* and Its Progeny.” *University of Pennsylvania Law Review* 120 ((1972) 510-511. Goldstein’s analysis provided the main arguments against Professor Berke’s data in the Texas Brief for the Appellants. See 21-22.

66Senate Select Committee on Equal Educational Opportunity, 90th Congress, 2d Session, Hearings, 10472. Quoted in Amicus Curiae Brief by Representatives of Thirty State Governments for the Appellants: 92.
This means that in New York City which has a good tax base and many poor families, poor and minority children would be hurt—not helped—by an application of the Serrano principle, re-distributing property wealth for school financing purposes. Second, the Serrano decision points not toward a system of financing based on educational need—which is what poor children really require—or even to equal expenditures, but simply to equalizing the property tax base... It is highly problematical that increases in expenditure alone will produce for poor children the higher quality teaching they so desperately need.

Because further investigation had shown that the poor often lived in rich, inner city districts, when Rodriguez reached the Supreme Court, the plaintiffs had difficulty proving that state school finance systems injured a "suspect" class, equal to race. Only a certain segment of the poor was injured—those living in poor districts. Also, in the early 1970s, advocates of equal educational opportunity began to fear that aiding this stranded group would require greater relief than might be forthcoming in the implementation of a fiscal neutrality decision. Application of such equal wealth alternatives as District Power Equalizing, which based its revenue outcomes on tax effort, not district wealth, would not only deny the rich a chance to provide a superior public education for their own children, but would likewise penalize the disadvantaged as well. Critics of DPE complained that not only was “a child’s constitutional right to an education” subject to the whim of the electorate in his district,” and the fiscal difficulties of central city schools, which were not caused by low property wealth, but “the high costs of educational and noneducational public services” would be increased, not lessened, as large urban districts lost funds under equalization.67

67 Betsy Levin, “Foreword to Future Directions For School Finance Reform,” Law and Contemporary Problems 38, no. 3 (Winter-Spring 1974): 294. A community with a high proportion of students attending private school or with a majority of retired residents might vote a low tax rate and thus penalize public education in their school district. Only some proponents of the Private Wealth principle of fiscal neutrality also supported DPE. The federal district court in the Minnesota case of Van Dusart v. Hatfield, 334 F. Supp. 870, 876-77 (D. Minn. 1971) appeared to adopt DPE when it held that “the fiscal neutrality principle not only removes discrimination by wealth but also allows free play to local effort and choice.” But the critics of DPE disagreed, believing that DPE would also be constitutionally impermissible. See Paul
The worry about the detriment to large cities of fiscal neutrality and DPE led some proponents of school finance reform to suggest that the requirements for equal educational opportunity should instead be met by providing equal school facilities. This would take into consideration the higher costs of urban education. Lawyers for the *Rodriguez* defendants argued that such a standard could not be adjudicated, and was unenforceable. It would lead judges into the constitutional thicket of choosing between apples and oranges, a library here, a swimming pool there. The Texas federal district court, however, sidestepped this problem when it returned the school finance problem to the state legislature.

In a sense, the plaintiffs won the *Rodriguez* case when they requested that the lower court “not substitute its discretion for that of the Legislature. . . as to the type of financing program for public schools in Texas, ‘as this involved a political rather than a judicial decision. The judges responded, “While the defendants were correct in their suggestion that this Court cannot act as a “super-legislature”, the judiciary can always determine that an act of the legislature is violative of the Constitution.” The federalism question in *Rodriguez*, or rather, the “political question” was solved half-way. The *Rodriguez* federal district court declared the state’s finance system in disagreement with the Fourteenth Amendment Equal Protection clause of the U.S. Constitution. But the jurists left it to the state legislature to decide the remedy: “Now it is incumbent upon the defendants and the Texas Legislature to determine what new form of financing should be utilized to support public education. . .” The selection could be made from any number of school finance plans, as long as the “quality of public education” was not “a function of

wealth other than the wealth of the state as a whole.\textsuperscript{68} The federal district court maintained the Texas tradition of local control of education, while at the same time it met the fairness requirements of the Fourteenth Amendment and the new equal protection.

Finally, the battle of the Berke data in Rodriguez brought on a national discussion of what a fiscal neutrality remedy in the second-wave school finance cases would cost the state and federal governments. In order to fund plaintiff relief, according to President Nixon's 1972 Commission on School Finance, it was estimated that it would cost 6.2 billion dollars to elevate all school districts to the level of the ninetieth percentile in each state. In the face of the rising demands of teachers' unions for funds, the central question

\textsuperscript{68} Amicus Curiae Brief by Representatives of Thirty State Governments for the Appellants: 95, 106. Brief for Appellees: 44-45. Rodriguez v. San Antonio Independent School District 337 F. Supp. 280, 285 (1971). The political question doctrine holds that some matters are political in nature and are best resolved by a legislative, or other political body, rather than a court. It is also referred to as the doctrine of nonjusticiability, i.e. a subject inappropriate for judicial review. A leading case in this area is Baker v. Carr 369 U.S. 186 (1962). A court will defer to other branches of government, for example, if there are a lack of adequate judicial standards for resolution or if there is a lack of judicial remedies. Historically, the Justices had regarded as a political question the gerrymandering of state voting districts. The Warren Court changed this position, however in Baker v. Carr and decided that the dilution of a person's vote by malapportionment is a violation of the equal protection clause of the Fourteenth Amendment. In this sense the school finance cases brought the same jurisdictional problems as the voting rights cases. This federalism question prompted the following comment in the Brief for Appellants: "[t]here will always be those who chafe at the slowness of the legislative process and who hunt for a shortcut by which society can be changed by constitutional construction. Today, the favorite vehicle for efforts of this kind is the recently developed doctrine that if a "suspect" classification affects "fundamental" rights, a "compelling state interest" is required to justify the legislation. " Brief for Appellants: 24. Lawyers for the Defendants/Appellants argued that the new Equal Protection doctrine was unfortunately well suited to school finance cases because it required not legal precedent but judicial policy formation and subjective judgment. They cautioned that the Court should heed the words of Judge Learned Hand on the duty of judicial deference to legislative decisions: "These men [Justices Holmes and Cardozo] believed that democracy was a political contrivance by which the group conflicts inevitable in all society should find a relatively harmless outlet in the give and take of legislative compromise after the contending groups had had a chance to measure their relative strength... They had no illusion that the outcome would necessarily be the best attainable, certainly not that which they might themselves have personally chosen; but the political stability of such a system and the possible enlightenment which the battle itself might bring were worth the price..." From Learned Hand, "Chief Justice Stone's Concept of the Judicial Function," in The Spirit of Liberty (New York: Knopf, 1952), 204, 207. Quoted in Amicus Curiae Brief for Appellants by Representatives of Thirty State Governments: 106-107.
was how could states and the federal government raise these extra billions for education. In Texas alone the charge cost approximately $263 million.69

Declining school revenues, rising school costs, and the legal challenges to state school finance systems had the Nixon administration propose a substantial increase in federal spending on elementary and secondary education in 1971 and 1972. Sidney P. Marland, the United States Commissioner of Education, and education interest groups proposed that the federal government assume at least one-fourth of the financial burden of education. A multibillion-dollar transfer of funds to the states could accomplish this.

These proposals coincided with President Nixon's efforts for reelection and a federal tax on consumption, a taxation area previously reserved to the states, while providing property tax relief to homeowners. In his 1972 State of the Union address, Nixon proposed a federal value-added tax (VAT) intended to yield $12 billion annually. The proceeds would be distributed to the states on a matching per pupil basis. The states in turn would agree to eliminate all local property and residential taxes for the purposes of education. Some of the newly raised funds would also be distributed to private schools, either through the states or by a federal income tax credit to parents.

Ultimately the Nixon tax plan foundered for the same political reasons that faced school finance advocates in district courts and state legislatures. It became clear that the beneficiaries of the plan would not be those in need, but would be the well-to-do suburbs, while financially stressed rural areas which raised minimal property tax and central cities, with a more diversified tax base, would not benefit. Congress also proved unreceptive to the VAT, especially as an instrument for raising targeted funds for education. A new tax,

at election time, that provided the government with revenue rather than taxpayer relief proved to be an illusive proposal. The recommendation of school finance experts that the improvement of large city school systems would best be attained by pinpointing a federal program to deal with the particular financial needs of the larger cities was politically not going to happen. 70

II. Education is Fundamental and Wealth Is a Suspect Classification: The Federal District Court Follows the Serrano New Equal Protection Mandate

Searching to prove that the poor live in property-poor districts and financially starved school districts would benefit from school finance equalization, the Rodriguez plaintiffs tried to convince the federal district judges that recent Supreme Court equal protection precedents were moving in the direction of declaring poverty or wealth, a “suspect” class equal to that of race. Were this accepted, then lower court judges would have some powerful Warren Court precedents on which to rest their decision. As previously noted, the Rodriguez lower court agreed with the plaintiffs—the Edgewood School District and other property poor and minority districts, that the Texas education finance statutes injured children living in poor districts, who were according to Berke’s data, usually poor themselves.

In Weber v. Aetna Casualty Co. (1972), the plaintiffs emphasized, the Justices held that any classifications that unequally burdened the poor, or discriminated on the basis of wealth, would be subjected to “strict scrutiny.” Wealth or indigency would be

70 For a discussion of the Nixon initiative see P. Michael Timpane, “Federal Aid to Schools: It’s Limited Future,” Law and Contemporary Problems 38, no. 3 (Winter-Spring 1974): 500 - 504. The financial requirements of suburban and rural school systems can be most adequately dealt with by the system of state and local finance which has been able to provide such large sums of money since the end of World War II. Large cities, on the other hand, present problems that are very different and probably can be dealt with only on a national scale with a national resource base. See Seymour Sacks, City Schools Suburban Schools: A History of Fiscal Conflict (Syracuse: Syracuse University Press 1972), 177. Quoted in Amicus Curiae Brief for Appellants by Representatives of Thirty State Governments: 98.
treated with the same seriousness as race. In previous cases, Gochman argued, the Court had ruled that a State had to prove that a compelling or substantial interest was being served by the action or legislation in question, "mere rationality" would not suffice. New equal protection reasoning should apply to equal educational opportunity education as it had been held applicable by the Warren Court to the "criminal process, the right to vote, and the right to travel freely." The poor were one of the "discrete and insular minorities" for whom the Court had increasingly shown "solicitude" since its 1938 *Carolene Products* decision.\(^{71}\)

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\(^{71}\) The precedents to Gochman referred in order to prove that wealth was a recently declared suspect classification were the following: *Weber v. Aetna Casualty Co.*, 406 U.S. 164 (1972) "Imposing disabilities on the illegitimate child is contrary to the basic concept of our system that legal burdens should bear some relationship to individual responsibility or wrongdoing." In *Weber*, the Burger Court invalidated a Louisiana workman's compensation law that denied benefits to unacknowledged illegitimate children. The Court held that if these children had been dependent on the injured parent there was no rational reason to deny full benefits. *Griffin v. Illinois* 351 U.S. 12, 17, 18 (1956) Due process required a state to furnish an indigent defendant a free transcript of the trial to permit appellate review. In this first wealth discrimination decision the court held that in criminal trials "a State can no more discriminate on account of poverty than an account of religion or color." Classification on account of poverty is unreasonable because "plainly the ability to pay costs in advance bears no rational relationship to a defendant's guilt or innocence and could not be used as an excuse to deprive a defendant of a fair trial. *Douglas v. California* 372 U.S. 353 (1963) A state's refusal to appoint counsel for an indigent seeking appellate review of a criminal conviction is unconstitutional. "For there can be no equal justice where the kind of an appeal a man enjoys depends on the amount of money he has."" The Court has ruled that indigents must be granted equal access to all aspects of the criminal process that affect the determination of guilt or innocence. Access to a fair trial and an initial appeal are constitutionally required. But the leveling of all economic distinctions in the process is not required. States need not provide counsel, for example, for a continual succession of appeals. *Harper v. Virginia Board of Elections* 383 U.S. 663 (1966) A state may not require a poll tax in order to vote. The twenty-fourth amendment prohibits the states from imposing a poll tax as a requirement for voting for the President and Congress. *Harper* dealt with a Virginia poll tax for state elections. The Court found that the ability to vote had no rational relationship to wealth. *McDonald v. Board of Election Commissioners of Chicago*, 394 U.S. 802 (1969) This case concerned the provision of absentee ballots to inmates confined in the Illinois Cook County jail. The court ruled that the statute denying the ballots was constitutional because they found no discrimination based on wealth or race. Even though in this case the appellants failed to receive redress, it was the equating of wealth with race by the Court that interested the *Rodriguez Appellees*. *Shapiro v. Thompson* 394 U.S. 618 (1969) A state may not deny welfare benefits to the indigent who have resided in the state less than a year. The Court found that the state law interfered with the right of needy persons to travel from state to state. The majority held that because the right to travel was fundamental, the indigent classification was invalid unless the state could show a compelling governmental interest for the legislation. The judges did not accept the state's explanation of the saving of welfare costs as acceptable grounds for the invidious classification. Justice Harlan attacked the elevation of travel to a fundamental right and also the new equal protection analysis, suggesting that to review governmental policy so strictly was allowing the Court to act as a super-legislature. Justice Black and Justice Warren also dissented in *Shapiro*. See Brief for Appellees: 38.
The *Rodriguez* federal district court accepted the Gochman analysis that the Warren Court had mandated a new suspect classification based on wealth. Poverty, the judges ruled, was constitutionally suspect and should be subject, as with any classifications based on race, to strict scrutiny.\(^{72}\)

Among the authorities relied upon to support the . . . conclusion that “lines drawn on wealth are suspect” is *Harper v. Virginia State Bd. of Elections*. In striking down a poll tax requirement because of the possible effect upon indigent voting, the Supreme Court concluded that “[l]ines drawn on the basis of wealth or property, like those of race . . . are traditionally disfavored. . . . To introduce wealth or payment of a fee as a measure of a voter’s qualifications is to introduce a capricious or irrelevant factor.” Likewise *McDonald v. Bd. of Election Comm’rs of Chicago*. . . noted that “a careful examination of our part is especially warranted where lines are drawn on the basis of wealth . . . which would independently render a classification highly suspect and thereby demand a more exacting judicial scrutiny.”

In addition, the *Rodriguez* district judges based their equal protection finding of wealth discrimination on two other Supreme Court decisions -- *Douglas v. California* and *Griffin v. Illinois*.

The Defendant/Appellants argued that basing the *Rodriguez* decision on these ambiguous equal protection wealth cases was an inaccurate reading of current Supreme Court intention. “The concern of [these] cases seems to be not with wealth—or, more accurately, ability to pay. . . . but with the interests in fair criminal procedure and in voting. " The focus of these cases was an individual’s ability to pay, not with the wealth of a collectively, such as a school district. The cases signified that certain fundamental rights such as voting, a right to a lawyer, or a transcript cannot be denied. An indigent person in the Edgewood area of San Antonio had a right to a lawyer if charged with a crime, but he

or she did not have the right to a "lawyer of the same distinction as the [citizen] in Alamo Heights." 73

The defense also attacked the failure of the plaintiffs to include in their argument recent wealth discrimination decisions indicating a more conservative Burger Court was moving away from the new equal protection determination. Six new rulings suggested that the justices realized equal protection wealth discrimination interpretation had proceeded far enough. Cases cited by the plaintiffs as not fully weighed by the plaintiffs were: *Dandridge v. Williams*, *James v. Valtierra*, *Gordon v. Lance*, *Lindsey v. Normet*, *Wisconsin v. Yoder*, and *Jefferson v. Hackney*. 74 Texas argued that the Supreme Court had entered a more conservation era of equal protection interpretation when it decided

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73Brief For Appellants: 30-31..

74Cases cited as proof that the Supreme Court was revising its wealth discrimination interpretation were: *Dandridge v. Williams*, 397 U.S. 471 (1970) The Court upheld a state regulation that put an absolute limit on welfare payments for dependent children regardless of the size of the family or its actual need. To justify strict scrutiny the court had to find the poverty-based inequality vital or fundamental to be unconstitutional. A market economy deprives the poor from access to many goods, but not all of these deprivations are unconstitutional. Since *Dandridge* the Court has ruled that some benefits are not subject to strict scrutiny such as welfare benefits or public housing. Therefore, since no fundamental interest is involved, there is no basis for strict scrutiny and the rules of traditional equal protection apply, i.e., the classification will be treated like any economic or social welfare legislation, and the defense must only show there is a rational relationship between the classification and legislative intent. Thurgood Marshall dissenting, suggested that some intermediate standard of review between rational relationship and proof of compelling interest needed to be created by the court because poor people faced the necessity of finding the bare necessities. *Gordon v. Lance* 403 U.S. 1,6 (1971). The Supreme Court upheld a West Virginia regulation that required a bond issue or a tax raised by political subdivisions should be approved by a super-majority (60%) of voters in a referendum. "There is nothing in the language of the Constitution, our history, or our cases that requires that a majority always prevail on every issue." *James v. Valtierra* 402 U.S. 137 (1971) This case upheld a state constitutional provision that prohibited the development of low-rent public housing projects unless the people of the neighborhood approved. *Lindsey v. Normet* 405 U.S. 56, 74. (1972) The plaintiffs asked that the Court use the new equal protection strict scrutiny test when considering the issue of housing for the poor because "the need for decent shelter" and the "right to retain peaceful possession of one's home" are "fundamental interests which are particularly important to the poor." The Court did not find housing to be a fundamental right when, in this case, it upheld a state statute that gave a landlord the right to repossess a premises even though he had not fulfilled his obligations under the building code. *Wisconsin v. Yoder* 92 S. Ct. 1526 (1972) Amish parents are not required to send their children to high school. In this case the Court recognized the right of the parent to direct the education of their children. The Court found that the Amish children were well cared for and well trained in their community and gave a limited exception to compulsory attendance laws based on free exercise of religion. *Jefferson v. Hackney* 92 S. Ct. 1724 (1972) was another welfare case in which the Court ruled as constitutional a provision giving a lower percentage of funds to a family on AFDC, than to a family on the
Dandridge. As long as state legislatures were rational, and not invidious in their regulation, according to the Jefferson decision, their efforts to “tackle the problems of the poor and the needy are not subject to a constitutional straitjacket.” In short, more than one constitutionally permissible method existed to solve complex social and economic problems.  

Similarly, recent welfare cases, which did not invite strict scrutiny by the Court, were even more likely candidates for judicial review than school finance cases because they involved “real dollars for real individuals, “not abstract equalization formulas like those proposed in Rodriguez. While education was vital, Wisconsin v. Yoder had proved that there are times when “it is an interest that on occasion must yield to other things.” Public housing decisions like Lindsey v. Normet, also indicated that there were certain mandates that were the province of the state legislature and not the judiciary.

The James v. Valtierra and Gordon v. Lance decisions, the defense argued, reflected the importance the Supreme Court gave to local self-determination even when such an important right as education, or a classification as critical as poverty was implicated. Texas had chosen a finance system that gave the people of each community a voice in the schooling of their neighborhood children. The system might not be “wise or desirable”, but it represented a balancing by the state of the interests within the community. Texas had assured every child in every school district an adequate education. It was up to each district to determine if it wanted to go beyond the minimum foundation program. The minimum program placed a floor under educational spending

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Aged, Blind, or Disabled program. This practice did not constitute a racial discrimination just because each program had a different statistical impact on racial groups

75 Brief for Appellants: 31-32.
but imposed no ceiling, the state argued, it provided for an equal right to education, but not a right to an equal education.\footnote{Ibid., 33. \textit{Lindsey v. Normet} 405 U.S. 74 (1972). The Court said in \textit{Lindsey}: "[w]e do not denigrate the importance of decent, safe, and sanitary housing. But the Constitution does not provide judicial remedies for every social and economic ill."}

In his response, Arthur Gochman argued that \textit{James v. Valtierra} was not the ruling precedent on wealth that the defense claimed. This California referendum case on housing did not deal with discrimination against the poor. As the Supreme Court pointed out in its decision, California required the popular voice on all kinds of issues: the issuance of long-term bonds by local governments, municipal annexations, alienation of public parks, and repeal of voter initiatives. Not only was there no legal question of wealth discrimination in \textit{Valtierra}, Gochman agreed with the defense, but also housing is a "purely economic interest," unlike education, which is a fundamental right. "Education in Texas is compulsory, and the State is required by the Constitution to provide it," Gochman argued. These features of fundamentality of education and the clear wealth discrimination in \textit{Rodriguez}, distinguished it from \textit{Valtierra}.\footnote{Ibid., 35-36. .}

A Supreme Court decision proving to the plaintiffs that the Burger Court, like its predecessor, still considered wealth a suspect classification, was \textit{Bullock v. Carter}. The \textit{Bullock} plaintiffs alleged that the Texas statutes requiring filing fees from candidates for public office, in some instances as much as $1,000, were unconstitutional. The Supreme Court agreed and held that wealth in this instance was a suspect classification. Gochman contended that \textit{Bullock} was the decisive precedent. Like \textit{Rodriguez}, both cases involved a fundamental right and discrimination based on wealth. While there might be some poor

\footnote{Brief for Appellees: 41.}
persons, not disadvantaged, living in property-rich districts, the reality was that “the poor still bore the brunt of the discrimination. 79

The federal district court accepted the plaintiff’s argument on wealth discrimination, deciding that poor Texans tended to live in poor districts, and the Supreme Court wealth discrimination precedents required the justices to subject the funding of Texas schools to strict scrutiny.

Civil rights advocates worried that the wealth question, however, would present problems if the second-wave finance cases ever reached the Supreme Court. Quoting Judge Clark, in his dissent in Douglas v. California, Coons, the originator of fiscal neutrality, warned that federal judges would become disenchanted with “the never-ending fetish for indigency.” Justice Harlan’s decisions were proof that when the Court came to defining the limits of equality it would find itself negotiating a “slippery slope.” 80

School finance reformers warned of the “plausible” differences between the wealth/crime cases and the school finance cases. In Griffin, Douglas, and other similar criminal rights cases, the Supreme Court dealt with the sensitive problems of a defendant, for example, the stigma of confinement and of prosecution. The judicial remedy, unlike deciding on a standard for equal educational opportunity, was simple, clear, and cheap -- the provision of a lawyer, and possibly a transcript. These cases also established a legal minimum of protection, rather than a maximum of provision.

79 Ibid., 42-43. Bullock v. Carter 405 U.S. 144,145 (1972). The Court said: “Because the Texas filing fee scheme has a real and appreciable impact on the exercise of the franchise, and because this impact is related to the resources of the voters supporting a particular candidate, we conclude, as in Harper, that the laws must be closely scrutinized and found reasonably necessary to the accomplishment of legitimate state objectives in order to pass constitutional muster.”

School finance advocates also pointed to the fact that children, unlike many criminal defendants, were innocent and deserved the full solicitude of the public. Public interest lawyers, who were asking the Courts to allow education into the inner circle of fundamental protections, would have to convince the Supreme Court that education affected more persons directly than criminal law, and that schooling was an effective weapon in the reduction of crime. Advocates needed proof that education supported “each and every other value of a democratic society” including “participation, communication, and social mobility,” and that schools touched a more deserving population than criminal defendants.

Another difference between criminal rights cases and school finance litigation was the immediate, personal, and decisive deprivation that resulted from criminal convictions. The impact of inadequate school funding was less evident, and also might be viewed as a collective deprivation (a school district), rather than an individual deprivation. School finance advocates would have to allay the fears of judges that the expense of school finance equalization would be monumental. Like a poor person’s demand for counsel, the Private Wealth standard of fiscal neutrality, accepted by the federal district court in Rodriguez, was not really a demand for equality. What school finance reformers sought was not parity between public and private or the “best” education, but equalization between the public education of some school children and the public education provided to others. Private Wealth proposed (and this was the basis of the Serrano and Rodriguez decisions) that only the quality of a public education not be a product of the wealth differences between districts, but a measure of the riches of a state as a whole. The Texas District Court accepted this standard of fiscal neutrality as an easy, appropriate
definition for equal educational opportunity that also provided parents with local choice.

The real question was, would the Supreme Court?

Rodríguez and the Race Factor

The Court: As I read this record, Mr. Wright, it seemed to me that the Testimony—I am not sure about the findings—pretty clearly demonstrated there is unequal treatment of these respondents who are Americans of Spanish ancestry at educational levels. Is that any part of this litigation?

Mr. Wright: The racial issue is in this litigation, yes, Justice Douglas. It is a major portion of the plaintiffs’ complaint. The trial court did not rely on it in its opinion. It put its holding squarely on the dollar inequality, without regard to whether the particular plaintiffs were of Spanish ancestry, or Anglo, or what. But the issue is certainly there.81

Race matters were the third ingredient in Gochman’s argument in Rodríguez v. San Antonio Independent School District. The fact that all the six plaintiffs-complainants in the case before the United States District Court for the Western District of Texas on July 30, 1968 were Mexican Americans, initiated participation of civil rights organizations, lawyers, and scholars across the country. Other elements in the case concerning race made it a landmark.

Most of the Hispanic children in Rodríguez, except for two in a private school, were enrolled in the Edgewood Independent School District, an urban area in downtown San Antonio—the poorest in Bexar County, Texas.82 Edgewood in 1968-1969 was a

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81 Oral Argument of Charles Alan Wright on Behalf of the Appellants, San Antonio Independent School District, et al., Appellants, v. Demetrio P. Rodríguez, et al. Appellees, No. 71-1332, October 12, 1972. Included as defendant/appellants in San Antonio Independent School District v. Rodríguez, 411 U.S. 1 (1973) were originally the seven school districts of Bexar county Texas: San Antonio, Edgewood, Harlandale, Northside, Northeast, Alamo Heights, and South San Antonio. Named as other defendants in the case were the State Board of Education, the Commissioner of Education, the Attorney General of Texas, and the Bexar County Board of Trustees. Before the trial the school districts were dismissed from the case by the court. San Antonio Independent School District—the central city district—fought the Edgewood ISD in the federal district court. On appeal to the Supreme Court, it filed a brief in support of the plaintiffs/appellees.

82 Rodríguez v. San Antonio 337 F. Supp. 280 (1971). Bexar County is in metropolitan San Antonio. Alamo Heights was the wealthiest school district in the county with $45,095 in property value per student,
minority district, ninety percent Hispanic and six percent black. The Mexican American parents, who resided in the barrio on the westside of the city, contended that the Edgewood school children were denied their right to equal educational opportunity guaranteed to them by the Fourteenth Amendment of the United States Constitution. Mexican Americans in Texas since the late 1920s had battled for their rights to an equal education, and Rodriguez was only one in a long line of civil rights cases.

The discontented Mexican American families formed the Edgewood District Concerned Parents Association to pressure the administration to make needed change. When they complained to Dr. Jose Cardenas, the district superintendent explained that he did not have the funds to rebuild the schools or provide more qualified teachers.

On behalf of Demetrio Rodriguez, the first parent to sign as a plaintiff in the case, the San Antonio civil rights lawyer, Arthur Gochman, described the conditions in Edgewood elementary school in 1968: 83

[It] was a old school, all beat up and falling down. It had a lot of bats, and they could only use the first floor. Sometimes bricks would fall down. We had a lot of problems in that school teaching problems and disciplinary problems: they didn’t care what the kids were doing...Willie Velazquez heard about it; he’s director of Southwest Voter Registration. He got us together with a lawyer named Arthur Gochman. Arthur is a real down-to-earth man; he’s got a lot of money but he doesn’t show it. We started talking about how we had problems at Edgewood. Arthur told us. The problem’s not your superintendent; your problem is the way the state finances your schools. It’s a very complicated thing for a layman to understand.

The Edgewood parents sued the Texas education establishment for themselves and for others in the same situation. Rodriguez became a class action in behalf of all

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parents "who have school children in independent school districts who are members of minority groups or are poor." In his brief Gochman stressed Rule Twenty-three of the Federal Rules of Civil Procedure. The plaintiffs claimed that prejudice against Mexican Americans in the southwestern United States resulted from "a generally poorer education, more sub-standard housing, more limited job opportunities, smaller incomes and more deprivations of civil and political rights for Mexican Americans than for other white Americans in Texas."\(^{84}\) Rule Twenty-three required that a party bringing a class action must demonstrate that the cause involves a question of law or fact that is common to all in that class, that the aim is to protect the interests of the class, and that the claims be typical of other members of the class.\(^ {85}\)

Reflecting the purpose of the Rodriguez complainants, Gochman sought common relief from the state of Texas for all school children similarly situated. Gochman proposed that a federal court, for the first time, should declare education to be a fundamental right. Under the U.S. Constitution, Texas, he contended, was required to devise a new school finance system that provided "equal opportunity of education for all its citizens." Second, the plaintiffs asked the federal courts to declare the poor in Rodriguez a "suspect class" in need of special judicial protection against state discrimination. Third, the discrimination against Mexican Americans in Texas was a result of "willful" action by the state. Mexican Americans should be treated by the courts as a "suspect class", a distinct racial group, which like African Americans, triggered

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\(^{84}\) Appendix, 24.

“strict scrutiny” of any state action affecting them by the judiciary. If the federal district court accepted any of the three Gochman contentions, Texas officials would be required to present a compelling justification for its school finance plan that discriminated against the property-poor districts and Mexican Americans.

Gochman decided to contrast the problems of Edgewood, the poorest of the county’s seven districts, with Alamo Heights, the city’s wealthiest. Alamo Heights, a property rich district, could afford to “hire better qualified teachers, more and better counselors, provide better building facilities, scientific equipment, libraries, equipment and supplies, and maintain a broader and better curriculum.” This wealthy Anglo district in the heights looked down on the Hispanic district on the city’s edge; “wealth look[ed] down on poverty,” and “San Antonio,” Gochman argued, “[was] no exception.”

Education is primarily a state rather than a county or city responsibility. However, the funds raised by local districts in the form of property taxes, are essential to the running of the Texas schools. Local districts are government bodies that oversee the schools in their region. School boards, a body of elected officials, make binding public decisions and develop the budgets for their districts. Since the passage of the 1884 Texas School law, the power to levy the property taxes was given to the local district. To understand how race played a part in the formation of school districts in San Antonio, and why minorities

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87 Appendix, 24.
88 Appendix 21.
89 Irons, The Courage of Their Convictions, 287.
were left with such meager resources, it is important to know how school districts were created in Texas and why politics prevented them from productive consolidation.

**The Formation of School Districts in San Antonio**

The first Texas school districts, in the late 19th century, were independent school districts (ISD's), formed in cities. County officials in Common School Districts (CSDs) oversaw students in rural areas. Citizens in wealthier areas established district lines that often excluded poorer neighbors. The 1876 Constitution, the seventh and present Constitution of Texas, set a limit on the local tax rate for ISDs. When the authority to levy local taxes was extended to CSDs, the Legislature set a tax rate much lower than the limit for city ISDs. Over the years as school districts began to rely more on local tax resources than on state funds, school districts developed mechanisms to contain property tax rates. By drawing boundaries to include few pupils, many districts were created solely to avoid paying property tax. The 1949 Gilmer-Aikin reforms eliminated many of these "tax havens" by requiring districts to consolidate with their neighbors. At the end of World War II, the number of Texas school districts numbered around 5,000, a figure declining to 1,161 by the time of *Rodriguez*.

The first districts to form in San Antonio were city ISDs, San Antonio ISD and Alamo Heights. In 1913, when Edgewood was still rural and "covered with mesquite brush and populated mostly by wolves," its citizens petitioned Bexar county commissioners to form a common school district. Attracted by jobs at the nearby military bases, and restricted from other areas by restrictive property covenants, Mexican

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91 Texas was predominantly rural until recent times. Population and property wealth were spread fairly evenly across the State. When the state became more industrialized, population shifts and location of commercial and industrial property lead to disparities in district wealth and their tax resources. 411 U.S.
Americans and blacks began to settle in the Edgewood District. Demetrio Rodriguez’s life mirrored this history. When he arrived in San Antonio in 1931, six years old, “There was one school and one teacher for the Mexican children.” “We had an Anglo teacher. She was a good teacher, trying to help us out, but it was hard for her, all by herself. I don’t think she could speak Spanish.”

As employment in defense grew during World War II, the Edgewood school district did not reap the benefits. Local and state entities cannot tax the property of the United States government. The Edgewood school board, therefore, could not tax the most valuable property in the district—the military bases. Edgewood could have united with a nearby ISD. But because of its financial status, its minority population, and fear that it would become a financial drain, it was unable to consolidate with its neighbors. It became an ISD by itself—one of the poorest in the state.

That poverty became a major point of argument for Gochman and his supporters. In his oral argument before the Burger Court, Gochman explained that it was not the state legislature that created school districts in Texas, but a majority of the voters.

But the boundaries are adjusted by a majority of votes of adjoining districts and by the county board of trustees if it is a county district. But the problem is, nobody is going to join up Edgewood. The San Antonio central city district, the evidence will show, continually took in neighboring districts. But it is not going to go to the Barrio—the majority of the people in San Antonio—to take it in. And, thereby,

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Rodriguez arrived in Edgewood in 1957, near the Kelly Air Force base where he eventually worked. He remembers Edgewood as a farming community populated by Belgians. “When Mexican people started coming they sold them lots, very small, about forty by a hundred and fifty feet. They called it Las Colonias, The Colonies. That’s funny. They didn’t have any drainage, and the streets were dirt. We had a lot of problems in Edgewood; the schools were all shot.” Peter Irons, The Courage of their Convictions, 295, 297-298.

Rocha and Webking, 20.

the San Antonio Independent School District—the central city district—has four
times the wealth per student of Edgewood. It would injure its ability to teach its
present students by having an election to decide to take in Edgewood and in that
way the State has locked in Edgewood.

It was the citizens of San Antonio, not the state legislature, that decided which district
would remain wealthy, and which poor. Local politics limited the options of Mexican
Americans and blacks trapped in the Edgewood school district. School districts were
created by popular demand but state law sanctioned their formation. The legal question
merged into a federal one. Education is a power reserved to the states. The Justices
would have to decide how much power over the education of their own children parents
can retain even if the result of their actions is discrimination.

In their Amici Curiae brief submitted to the U.S. Supreme Court in defense of the
plaintiffs-appellees, John E. Coons, William H. Clune, and Stephen D. Sugarman argued
that because children of the poor, living in poor districts, are unable to escape to private
schools, they suffer more than those who have the resources to find alternative forms of
instruction. Coons et al. also argued that the middle class or wealthy parent who prefers
their children attend public schools likewise suffers. Forced to chose a private school out
of “desperation” rather than their neighborhood preference, they are subjected to
“substantial injury.”95 Rodriguez, the plaintiffs argued, was not only an “egalitarian”
complaint of the poor. An expansion of equal protection into the field of school finance
would benefit everyone by strengthening the public schools. The goal was not just to help
the poor, but everyone living in an impoverished district.

Coons, Sugarman, and Clune developed a new judicial standard to rectify the
school finance problem—the principle of “fiscal neutrality.” They proposed that the

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quality of public education should reflect the wealth of the State as a whole, not that of the school district. Equal educational opportunity did not mean uniform spending among districts. Fairness required that district differences in taxable wealth should not affect the final outcomes in education spending, but districts would still be allowed to set their own spending levels.⁹⁶

Coons, Clune, and Sugarman believed themselves to be the authors of a fairly moderate judicial standard that would continue local control over education and offer a simple equitable solution to a complex problem. Those proposing more radical reforms argued that minorities might be hurt by the adoption of the new standard of fiscal neutrality. Its creators countered, "As with any neutral constitutional principle, the point is not to reward a particular class or to determine in advance who shall be the beneficiaries." The purpose of fiscal neutrality was devised to save public education—its authors argued it was not intended to only save minorities and the poor. Local chosen tax effort, with equalization help from the state's coffers, was to replace a district's wealth as the measure of equal educational opportunity.

⁹⁶ Coons, Clune, and Sugarman wrote Private Wealth and Public Education two years before Rodriguez reached the Supreme Court. They created a new constitutional standard of "fiscal neutrality" to solve the problem of wealth disparities between school districts. It required that "the quality of public education may not be a function of wealth, other than the wealth of the state as a whole." As a mechanism to implement "fiscal neutrality" they devised a complicated scheme dubbed DPE or "district power equalizing." Aware that the courts would be reluctant to interfere with state legislatures and local school districts on the issue of education, they maintained that local control by school districts would be ensured with DPE. Under DPE each district decides for itself the rate at which it wishes to tax. The state then guarantees a stated number of dollars per pupil for every given tax rate. If at a given tax rate, because of low property wealth, a district does not produce the number of dollars guaranteed by the state formula, the state then supplies extra dollars to the poor district. If at a given rate a wealthy district produces surplus dollars at the given rate, it is recaptured by the state. Professor Arthur Wise, who was the first advocate of school finance reform in his Rich Schools, Poor Schools: The Promise of Equal Educational Opportunity (1969), thought DPE was unconstitutional and proposed that school funds be allocated only by the state, and that no district be allowed to supplement its resources. See Wise, "School Finance Equalization Lawsuits: A Model Legislative Response, 2 Yale Review of Law and Social Action 123. John E. Coons, William H. Clune III, Stephen D. Sugarman, Amici Curiae In Support of Appellees, San Antonio Independent School District, et. al. vs. Demetrio P. Rodriguez, et al., No. 71-1332, 7,8,18. Brief for Appellants, 5,15.
Coons argued that it was the poor school district that was at issue in *Rodriguez*, not the contention that the individuals within such districts were minority or poor. This contention proved to be too “sophisticated” for the appellants’ lawyer, Charles Alan Wright. Wright insisted this argument weakened the legal case for fiscal neutrality. The precedents cited by the plaintiffs in their brief pressed the point that “wealth” or poverty was a suspect classification. The cases mentioned, however, were concerned with individual wealth, not with the collective wealth of a territorial subdivision. The plaintiffs were making new law.  

**Step One to Rodriguez: LULAC and Early Legal Challenges by Mexican Americans**

Education has long been a concern for Mexican Americans in Texas. *Rodriguez* was only one in a extensive line of cases in which Hispanics fought for their rights for equal educational opportunity for their children. Before he joined the Edgewood District Concerned Parents Association in 1968, Demetrio Rodriguez had been a member of LULAC, the League of United Latin American Citizens, and the American G. I. Forum. He, as well as many others of his generation, had frequently been active in civil rights

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97Brief for Appellant at 20. Arthur Gochman argued that wealth had recently become a new “suspect” classification in the eyes of the Supreme Court. Suspect classifications required the Court to exercise “special solicitude” when it reviews cases in this category. Precedents such as *Griffin v. Illinois*, 351 U.S. 12 (1956) an indigent has a right to a trial transcript for a criminal appeal, *Douglas v. California* 372 U.S. 353 (1963) counsel must be appointed for all indigents in their first criminal appeal, *Harper v. Virginia*, 383 U.S. 618 (1969) a poll tax is an infringement on the franchise, and *Shapiro v. Thompson* 394 U.S. 618 (1969) the right to interstate travel is fundamental and residency requirements for obtaining welfare benefits are unconstitutional. Prior to *Rodriguez* the Supreme Court had not definitively ruled on this subject. Some precedents seemed to invalidate Gochman’s contention. Two mentioned in the oral argument were *Dandridge v. Williams*, 397 U.S. 471 (1970), *James v. Valtierra* 402 U.S. 137 (1971), *Jefferson v. Hackney* 92 S. Ct. 1724 (1972). In his brief, Charles Alan Wright argued the most important precedent proving that the court did not intent wealth to be a suspect class was *Dandridge.* “There the Court upheld a state regulation that put an absolute limit on welfare payments for dependent children regardless of the size of the family or its actual need.” Brief for the Appellants, 31. Gochman realized he had to face these precedents, he contended that “public health, food, lodging, those things are of great economic importance.” But education was different than welfare. “...[I]n importance education lies at the
matters. Mexican Americans in Texas learned early on the value of interest group politics.

Organized in Texas in 1929 by Mexican Americans in response to deteriorating social and economic conditions in Texas, LULAC differed from earlier mutual aid societies. Its founders were first generation middle class Americans who “proposed to integrate the community into the political and social institutions of American life.” Members sought to participate in local, state, and national political affairs through traditional political means such as jury duty, voting, the adoption of American cultural values, and the acquisition of the English language.

LULAC was prepared to employ any means necessary, except violence, in its search for equal opportunity for Mexican Americans. Its members, who viewed education as the pathway to socioeconomic and political success for Mexican Americans, began a protracted campaign to desegregate schools.\(^{98}\)

The laws of Texas required the separation of white from Negro children in public schools. Mexican children, however, were legally classified as white. No Texas law segregated Mexican children. In his 1920s study of Mexican Anglo relations in Nueces County, Paul Taylor found that Mexican children, by local practice, were generally separated from the whites, particularly in rural towns. In 1929, Mexican children were...
taught in separate school buildings in six of the Nueces County common school districts and in six of the eight ISDs. Two other common schools provided separate rooms for Mexican children, and in the fourteen districts where Mexican and Anglo children were not segregated, the enrollment of Mexicans was low. Segregation increased in proportion to a rise in minority enrollment. 99

Taylor found that little effort was made by school officials in rural Nueces County to enforce compulsory attendance laws. As the cotton-picking season waned, Mexican farm families followed the harvesting of other crops. Ranchers, many of whom served on boards of education, did not encourage upward mobility of their valuable farmhands: 100

Said a large landowner: “Education? It’s effects are not very good. They want to be clerks, etc. but you can’t put them in responsible positions. They have no executive capacity. If they get in a tight [place] they blow up. It must be inherent in the race. For example, the Mexican railways are run by Americans. Whenever Mexicans are above common labor they are out of their class.

Race and class antipathies against Mexican Americans in South Texas, according to Taylor, went back as far as the Civil War. Because slaves sometimes escaped over the border with their assistance, Mexicans were regarded as a threat to the institution of slavery. Dark-skinned and of the laboring class, Mexicans sometimes intermarried and socialized with Negroes. This commingling lowered their status in the eyes of whites.

99 Negro children in poor districts with low enrollment were provided with no school. Taylor quotes a Nueces County farmer that wanted such a school: “There are three Niger’s but they have no school. If we did have the school, more would come in to the point where we would have more competition in labor.” Taylor, 215.
100 Paul S. Taylor, An American-Mexican Frontier: Nueces County, Texas. (Chapel Hill: University of North Carolina Press, 1934. Reprint. New York: Russell, 1971) 196. Taylor found that after the close of the Civil War, Catholic schools admitted Mexican boys with white boys, and for a year Mexican and Negro girls attended classes together for a year. Public schools were founded in the 1870s in Texas. Mexicans entered the public schools in Corpus Christi in 1891. At the time of their entry a separate school was created for Mexican Americans and by 1896 the enrollment was 110 children. By 1929 it was 1,320. Urban Mexicans attended school more regularly than rural pupils. Taylor, 191 - 194.
By the late 1920s, however, Taylor uncovered evidence that upper class Mexicans were adopting whites’ prejudices against the Negro.\(^{101}\)

The practice of segregation in Nueces County, depended upon the number of Mexican children in school. In theory, segregation of Mexican children in Texas was confined to the early grades. Taylor estimated that in the 1920s, nine-tenths of the Mexican children were segregated, most in the elementary schools. In the rural schools, Mexican children rarely advanced beyond the lower grades. Anglos cited many reasons for segregating Mexican children: cleanliness, race prejudice, irregular attendance, hazing by other American children, fear of intermarriage, and language deficiency.

Some Mexican Americans preferred separated schools for the preservation of their own culture. A Kingsville attorney advised Mexican Americans not to fight segregation.\(^{102}\)

The Mexicans demand separation. We want our children to learn obedience and polite manners; the American children are rough and sassy and without respect for others; this may be necessary to develop independence and aggressiveness, but we believe that obedience is the foundation of education and wish our children so taught. But we want facilities. We are tax-payers, and want as good a school with as good ventilation, lighting, etc. as the Americans, and we are entitled to it by law. Also we want teachers who like to teach Mexicans—it they don’t like us, don’t give them to us.

The first education case in which the Texas Court of Civil Appeals reviewed the constitutionality of Mexican American segregation was a class action suit sponsored by LULAC against the school officials of Del Rio, a small rural border town.

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\(^{101}\)Ibid., 296-297. Taylor’s book discusses the shifting relations between the four major races occupying Nueces County over time: Indian, Negro, Mexican, and white American. He found that the races traded places in political dominance, exchanged ownership of the land, exchanged economic roles according to the change in commercial development, and always adjusting their roles according to their trade relations. A mid-1930’s study found that 85 percent of the surveyed districts in the Southwest were segregated, some through high school, some only through fifth grade.

\(^{102}\)Id. at 222.
in Val Verde County, South Texas. In *Independent School District v. Salvatierra* (1931), several Mexican American parents claimed that the attendance of their children in a separate Mexican school was a denial of equal protection under the Fourteenth Amendment of the U.S. Constitution.\(^\text{103}\)

The complaint did not question the quality of facilities provided Mexican American children, nor the quality of instruction. The Hispanic parents simply did not want their children separated from the whites in school. The superintendent of Del Rio gave two reasons for the segregation: the late enrollment and irregular attendance of the Mexican American children, their slowness in reading English, and, in consequence their failure in other language-driven classes such as history. The Court ruled that it was unconstitutional to segregate Mexican students on the basis of national origin, but allowable on educational grounds. White Texans, if they wished to segregate Mexican Americans, had to find another reason besides race.

After *Salvatierra*, LULAC began to concentrate its energies less on segregation cases and more on "second generation" segregation, that is discriminatory education within the schools.

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\(^{103}\) The Del Rio schools encompassed four buildings, all on one piece of property with an athletic field in the middle. The Mexican school was a two-room building at one end of the property, the white high school and two elementary schools were at the other end of the property. *Independent School District v. Salvatierra*, 33 S.W. 2d 790 (Tex. Civ. App.—San Antonio 1930), cert. denied., 284 U.S. 580 (1931). See Guadalupe San Miguel, Jr., “"Let All of Them Take Heed" for an extensive discussion of this case and other equal protection cases dealing with Mexican Americans and education through 1975. See also Guadalupe San Miguel Jr., “The Struggle Against Separate and Unequal schools: Middle Class Americans and Desegregation Campaign in Texas, 1929-1957,” *History of Education Quarterly* 23, no. 3 (Fall 1983): 343-356.
Step Two to Rodriguez: The Rise of the American G.I. Forum and the Impact of

*Mendez* on the Mexican American Fight in Texas for Equal Educational

Opportunity

World War II brought more jobs for women and minorities in Texas. Increasingly urbanized, Texas and the U.S. recruited agricultural workers, both legal and illegal, from Mexico. While their social and economic status remained unchanged, their participation in the war effort deeply affected Mexican American attitudes toward segregation and discrimination. The experience of fighting fascism and their participation in the war led veterans in the Mexican community to become painfully aware of their continued second class status.

The formation of the American G. I. Forum by Dr. Hector P. Garcia in Corpus Christi on March 26, 1948 reflected the emergence of a new kind leadership among Texas Hispanics following the war. The organization strove for “the procurement of all veterans and their families, regardless of race, color, or creed, the equal privileges to which they are entitled under the laws of our country.” The Forum joined LULAC in its fight to free public institutions, including the schools, of discriminatory practices against Mexican Americans.

Demetrio Rodriguez recalls the influence that the leaders of the Forum had on him when he returned in 1951 to San Antonio after serving in the Air Force during the Korean War:

I made an application for federal civil service and they called me and told me I had passed the exam. I was an aircraft sheet-metal work at Kelly Air Force Base here in San Antonio. . .It was kind of rough when I started working at Kelly. The ones in the top jobs are mostly Anglos. I saw a lot of abuses—not physically but verbally...I’d say, How the heck can I do anything? Maybe I should take a gun

and start shooting these people. . . I knew there was something wrong but I didn’t
know how to do anything about it... So when I came from the service I joined
some organizations, like LULAC . . . and the American GI Forum. At that time
we had people who were educated, they had degrees—like Albert Pena, who’s
now a municipal judge; and Richard Casillas, he’s a regional director for
Immigration and Naturalization Service. Those are some of the people who were
in the American GI Forum, very active in trying to integrate the schools in small
towns like Hondo, where they had the schools segregated in the 50s. When the
Brown case came out of the Supreme Court, that’s when they broke that up. They
used to have one elementary school for the Mexican kids in the small towns.
Very few Mexican kids went to high school then. I learned a lot from those
organizations in the ‘50s, although I was just a member.

In 1945, LULAC assisted several Mexican American families in a class action
suit in the Ninth Federal District Court of Los Angeles against four California schools:
Westminster, El Modena, Garden Grove, and Santa Ana. The suit’s purpose was “to
enjoin” the school districts from “the application of alleged discriminatory rules
regulations, customs and usages” and charged the schools also with such discriminatory
practices as drawing school districts to contain minorities and busing, or transferring
Mexican and white students to maintain segregated populations. 105

Gonzalo and Felicitas Mendez leased a sixty-acre farm owned by a Japanese
family interned in a concentration camp. Located in Westminster, fifteen miles from
Santa Ana, the three Mendez children were denied admission to Westminster Elementary
School. Gonzalo had previously attended grammar school in Westminster before the
town had a segregated school system. 106 But now, on the first day of the 1944 school
year, the school denied admission to the Mendez children on the grounds of language
deficiency, even though their cousins were in attendance.

106 Gilbert G. Gonzalez, Chicoano Education in the Era of Segregation (Philadelphia: The Balch Institute
Press, 1990), 149.
After petitioning the school for admission of their children and organizing local parents, the Mendez family was offered a special exception by the superintendent, which they refused. They decided instead to hire civil rights lawyer David Marcus of Los Angeles to attack the California system of segregating Mexican children into separate schools.\textsuperscript{107}

On 18 February, 1946, U.S. District Judge Paul J. McCormick enjoined the segregation of Mexican children. Since California, like Texas, did not have segregated schools by law, he ruled that the federal court had jurisdiction over the case. The defense claimed that the \textit{Plessy} separate but equal doctrine should apply in \textit{Mendez}. McCormick broke with \textit{Plessy} and ruled that segregation created a social inequality and therefore, a distinction needed to be made between "physical" equality, equality in facilities, and "social" equality. McCormick, therefore, employed the Fourteenth Amendment not as a protection for segregation, but as a constitutional tool against segregation. Appealed on April 14, 1947, the seven judges of the San Francisco United States Circuit Court of Appeals upheld Judge McCormick's decision.

In a foreshadowing of \textit{Brown}, as the \textit{Columbia Law Review} noted, \textit{Mendez} broke sharply with the separate but equal approach to equal protection by requiring "social equality" rather than "equal facilities" in schools.\textsuperscript{108} Price Daniel, Attorney General of Texas, issued a legal opinion forbidding the segregation of Mexican children in Texas public schools, solely on the basis of race. Students through the first three grades could still be segregated for language deficiencies and other individual needs, if they were

\textsuperscript{107} Gonzalo Mendez became Marcus's chauffeur; and helped gather evidence and interview parents. He left Felicitas in charge of the farm which she ran alone for one year, "it become more prosperous than ever." The Mendez family also contributed $1,000 to the cause of action, this included compensation for
uncovered by certified testing. The Attorney General’s opinion proved ineffective. No administrative mechanism secured compliance by school districts; no guidelines held local school officials to implement the ruling. A random sample of ten Texas school systems after *Mendez*, found that Texas school districts still continued to use educational needs as an excuse to segregate Mexican American children.¹⁰⁹

Inspired by the *Mendez* case, LULAC, with the support of the American G.I. Forum, in January 1948, came to the aid of Minerva Delgado and twenty other parents determined to file a desegregation suit against several school districts in Central Texas. Brought to the United States District Court for the Western Division of Texas, the same court that would years later decide *Rodriguez*, Judge Ben H. Rice ruled that placing Mexican students in different buildings was arbitrary, discriminatory, and illegal. He enjoined local school boards “from segregating pupils of Mexican or Latin American descent in separate schools or classes. . . . and from denying said pupils use of the same facilities and services enjoyed by other children of the same age or grades.”¹¹⁰

Although the state superintendent of instruction Gordon Worley stipulated that segregation applied only “to members of the Negro race or persons of Negro ancestry” and that “it does not apply to members of any other race,” most schools districts failed to comply. The Texas legislature replaced Worley with an appointed Commissioner of Education, a professional educator less inclined to dismantle segregated Mexican schools and the State Board of Education then erected an elaborate bureaucratic redress mechanism to prevent compliance with *Delgado*.

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¹⁰⁹ San Miguel, Jr., 121.
¹¹⁰ Ibid., 154.
During this 1950s “era of subterfuge,” as education historians described these years, Texas continued to employ a multitude of segregation tactics, among them freedom of choice plans, selected student transfers, and language and scholastic ability classifications. LULAC and G.I. Forum leaders saw further segregation litigation as futile and few initiatives were undertaken to desegregate Mexican schools and implement equal educational opportunity for Mexican American school children until the 1960s.\textsuperscript{111}

In the 1960s, with the arrival of the civil rights and Chicano Movement, segregation and equal educational opportunity returned as an issue. LULAC and a new organization, the Mexican American Legal Defense Fund (MALDEF) sought to enforce court decisions twenty years past, and Mexican American parents in San Antonio, inspired by this previous history of civic action, taken by their Texas and California predecessors, initiated a new equal protection attack on the school finance system of the state.\textsuperscript{112}

Step Three to *Rodriguez*, MALDEF, and the Rise of the Mexican Civil Rights Movement

The Vietnam War, the black civil rights movement, and the “War on Poverty” contributed to a growing restlessness in the Mexican American community during the 1960s. Mexican Americans considered themselves a “forgotten minority”, underrepresented and unrewarded in the Kennedy and Johnson administrations.

\textsuperscript{111} Ibid.,at 126-134.
\textsuperscript{112} Gonzalez, 156.
Excluded in February 1966 from a multiracial council coordinating a White House conference on civil rights, many Hispanics viewed federal anti-poverty and education programs as directed primarily toward the black community. While LULAC and the American GI Forum continued to place their faith in conventional forms of political activity, in order to focus the public’s attention on Hispanic discrimination, a younger generation of Mexican Americans were ready to use potent confrontational tactics the black civil rights movement had popularized.¹¹³

Mexican American lawyer from San Antonio, Pat Tijerina, had helped to found the Mexican American Legal Defense and Education Fund. Although LULAC had earlier (1954) won for Mexican Americans representation on juries in Texas, Tijerina had been forced to settle a personal injury case out of court when not one Mexican American was on the jury panel.¹¹⁴ Convinced of the need to form a new organization to monitor and enforce court-ordered rulings, Tijerina consulted Jack Greenberg of the National Association for the Advancement of Colored People Legal Defense Fund (NAACP-LDFP). Greenberg suggested that Tijerina try to establish a Mexican American legal defense fund similar to the NAACP’s and, for financial support, contact Bill Pincus of the Ford Foundation.

¹¹³ High school walkouts, like the initial action taken in Rodríguez, and college demonstrations for the inclusion of Chicano studies programs during late 1967 and 1968 were indicators of a younger generation beginning to take part in the Mexican American struggle for civil rights. Johnson did not include Mexican American concerns in the White House Conference on Civil Rights held in June 1966. He did arrange Cabinet hearings in El Paso. Protesting the fact that such major leaders as Caesar Chavez, Reis Tijerina, and Rodolfo Gonzales were not included, a group of invited Mexican American leaders walked out and formed an alternative conference in the barrios of El Paso. These groups, disaffected with the tactics of LULAC and the G.I. Forum, formed a more militant, nationalistic organization called La Raza Unida. A statement drafted at the alternative conference was indicative of the new, more militant mood: “the time of subjugation, exploitation, and abuse of human rights of La Raza in the United States is hereby ended forever…” The statement “affirm[ed] the magnificence of La Raza, the greatness of [Mexican American] heritage…” It supported the greatness of Mexican American heritage, history, language, traditions, and “contributions to humanity and our culture.” San Miguel, Jr., 168-169.
In spring 1967, Tijerina, Bexar County Commissioner Albert Pena, and San Antonio City Councilman Ray Padilla had a long meeting with Pincus. The Ford Foundation agreed to consider a proposal for a new five state Mexican American civil rights litigation fund. Tijerina recalled that, "They [the Foundation] did not know we existed. . . . it was up to us to convince them of the police brutality, the segregation in schools, denial of fair trials because there were no Mexican Americans on juries, and employment discrimination." After Tijerina incorporated the Mexican American Legal Defense Fund [MALDEF] in Texas, he traveled to New Mexico, Arizona, California, and Colorado to organize those states. On May 1, 1968, at a meeting of the Southwestern board members in San Antonio, the Ford Foundation donated $2.2 million to be spent over a period of five years on relevant civil rights litigation with a stipulation that $250,000 of the grant was to be spend on scholarships for Chicano law students.115

MALDEF brought new legal and financial resources to the struggle for equal educational opportunity. MALDEF's goal was to "spearhead a struggle for social and economic change. . . . to have representation in the legal profession [and] to cause the immediate removal of the injustices which have afflicted the Chicano since time immemorial." Litigation was the primary tool to expand the political rights of Mexican Americans, to end employment discrimination, and to improve equal educational opportunity. MALDEF would attempt to negotiate a settlement with a discriminatory institution or individual. If that failed, litigation would be threatened, but if the threat did not produce results, a class action suit then would proceed. LULAC and the American G. 

114 The case that won the right for Mexican American representation on juries was Hernandez v. Texas, 347 U.S. 475 (1954).
115 San Miguel, Jr., Let All of Them Take Heed, 169-171.
I. Forum had viewed litigation as a last resort; MALDEF considered the courtroom as the primary instrument of social and economic change.\textsuperscript{116}

From 1968 to 1970 MALDEF’s first forays into the civil rights arena proved “reactive” and “haphazard.” Lacking skilled civil rights lawyers and administrators, MALDEF settled most of its early cases out of court with limited influence on judges. During the 1970s, the Defense Fund filed frequent equal educational opportunity lawsuits. They fought for bilingual education, Mexican American representation on school boards and in colleges, and an end to school segregation and discrimination in testing, student placement, and school finance. Additionally they initiated civil rights lawsuits alleging police brutality, voting rights, and employment discrimination.

In 1968, 162 Chicano students walked out of Edcouch-Elsa High School in Hidalgo County, sixty-two were expelled. MALDEF charged school officials with violation of the students’ constitutional rights. They won MALDEF’s first civil rights victory in Texas. The fund also defended Mexican American teachers who were fired for their involvement in the Chicano movement, and another student expelled for handing out anti-Vietnam war handbills. These suits helped only a few individuals and had a limited legal impact. But these initial cases proved MALDEF to be a new, passionate organization that stood poised to protect Mexican American’s constitutional rights.

When Arthur Gochman approached MALDEF in 1968 for support in the \textit{Rodriguez} case, however, the fund decided to continue concentrating on individual cases of discrimination. It feared that a suit against Texas “on behalf of millions of Mexican Americans, would have drained the group’s limited resources.” Arthur Gochman, aided

\textsuperscript{116} Ibid., at 172.
by Warren Weir, Manuel Montez, and Rose Spector, undertook the Rodriguez litigation at his own expense.\textsuperscript{117}

After Gochman lost the Rodriguez case before the Supreme Court in 1973, in 1984 Edgewood school officials turned to MALDEF to assist them in reopening the case. Now titled Edgewood v. Kirby, the case was reargued in the state courts and temporarily, as events proved, won in 1989 by MALDEF attorney Al Kauffman. Kauffman said it was "the greatest thing I'll ever do in my life."\textsuperscript{118}

Rodriguez would end school finance litigation based on the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution. But the Supreme Court decision opened the way to future challenges under the Texas Constitution and statutes. Through the 1980s and 1990s, civil rights lawyers, stressing the equal protection and education guarantees of the Texas Constitution, continued to challenge every new school finance law proposed by the state legislature.\textsuperscript{119}

Although MALDEF did not support the 1968 Texas school finance case, in the 1970s it litigated many cases that tried to eliminate segregation and discriminatory practices in the public schools. In order to bring actions under the Fourteenth Amendment to the U.S. Constitution, MALDEF sought to have the federal judiciary recognize Mexican Americans by as a separate, identifiable minority. Before 1954, most state and federal documents ordered or sanctioned the separation of blacks and whites. But whites treated Mexican Americans as whites and therefore not segregable.

\textsuperscript{117} Ibid. 173. See also Irons, "The Courage of Their Convictions" 299.
\textsuperscript{118} Rocha ad Webking, 31.
\textsuperscript{119} Rocha and Webking, 28-31. By the 1980s MALDEF had also successfully argued Plyler v. Doe 457 U.S. 202 (1982). In this 5-4 decision, Justice Brennan held that a free public school education can not be denied to undocumented alien children. Justice Powell, who wrote the Rodriguez opinion in 1973, was uncomfortable with the opinion, because he felt it implied that education was a fundamental interest, a position he denied in Rodriguez.
Article VII, Section One of the 1876 Texas Constitution, the state's seventh and current constitution, required that the legislature provide and maintain "an efficient system of public free schools, since "the general diffusion of knowledge" is "essential to the preservation of the rights and liberties of the people." During Reconstruction, the mixing of black and white children had angered Texans, and the constitutional convention made sure that "separate schools" were provided "for white and colored races, without racial discrimination." Although Mexican American children were to be treated as white, and by law, were not to be segregated, most Texas school districts maintained separate "Mexican" schools.

MALDEF lawyers, after Brown in 1954 sought judicial recognition of Mexican Americans as a national class, equal to that of African Americans. To envision a new and separate class, the court had to rule that Mexicans were a group possessing "unalterable congenital traits," that Mexican Americans were a class suffering from "political impotence" and the "stigma of inferiority." Once classified as a separate class, Hispanics would then be entitled to judicial relief from individual and state discrimination and plaintiffs could claim a denial of their rights to equal protection under the Fourteenth Amendment.

In June 1970 what became the landmark desegregation case, Cisneros v. Corpus Christi Independent School District, asked the judiciary to apply the Brown principles to Mexican Americans. In Cisneros, the steelworkers union of Corpus Christi had abandoned the early "other white" legal strategy of LULAC and the American G.I. Forum, and asked the federal district court of the Southern District of Texas to rule that, in spite of Texas law, Mexican Americans were an identifiable ethnic minority. Judge
Owen Cox found for the first time that Mexican Americans, for desegregation purposes, were an identifiable minority group in the public schools because of their "physical characteristics, their Spanish language, their Catholic religion, their distinct culture, and their Spanish surnames." Recognized as an ethnic minority, the equal protection guarantees could now be applied to Mexican Americans. MALDEF and other civil rights organizations were provided with a powerful new legal weapon with which to argue their cases.\(^{120}\)

The Fifth Circuit Court of Appeals upheld \textit{Cisneros}, noting that, unlike \textit{Brown}, the Corpus Christi case dealt with \textit{de facto} segregation of Mexican Americans, a separation never mandated by Texas statute. Although it declared \textit{de jure} segregation, or segregation by statute unconstitutional, \textit{Brown} also found unlawful segregation that resulted from the actions and policies of school authorities. The plaintiffs in future segregation cases had to establish only that the actions of a school board, for example, resulted in segregation, they did not have to prove that the actions had a discriminatory "intent" or purpose.

Although, after \textit{Brown}, some courts required a "purposeful" discrimination to find unconstitutional segregation, the Fifth Circuit's decision in \textit{Cisneros} did not accept this distinction. By finding that Mexican Americans were an identifiable minority, and by refusing to accept any "benign" intent for discriminatory practices, \textit{Cisneros} provided the basis for attack not only on \textit{de facto} segregated schools, but also on the actions and policies of school authorities.\(^{121}\)

\(^{120}\) \textit{Cisneros v. Corpus Christi Independent School District} 467 F.2d 142 (5th Cir. 1972). San Miguel, Jr. \textit{Let All of Them Take Heed} 178.

\(^{121}\) George A. Martínez, "Legal Indeterminacy, Judicial Discretion and the Mexican-American Litigation Experience: 1930-1980," \textit{University of California, Davis} 27 (1994): 592. The Fifth Circuit Court of
The protection of Mexican American minorities in this new desegregated school setting became MALDEF’s next major goal. MALDEF began to support the implementation of bilingual education and bicultural educational programs in the public schools. After Cisneros, equal educational opportunity for Mexican Americans meant not only the desegregation of the public schools, but also an end to many discriminatory practices by school authorities. The new civil rights battle was to guarantee each Chicano child the right to have an education suited to his own special linguistic and cultural needs.\textsuperscript{122}

In 1973, the same year Supreme Court decided Rodriguez, the issue of Mexican American desegregation and bilingual education came before the high court in Keyes \textit{v. Denver School District No. 1}. Keyes dealt with the dual segregation of blacks and Mexican Americans within the same district. Denver’s black school children, about one-sixth of the population, were segregated by law. The Supreme Court had to decide whether the Hispanic school children, approximately one-fourth of the school population, were to be treated as white or as a distinct minority, or were to be paired like blacks with Anglo children.\textsuperscript{123}


\textsuperscript{123} Keyes \textit{v. School District No. 1}, 413 U.S. 189 (1973). Denver had never been statutorily segregated, but it was de jure segregated because the school board used race when it drew attendance zones and located new schools. Jack Greenberg in his Rodriguez Amicus brief for the NAACP Legal Defense Fund mentions the pending Keyes case before the court: “...the Fund has pioneered in the legal struggle to eliminate racial and ethnic segregation in the public schools. Its attorneys have been associated with virtually every major school desegregation case decided by this Court between Brown \textit{v. Board of Education}, 347 U.S. 483 (1954) to Wright \textit{v. Council of the City of Emporia}, 40 U.S. L. W. 4806 (U.S. June 22, 1972), and likewise participated, with local counsel, in literally hundreds of such actions in federal courts. Typically these suits involved the segregation of black and white pupils within a school district. Fund attorneys have also worked to eliminate segregation of Mexican-American or Hispanic children, however. In Keyes \textit{v. School District No. 1}, 413 U.S. 189 (1973), the High Court decided that black children in Denver, like those in other school districts across the country, were entitled to the full benefit of the Court’s decision in Brown. The Denver cases were not just about desegregation; they were about education. The goal was to ensure that all children were given equal educational opportunity, regardless of race.” See Keyes Amicus Brief, 1973, p. 11.
In an opinion by Justice Brennan, the Supreme Court ordered all schools in the district desegregated and decided that, for desegregation purposes, Mexican Americans were constitutionally entitled to recognition as an identifiable minority. Brennan distinguished between de jure segregation and de facto. The white school district of Park Hill had been purposefully segregated by race, and the plaintiffs, the court stated, did not have to make a de jure showing of segregation in the rest of the district in order to have entire district desegregated. Justice Powell concurred with Brennan in part, but suggested that the distinction between de jure and de facto segregation be dropped and that there be only one standard for segregation. If segregated schools existed within a district, according to Powell, a prima facie case was established, and school authorities were bound by law to desegregate.\textsuperscript{124}

Two years later, when Keyes was on remand to the district court, Mexican Americans sought to have the Denver school board adopt a bilingual and a bicultural program in accordance with Title VI of the 1964 Civil Rights Act. Title VI requires that “No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of or be subjected to discrimination under any program or activity receiving Federal financial assistance.”\textsuperscript{125} The Tenth Circuit Court of Appeals ruled that the bilingual programs Denver had already implemented, although viewed as inadequate by the Mexican American plaintiffs, satisfied the requirements of Title VI. In \textit{Lau v. Nichols}, the year before the Tenth

\textit{Dist. No. One, Denver}, No. 71-515, presently before this Court, suit was brought to reverse Denver school policies which separated black, Hispano and white pupils.” Brief Amicus Curiae For the N. A.A.C.P Legal Defense Fund and Educational Fund, Inc., 2.


Circuit decision, the Supreme Court ruled that the San Francisco School District’s treatment of non-English speaking Chinese students in violation of Title VI of the 1964 Civil Rights Act, even though the District had also made a significant effort in its provision of supplemental English language instruction.\textsuperscript{126} Mexican American lawyers found the Tenth Circuit’s 1975 \textit{Keyes} decision inconsistent with the Supreme Court’s decision in \textit{Lau}. This “legal indeterminacy” frustrated civil rights lawyers who sought “full blown” bilingual and bicultural programs for Mexican American school children.\textsuperscript{127}

\textit{Keyes} made the final determination of the racial status of Mexican Americans in the eyes of the Supreme Court, and once Hispanics were recognized as a separate class, MALDEF changed its litigation strategy. Its lawyers began to concentrate on discriminatory practices within desegregated schools, practices that education historians have called “second-generation” desegregation. When Gochman approached MALDEF for assistance with \textit{Rodriguez}, however, the defense fund was still a new, inexperienced organization, formed on the NAACP model, whose initial goals were at first the desegregation of the schools and next, the declaration of Mexican Americans as a distinctive class. In 1973, the same year that the Supreme Court overruled the federal district court in \textit{Rodriguez}, MALDEF’s achieved its early goals in \textit{Keyes}. When a new Superintendent of Edgewood ISD called upon the defense fund again in 1984, it was ready to take on the Texas school finance case. But this time, reform would eventually be instituted by the Texas courts, with the reluctant cooperation of the state legislature, not by order of the Supreme Court.

Rodriguez v. San Antonio Independent School District
Arrives in District Court

The court below held the Texas system unconstitutional because it distributes educational benefits on the basis of district wealth. The court said, as might be expected, "Those districts most rich in property also have the highest median family income, and the lowest percentage of minority students; while the poorer districts are poorer in income and predominantly minority in composition." . . . The court further found that there was no rational or compelling reason that could be offered for this invidious discrimination.\textsuperscript{128}

On July 30, 1968, seven parents and eight children from the Edgewood District filed a class action suit in the United States District court for the Western District of Texas on behalf of all indigent and minority school children living in property poor districts in the state. The plaintiffs charged that the state’s school finance system deprived them and the other school children of Texas of "equal educational opportunity in violation of Amendment Fourteen of the United States Constitution."\textsuperscript{129}

The complainants initially sued the State Board of Education, J.W. Edgar, the Commissioner of Education, Crawford Martin, the Attorney General of Texas, the Bexar County School Trustees, and the seven Bexar County school districts—San Antonio, Edgewood, Harlandale, Northside, Northeast, Alamo Heights, and South San Antonio. Before the trial, the district court dismissed the school districts from the case when they

\textsuperscript{127} Martinez, "Legal Indeterminacy, Judicial Discretion and the Mexican-American Litigation Experience: 1930-1980" 609.
\textsuperscript{128} Oral Argument of Arthur Gochman, Esq. On Behalf of the Appellees, October 12, 1972, 580.
claimed that individual school districts could not bear the cost of defending the state's school finance system.\textsuperscript{130}

Because \textit{Rodriguez} challenged a state law under the federal constitution, it was brought before a federal three-judge panel. The trio would decide the first Texas school finance case without a jury. On October 15, 1969, the court denied the defendant's motion to dismiss the case, but the proceedings were then delayed for two years to give the Texas legislature time to address the disparities in the state's school finance system.\textsuperscript{131}

When the 62nd Legislature adjourned without taking action on the school finance issue, United States District Judge Adrian Spears, a Democrat placed on the bench by President John F. Kennedy, who lived in Alamo Heights, San Antonio's wealthiest school district, lectured the state's lawyers at a hearing in December 1971:

\begin{quote}
I think it is a little disconcerting to a court, when it abstains and does it on specific grounds that it wishes for the legislature to do something about it, and with education as important as it is to the citizenry of our state and our nation, for the legislature to completely ignore it. It makes you feel that it just does no good for a court to do anything other than, if it feels these laws are suspect, declare them unconstitutional; then make the Legislature take action, which they don't seem to want to do unless they are forced to do it.\textsuperscript{132}
\end{quote}

Throughout the trial, Arthur Gochman contrasted the riches of Alamo Heights with the poverty of Edgewood. For example, in 1967-1968 school year, the property value per student in Edgewood was $5,429 per student, in Alamo Heights $45,095.

\textsuperscript{130} These school districts later reversed their position when the California Supreme Court declared the state's school finance system unconstitutional in \textit{Serrano v. Priest}, 5 Cal. 3D 584, 487 P.2d 1241, 96 Cal. Rptr. 601 (1971). The court denied the request but the \textit{San Antonio Independent School District} later filed an amicus brief in support of the federal district court decision.

\textsuperscript{131} On October 2, 1969 U.S. District Judge Adrian A. Spears, speaking for the other judges explained that the Court was aware that the Legislature of Texas had appointed a Committee to study the public school system... and intended to recommend "a specific formula or formulae to establish a fair and equitable basis for the division of the financial responsibility between the State and the various local school districts of Texas." He then ruled that the Texas should act on the problem before the 62nd Legislature adjourned. Pretrial aspects and discovery of the case were to continue during the delay and defendants were to advise the court every 90 days of the committee's progress. \textit{Rodriguez} Appendix, 42.

\textsuperscript{132} Hearing before the Court held December 10, 1971, p. 24. Brief for Appellees, 6.
Alamo Heights, with a fourteen per cent minority population and a medium income of $8,184, had a combined local-state-federal fund expenditure of $594 per pupil, while Edgewood, with a seventy-five per cent minority population and a medium income of $3,405, received only $356 in local, state and federal funds. These financial discrepancies were present despite the fact that Edgewood parents taxed themselves at an equalized tax rate of $1.05 per $100 of assessed property, the highest in the metropolitan area, and Alamo Heights taxed itself at a rate of $ .85 per $100 of property valuation. The state imposed a property tax ceiling on school districts of $1.50, but the Edgewood district would have had to raise its property tax to $5.76 per $100 of property value to equalize its tax revenues with Alamo Heights.

The Texas Legislature adjourned in June 1971. On October 5th, Arthur Gochman, assisted by Mark G. Yudof, Professor of Law at the University of Texas, charged in federal district court that the plaintiffs’ children had been denied equal protection of the laws under the Fourteenth Amendment as a result of the State’s public school’s finance system: “Plaintiffs allege that the State financing system makes education expenditures a function of the wealth of each district thereby denying Plaintiffs, and the classes they represent, educational opportunities and resources enjoyed by children attending school in other school districts.”

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133 Affidavit of Joel S. Berke, Rodriguez v. San Antonio, Civil Action No. 68-175-SA, Table VII and Table X. See also San Antonio Independent School District v. Rodriguez 411 U.S. 12-13. In Texas, the school districts assessed property values at rates lower than market value. The ratio of assessed valuation to market value differed among districts, as did the tax rate levied on assessed valuation. To make interdistrict comparisons, the tax ratio of the district had to also be adjusted to reflect the rate of tax on property at market value. See Appendix of San Antonio Independent School District v. Rodriguez, October Term, 1971, No. 71-1332, 226. See also Amicus Curiae Brief for the National Education Association, American Association of School Administrators, National Congress of Parents and Teachers, and Council of Chief State School Officers, 6.

The defendants in turn claimed that the "Fourteenth Amendment of the United States Constitution does not require that public expenditures by the State of Texas be made to rely on the basis of pupils' education needs." The state argued also that the lack of "judicially manageable standards" made *Rodriguez* nonjusticiable and maintained that the Texas foundation school program guaranteed to all students a "minimum amount of funds sufficient to afford a reasonable education."

Pat Bailey and Raul Rivera, the defendants' chief counsel, praised the state's school finance system because it guaranteed the local control of education. The Fourteenth Amendment, they pointed out, permitted "the creation of political subdivisions with different powers," and did not require that "one political subdivision. . .assume the debts and obligations of another." In the state's view, the federal constitution did not require that education funds be equally allocated. Also, the amount of funds expended by a school district did not "necessarily determine the quality of education," nor did money determine whether the education the student received was of a "greater or lower quality" than that received by pupils in another district. The defendants also charged that the plaintiffs were "seeking to have this Court substitute its discretion" for that of the state legislature.135

During the trial Gochman relied on the testimony of nine experts. They included J. Richard Avena, the Director of the Southwestern Field Office of the U.S. Commission on Civil Rights, Dr. Jose Cardenas, the Superintendent of the Edgewood Independent School District, Dr. Daniel C. Morgan, Jr., Associate Professor of Economics at the University of Texas, Dr. Don Webb, Associate Professor Economics at Trinity University, Dr. Charles Feldstone, director of Computer Program, Trinity University,
and Dr. Joel S. Berke, Director of the Educational Finance and Governance Program at the Policy Institute Syracuse University. The *Rodriguez* court record soared to 100,000 pages of statistics and materials.\textsuperscript{136}

On December 23, 1971, three years after the Edgewood parents had filed their case, in a per curiam opinion, the three-judge *Rodriguez* court held that the "current method of state financing for public elementary and secondary education deprives their class of equal protection of the laws under the Fourteenth Amendment to the United States Constitution. . . .For poor school districts educational financing in Texas is, thus, a tax more spend less system." The existing system, the court decided, drew "distinctions between groups of citizens depending upon the wealth of the district in which they live."\textsuperscript{137}

The Judges found that the rational basis test, normally employed in cases dealing with state commercial and economic regulation, did not apply to *Rodriguez*.\textsuperscript{138} Because the system of financing public education permitted citizens of affluent districts to provide a higher quality education for their children, while at the same time paying lower taxes, the Texas public school finance system constituted discrimination based on "wealth." The court also found education to be a fundamental right protected by the Fourteenth Amendment. Since the state's school finance system deprived a "suspect class" (the poor) of a fundamental right, it was necessary for Texas to demonstrate a compelling state interest for classification.

\textsuperscript{135} Ibid., 2-3.
The justices found no compelling state interest present. True the District Court should not act as a “super-legislature.” But it still retained the power to declare an act of the state legislature unconstitutional. Not only were the defendants “unable to demonstrate a compelling state interest for their classifications based upon wealth,” they failed even to “establish a reasonable basis for these classifications.” The defendants had refuted their own argument when they urged the court to continue the present finance system because it “granted decision-making power to individual districts,” and “permitted local parents to determine how much they desire[d] to spend on their children’s schooling.” Because it guaranteed that some districts could spend low with high taxes, and others might spend high with low taxes, the state’s financing system, did not promote local control, but actually negated it.\textsuperscript{139}

The federal district judges accepted two of Gochman’s contentions when it ruled that poor families constituted a “suspect class” and that education was included in the “fundamental” rights guaranteed by the Fourteenth Amendment. The plaintiffs’ third claim, however, that Mexican Americans were a distinct racial and ethnic group, and like blacks, a “suspect” class, was not recognized in the federal district court’s opinion.

Chapter Four

Liberty Foes and Equity Friends: The Rodriguez Briefs and Two Standards of Equal Protection

The special circumstances that bring into play the “compelling state interest” test are not present here. The applicable standard is the “rational basis” test. It would be doctrinaire in the extreme to hold that there is no rational basis for continuing a system that has worked well and been widely hailed for 50 years in preference to immediate adoption of some new scheme, on which the reformers themselves cannot agree, based on a premise that has only been conceived in the last few years. 1

Charles Alan Wright, Brief for Appellants

Yet, as the defendants remind us, the fact that an enormous political and educational wrong has been visited upon large numbers of powerless children, does not necessarily invite judicial intervention. The injury must amount to a constitutional deprivation to justify such intervention. The Court should not entertain any doubts as to the constitutional vitality of the plaintiffs’ claims. Under the Equal Protection Clause of the Fourteenth Amendment, whether the Court applies the rational basis or the compelling state interest test, the Texas scheme for financing the public schools is unconstitutional. 2

Arthur Gochman, Brief for Appellees

Waiting for Nine Friends—the Period Between Rodriguez I and II
December 23, 1971 - March 21, 1973

On December 23, 1971, Texas federal district court justices Adrian A Spears, Jack Roberts and Irving L. Goldberg, in a per curiam opinion, unanimously found that the Rodriguez plaintiffs had been denied equal protection under the Fourteenth Amendment. “The current system of financing public education in Texas, they declared, “discriminates

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1 Brief for Appellants, 38-39. Charles Alan Wright went to Wesleyan University and graduated from Yale Law School in 1949. He clerked for Judge Charles E. Clark on the Second Circuit, and joined the University of Texas Law School faculty in 1955, five years after Sweatt v. Painter 339 U.S. 626 (1950). Over his career he argued twelve cases before the Supreme Court, winning ten. His most famous case was United States v. Nixon 418 U.S. 683 (1974) in which he wrote the reply brief, unsuccessfully defending the President’s right to withhold the Watergate tapes from the new special prosecutor. Texas International Law Journal 32 (Summer 1997): 367.
on the basis of wealth by permitting citizens of affluent districts to provide a higher
good quality of education for their children, while paying lower taxes." The parents and
children of the property-poor Edgewood School District of San Antonio had been denied
"equal protection of the laws under the Fourteenth Amendment of the United States
Constitution," and it was now "incumbent" upon the Texas Legislature to determine the
framework of a new school finance system. Any funding plan was considered to be
constitutional by the District Court as long as it fit the _Serrano/Private Wealth_ fiscal
neutrality model and did not make "the quality of public education a function of wealth
other than the wealth of the state as a whole." The three-judge federal district court
concluded that the Texas education establishment had not demonstrated a compelling
reason for establishing school districts with great variation in wealth. Texas also had
failed to "even establish a reasonable basis for these classifications." The District Court
retained jurisdiction of the case and gave the Legislature and the defendants two years to
comply with its decision. The _Rodriguez_ lower court also avowed it would take any
"further steps as may be necessary to implement both the purpose and the spirit of its
order."³

Decisions by a three-judge federal district court can be appealed directly to the
U.S. Supreme Court; the State of Texas, taking advantage of this provision in federal
procedure immediately filed its appeal. Since the original defendants lost in district court,
when _Rodriguez I_ reached the Supreme Court, it was renamed _San Antonio School
District v. Rodriguez (_Rodriguez II_).⁴

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² Brief for Appellees, 24-25.
Before the *Rodriguez* I decision, the state’s attorneys spread the word that the Texas school finance suit was “frivolous and need not concern educators or politicians.” The defendants, therefore, reacted with what Mark Yudof, the plaintiffs’ co-counsel, described as “surprise, bordering on shock” when the judgment was handed down. The public’s reaction in Texas was “equally hostile.” Texas state senator, A.M. Aiken, the co-author of the Gilmer-Aiken Bill, expressing a predictable Texan “xenophobic hostility” to any future federal interference in local affairs, threatened to leave the convoluted funding question to the judges, since they had all the answers with regard to how the public schools should be operated and financed. The Texas legislators also feared that *Rodriguez* spelled the abolition of the property tax. Amarillo State school board member Herbert Willborn foresaw the future necessity of installing a “share-and-share

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5 The 1949 Gilmer Aikin Law created the Texas Minimum Foundation Plan (MFP) under contention in *Rodriguez*. Following the Supreme Court decision in *Rodriguez*, the MFP remained in operation in Texas throughout the 1980s. The foundation plan was originally designed to guarantee enough funding to districts so that each child received an adequate basic education. Districts were free to add to the minimum through local property taxes. In 1975, the name of the MFP was changed to the Foundation School Program (FSP). Judge Harley Clark of the 250th State District Court finally declared this program unconstitutional under the Texas Constitution in 1987. The Austin Court of Appeals reversed the district court’s decision, finding the Aikin school finance system constitutional according to the rational relationship equal protection test under the Texas Constitution. The Texas Supreme Court on October 2, 1989 reversed the Court of Appeals and found theTexas system of financing public education unconstitutional. In a unanimous decision Justice Oscar H. Mauzy ruled that the state school funding system was unconstitutional: “Children who live in poor districts and children who live in rich districts must be afforded a substantially equal opportunity to have access to educational funds.” See *Edgewood Independent School District v. Kirby*, No. 362, 516 (Dist. Ct. of Travis County, 259th Judicial Dist. of Texas, June 1, 1987), rev’d 761 S.W. 2d 859 (Tex. App. –Austin 1988), rev’d 777 S.W. 2d 391, 397. Sitting on the Texas Supreme Court in 1989 were Republicans Thomas R. Phillips, Eugene A. Cook, and Nathan L. Hefcht. The six Democrats on the court were Raul A. Gonzalez, Oscar H. Mauzy, Franklin Spears, C.L. Ray, Jack Hightower, and Lloyd Doggett. For a discussion of these cases see Gregory G. Rocha and Robert H. Webking, *Politics and Public Education: Edgewood v. Kirby and the Reform of Public School Financing in Texas* (Minneapolis: West Publishing Company, 1993), 27-45. See also the article by Albert H. Kauffman, the lead attorney for the plaintiffs in *Edgewood v. Kirby*. Albert H. Kauffman and Carmen Maria Rumbaut, “Applying *Edgewood v. Kirby* To Analysis of Fundamental Rights Under the Texas Constitution,” *St. Mary’s Law Journal* 22 (1990): 71-80. The court instructed the legislature to design a finance plan that created a “close correlation between a district’s tax effort and the educational resources available to it.” The state Supreme Court gave the Texas legislature until May 1, 1990 to form a new finance plan. *Edgewood Independent School District v. Kirby*, 777 S.W. 2d 397. Equal protection appears in the Texas Constitution in two provisions—sections 3 and 3a of article I.
alike” school funding system that could result in establishing “the same level of mediocrity” in education throughout the state.  

In January 1973, Governor Briscoe, Lieutenant Governor William Hobby, the presiding officer in the Senate, and the newly elected state legislators, although inexperienced, had pledged themselves to no new taxes in their recent campaigns. Since it was widely believed that any equitable school finance reform would require a substantial infusion of education funds, these “green” politicians were content to do nothing until the United States Supreme Court ruled on the issue. In addition, Oscar Mauzy, “an avowed Texas liberal,” and Chairman of the Senate Education Committee at the time, did not relish pressing school finance reform on a reluctant conservative chamber until reinforced by a favorable Supreme Court affirmation, which he anticipated. With “indeterminate” guidelines from the district court, and a mixed response from the public and political interest groups in the state, short-run postponement of school finance reform in the state legislature became inevitable.

School administrators reacted to Rodriguez I with reservation and “division” as well. The plaintiffs viewed the Texas education establishment as “hostile” to the Private Wealth standard of fiscal neutrality and unalterably opposed to the principle of equal educational opportunity. They rested their future faith with the Supreme Court. The 150,000 member Texas State Teachers Association (TSTA), however, perceived Rodriguez as a “god-send”; a means to gain salary increases in the guise of school finance reform. In the fifteen-month period between the two Rodriguez decisions, the

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7Yudof and Morgan, “Gathering the Ayes of Texas,” 395-396.
TSTA proposed to the state legislature a new billion-dollar tax increase to finance the demands of plaintiffs living in property-poor districts. "The heart of the TSTA plan," according to Yudof, "was, predictably, job creation and salary increases," with little attention given to equalization of school funds beyond a new expanded foundation program. Some of the TSTA preliminary proposals were lower pupil/teacher ratios, additional special duty teachers, a required kindergarten program, more supervisors, counselors, and principals. They asked that extra tax dollars also be directed to equalization of per pupil expenditures between districts.  

Ten months after the lower court *Rodriguez* decision, the State Board of Education made its own proposal, suggesting increased allotments to school districts and the employment of property market values in computing a school district's contribution to a new foundation program. The Board also recommended a limit, or cap on affluent district expenditures—districts spending more than $300 per Average Daily Attendance (ADA) could maintain their current expenditure level, but would not be allowed to enrich further. This would give time for the state to bring poor districts up to an acceptable minimum, if they met a state specified tax obligation. The Board's plan attracted the wrath of rich, powerful school districts, and drew criticism from proponents of school finance reform because its implementation would be too gradual.

The most equalizing recommendation in the period between *Rodriguez I* and *II* came from an expansive study prepared by Peat, Marwick, Mitchell & Co. for the Joint Interim Senate Committee to Study School Finance, a combination of three Senate

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8 Ibid., 398.
interim committees. Published one day before the Supreme Court’s Rodriguez decision, the study offered twelve possible solutions to the state’s equity school funding problem. The preferred proposal placed a limit on local spending for enrichment, recommended increased financial support for school districts, and a minimum as well as a maximum local property tax rate. Like the TSTA and the Board proposals, this Senate study urged a state-equalized property evaluation for the purpose of taxation and determination of a district’s local share contribution.

The study for the Senate Joint Committee never received serious consideration by the State Legislature because the Supreme Court announced its decision only one day after it officially released it proposals. From December 23, 1971, the day of the District Court decision to March 21, 1973, the period between Rodriguez I and II, the opposing forces in the Texas school finance case prepared arguments, briefs, and plans that expressed their traditional and new equal protection views. School finance reformers and litigators around the state and nation waited to see what the fruits of eight years of legal and intellectual struggle would be. Would nine “friends” in Washington on the Burger Court continue the egalitarian revolution that began in Brown? Equity advocates asked that education at last be declared a fundamental right of every American citizen, and poverty, like race, found a “suspect” class, subject to the close “scrutiny” of the Court.

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9 Ibid. These committees were: The Senate Interim Committee to study Urban Education, the Senate Interim Committee on Occupation Education, and the Senate Interim Committee to Study Tax Revenue to Fund Rising Costs of Education. See the JOINT SENATE INTERMIN COMMITTEE REPORT ON PUBLIC SCHOOL FINANCE (1973): 1.

10 The Local Fund Assignment, apportioned among the school districts, was their contribution to the Texas Minimum Foundation Program (MFP) created by the Gilmer-Aikin bills in 1949 and declared unconstitutional by the three-judge district court in Rodriguez. At the time of the Supreme Court case, there were 1,161 school districts in Texas. The State supplied 80% of the funds for the MFP from general revenues; the school districts provided the remaining 20%. For the 1970-1971 school year the state aid program accounted for 48% of all public school funds in Texas. Local taxes contributed 41.1% and the federal government 10.9%. San Antonio School District v. Rodriguez, 411 U.S. 9 (1973).
Believers in state and local control of education, hoped that the Court would end federal interference with the freedom of parents and legislators to work out their own solutions to equal educational opportunity challenges.

Rodriguez Arrives in Washington

Oral arguments in Rodriguez were made before the Supreme Court on October 12, 1972. The state “at last recognizing the gravity of the case,” hired Charles Alan Wright, the renowned constitutional scholar and professor of law at the University of Texas.11 Again representing the plaintiffs was Arthur Gochman assisted by Professor Mark C. Yudof, also of the University of Texas law school. Only eight justices were present that day as Justice Thurgood Marshall was ill. They were Warren E. Burger, the Chief Justice, William O. Douglas, William J. Brennan Jr., Potter Stewart, Byron R. White, Harry A. Blackmun, William H. Rehnquist, and Lewis F. Powell, Jr. This chapter examines the oral arguments and briefs of the Rodriguez plaintiffs, defendants, and friends in order to reconstruct opposing interpretations of equal educational opportunity in the late 1960s and 1970s. This battle over school funding, which continues to the present, is a potent example of the continuing tension between the values of liberty and equality, each ideal firmly embedded and protected by the U.S. Constitution and the Bill of Rights.

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11 At the age of forty-three Wright was an expert on federal litigation, with close ties to the Republican establishment.
Friend of Liberty:

Charles Alan Wright Argues for Traditional Equal Protection Review

In his written brief and oral presentation Wright argued that the Texas district court’s *Rodriguez* decision was based on “unsound factual assumptions,” “erroneous law,” and would have disastrous consequences. The plaintiff’s constitutional argument Wright claimed was a “simple one.”\(^{12}\) Education, the plaintiffs held, was a “fundamental interest,” and district wealth a “suspect” classification. The Texas school finance system was constitutional only if the state could demonstrate a compelling reason to continue the inequitable system. “New” equal protection doctrine, Wright criticized, was well suited to the school finance cases because the determinations of “the relative invidiousness of the particular differentiation and "the relative importance of the subject with respect to which equality is sought" are “largely subjective judgments.”\(^{13}\) Wright also sought to prove that *Rodriguez* was not even a new equal protection case since it did not involve a “fundamental interest”, nor did it affect a “suspect” classification.

Firstly, the defense found no correlation between personal wealth and school district wealth, and this, Wright argued, was a statistical finding necessary to plaintiffs’ equal protection argument. The factual assumptions supplied to the *Rodriguez* lower

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\(^{12}\) Gochman in his brief agreed with Wright on this point. The plaintiff’s equal protection was simplistic, but the impact of the Texas school funding system on the poor was not: “Defendants characterize these legal arguments as “simplistic”, and in a sense, the plaintiffs agree. The State has chosen to allocate education services, possibly the most vital service it provides, in a way which systematically deprives children living in poor districts of an equal educational opportunity. . . .This is particularly invidious where the class being adversely treated consists of children who are politically powerless and who are, for the most part, members of poor and minority group families.” Brief for Appellees, 25.

\(^{13}\) Ibid., 27. Wright is quoting from Archibald Cox’s article “Foreword: Constitutional Adjudication and the Promotion of Human Rights,” *Harvard Law Review* 80 (1966-67): 91, 95. Wright referred to Cox as a “distinguished commentator sympathetic” to the new equal protection doctrine, but contended that even Cox found the Warren Court’s interpretation of the Fourteenth Amendment based on personal values, rather than precedent.
court by the Edgewood School District’s expert Professor Joel S. Berke, were erroneous. Citing a critique by Professor Stephen R. Goldstein, Wright pointed out that poor families do not always reside in poor districts. While a “wealth” correlation existed between the ten richest districts in Texas and median family income and the four poorest, for the majority of the school districts in the three middle market value categories, there was an inverse relationship between property wealth and median family income. Even though the authors of *Private Wealth* argued that a poor school district in terms of taxable property wealth was unconstitutional even if families within the district were individually rich, Wright pointed out that this point weakened their constitutional argument. In addition, the plaintiffs’ contention that the Supreme Court had declared wealth to be a suspect classification was drawn from “cases that are concerned with individual wealth, not with the collective wealth of a territorial division.”

Secondly, the Texas district court judges wrongly accepted as fact that “quality is money” and that per pupil expenditures are a measure of educational equality. “It is reasonable to suppose,” Wright asserted, “that there is some minimum sum of dollars beneath which a sound education cannot be had. Beyond that minimum it cannot be assumed that more dollars means better education—and there is considerable reason to doubt that there is any relation between the two.” As proof, Wright cited the 1966 Coleman Report, which revealed that although there was a correlation between social

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14 Ibid., 21. Wright is citing here Stephen R. Goldstein, “Interdistrict Inequalities in School Financing: A Critical Analysis of *Serrano v. Priest* and Its Progeny,” *University of Pennsylvania Law Review* 129 (1972): 504, 525 N. 71. The data under contention in the Wright Appellant Brief was Table VII of the Plaintiffs’ District Court’s Exhibit VIII. It can also be seen as Table I in the *Rodriguez* Appendix, No. 71-1332, Affidavit by Joel S. Berke, 198. Wright’s argument is that the *Rodriguez* federal district court simplified the factual data when it said “The rich districts had eight per cent minority pupils while the poor districts were seventy-nine percent minority.” *Rodriguez v. San Antonio Independent School District* 337 F. Supp. 282, Note 3.
class and educational achievement, the variations in such factors as "school facilities and curriculum," were "little related to differences in achievement levels of students."  

Finally, the Berke data showed no correlation between race and minority composition of school districts and their property wealth. Again quoting Goldstein, Wright agreed that there was a high percentage of minorities in the 4 poorest districts in Texas (79%), and a low percentage (8%) in the 10 wealthiest districts with a market value of taxable property above $100,000. But the correlation between district wealth and race disappeared in the 96 districts grouped by Berke in the middle. Wright pointed out that the authors of the Private Wealth standard of fiscal neutrality agreed with his conclusion when they stated: "There is no reason to suppose that the system of district-based school finance embodies racial bias. No doubt there are poor districts which are basically Negro, but it is clear almost by definition that the vast preponderance of such districts is white." Wright therefore viewed the lack of reliance in the district court's decision on "racial considerations in its determination of unconstitutionality" as "wise."  

These factual findings the defense argued should convince the Court that in Rodriguez race was

15 Brief for Appellants, 18. Equality of Educational Opportunity (Summary Report) Washington D.C. Office of Education, U.S. Department of Health, Education, and Welfare, U.S. Government Printing Office 1966. OE-38000; Superintendent of Documents Catalog No. FS 5-238:38000. Section 402 of the Civil Rights Act of 1964 provided that the U.S. Office of Education should undertake a survey "concerning the lack of availability of equal educational opportunities for individuals by reason of race, color, religion or national origin in public educational institutions at all levels in the United States, its territories and possessions, and the District of Columbia." Congress, according to Frederick Mosteller and Daniel P. Moynihan, appears to have intended to use the study as a tool to take legal action concerning minority discrimination in educational institutions. The Coleman Report was the second largest social science research project in history. "It is the most important source of data on the sociology of American education..." The report was controversial because its findings were opposite to what was projected. For example it discovered that there was not a great difference between the facilities of Negro schools and white; it also found that there was little relation to levels of academic achievement and variation in school facilities. See Frederick Mosteller and Daniel P. Moynihan, On Equality of Educational Opportunity (New York: Vintage Books, 1972) 4-5, 8-9, 15.

16 John E. Coons, William H. Clune III, and Stephen D. Sugarman, Private Wealth and Public Education (Cambridge: Belknap Press, 1970), 356-357. Wright also cited an unpublished study by the California State Department of Education that showed that 59% of minority students lived in districts that were above the median property valuation per pupil. See note 47 in ibid., 357.
not a factor, and district wealth should not be considered a suspect class within the
parameters of the new equal protection.

Similarly, Wright found fundamental flaws in the appellees' legal argument.
There was "no direct authority" that the Supreme Court had declared education to be a
fundamental interest, or wealth a "suspect" classification. \textit{Brown}, Wright argued, should
be reviewed as a racial segregation precedent with the strict scrutiny test applied not
because education is a fundamental interest but because classification by race had
become clearly suspect in Supreme Court interpretation. This was not the case in
\textit{Rodriguez}. "That education is important and a vital concern of state and local government
cannot be denied," Wright countered, "[b]ut this is far from saying that education is so
vital as to be called a "fundamental" interest from a constitutional point of view and thus
made subject to a much more rigorous constitutional test than that applied in other areas
of state concern." The Court had declared few interests to be fundamental, and only those
"rooted in some provisions of the Constitution." The recent case of \textit{Dandridge v. Williams}
was proof of this point. There the Court upheld a state regulation that placed a
limit on the amount of welfare payments for dependent children. Welfare cases, like
\textit{Dandridge}, and its companion case \textit{Jefferson v. Hackney}, were even more likely
candidates for a "rigid scrutiny" test than \textit{Rodriguez}, but in these early 1970s cases, the
Burger Court had moved away from the implications of the new equal protection.
Although "they involved real dollars for real individuals, not the statistical abstractions"
that were the substance of the current litigation, the court still had not agreed with the
plaintiffs and expanded the scope of wealth discrimination under the Fourteenth
Amendment. Wright compared a Maryland welfare family in *Dandridge* with an Edgewood plaintiff.\(^{17}\)

If Maryland can say to a hungry family that $250 per month is enough for it to live on, no matter how many children there are or what the circumstances of the family may be, why is it unconstitutional for Texas to determine that the amount spent per pupil in the Edgewood School District is enough to provide an adequate education?

Also, Wright argued, previous “new” equal protection cases were no proof that the United States Supreme Court was moving toward declaring wealth a “suspect classification.” These cases were concerned not with wealth, but the ability to pay. Most of the Warren Court’s new equal protection cases encompassed fundamental interests such as fair criminal procedure and voting. “They teach that there are certain rights—voting, a lawyer, a transcript—that cannot be denied entirely.” The indigent Edgewood client in a criminal case, Wright argued, had the same right to counsel if he was charged with a crime as a man in Alamo Heights, he did not have a right to a lawyer of the “same distinction.” The “new” equal protection poverty cases, therefore were an insufficient basis for the Appellees’ argument that the Edgewood plaintiffs were a suspect class, or the Texas state school funding system a discrimination based on wealth.\(^{18}\)

The special equal protection requirements that brought into play the “compelling state interest” test were not present in *Rodriguez*. Having proven that education was not a “fundamental” constitutional right, nor school district wealth a “suspect” class, Wright

\(^{17}\) Ibid., 33. See *Dandridge v. Williams*, 397 U.S. 471 (1970) and *Jefferson v. Hackney*, 406 U.S. 535 (1972). In *Dandridge* as stated above, the Court upheld a Maryland state regulation that placed a cap on welfare payments to dependent children regardless of family size or need. In *Jefferson*, the Court found no racial discrimination in the more generous funding for the Aged, Blind and Disabled as compared to the federal funding for Aid to Families with Dependent Children.

contended that the appropriate standard for the Supreme Court to apply was the rational basis test:19

It would be doctrinaire in the extreme to hold that there is no rational basis for continuing a system that has worked well and been widely hailed for 50 years in preference to the immediate adoption of some new scheme, on which the reformers themselves cannot agree, based on a premise that has only been conceived in the last few years.

The Texas foundation program, as that in many states, had a rational basis—it assured every child an adequate, minimum education. Although it set a floor under educational spending, it placed no ceiling. Finance plans such as the program in Texas, Wright argued, were the result of the pioneering work in 1923 by George Strayer and Robert Haig. Texas education funding guaranteed “an equal right to an education even if not a right to an equal education.” They did not prevent any particular community from offering at its own expense “a particularly rich and costly educational program,” so long as the state provided “an adequate minimum offering everywhere.” The system in Texas therefore had a rational constitutional basis. It insured every child an adequate education, and at the same time left to the local district the right to go beyond that minimum, if it desired. To impose a “constitutional straitjacket” on Texas or any other state, would “destroy the important value of local autonomy” and would have “dangerous consequences.”20

19 Brief for Appellants, 38.

The Texas foundation plan was not the result of "mere happenstance." It was not designed to be racially discriminatory. It was the result of repeated studies and educational reform within the state and consistent with what most states had chosen to do throughout the country. Over the last half-century, the state legislative had continually appointed legislative commissions to evaluate the public schools and make recommendations. The present system in operation, the work of the Gilmer-Aiken Committee in 1948, had been changed according to suggestions made by the Hale-Aikin Committee in 1958, and the Governor's Committee on Public Education in 1968. Current studies were also underway by task forces sponsored by the Texas Education Agency, the Texas Senate Committee, the Texas State Teachers Association, and the Texas Research League. "Whatever else may be said about school finance in Texas, it is not a subject that suffers from lack of attention," Wright contended.21

The defense did not claim that the Texas school finance system had reached perfection. Likewise, according to Wright, the Edgewood School District did not propose, nor did the District Court hold that the plaintiffs were receiving an inadequate education. Rather, the lower court found the Texas school finance system unconstitutional under the Fourteenth Amendment and required the state to devise a new school finance plan in accordance with the principle of "fiscal neutrality." The problem with depending on the financial resources of the state as a whole, as the judicial standard of fiscal neutrality would require, and then allocating school funds to districts, was that "only the amount allocated by the state, by whatever formula, could be spent and ... no

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21Ibid., 9-10. Wright pointed out that from 1960 to 1970 Texas had increased school expenditures from $750 million to $2.1 billion, while the student population increased only 37%. This represented a doubling of expenditures per student ($416 to $855.) See Texas Research League, Public School Finance Problems in Texas 2 (1972).
district would be permitted to supplement this subvention from its own resources.”

This would be the antithesis of the long-held tradition in education of local authority and the private right of parents to control the quality of education of their children.

Professor Coons and his associates in *Private Wealth* proposed that the solution to this lack of local control under the principle of fiscal neutrality was the imposition of “district power equalizing” or DPE. In this plan, Wright pointed out the state would take funds from “richer districts” and give them to “poorer districts,” while at the same time guaranteeing that a certain tax rate would yield a certain number of dollars per student, regardless of the district’s property tax base. Local freedom of choice would be preserved in this form of fiscal neutrality because each district remained free to decide how much it spent on education by setting its own tax rate.

Wright argued that DPE in fact did not ensure “equality without sacrificing freedom.” Districts with low property values would be under pressure to tax high to receive maximum state aid. Other services would be at a disadvantage because taxes for education yielded a state bonus, while taxes for a park or a library would not. Also, DPE departed from the principle of equal educational opportunity. “It is those who think Proposition I is constitutionally compelled who should say whether power equalizing is consistent with that principle, or with the Constitution, but it is difficult to see why the same arguments that are made against present financing plans cannot also be made against a plan based on power equalizing.”

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Private schools would always remain an alternative for the wealthy as long as the *Pierce* Supreme Court decision remained the authority. Wright theorized that the district court decision would encourage "flight away from the public schools at a time when those schools are the principal hope of achieving a society that is not divided by artificial barriers of race or class or wealth."  

The only legitimate question the Supreme Court had to consider in the *Rodriguez* case, according to Wright, was "whether the District Court’s adoption of Proposition I is required by the Constitution." The consequences that would follow from affirming the lower court’s decision would be unwarranted and drastic. For example, for a state to comply with the decree would require a vast increase in the amount it spent on education, and few could afford it.  

Quoting Professor Daniel Moynihan, "the only certain result" of this finance reform would be "that a particular cadre of middle-class persons in the possession of certain licenses—that is to say teachers—will receive more public money in the future than they do now."  

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*Rodriguez* District Court held that this principle of "fiscal neutrality" was required by the Equal Protection Clause of the Fourteenth Amendment. "Unlike the measure offered in *McLemire*, this proposal does not involve the Court in the intricacies of affirmatively requiring that expenditures be made in a certain manner or amount. On the contrary, the state may adopt the financial scheme desired so long as the variations in wealth among the governmenally chosen unites do not affect spending for the education of any child." *Rodriguez v. San Antonio Independent School District* 337 F. Supp. 284 (W.D. Tex. 1971), rev’d, 411 U.S. 1 (1973). The lower court did not mandate DPE.

*Pierce v. Society of Sisters*, 268 U.S. 510 (1925). In Oregon the Ku Klux Klan pushed through a law requiring children to attend public schools. The intent of the legislation was to eliminate Catholic schools. Supreme Court Justice James Clark McReynolds, in a unanimous opinion, found "no peculiar circumstances or present emergencies" to uphold such a law that interfered with personal and property rights. A case based on the due process clause, rather than the Equal Protection clause of the Fourteenth Amendment, *Pierce* was a historic case in the Court’s recognition of a right to private decision-making in family matters.

For example, Wright argued that in 1970-71 Andrews School District in Texas spent $1,708 per student, and this was matched by 99.9% by all the other Texas districts. To raise every district to this level would require an addition of $2.4 billion to the total cost of education, and still the level of the highest 36 districts would not be met. See Texas Research League, *Public School Finance Problems in Texas* 17 (1972). Brief For Appellants, 38.

A second financial consequence of the adoption of the principle of “fiscal neutrality” would be a “Robin Hood” solution, the transference of school funds from 622 rich districts in Texas to 527 poor districts. Wright predicted that not only would affluent districts not adjust to such stricture, but that teachers would lose tenure, and districts that had issued bonds based on their incoming revenue would be considered financially unsound.

Also, the argument that centralized state financing of public schools would increase the revenue of urban schools was an illusion. The Urban Institute’s 1968-69 report on California education found that in comparing the resources of five kinds of schools, the rapidly-growing suburbs had the lowest property tax base per child ($53,222) and the central cities had one of the highest ($56,428.) The study also discovered that teachers in these areas were less experienced and held fewer advanced degrees. Teachers in the central cities and stable suburbs were the most experienced and urban teachers more commonly had advanced training.

In oral argument, Justice White asked Wright if to sustain the state’s case, “we must agree with you that the Foundation program brings it (Texas education) up to a minimum level.” Wright responded “No, I think that this is simply not an issue here. There is hardly so much as an allegation.” The key question for the defense was “not drawn on the theory that the Foundation program does not give Edgewood enough,” or whether the Court should decide what a constitutionally minimum public school education would be. The position of the plaintiffs, according to the defense, was whether Edgewood was given as much as its neighbor Alamo Heights. “And that is certainly the constitutional violation found by the District Court.” “The District Court
made no finding that we (the state) fall below whatever the constitutional minimum may be.” Wright agreed that the court had suggested in *Wisconsin v. Yoder* that a "constitutional minimum" public education could be required of a state and the Court had quoted Thomas Jefferson regarding this point. But Wright did not agree that "there is any issue between the parties in this case on whether or not Texas is providing a minimum education."27

**Mr. Gochman’s New Equal Protection Strategy**

During the 1950s and 1960s, the Supreme Court, headed by Chief Justice Earl Warren (1953-1969), initiated an egalitarian revolution. It massively expanded the rights of underprivileged classes and persons in American society, especially the right of racial and ethnic minorities to equal treatment under the Fourteenth Amendment to the United States Constitution, wrote law professor Peter Enrich. The Court crafted the equal protection clause into a powerful tool “whose promise as an instrument of social change appeared vast.” The decision of civil rights and anti-poverty litigators to test the potential of the equal protection clause in the arena of education funding, as had already been

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27 Oral Argument, *San Antonio Independent School District, et al. Appellants v. Demerio P. Rodriguez, et al., Appellees*. No. 71-1332, Washington, D.C., Thursday, October 12, 1972, 4. *Wisconsin v. Yoder*, 406 U.S. 205 (1972). The Amish objected in Wisconsin to a state law that required compulsory education beyond the eighth grade. They believed that sending their children to high school would place them in a non-religious environment that emphasized competition and sports. This would take them away from their religion. The Court found that the state statute inferred with the parent’s right to practice their religion. It did not deal with the right of Amish children to attend public school, if they desired. Justice Douglas in his dissent disagreed. The opinion of Amish children should have been canvassed, if of sufficient maturity, to determine if they wanted to attend public school. Although it was true that a parent normally speaks for the family, a child’s view on his education should be taken into consideration.
accomplished in areas of desegregation, voting rights, and criminal law, was "almost inevitable."²⁸

The early school desegregation cases were the most striking examples of the Warren Court's application of the "new" equal protection doctrine.²⁹ These decisions expanded the ideal of equal educational opportunity in American education so eloquently expressed in Brown. Concerned primarily with racial discrimination, the desegregation cases convinced school finance reformers that the Supreme Court was ready to declare access to education and uniform funding of public schools a fundamental right of all public school children.³⁰

Gochman depended primarily on the school desegregation cases in his Rodriguez equal protection argument. Seeking a stricter standard of equal protection review on the


³¹ Brown, Enrich points out, continues to inspire school finance reformers today, even though constitutional challenges to state funding systems have returned to the state court arenas. In Rose v. Council for Better Education, for example, the Kentucky Supreme Court ruled that the state legislature had failed to establish an "efficient system of common schools" and declared the entire state system of education, including the financing structure unconstitutional. The court in Rose focused on the twin principles of the fundamentality of education, inspired by Brown, and the adequacy of funding. "The total local and state effort in education in Kentucky's primary and secondary education is inadequate and is lacking in uniformity." (790 S.W. 2d 186 Kentucky 1989). The case marked a new era in school finance litigation post-Rodriguez because of the breath of the decision. To meet the state constitution's requirement of an "efficient system" the legislature would have to satisfy two ambitious standards—equity and adequacy. Enrich suggests that current school finance cases would have more success in litigation if plaintiffs rest their constitutional claim on the principle of adequacy rather than equality, and that school finance lawyers should leave the 60s and 70s equality arguments behind. Enrich, "Leaving Equality Behind," 100, 117 n.75, 188. For a discussion of the Rose case see Betty E. Steffy, The Kentucky Education Reform: Lessons for America (Lancaster: Techonic Publishing Company, 1993), 96-98.
part of the Supreme Court justices, the plaintiff-appellees also relied on subsequent Warren Court decisions that dealt with the issue of wealth discrimination. For example, new equal decisions protected indigent criminal defendants. *Harper v. Virginia Board of Elections* (1966), declared the poll tax unconstitutional, *Boddie v. Connecticut* (1971), granted the poor a right to divorce. Such decisions gave public interest lawyers an expectation that the Supreme Court was ready to make poverty as well as race a suspect class subject to strict judicial scrutiny.\(^{31}\)

These cases condemning wealth-based discrimination suggested a substantially broadened scope for the Equal Protection Clause. The school integration cases were concerned with discrimination that was the product of deliberate governmental distinctions based on race. . .If wealth was indeed a suspect classification, as these cases suggested, then a system which determined the educational opportunities afforded to a child on the basis of the affluence or poverty of her parents and neighbors would be difficult to justify.

Legislative reapportionment decisions in the Warren Court’s equity revolution of the early 60s were a third line of precedents on which the school finance complainants relied. In both his brief and oral arguments, Gochman sought to convince the Justices that *Rodriguez* was a continuation of these previous reapportionment and wealth-based discrimination decisions. Litigators anticipated that this reliance on new equal protection interpretation might prove difficult since the plaintiffs’ deprivations in the wealth cases were personal rather than due to the impoverished condition of a larger community.

Additionally, in the previous equal protection cases, most individuals had been

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completely denied access to a fundamental constitutional protection such as the vote or access to a lawyer. In the finance cases, the plaintiffs suffered from a relative, not an absolute, denial of schooling, and as Gochman acknowledged in 1973, despite the eloquence of Brown, the Supreme Court had yet to declare education a fundamental right.

Would the Court continue to use the equal protection clause as a vehicle for attacking economic inequalities, or would the more conservative Burger Court (1969-1986) bring the Warren Court’s egalitarian revolution to a close or at least moderate its progress? In his brief, Gochman argued that the earliest equal protection decisions in which the Court moved away from its former expansion of equal protection rights should not apply to Rodriguez.

If the Court applied traditional equal protection requirements, or minimal scrutiny to Rodriguez, Texas needed only to demonstrate that those similarly situated were treated equally in respect to the law and any legislative classifications created by the school finance statute were “reasonably” related to valid ends. Gochman, however, argued for the application of the “new” equal protection interpretation to Rodriguez. This standard of heightened scrutiny required “where a fundamental interest is at issue or inferior treatment is afforded a suspect class, the State [has] to show that a compelling or substantial interest is being served that cannot be satisfied by some less onerous alternative.” The Court had already found race and poverty to be “suspect”

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32 The Burger Court, according to Professor Mary Cornelia Porter, “while not altogether reversing the Warren Court’s equal protection directions . . . moved to a position closer to the ‘old’ equal protection.” Mary Cornelia Porter, “Rodriguez, The ‘Poor’ and the Burger Court: A Prudent Prognosis,” Baylor Law Review 29, no. 2 (Spring 1977), 212. See for example Baker v. Carr 369 U.S. 186 (1962). The Supreme Court declared that Tennessee’s failure to reapportion legislative seats in the state’s General Assembly was a denial of equal protection because it caused the dilution of the plaintiffs’ vote. In a 6 to 2 decision, Justice Brennan broke with tradition and ruled that malapportionment was no longer a political question, but a legal question, and that the plaintiffs had standing to bring a suit in federal district court. Similarly,
classifications, and voting, interstate travel, and fair criminal process to be "fundamental rights," Gochman stressed. Now the Justices should declare education a fundamental interest, and apply the second tier "strict scrutiny" test to Rodriguez.\textsuperscript{33}

The Gochman Brief and Oral Argument

Gochman sought first to resolve the issue of state action with respect to the Fourteenth Amendment. Individual rights, guaranteed by the United States Constitution are primarily safeguarded against the activities of the state or federal governments. Only the Thirteenth Amendment and its implementing civil rights statutes covered actions of private individuals. In Rodriguez, as in many civil rights cases, the Court was asked to determine whether the defendant's actions constituted governmental or state action of the kind subjected to federal regulation.\textsuperscript{34} Texas had established a state-wide system of

\textsuperscript{33} Porter, "Rodriguez, The 'Poor' And the Burger Court: A Prudent Prognosis,": 211-21. Two cases that indicated that the Burger Court was returning to traditional equal protection interpretation were Dandridge v. Williams 397 U.S. 471 (1970) A Maryland welfare program, which set a maximum benefit limit of $240 to $250 per month regardless of the size or need of the family, the Supreme Court found constitutional under the rational basis test. This traditional equal protection standard, as stated previously, was applied to most statutes involving economic and social legislation, and the state action was declared constitutional if a legitimate state interest was proven. Another pre-Rodriguez precedent, James v. Valtierra 402 U.S. 137, 143 (1971) (a referendum procedure to allow low income housing into an area is constitutional) also appeared to indicate the Court was moving away from the egalitarian revolution. In James, the Supreme Court held that a local determination gave the community a voice in decisions that affect their future development. Similarly, another case that was frequently used as support for the Rodriguez defendants' traditional equal protection argument, and therefore had to be dismissed by Gochman in his brief, was Jefferson v. Hackney (406 U.S. 535). In Hackney the justices ruled that a lower funding for Aid to Families with Dependent Children as compared to monies for the Aged, Blind or Disabled was constitutional, even though there was a different impact upon racial groups.

\textsuperscript{34}The problem of state action originated with the passage of several civil rights statutes protecting the rights of blacks against the actions of state officials and private persons after the initial passage of the Thirteenth and Fourteenth Amendments. In the Civil Rights cases 109 U.S. 3 (1883) the Supreme Court ruled that the exclusion of blacks from accommodations by private individuals was not subject to prosecution under the Fourteenth Amendment because there was no finding of state action. See Harold M. Hyman and William M. Wiecke, Equal Justice Under Law: Constitutional Development 1833-1875 (New York: Harper Torchbooks, 1986) 497. In this instance, five prosecutions were combined—four were criminal cases against citizens who barred blacks from hotels or theaters, the fifth was a civil claim brought by a black female excluded from a ladies' railroad car.
public education and school districts allowed property values to determine the amount of money available to the children in each district. Therefore adequate state action existed in the school finance case, Gochman maintained, for the quality of education a child received in Texas depend on the wealth of his state-created district, and the legislature also mandated his attendance at school.\textsuperscript{35}

The Texas School Finance System and Its Impact on the Poor

The first part of Gochman's brief described the state school financing system, including its impact on the poor and minorities, the second presented his new equal protection interpretation. Gochman reasoned that the Supreme Court had ample precedent to declare education a fundamental right and the poor a suspect class. Though originally conceived as a progressive reform to provide every Texas child with a minimum or basic education, the 1949 Foundation School Program egregiously discriminated against minorities and the poor. Further, the school-funding program expended more than 80% of its outlay on teachers' salaries, most going to teachers with the greatest experience and education. This emphasis on personnel units (teachers) in appropriating school funds enabled wealthy districts, which attracted and paid for higher quality personnel, to receive greater Foundation School Program allocations.\textsuperscript{36}

The Texas school-finance tax structure also discriminated against property-poor school districts and minorities. School districts contributed 20% of the funds to the Minimum Foundation Plan (the Local Fund Assignment). A controversial economic

\textsuperscript{35} See Texas Constitution, Article VII, Section I. Texas Education Code, Section 21.032.
\textsuperscript{36} In the 1970-1971 school year, the property value per student of Edgewood School District was $5,429, but it only received $350 per student in state minimum foundation funds, while Alamo Heights, the richest
index determined a county's share—it took into account the relative amount each entity contributed to the state's total income from manufacturing, mining, and agriculture. The index also took into consideration the county's share of the state payroll and property value. The state divided each county's assignment between its member schools districts. Each district's relative assessable property wealth determined its share of the Local Fund Assignment. The original intent of the Assignment was to compel every school district to support the education of every child in the state. The *Rodriguez* plaintiffs claimed, as did Governor John Connally's 1965 Committee on Public School Education, that the economic index unfairly measured a county's wealth. Different property assessment ratios prevented the real value of land within a county from being known. Until property tax evaluations were equalized, actual ability of each district to support the public schools could not be known.  

Gochman relied on new statistical data compiled for the plaintiffs by Joel Berke, Director of the Education Finance and Governance Program of the Syracuse University Research Corporation Policy Institute (SURC). Berke discerned a correlation between the size of a district's property tax base and the amount it expended on education.

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38 The Ford Foundation funded a variety of projects aimed at generating new research for the school finance reform movement. One program at Syracuse trained Ph.D's in the economics of school finance. The Syracuse University Research Corporation was a non profit research organization affiliated but independent of the university. Berke directed a two-year study also supported by the Foundation that investigated the patterns of the allocation of federal educational aid, and the decision-making patterns in Washington that caused them. At the time of *Rodriguez*, Berke was a guest scholar at the Brookings
Property-poor districts tended to have indigent and minority residents but they taxed at higher equalized tax rates than more affluent districts. For example, in 1968-69, the Edgewood School District was 89.6% Mexican American and 6.30% Negro, with a median per capita income of $995.01 and a property value per student of $5,429. Alamo Heights ISD had $45,095 property value per student and a school population of 85.15% Anglo-American, 14.15% Mexican-American, and .42% Negro--its median per capita income was $2,807.59. In 1970, however, Edgewood's equalized tax rate was $1.05 per $100 valuation, while the equalized rate per $100 for Alamo Heights was $.85.\(^{39}\)

Gochman's central point was that poor school districts were getting less educational quality, but were expending more tax effort, a pattern existing throughout Texas, not only in metropolitan San Antonio and Bexar County. For 26 Texas districts with taxable property valued at $4,425 per pupil for example, the equalized property tax rate per $100 was $.38 per $100. For 40 districts with the lower market value of $30,000 to $10,000 per pupil, the equalized tax rate per $100 was $.72.\(^{40}\) In another telling statistic, the Berke data showed that the average school in the poorest category would have to tax at 20 times the rate of the average school in the wealthy category to achieve the same tax yield. The Texas system, Gochman argued, was comparable to the school finance system successfully challenged in *Hargrave v. Kirk*.

In *Hargrave*, the District Court declared Florida's school funding statute unconstitutional because it set a maximum tax rate and therefore made it impossible for a poor family or school district to provide an education as costly as a rich district.

\(^{39}\) See the Glossary for a discussion of the equalization of property taxes.

\(^{40}\) Institute under another Ford Foundation grant to conduct research on the political and economic aspects of equal educational opportunity. Appendix to *Rodriguez*, 193-194.
Gochman claimed that the Texas school funding system "[m]akes it impossible for poor districts to provide quality education in fact as well as in law."

Local control of education and the right of parents to supervise the schooling of their children was essentially not available to poor districts in Texas, Gochman argued further. There was no rational explanation for the school funding system because few school districts were locally controlled—the poor never had the opportunity to obtain the best education possible.\(^{41}\) Gochman forcefully refuted the defense's argument concerning local control. "The court below thought that the choice Texas gives to school districts was illusory since "poor districts in reality have no choice." Though they taxed themselves heavily they were unable to raise substantial monies. Consequently, the Foundation Plan failed the poor. Although it put a floor beneath educational spending, it imposed no ceiling on the rich. It may have guaranteed an equal right to an education; it did not guarantee a right to an equal education.\(^{42}\) The plan even failed the traditional

\(^{40}\) Gochman convinced the lower federal district court on this point. This three-judge court ruled in \textit{Rodriguez} that "[f]or poor school districts educational financing in Texas is thus a tax more spend less system." \textit{Rodriguez v. San Antonio Independent School District} 337 F. Supp. 280 (1971).

\(^{41}\) \textit{Hargrave v. Kirk} 313 F. Supp. 944 (N.D. Fla. 1970), vacated 401 U.S. 476 (1971). In \textit{Hargrave}, as stated in the defendant's brief, "the state made it impossible as a matter of law for a poor family or school district to provide an expensive education." Texas, Wright argued, was different. The "state assured every child in every school district an adequate education," and left it to the people of each district a choice of whether to go beyond the minimum, and by how much. This reinforced the defense's argument that the Texas school finance case was constitutional because it gave the family freedom to control education and the chance to avoid the centralization of school funding, and in consequence educational policy. "The foundation program in Texas, like that in a majority of the states, puts a floor under educational spending but imposes no ceiling on it." Brief for Appellants, 35-36. Gochman argued that \textit{Hargrave} did apply to \textit{Rodriguez} because "[t]he Texas system makes it impossible for poor districts to provide quality education in fact as well as in law." The Texas Education Code set the maximum rate for school maintenance at $1.50 per $100 valuation and Berke's figures showed that "poor districts...would have to tax at several times that rate to make available the revenues available in wealth districts." Unlike Gochman, the defense did not equate equalization with bringing poor districts to the high spending levels of the richest districts. For Wright an equal education, in essence, was one that set an adequate floor, and allowed all districts to go beyond the minimum. Equity in \textit{Rodriguez} did not mean an equalization of spending between districts. Equality and equity were not the same thing. Brief for Appellants, 35-36. Brief for Appellees, 15.

\(^{42}\) Brief for Appellants, 36. Brief for Appellees, 18. As proof that the Minimum Foundation School Program had no relation to "general educational quality," Gochman pointed out that the State did not even keep data on courses offered, dropout rates, equipment, hours of education, physical plant, teaching facilities, and other such indices that could evaluate the adequacy of the foundation program.
equal protection test, Gochman argued, because it did not mandate a specific level of
education or expenditure per child. The Minimum Foundation Plan provided no
minimum and no foundation.

In his final point on the Texas school funding plan, Gochman countered the
defendants' statement that "equal money alone cannot cure the damages caused by
discrimination and deprivation." The tragedy of the current discrimination against the
poor and minorities in property-poor districts was that the richer districts, which sought to
retain their advantages, claimed that "money did not make a difference." The Coleman
Report, commissioned by Congress after the passage of the 1964 Civil Rights Act,
declared that differences in school facilities and curriculum were little related to
differences in student achievement. "Their standard [Coleman], Gochman said, "is that
money makes no difference in the education of those who have suffered from
discrimination, but large sums are required to educate those who are privileged to live in
wealthy districts." The Texas system was "capricious and irrational." It favored the
affluent and discriminated against those who were greatest in need—"children who are
politically powerless and who are, for the most part, members of poor and minority group
families." Texas had chosen to "reinforce the privilege of those already blessed. . ." and

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43 Ibid., 23.
Opportunity (1966) 325. "[S]chools bring little influence to bear on a child's achievement that is
independent of his background and general social context; and, . . . this very lack of an independent effect
means that the inequalities imposed on children by their home, neighborhood, and peer environment are
carried along to become the inequalities with which they confront adult life at the end of school." Quoted in
8 (December 1971): 1379-1380, 1357. Schoettle's article, cited in Wright's Brief for the Appellees on page
19, summarizes the cost-quality debate of the early 1970s, a debate that Gochman seemed to be arguing
was morally wrong. The cost-quality educational debate reflected the disillusionment in the late 60s with
the failure of compensatory educational reforms brought about with the passage of Title I of the Elementary
and Secondary Education Act of 1965. Schoettle concluded that although the nature of the decision-
making process for education in our tripartite system of government placed the major decisions in the
“systematically deprive the poor and powerless of their only opportunity to escape the bonds of their environment and to participate fully in American life.”

By attacking the Minimum Foundation Plan first, Gochman sought to lay the historic basis for the case and to demonstrate that there was no rational basis for the Texas school-funding plan. The Texas school funding system did not meet the basic requirements for the traditional equal protection test. It did not, as its defenders had argued, provide for local control of education because it denied poor districts the same equal educational opportunities as the rich.

**Education is a Fundamental Right**

Gochman’s second equal protection argument sought to satisfy the two requirements for the “strict scrutiny,” or the “compelling state interest” standard of judicial review. For the Supreme Court to apply the strictest scrutiny to a civil rights case—a fundamental right guaranteed by the United States Constitution had to be involved, or any discrimination (classification) had to affect a “suspect class” such as race. Any state statute can survive this second tier strict scrutiny test only if the its defenders can prove a compelling reason for the existence of such discrimination or classification.

“Where a fundamental interest is at issue or inferior treatment is afforded a suspect class, Gochman argued, “the State must show that a compelling or substantial interest is being served that cannot be satisfied by some less onerous alternative.”

Gochman sought to demonstrate that education, like voting, interstate travel, and fair hands of non-judicial branches, the courts still needed to protect the individual against an unequal distribution of educational resources.
criminal process is a fundamental right, and indigency, like race, indicates a suspect class. If the lawyers for the plaintiffs met one of these two conditions, the Supreme Court was required to give the Texas school funding system the highest or strictest review, and to guarantee the Edgewood School District a declaration of unconstitutionality.

True, the Court had never held that education was a fundamental interest, but Gochman argued, there were “strong dicta to this effect.” The Brown decision proved that the Court believed education to be more than a “nice-to-have” public service. Educators John Dewey, Lawrence Cremin, Charles Silberman, and Horace Mann had considered education to be the inculcator of civic virtue and the instrument of social mobility. “Education, Mann had written in the mid-nineteenth century, is a great equalizer of the condition of men... [It] gives each man the independence and the means by which he can resist the selfishness of other men. It does better than to disarm the poor of their hostility toward the rich; it prevents being poor.” Our national tradition, Gochman emphasized, demands that every child, “irrespective of his background, through diligence and perseverance, and the opportunity afforded by the public schools, should be able to take his fair share of society’s status and income rewards.”

Education is an “absolute prerequisite to success... in a highly complex society.” Citing a laundry list of essentials, Gochman asserted that education was crucial to the free enterprise system, vital to the development of human potential, universally relevant and compulsory, a molder of personality, and indispensable to the economic and political survival of the state.

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46 Horace Mann, Twelfth Annual Report as Secretary of Massachusetts, State Board of Education. Brief for Appellees, 28.
Recent Burger Court equal protection welfare decisions, *Dandridge v. Williams* and *Jefferson v. Hackney*, in which the Supreme Court declined to hold wealth a suspect classification, Gochman contended, did not apply to *Rodriguez*. In *Dandridge*, the Justices upheld a state regulation that placed a limit on welfare payments per family. It involved a form of governmental largesse that historically had received less judicial solicitude than education. “Our national tradition in public education,” Gochman said, “is far stronger than the welfare tradition.” Education is compulsory, but unlike welfare, is provided to all children; it should not be considered a stop gap activity. 48

Furthermore, *Dandridge* did not involve a classification based on wealth. The state statute there attacked merely distinguished between families of different size. State action was not involved since government does not create large families, people do. Poor school districts, however, are creatures of the state. Although Texas’s constitution traditionally prohibited welfare, public schools were mandated in every state constitution since 1845, therefore, as subdivisions of the state, were subjectable to equal protection scrutiny by the state and federal courts.

Gochman acknowledged that *Jefferson v. Hackney*, the other recent equal protection decision, still had to be faced. In *Hackney*, the Court had found no racial discrimination in a state’s lower percentage funding for families with dependent children, in comparison with greater funding it provided for the aged, blind, and disabled. In oral argument, the Justices asked if Gochman agreed with the Court in *Hackney* when it found no racial discrimination in the state’s welfare program. *Rodriguez* was unlike *Hackney*. Gochman reasoned, “because of the importance of education, because it falls on helpless

children, and because the State created the discrimination.” But did not welfare, the
Justices responded, “fall” also “on helpless children too?” The difference, Gochman
answered, was that the discrimination in Rodriguez was state imposed, and education was
a more fundamental right than welfare. 49

In addition, the Texas plaintiffs valued education because of its connection to
citizenship. Education, Gochman argued, is fundamental because it affects not only a
citizen’s right to free association, but also it enhances his freedom of speech, guaranteed
by the First Amendment:

The effect of the Texas financing scheme, providing the children in poor districts
with an inferior educational opportunity, is to deprive them—in a systematic, if
imperfect, way—of an equal ability to communicate in a meaningful fashion, and
thereby to diminish their influence in the political and social processes.

Texas was obligated to promote the flow of ideas to children. By adopting a
discriminatory educational financing system, Texas denied its minorities and poor an
equal right to knowledge and information. Children from disadvantaged backgrounds did
not have the “luxury of well-educated parents and friends” or the option of a private
education. 50

Yet education was fundamental, Gochman argued, because it related directly to
the right to vote. An uneducated citizen cannot assimilate the “battery of conflicting
opinions and cast his vote wisely.” As the Court had already held in Lassiter v.

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49 San Antonio Independent School District, et. al., Appellants v. Demetrio P. Rodriguez, et. al., Appellees,
commented: “So long as its judgments are rational, and not invidious, the legislature’s efforts to tackle the
problems of the poor and the needy are not subject to a constitutional straitjacket. The very complexity of
the problems suggests that there will be more than one constitutionally permissible method of solving
them.” Quoted in Wright’s Brief for Appellants, 32. As previously stated, Wright’s position was that the
Burger Court welfare cases indicated that in the area of economics and social welfare, the Equal Protection
Clause of the Fourteenth Amendment was not violated even if classifications created by the state were
imperfect. The federal courts, therefore, the defendants argued should not impose on the states their views
Northampton County Board of Elections, literacy was related to intelligent use of the ballot. By discriminating against poor school districts and providing minorities with an inferior educational opportunity, Texas had "greatly disadvantaged these children in their ability to participate in the democratic process."\textsuperscript{51}

The Second Essential Equity Element: Wealth is a Suspect Classification

Since the 1937 United States v. Carolene Products decision, the Supreme Court had practiced a double, or two-tier equal protection analysis of public legislation, the plaintiffs maintained. Laws dealing with economic or property interests were traditionally subjected to minimal judicial review, while statutes that concerned a fundamental constitutional right, or that affected a "discrete and insular minority" were subjected to higher standard of review, or "strict scrutiny."

Justice Harlan Fiske Stone stated in Carolene Products famous footnote four that a "more searching judicial inquiry" was required when "prejudice against discrete and insular minorities" was involved. The tendency for state discrimination was to "curtail the operation of those political processes ordinarily to be relied upon to protect minorities", and therefore greater attention from the justices was required. To prevail in Rodriguez, Gochman sought to convince the Court that not only was education a

\textsuperscript{50} Brief for Appellees, 33-34.
fundamental right, but in addition, poor students and property-poor school districts were “suspect” classes.\textsuperscript{52}

Gochman also argued that in \textit{Rodriguez} he did not need to prove a “suspect” classification present. Sometimes, as in \textit{Reynolds v. Sims}, the Court applied the strict scrutiny test in the absence of a suspect classification, if a fundamental constitutional interest, such as voting, was at stake.\textsuperscript{53} Following the example of the school desegregation cases, Gochman argued he did not need to prove a complete denial of educational opportunity in order for the Court to find an unconstitutional deprivation of a fundamental right. Nevertheless Gochman attempted next to convince the Court that not only were the fundamental rights of poor school districts denied in \textit{Rodriguez}, but these same districts also constituted a “suspect” class within the \textit{Carolene} tradition.\textsuperscript{54}

The poor, he argued, like racial and ethnic minorities, are unable to secure their basic rights through legislation and therefore should be shown special solicitude by the Court. School children’s access to educational dollars concerned relative rather than absolute wealth. Previous Warren Court wealth precedents, for example, an accused man’s right to a transcript (\textit{Griffin v. Illinois}) and an attorney (\textit{Douglas v. California}), a citizen’s right to vote (\textit{Harper v. Virginia Board of Elections}) and to travel (\textit{Shapiro v. Thompson}) were likewise concerned with a plaintiff’s relative wealth. \textit{Rodriguez}, Gochman argued, should be viewed by the Court as a case that called out for protection of the poor against wealth discrimination. Various Justices had shown that they were

\begin{flushleft}
\textsuperscript{53} See \textit{Reynolds v. Sims} 377 U.S. 533 (1964). \\
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willing to declare that legislative classifications based on wealth, like those based on race, were "suspect" and therefore demanded a more exacting judicial scrutiny.\textsuperscript{55}

Relevant Burger Court (1969-1986) precedents were not fatal to the plaintiff's position. In \textit{James v. Valtierra}, Justice Black had declared that California did not discriminate on the basis of wealth when it required a referendum on public housing, and plaintiffs' contention that a recent public housing amendment to the California Constitution discriminated against the poor. "Provision for referendums demonstrate devotion to democracy, not to bias, discrimination, or prejudice." The poor were not singled out; mandatory referendums frequently were required by California law for the approval of state constitutional amendments, for the issuance of general obligation long-term bonds by local governments, or for certain municipal territorial annexations.\textsuperscript{56}

\textit{Valtierra} proved to be a flash point for the appellees. During oral argument the Court characterized the plaintiffs' position as "\textit{Valtierra} with a vengeance." The defense had argued that \textit{Valtierra} indicated the Burger Court held the principle of local determination in education in high regard, even when a "suspect" classification or a fundamental right was involved. Gochman, however, dismissed this argument. \textit{Valtierra} suggested, instead, that the Justices considered housing to be a purely economic interest,

\textsuperscript{55} Warren wealth cases frequently referred to by school finance lawyers were, in review: \textit{Griffin v. Illinois} 351 U.S. 12 (1956) (the right of the indigent to a free transcript case), \textit{Douglas v. California} 372 U.S. 353 (1963) (the indigent has a right to counsel in their first appeal case), \textit{McDonald v. Board of Election Commissioners of Chicago} 394 U.S. 802, 807 (1969) (the Cook County inmate voting case), \textit{Harper v. Virginia Board of Elections} 383 U.S. 663 (1966) (the abolition of the poll tax in Virginia). In a dictum in the \textit{McDonald} case, Chief Justice Earl Warren took the position that wealth and race are "two factors which would independently render a classification highly suspect and thereby demand a more exacting judicial scrutiny. Justice Douglas's dictum in \textit{Harper} was also often cited in a school finance plaintiff's briefs: "Lines drawn on the basis of wealth or property, like those of race . . . are traditionally disfavored." Lawrence Tribe, \textit{American Constitutional Law}, 2\textsuperscript{nd} ed. (Mineola: Foundation Press, 1988), 1625.

\textsuperscript{56} \textit{James v. Valtierra} 402 U.S. 141 (1971).
a private rather than a governmental concern. "Education," Gochman argued, was "by contrast a fundamental interest with both economic and First Amendment significance."\textsuperscript{57}

During oral argument, a Justice expressed the view that local control of education was the essential issue in \textit{Rodriguez}, and that the implications of retaining local control in education had to be faced: "What is your position on that question about the compelling interest," a Justice inquired. "I mean, that is really the question. Would it be constitutional, or would it not, for Edgewood to have the opportunity but choose not to exercise it?" If the Court's view of "the compelling interest of local control is that strong," Gochman replied, then "the people in an area" should decide "for themselves whether they want to lock themselves into a poor school system." Gochman admitted to the Court that if a "new" equal protection interpretation of the Fourteenth Amendment was adopted by the Court in \textit{Rodriguez} the result would be equalized school districts, but as one Justice commented, some students could still be left "utterly unequal."\textsuperscript{58}

"A literal reading of the Warren Court's precedents" on wealth, should have "made \textit{Valtierra} seem an open and shut case," according to Lawrence Tribe. An almost identical fair housing amendment to an Ohio's charter, requiring approval by a majority, was struck down as a violation of equal protection in the 1969 \textit{Hunter v. Erickson} decision. "The obvious difference between the two amendments, was that one discriminated on the basis of race, the other on the basis of wealth." In \textit{Valtierra}, Justice Black refused to recognize that the California public housing amendment constituted a wealth classification, or that wealth discrimination required special scrutiny. "The

\textsuperscript{57} Brief for Appellees, 40-42.
present case could be affirmed only by extending Hunter, and this we decline to do," the majority decided.

In a stinging dissent, Justice Thurgood Marshall responded. "It is far too late in the day to contend that the Fourteenth Amendment prohibits only racial discrimination; and to me, singling out the poor to bear a burden not placed on any other class of citizens tramples the values the Fourteenth Amendment was designed to protect." Legal historians thought Marshall’s point in Valtierra was well taken since the challenged amendment was an "explicit, de jure wealth classification," and the law’s impact would allow communities to band together and exclude the poor.59

School finance litigators may have misjudged the extent of the Warren Court’s extension of strict scrutiny to cases based on poverty-wealth challenges. The Warren Court’s expansive language in leading wealth discrimination decisions such as Harper v. Virginia Board of Elections in effect applied second-tier strict scrutiny to only two areas of the law affecting the poor--equal access to the franchise and to the criminal justice system. As evidenced by the Rodriguez oral argument, Gochman faced a more reluctant Burger Court. It endorsed the voting and criminal justice decisions of its predecessor, but worried about expanding wealth classifications into new constitutional areas.60

Gochman concluded his new equal protection argument emphasizing the 1972 Bullock v. Carter decision. In Bullock the Court ruled unanimously that Texas filing fees for public office were unconstitutional. The decision seemed to indicate the continuing vitality of the principle that poverty was still a suspect classification under the Equal

59 James v. Valtierra 402 U.S. 141, 145 (dissent). Hunter v. Erickson 393 U.S. 385 (1969). See Tribe, American Constitutional Law, 1130. De jure. "By law" is used to describe a classification or a situation that is the result of law or official governmental action. Defacto. "In fact" is used to describe a situation that actually exists, for example a racial classification caused by where people choose to live.
Protection Clause. In both Rodriguez and Bullock, Gochman argued, statutes that discriminated against the poor were challenged, and in both instances not all the suspect class was disadvantaged. There were some candidates of modest means able to pay filing fees and many poor lived in affluent districts. But the Court had ruled decisively in Bullock, as they should in Rodriguez. The decentralization of education was a worthy goal, but as Bullock indicated, under the rational basis test, a state needed to consider other less restrictive means to protect valid interests. This principle should apply to the Texas school finance case. 61 “Choice with respect to educational expenditures and “the opportunity to provide diverse school experiences” are luxuries available only to rich districts with bountiful resources. Under the present Texas finance system local control had no meaning for poverty-poor districts. The Texas finance system, Gochman concluded, created two kinds of citizens: “minimum opportunity citizens and first class citizens.” The Court needed to find a more equitable solution. 62

The Problem is there is no Solution

Gochman took the unusual position that the Court need not mandate any particular legislative solution if the Supreme Court prohibited Texas from discriminating based on wealth. The Justices should not fear that school finance reform would require the leveling down of education for richer, or “lighthouse” districts. The legislature should be left “free to choose among a host of alternatives for raising and distributing education dollars.” Texas might choose to centralize or decentralize finance and governance systems; it might opt for absolute equality in dollar expenditure or design

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61 Bullock v. Carter 405 U.S. 134 (1972), Brief for Appellees, 42.
compensatory education programs to aid the handicapped, and the retarded. New reformulated aid formulas could also take into account the municipal “overburden” that comes from additional welfare, police, and fire protection costs in urban communities.  

In searching for a solution to a no solution problem, Gochman invited the Court to distinguish Rodriguez from the first school finance cases: McInnis v. Shapiro and Burruss v. Wilkerson. The McInnis plaintiffs sought to have Illinois educational expenditures based solely on a pupil’s “educational needs.” In Burruss, the plaintiffs asked that school funds be distributed, not according to educational needs, but “in such a way as to provide equal educational opportunity to every child in the state, through equal facilities.” In both plaintiffs had failed to achieve unconstitutionality decisions in the lower federal district courts and these decisions were affirmed in the Supreme Court. Nevertheless, Gochman argued that these precedents did not apply to Rodriguez—the “educational needs” formula was “unworkable” and would involve the Court in “endless research and evaluation for which the judiciary is ill-suited.” The plaintiff’s solution was to recommend no solution. “The Fourteenth Amendment prohibits discrimination, but mandates no specific remedy. This Court need only declare the Texas School financing system, which discriminates against the poor, is unconstitutional.”

During the oral arguments, Justices had worried about the absence of a clear constitutional standard or solution to the school finance problem. They appeared most concerned about imposing the Serrano fiscal neutrality solution on Texas education. Chief Justice Burger feared that reforming school finance with a declaration that the

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62 Oral Argument, 583.
63 Brief for Appellees, 51.
quality of a public service could not be a function of wealth other than the wealth of the state as a whole (the fiscal neutrality standard) would enmesh the Court in equity challenges to a whole new array of services. Justices Brennan and White "seemed quite concerned with the constitutionality of district power equalizing (DPE) under the standard suggested by the plaintiffs," co-counsel Mark Yudof recalled. How was the equal educational opportunity problem solved if under DPE districts that choose to spend more on education could do so, and adult preferences, instead of wealth, determined a district's quality of education? Under DPE, Gochman responded, "[a]t each rate of taxation a district would be guaranteed a particular level of school revenues. In poor districts, the state could accomplish this by simply granting subsidies to make up the difference between what the district actually raised and the amount guaranteed by the state." Under a system of fiscal neutrality and DPE, poor districts as well as rich could sponsor innovative and expensive educational programs, as long as they were willing to continue to tax themselves at a high level.\footnote{Mclnnis v. Shapiro 293 F. Supp. 327 (N.D. Ill. 1968), aff'd sub nom Mclnnis v. Ogilvie 397 U.S. 74 (1970) (summary affirmance). Burrell v. Wilkerson 310 F. Supp. 572 (W.D. Va. 1969) aff'd 397 U.S. 46 (1970) (summary affirmance). Brief for Appellees, 39.}
Rodriguez and its friends

The amicus curiae Rodriguez briefs identify the public interest law firms, litigators, and organizations that were active in the school finance reform movement of the late 1960s and 1970s. In 1972, the Lawyers' Committee for Civil Rights Under Law prepared a directory of the varied interest groups championing school finance reform. The Committee found 28 organizations actively involved in the equal educational opportunity reform movement. Nineteen were engaged in information-gathering, sponsoring conferences, and publishing materials. Nine organizations actively participated in the sponsored legislation and drafted model school finance statutes. Nine public interest lobbies were listed as engaged in school finance litigation and the submission of amicus briefs, and another half-dozen were active in lawsuits pending in some fourteen states.66

In 1968, the Potomac Institute, a Washington-based organization engaged in research concerning race relations and urban problems, sponsored the first national conference on school funding. The Lawyers' Committee established a special project on public school finance inequality, and in 1971, convened a second school litigation conference. The Committee provided technical assistance and litigation materials for finance equity lawsuits which were brought initially under the Equal Protection clause of

66 Included in the Lawyers' Committee for Civil Rights Under Law's list as active in information gathering were the Harvard Center for Law and Education, the National Association of State Boards of Education, the National Education Association, the National Education Finance Project, the National Organization on Legal Problems in Education, the National Urban League, and the Syracuse University Research Corporation Policy Institute. Active in pending lawsuits were the American Federation of Teachers, the Bureau of Educational Research at the University of Virginia, the Education Commission of the States, the Lawyers' Committee for Civil Rights Under Law, the Massachusetts Educational Conference Board, the National School Boards Association, and the United States Commission on Civil Rights. See Burton A.
the Constitution. The Education Commission of the States also provided information to school finance advocates and undertook legislative and research activities. Located in Denver, the Commission's members include the U.S. Education Office and most state governments.67

Public interest law firms and organizations that supported the Rodriguez plaintiffs all urged the Supreme Court to uphold the lower court's decision.68 Concerned state governments also filed amicus briefs in support of the plaintiff/appellees.69 The governors of Minnesota, Maine, South Dakota, Wisconsin, and Michigan, each actively engaged in school finance reform, argued that "[while constitutional law obviously cannot be made for the sole purpose of supporting legislative reform efforts, it [was] equally true that constitutional law should not thwart such efforts, particularly where . . . the absence of legislative reform [was] attributable to the entrenched political power of persons who most benefit from the inequalities of the status quo."70


67 In April 1973, the Lawyers' Committee held a post-Rodriguez conference for all attorneys handling school finance cases.

68 The American Civil Liberties Union, the American Jewish Congress, the Anti-Defamation League of B'Nai B'rith, the National Coalition of American Nuns, the National Catholic Conference for Interracial Justice, the National Council of the Churches of Christ in the U.S.A., the Scholarship, Education and Defense Fund for Racial Equality, Inc., the Southwest Council of La Raza, and the United Ministries in Public Education all joined in one amicus brief submitted by seven law firms representing their clients. The N.A.A.C.P.'s LDF filed one on its own. The lower court decision was Rodriguez v. San Antonio Independent School District, 337 F. Supp. 280 (W.D. Tex. 1971). Two foundations supported public interest law firms for the purpose of litigating school finance issues: the Carnegie Foundation's Educational Finance Reform Project and the Ford Foundation's Education Law Center.

69 Public interest law firms and organizations providing amicus briefs in Rodriguez included the NAACP Legal Defense Fund and Educational Fund (LDF), the American Civil Liberties Union (ACLU), the Southwest Council of La Raza, the United Ministries in Public Education, the National Catholic Conference for Interracial Justice, and the Scholarship, Education and Defense Fund for Racial Equality.

Two states, New Jersey and Pennsylvania filed separate amicus claims. Pennsylvania did not share the defendant’s view that a Supreme Court ruling of unconstitutionality would cause “irreparable damage” with “concomitant administrative and social disruptions” to the Texas school system. Instead the state’s Attorney General asked the Court to “forestall further needless litigation and conflict and resolve the ever increasing confusion in the lower courts and the state courts by noting probable jurisdiction and setting the appeal for argument.” Furthermore, Pennsylvania did not see the affirmation of the principle of fiscal neutrality to be “unduly onerous.” New financial formulas could be incorporated into the tax structure, and alternative revenue producing resources could be found.\(^{71}\)

In *Robinson v. Cahill* New Jersey was undergoing its own contentious challenge to the state’s school finance system. It financed an amicus brief in support of Texas. New Jersey was “actively seeking reform of public school financing through its legislative and executive branches,” the brief maintained, and did not support the poverty-poor school district’s claim that the judiciary should impose the strictures of new equal protection upon the state school finance systems. An “appropriate” balance was needed “between

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\(^{71}\) Amicus Curiae Brief for the Commonwealth of Pennsylvania, 10-11.
the federal and state governments and the judicial and legislative branches." *Rodriguez* constituted an "unparalleled affront" to the very fundamental governing principles of a nation whose Declaration of Independence contains a warning against a "ruler with life tenure" who subjects his citizens to taxes without their consent.72

John E. Coons, William H. Clune III, and Stephen D. Sugarman, the authors of "fiscal neutrality," the judicial standard being contested in *Rodriguez*, wrote a sixty-four page brief in favor of Edgewood on behalf of John Serrano, Jr. and John Anthony Serrano, Sr., the plaintiffs in the California school finance case, *Serrano v. Priest*. In the 1971 *Serrano I* decision Justice Sullivan of the California Supreme Court accepted the principle of "fiscal neutrality", and held the state’s school finance plan in violation of the federal and state equal protection guarantees because it made the quality of a child's education "a function of the wealth of his parents and neighbors." *Serrano I* not only recognized education's importance as a fundamental right, but for the first time it also "coupled the interest in education with wealth discrimination rather than racial discrimination." At the time of the Coons brief, *Serrano I* was still pending because the case was remanded for trial to a California Superior Court and, as amicus for the defense pointed out, the financial facts in the case had yet to be determined.73

72 Amicus Curiae Brief for the Attorney General of New Jersey, 22.
73 Amicus Curiae Brief for John Serrano, Jr. and John Anthony Serrano, Sr. Terry J. Hatter, Jr. of the Western Center on Law and Poverty also contributed to the brief by Coons, Clune, and Sugarman. Texas argued that the district court had failed to notice that *Serrano*, although sweeping in its acceptance of fiscal neutrality and in its declaration of education as a fundamental interest and wealth a suspect class, had come to the courts by way of appeal from a dismissal judgement entered after sustaining the defendants' demurrers. The *Serrano I* decision was therefore not final because the California Supreme Court simply reversed the lower court's dismissal of the complaint and remanded the case for trial. In *Serrano I*, the California Supreme Court assumed that the facts supporting the plaintiffs' argument in the complaint were true. The Court assumed, for example, that different levels of education expenditure affect the quality of education. The Court also accepted that in California there was a correlation between a district's per pupil assessed valuation and the wealth of its residents. *Serrano v. Priest* 5 Cal. 3d 584 (1971). After the Supreme Court ruled in *Rodriguez*, as the Pennsylvania Attorney General's amicus brief predicted, the school finance battle continued for years in the state courts under challenges to the state
Richard Clowes, the Superintendent of Schools in Los Angeles County, supported by the seven defendant school districts in Serrano, submitted to the U.S. Supreme Court a seventy-nine page amicus brief on behalf of the Defendant/Appellants, i.e. Texas. “The California Supreme Court, the first to declare its entire state’s system of financing public schools to be unconstitutional,” in adopting Coons’ “fiscal neutrality” thesis had provided the basis for the Rodriguez suit, and presented the Supreme Court with fundamental questions concerning “the drastic restructuring of a state’s local government services,” and the role to be played by the judicial branch of government in future education litigation, the amicus brief argued. The Clowes brief provided a way for El Segundo, San Marino, Glendale, Long Beach, South Bay Union, Beverly Hills, and the Santa Monica Unified School districts, all in Los Angles County, to present their arguments against Rodriguez to the Supreme Court. Appellant arguments were also represented in an amicus brief prepared by the attorneys general from thirty-one states including New Mexico, North Carolina, North Dakota, Ohio, South Carolina, Maryland, and Wisconsin.

Serrano, like Robinson is another case in point. In Serrano II (1976), the California Supreme Court invalidated the school finance system in violation of the state’s equal protection provisions because it was founded on district wealth. The state legislature’s response to Serrano I was invalidated as providing insufficient equality Serrano v. Priest 18 Cal. 3d 728 (1976). In 1986, the California Supreme Court decided Serrano III, Serrano v. Priest 226 Cal. Repr. 584. In the third case, the Court accepted a new school finance system based on a finding that the state legislature had reduced wealth-based discrimination. In a 1992 case, Butt v. State, 4 Cal. 4th 668, the California Court applied the well-worn principle of equality of educational opportunity to state school finance when it required the state to provide resources to a district who had mismanaged funds, and could not remain open for the year. California, as Peter Enrich points out, has struggled not only with its judicial mandates, but also with voter constraints imposed on public spending by taxpayer revolts. In 1988, a constitutional amendment was adopted that imposed a mandatory floor on state financial support for public schools. School equity suits, have not improved the condition of California education, Enrich contends, instead “[o]nce among the highest spending and highest achieving states, California now finds itself near the bottom on many measures.” Peter Enrich, “Leaving Equality Behind: New Directions in School Finance Reform,” 48 Vanderbilt Law Review 48 (1995): 113-14. For a summary of state finance cases post-Rodriguez see Enrich 185-194. At the time of Rodriguez, John Serrano Jr. was 12 and attending the 7th grade at Dexter Junior High School in the Los Angeles County’s Whittier School District.
Some *Rodriguez* amicus briefs, as discussed above, represented the now familiar constitutional arguments of the late 1960s school finance activists, but the credit concerns of banks and underwriters of school district bonds were also represented. These financial interests asked the Supreme Court for neither affirmance nor reversal of *Rodriguez*, but urged instead that if the Justices confirmed the decision of the District Court, they would make clear that *Rodriguez* applied only to future cases. In addition the Court should take care not to affect the enforceability of school district's outstanding bonds. Texas, for example, at the time of *Rodriguez* had over $2 billion in school district bonds sold between 1946 and 1971. More than 700 securities firms and banks were underwriters for the majority of the bonds and four Texas banks held over $100 million in school debt. One amicus brief for the banking and security industry was initiated by the Republic National Bank of Dallas, the First City National Bank of Houston, the Mercantile National Bank of Dallas, the Bank of Texas, and by the bank's professional organization, the Securities Industry Association.\(^7\)

The District Court’s decision in *Rodriguez* was silent on the question of the enforceability of Texas school district loans, and neither the Attorney General of Texas nor the bond counsel for issuers was able to approve new district bonds after the lower court’s decision. Likewise, the value of outstanding Texas school district bonds fell after *Rodriguez I* and the sale of new bonds was halted and did not resume until the District Court in January 1972 clarified its opinion, allowing continued collectibility. If the Supreme Court affirmed *Rodriguez*, bondholders asked if it would also “make clear that the District Court acted rightly in issuing its Clarification of Original Opinion to protect

outstanding and interim-issued Texas school district bonds.” In theory, taking no
position with respect to the merits of the appeal, the *Rodriguez* financial interests were
less than enthusiastic about a Supreme Court affirmanice of the lower court in their brief.
The financial counsel suggested that upholding *Rodriguez* would establish “a new
principle of law.” Bond counsel, including Lawrence Walsh, also reminded the Justices
that the Court had already “twice sustained existing systems against equal protection
attacks” in *McInnis v. Ogilvie* and *Burruss v. Wilkerson*. “We recognize that the District
Court held *McInnis* and *Burruss* to be distinguishable from its decision . . . but we
respectfully submit that, even accepting the distinction, the District Court’s decision was
not ‘clearly foreshadowed’ by any decision of this Court.” While professing to take a
neutral position with regard to *Rodriguez I*, in their amicus brief school bondholders
made their constitutional position crystal clear to the Court.75

The original amicus curiae was very different from the *Rodriguez* amici described
above. Legal scholars have traced the origin of amicus curiae back to Roman times.
Roman amici curiae were judicially appointed attorneys appointed to advise and assist the
court in the disposition of cases. In order to prevent errors in judging, the amicus curiae
provided Roman judges with nonbinding opinions and advice on points of law. Since
the reign of King Edward III in the 1300s, in common law, the amicus curiae also
assisted infants, called attention to manifest error, informed the court on the death of a
party to a proceeding, provided previous precedent and statutes, informed the court on

75 Ibid., 17-18. The Plaintiff/Appellees maintained that *McInnis v. Ogilvie*, 394 U.S. 322 (1969) and
*Burrus v. Wilkerson*, 397 U.S. 44 (1970) were not inconsistent with *Rodriguez I*. The plaintiffs in *McInnis*
and *Burrus* defined equal educational opportunity as the provision of an education to each child in
accordance with his individual needs. This “needs” standard the District Courts and the Supreme Court
found judicially unmanageable and not required by the Equal Protection Clause of the U. S. Constitution.
See *Rodriguez* Motion to Affirm, 9.
legislative intent, and called attention to collusive suits. The original amicus was a respected bystander, seldom used, without any direct interest in the litigation. 76

With the coming of the Industrial Revolution and its persistent technological advancements, courts were presented with new points of law and fact that judges were ill-equipped to handle without technical assistance. The modern amici has therefore been transformed into a “flexible tool through which interested individuals or entities lacking party standing may nevertheless represent third-party interests.” The contemporary amicus is now a lobbyist, an advocate, and a vindicator of the politically powerless. The Supreme Court today treats the amicus as a “political litigant in future cases, as an ally of one of the parties, or as the representative of an interest not otherwise represented.” More important, the increased use of the amicus brief mirrors the change that took place in the tactics and structure of interest group politics during the last quarter of the nineteenth century. Interest group politics shifted from the “personal face-to-face contacts (including corruption) to an impersonal, organized, and systematic bureaucratically undertaken and oriented activity.” In the twentieth century, the Roman amicus creation was transformed from “neutrality to partisanship, from friendship to advocacy.” 77

Around the time of the *Rodriguez* case, the procedure for filing amici briefs in the Supreme Court was governed by Supreme Court Rule of Procedure 42. A Supreme Court amicus curiae brief could be filed “only after order of the court or when accompanied by written consent of all parties to the case.” If consent of the parties was refused, a motion for leave to file could be submitted in reasonable time to the Court, but “such motions [were] not favored.”

A continuing debate developed among legal scholars about the value of amicus briefs to the Supreme Court. The number of amicus briefs filed per term is not known—the clerk does not keep count. Professor Philip Kurland asserted in 1983 that most amicus briefs are not read by the Justices, and they usually “add nothing to the arguments that are made by the parties.” The briefs are no more than a compilation of the votes of the interests on one side of the case or the other, and “the present Court’s rules and their application encourage what is, for the most part, a waste of time, effort, and money in a useless function.” Some *Rodriguez* briefs exceeded sixty pages. Any Justice attempting to absorb the entire *Rodriguez* record would be duly challenged. In 1983 Supreme Court Rule 36 specified that any amicus brief “Must identify the party supported, shall be as concise as possible, and in no event shall exceed 30 pages in length.” In addition, no reply brief to an amicus curiae would be accepted.

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78 United States Supreme Court Rule 42, 1976.
79 United States Supreme Court Rule 36, 1983. Philip B. Kurland, “The Business of the Supreme Court,” *University of Chicago Law Review* 50 (1983): 647. Kurland is equally disdainful of the Supreme Court oral argument maintaining that it can not be justified in terms of the enlightenment it brings, but it might be justified “because the pageantry involved really does enhance the image of an institution that is regularly a target of its political peers and its critics in the press and academia.”
In Justice William H. Rehnquist’s recent book on the inner workings of the Court, he reflected on the changes in procedure, including the presentation of amicus briefs before the oral arguments.  

Several weeks before the oral argument is scheduled, the briefs filed by the parties are available to the justices to read. Court rules rigorously prescribe the form and contents of the brief: The briefs must be printed on relatively small pages in a particular type of print, they must have indexes listing each case or other authority cited and they must not exceed fifty pages in length. Even the colors of the briefs are prescribed: The brief of the petitioner (the party who seeks to overturn the lower-court judgment) must have a blue cover, and the brief of the respondent (the party who seeks to support the judgment of the lower court) must have a red cover. The Court will also receive briefs from _amicus curiae_, “friends of the Court” in a case; these briefs cannot exceed thirty pages, and they must have a green cover. All of this may seem highly ritualistic until it is remembered that the bundle of briefs that a justice pulls out in a particular case may well include eight or ten separate briefs, and it is very handy to be able to identify them by color without having to read the legends on the cover.

The modernization of Supreme Court amicus procedure constituted a half-way measure between the high esteem that public interest lawyers placed in such documents during _Rodriguez_ and the low opinion of critics who saw them as a clog on the business of the Court and an “expression of votes rather than reason.”  

Public interest groups realize that the filing of amicus briefs by professional associations, government agencies, and advocacy groups on behalf of their disadvantaged clients can influence the Court’s decisions, especially in cases where the decision will have an wide impact on a wide variety of interests. Traditional public interest law firms

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81 Kurland and Hutchinson, “Too many friends of the court?” 16. When Rehnquist decribed his decision-making on the Court he did not attach any significance to the reading of amicus briefs. Before oral argument he reads brief digests from law clerks, the clerks’ analysis of legal points, the lower Court decision and controlling precedents. The Chief Justice then places reliance on the oral argument—it acts as a “catalyst” to decision. Rehnquist disagrees with Kurland, the oral argument has many purposes, and not all of them merely formal. It forces the judges to face the clients and it is the only venue in when the judges gather before conference to concentrate on one particular case at a time. Rehnquist, _The Supreme Court: How It Was, How it Is_, 272,273.
such as the ACLU, the LDF, and the Lawyers’ Committee for Civil Rights Under Law file amicus briefs for a variety of reasons. The Mexican American legal Defense and Education Fund (MALDEF), for example, later active in the post-Rodriguez Texas school finance cases, “considers amicus advocacy to be a central component of its overall litigation strategy.” By filing amicus briefs, public interest lawyers avoid the financial and time demands imposed on a plaintiff in a long running lawsuit. By acting as amicus, advocates of minority rights can still influence the outcome of a case that could drastically change the lives of their clients. According to poverty lawyers Gary Smith and Beth Terrell, “amicus advocacy is a simple, direct and relative inexpensive vehicle through which groups may influence and inform the court.” Amicus briefs are a way to achieve publicity, built coalitions, devise long-term litigation strategy, and provide the judiciary with detailed empirical data on a narrow issue that may be impossible within the constraints of the presentation of a case before the Court. 82

Although legal research has not yet shown the impact that amicus briefs have on the Justices, there is evidence that many amicus briefs have been influential. In Mapp v. Ohio, for example, an ACLU amicus brief persuaded the Court to apply the Fourth Amendment search and seizure exclusionary rule to the states, even though the issue was not argued by the petitioner. 83 Stephen Shapiro interviewed former Supreme Court clerks concerning effective amicus briefs, and discovered that favored briefs brought “something new and interesting to the case,” connected the issue before the Court with other pending litigation, and convincingly pictured the future impact of the case. Briefs that are “excessively argumentative,” “partisan,” or fail to “stick to the legal issue” are

considered to be "distracting" and "a waste of time." The Supreme Court clerks also warned that an ineffectively argued amicus brief can have an adverse impact on the reception of the advocate's arguments in future cases. 84

Five of the most important Rodriguez amici briefs provided insight into the pursuit of equal educational opportunity by advocates of school finance reform in the 1960s and 1970s, and also clarified the debate between the advocates of traditional and new equal protection interpretation. The first brief supporting new equal protection interpretation was funded by the Office of Economic Opportunity and was written by the Western Center on Law and Poverty and by John Coons, William Clune, and Stephen Sugarman, the fathers of fiscal neutrality. The second was filed by the LDF and was written by NAACP lawyer Jack Greenberg. The third, was sponsored by the American Civil Liberties Union and the Southwest Council of La Raza, and the variety of advocates cited above.

Two amicus briefs favoring a traditional equal protection interpretation were entered by Richard M. Clowes, Superintendent of Los Angeles County Schools and the attorneys general from thirty states. Perhaps these amicus briefs, heavily documented with precedents and supporting literature were not read by the Justices, but they provide historical insight about the fight for equal educational opportunity following Brown. The attack on school finance systems was an attempt to bring about a second wave of education reform. A contentious history of equality is explicit in the amici curiae briefs. Kurland was correct. Most equal protection arguments are stated in the contenting parties' briefs and oral arguments. Public interest advocates were also accurate in their

assessment of the role of the amicus, but the \textit{Rodriguez} briefs convey the convoluted evidence. Each side inadvertently played its role in the Roman amicus tradition. They purvey precedent and attempt to prevent legal error on the part of the Justices.\textsuperscript{85} The NAACP acted as amicus in \textit{Rodriguez}, according to Jack Greenberg, the author of its brief, because “Negroes are served by the elimination of all racial and ethnic discrimination.” The LDF amicus brief primarily asked the Court to affirm \textit{Rodriguez I} “because it is plainly correct.” At the same time, Greenberg urged the Justices not rule on the central question of equal protection interpretation “the resolution of which must depend upon the circumstances of each individual case.” The problem for LDF was that in some large cities the poor and minorities reside in rich districts. A Texas school funding remedy for the elimination of equal protection discrimination might not be beneficial to other states and regions. Although Greenberg agreed that the allocation of resources had an “enormous impact” upon “educational offering and opportunity, LDF expressed the fear that an equal-funding system imposed by a affirmance of \textit{Rodriguez} might, in the long run, penalize racial minorities and disadvantage urban schools. Equal educational opportunity, Greenberg maintained, did not require identical expenditures.

Greenberg’s amicus brief presented problems for the Edgewood plaintiffs. His central argument appeared to confirm the defendant’s contention that there was really no “suspect class” in \textit{Rodriguez} since, as LDF stated, many of the poor and minorities resided in rich districts. Why then should school finance reform qualify as a subject for

\textsuperscript{85} It was the OEO that funded the first fiscal neutrality school finance case, \textit{Serrano v. Priest} 487 P. 2d 1241 (1971).
rectification under the equal protection clause of the federal constitution and, in addition, be subjected to strict scrutiny, or new equal protection interpretation by the Court? 86

Greenberg closed his brief with a commentary on quality education and a rebuke to the Coleman Report findings. In so doing, he added a new twist to the quantity-quality Rodriguez debate. “Dr. Coleman and others are interested in whether expenditure differences affect achievement levels in the basic academic skills, such reading and writing, as measured by tests most responsible educators concede are socially biased and scientifically primitive both in conception and in administration.” But a quality education, LDF posed, did not mean one measured in basic skills, but one that enables “students to become better citizens, earners, and human beings.” Self-respect, the acquisition of a manual skill, other special capabilities were “as important in public education as reading or writing achievement in English—especially if English is the student’s second language.” Money spent “creatively” rivaled any improvement in an achievement test score. 87

Agreeing with LDF’s brief, the ACLU and the Southwest Council of La Raza, accompanied by other public interest amici, requested that the Supreme Court uphold the lower court’s decision because the trial record proved discrimination based on race. “It has been clearly established, and the court below found, that school districts in Texas are

87 Ibid., 14. Since the NAACP engaged in lobbying it did not qualify for tax exempt status and the organization lost contributors like the Rockefellers. In 1940, the NAACP created its Legal Defense and Educational Fund with Thurgood Marshall as its chief counsel. Major foundations did not contribute to the fund until the late 1960s and early 1970s after the beginning of the civil rights revolution. For twelve years Jack Greenberg worked under Marshall’s leadership. Greenberg succeeded Marshall as Director-Counsel of LDF in 1961. He became a law professor at Columbia in 1984. As Greenberg points out, “We take for granted today advocacy associations working in the courts, but they were virtually unheard of before 1940.” LDF was the first to prove “how effective such organizations could be.” Jack Greenberg, Crusaders in the Courts (New York: Basic Books, 1994), 19.
unequally financed and that the districts which are best able to finance themselves have
the lowest proportion of minority group pupils and vice versa.” Chicanos, in Texas, have
long been the “orphans of the Texas school system,” the ACLU argued. Edgewood
School District, where three-fourths of the pupils were Mexican-Americans had access to
“one-third as many library books” as children in neighboring Anglo districts, “one-fourth
as many guidance counselors,” and classrooms that were “fifty percent more crowded.”
The poverty of the schools was not an indicator of the parents commitment to education.
“The richest, heavily Anglo districts paid an average tax of 31 cents per $100 of property,
while the poorest, predominantly Brown and Black districts taxed themselves at 70 cents
per $100—or well over twice as much.” The Texas school system, the ACLU
characterized as one where “the poorest and most oppressed pay more for less.” 88

In numerous education cases since 1896 in Plessy v. Ferguson, the ACLU
claimed, the Court had held access on the part of different racial groups to an equal
schooling as a fundamental constitutional right. If the law’s effect was to deprive
minority students of an education equivalent to that offered to other races, it already had
struck such discrimination down. Rodriguez was essentially a repeat of another Texas
case, Sweatt v. Painter. In that case, the Court declared the segregated law school at
Texas Southern University in Houston to be unequal to the all-white law school at the

88 Amici Curiae Brief of the American Civil Liberties Union, American Jewish Congress, Anti-Defamation
League of B’nai B’rith, National Coalition of American Nuns, National Catholic Conference for Interracial
Justice, National Council of the Churches of Christ in the U.S.A., Scholarship, Education, and Defense
Fund for Racial Equality, Inc., Southwest Council of La Raza, and United Ministries in Public Education,
11, 14, 21. The brief cited many other inequalities between Edgewood and its neighbors. Edgewood
students had fewer square feet of classroom space, more students per teacher, and less experienced
teachers.
University of Texas. The evil condemned in Sweat, as in Rodriguez, was "racially unequal schooling." 89

Racial discrimination was also evident in the formation of Texas school districts, the ACLU argued. The fact that minorities in Texas were concentrated in school districts with low assessed valuations was not accidental, but a result of intentional segregation. At the time the school districts were drawn, Texas courts were enforcing deed restrictions that barred Mexican Americans from everywhere but the poorest neighborhoods. Like Sweat and Brown, Rodriguez should be viewed by the Court as an attempt by a disadvantaged minority to redress past discrimination visited upon them by a state. "The racial discrimination issue is not an afterthought to the litigants here and to those millions who are interested in their behalf. It lies at the very core of this case." Failure to affirm would push the Mexican American community into a "position of despair," the same position held by blacks twenty years ago. 90

In their amicus brief in support of the Edgewood School District, Professors Coons, Clune, and Sugarman, the authors of fiscal neutrality, and spokesmen for John Serrano Jr. and John Serrano Sr. as amici defended their new equal protection standard as

89 Ibid., 15, 16. In its Amici Brief, the ACLU not only cited Sweat v. Painter 339 U.S. 629 (1950), but also McLaurin v. Oklahoma 339 U.S. 637 (1950), Missouri ex rel. Gaines v. Canada 305 U.S. 337 (1938), and Judge Skelly Wright's decision in Hobson v. Hansen 269 F. Supp. 491, 496, aff'd sub nom. Smuck v. Hobson, 408 F. 2d 175 (D.C. Cir. 1969). McLaurin and Sweat were decided on the same day by the Court. 187 law professors wrote an amicus brief supporting Thurgood Marshall, the lawyer arguing Sweat before the Supreme Court for the NAACP. "By sending Sweat to a raw, new law school without alumni or prestige, Texas deprives him of economic opportunity which its white students have," they argued. The Justice Department filed supporting amicus briefs in both Sweat and McLaurin. In defense of the University of Texas were amici briefs from eleven states. Chief Justice Vinson declared that the new law school for Negroes did not meet the standards of equal educational opportunity: "What is more important, the University of Texas Law School possesses to a far greater degree those qualities which are incapable of objective measurement but which make for greatness in a law school. Such qualities, to name but a few, include reputation of the faculty, experience of the administration, position and influence of the alumni, standing in the community, traditions and prestige. It is difficult to believe that one who has a free choice between these law schools would consider the question close." Sweat v. Painter 339 US 634 (1950).
one of "extraordinary restraint." By requesting that "the quality of public education be a function of wealth of the State as a whole, and not of a school district, the Court was not restraining the legislative branch, but "liberating" it and opening the problem of school finance to the democratic process. Brown affirmed the fundamentality of education and it was "grossly unreasonable to condition fundamental rights upon ability to pay." While it was evident that the segregation cases were essentially "race" cases, the nature of the interest at stake in Rodriguez, education, was equally fundamental and valid. As Justice Frankfurter stated in McCollum v. Board of Education, Coons argued, "[t]he public school is at once the symbol of our democracy and the most pervasive means for promoting our common destiny."  

The "suspect" class that suffered in Rodriguez, Coons declared, were the children of the poor. Texas had created a "compulsory training system" that differed in "scope and quality for the haves and have-nots." Children historically have consistently needed the aid of the courts. Equality in previous racial discrimination cases had always been measured "in terms of the opportunity to learn." The desirable test of equal protection in Rodriguez was one of state inputs, not in the performance of pupils, nor in a "narrowly

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90 Ibid., 19, 22. It wasn’t until Shelley v. Kraemer 334 U.S. 1 (1948) that the Supreme Court ruled restrictive housing covenants involved state action and were therefore prohibited.

91 McCollum v. Board of Education 333 U.S. 231 (1948). In Everson v. Board of Education 330 U.S. 1 (1947) Justice Black revived the Jeffersonian wall of separation theory between church and state in his opinion, but still proceeded to approve of a New Jersey statute that reimbursed parochial school parents of school transportation cost. McCollum, however, dealt with a released time program in Champaign Illinois. Jewish, Roman Catholic, and some Protestants obtained permission from the Board of Education to offer religious instruction classes in the public schools to children whose parents consented. The Court, with only one dissent, ruled the program a violation of the First Amendment Establishment Clause. Justice Frankfurter, concurring, not only validated the position of public education in American society, but noted that in the relation between Church and State, "good fences make good neighbors." The released time program created a problem of coercion for school children where "non-conformity is not an outstanding characteristic." See Amici Curiae Brief for John Serrano, Jr. and John Anthony Serrano, 34. The brief cited other cases in which the Justices had expressed their belief in the primacy of public education. See Abingdon School District v. Schempp 374 U.S. 230 (1963) and Wisconsin v. Yoder 92 S. Ct. 1532 for examples.
focussed battery of tests.” Even if the class of school children in this case were “literally incapable of improving their test scores,” this would never justify any input discrimination. The state had no rational reason for its unequal distribution of school funds.  

The Coons brief was particularly revealing when it listed the fifteen highest spending districts in Texas at the time of *Rodriguez*, and the fifteen lowest. The list confirmed defense arguments that rich districts did not necessarily contain families with high personal income. Some of the highest spending districts that included more than 5,000 pupils in average daily attendance in 1967-68 were Deer Park, the highest expenditure at $754 per pupil, Texas City ($526), Midland ($525), and Port Arthur ($515). Among the fifteen lowest spending districts were Laredo ($210), Edgewood ($215), San Benito ($284), Brownsville ($307), Mesquite ($342), and Texarkana ($348.) The distribution of petroleum resources across the state accounted for a certain percentage of district property wealth, as well as the uneven economic development within many urban and rural areas. The listing of the districts was not included in the briefs of the Texas plaintiffs, but appeared in the *Serrano* California amicus brief, which originated in California. Possibly Coons and his associates were unaware of the political and economic implications of presenting the actual list of rich and poor Texas schools in their brief.  

Gochman, in his oral argument and brief, contrasted Edgewood, the poorest

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92 Ibid., 21,41.  
93 Ibid., 13. The figures do not include federal funds. In 1970, for example, Edgewood had $5,429 property value per student, Alamo Heights $45,095. Edgewood was 89.66 Mexican-American with a median family income of $4,686. Alamo Heights was 14.15% Mexican-American with a median family income of $8,001. In the school year 1967-1968 Alamo Heights spent $354 per pupil, Edgewood a total of $356 per pupil. Edgewood was approximately the same size as Alamo Heights but enrolled 22,000 students, Alamo Heights enrolled 5,000 students. Edgewood’s equalized tax rate was the highest in the metropolitan area, $1.05 per $100—Alamo Heights taxed at $0.85 per $100 of evaluation. See *San Antonio School District v. Rodriguez* 411 U.S. 30-33 (1973) for a discussion of this data.
of Bexar County’s seven school systems, with Alamo Heights, the most affluent school district in San Antonio. His comparative choice proved more dramatic than the Coons’ analysis. Edgewood, in the core-city center of San Antonio, was located in a residential neighborhood with little commercial or industrial property. Alamo Heights was a residential community where, in 1970, over fifty percent of its male workers held executive or professional positions. Gochman effectively pointed out that the poorest school districts like Edgewood would have to tax at 20 times the rate of the average wealthy school district to yield the same amount of revenues. “The Texas system” made it “impossible for poor districts to provide quality education,” he concluded.  

The lawyers for the Los Angeles County Superintendent of Schools, Richard Clowes, maintained in their amicus brief that the Serrano and Rodriguez new equal protection analysis was “an unparalleled opportunity” to establish more definitive guidelines for determining of the degree of judicial scrutiny to be applied in cases under the equal protection clause. The District Court was in error when it implied that perfection should be expected of legislative bodies comprising “elected representatives of peoples with widely varying and competing interests.” The Supreme Court had previously limited its application of the onerous “strict scrutiny” standard of review to cases with inherent “suspect” classifications and clearly defined fundamental interests. Rodriguez, the Clowes brief reasoned, was not such a case.  

The present Texas financing system did not establish a “suspect” classification based upon wealth. First, the school finance statute classified school districts, not

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94 Brief for Appellees, 14-15.
individuals according to wealth. All previous wealth precedents cited by Gochman involved the individual’s exercise of right to vote or to invoke criminal due process. Instead, *Rodriguez* placed an unequal tax burden on taxpayers in various school districts. Except in cases involving racial discrimination or the right to vote, the Supreme Court had not required intrastate or interdistrict territorial uniformity under the equal protection clause. Such a ruling would require tax base equality for all kinds of local entities in the future, the Clowes brief argued, such as access to public welfare, health services, police and fire protection, sewers, drains, lighting, libraries, hospitals, parks and playgrounds. If *Rodriguez* required an equal tax ruling, local government would be “effectively destroyed.”

The main value in contention in the Texas school finance case was local control or liberty—“a singular devotion to democratic values and precepts in the administration and control of education.” Adoption of the fiscal neutrality standard would “only diminish the values of the democratic processes in educational matters by undercutting the responsibility and concomitant local spirit and interest which flow from local autonomy and control of educational programs.” The genius of public school education in America, the Clowes brief asserted, was the ability of local school districts, with the approval of their residents, to experiment and innovate. Further, each state government needed to be left free to address its own special education problems—whether the programs concerned aid for the physically handicapped, the mentally retarded, or the educationally handicapped. All such programs involved “excess-cost” state funding and therefore, any “adoption of the constitutional rule” urged by Coons and his *Serrano*

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District, South Bay Union High School District, Beverly Hills Unified School District, and Santa Monica Unified School District, all of Los Angeles County, 16-19.
associates could “seriously jeopardize the efforts of state legislatures and local boards to
tackle their particular educational problems.” Close judicial scrutiny by the judiciary of
school finance systems could end state experimentation in innovative programs in
selected school districts.

The LA defendant school districts also questioned the ability of judges to
determine what educational programs “are necessary” or “desirable” for particular
districts. Education problems on the local and state level remain complex and require the
“best judgment of the people of a state and local school district.” They may call for “the
adoption of programs or procedures which operate to the disadvantages of some
particular group or groups within the state or district.” Court decisions must allow for
choice in the adjustment and accommodation of local problems and groups.

Local choice, then, is neither illogical nor unscientific. “It represents a devotion
to democracy and a historical and common sense recognition that decisions concerning
distribution of governmental services in such a complex and changing area should be
made at the local level in the most democratic manner possible.” For the Supreme Court
to uphold the standard of fiscal neutrality and demand that all government services be
distributed equally and in such a way that ignored localized pricing and taxation would
“require wholesale restructuring of all governmental institutions.” The constitutional
standard urged by Coons and friends in Serrano the Clowes brief held, would only result
in an “irrational upward or downward leveling of educational expenditures resulting in
increased tax burdens and artificial uniformity in educational programs.”

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96 Ibid., 28-31.
97 Ibid., 32-33.
98 Ibid., 55-57.
If the courts undertook the job of allocating educational resources equally to school districts, the task would be monumental. The *Serrano* defendant school districts pointed out that judges would have to make decisions about bonded indebtedness, existing contractual commitments, salary schedules, and a wide variety of school programs such as adult education, vocational education, lunch programs, and curriculum for the culturally disadvantaged. Were the courts equipped to equitably alleviate the consequences of school differences?, the Clowes brief inquired.

The fiscal neutrality principle was also not as basic as it first appeared. “The more simple the rule . . . “the less it would provide for alleviation of the consequences of the wide variety of differences in the educational needs and desires of the millions of students to be affected.” Kurland had been correct when he argued that the courts were not the proper forums in which to hammer out solutions to intricate educational problems. Kurland suggested three ingredients for a successful court decision—simplicity, the possibility of adequate judicial enforcement, and public acquiesce. In *Rodriguez*, only one component, simplicity appeared to be present, and even this “apparent simplicity was misleading.” The *Rodriguez* plaintiffs, the Clowes brief emphasized, were asking the judiciary not only to equalize school expenditures, but to oversee the quality of the educational system and this was a task “impossible to perform.”

The strategies outlined in *Private Wealth* for an attack on public school finance were inappropriate for court administration, the Los Angeles amici argued. Coons and his associates suggested that courts should retain jurisdiction of a case after a declaring the

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99 Ibid., 59, 64, 67-69. The Los Angeles school defendants emphasized the fact that the *Serrano* principle of fiscal neutrality did not ask the Court for a simple formulation of “one scholar, one dollar” because its authors realized students have different educational needs that require differential expenditures. In addition if the courts assumed the burden of school finance equalization, the problems of running all aspects of state
school finance system unconstitutional. If the political forces of the state did not respond
“in an acceptable fashion,” the court, on motion by individual plaintiffs, had many
options of enforcement. It could excuse students from class, order their assignment to
other districts, award state money in compensation, impound and redistribute equalization
and flat grants, and tie up money from rich districts. The courts could also hire computer
experts to redraft school districts in order to produce a uniform base of property wealth.
This insight into Coons’ implementation of fiscal neutrality, the Clowes brief warned,
was evidence that the “multi-faceted problems involved in pursuing the ideal of providing
high quality education to all” was best left to Congress and the state legislatures.
Reformers had to concede that democracy is imperfect and the will of the people needed
to be represented.100

The amicus brief for the attorneys general from thirty-one states reiterated the
necessity for local and legislative control of education. “The present case constitutes a
threat to the autonomy and independent existence of state and local governments” and “to
the power of the purse of legislatures that is the enduring and perhaps the most important
legacy of seven centuries of Anglo-American constitutional history.” Intervention in the
school finance cases by the Supreme Court, could generate a “generation of litigation”
phenomenon similar to that following Brown.101

*The Private Wealth* principle of fiscal neutrality, which recommended equal
taxing resources, with some deference to local initiative, was under attack by other school
finance reformers, the attorneys general pointed out. Many school finance reformers

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100 Ibid., 70-71.
rejected the standard as too conservative. How could the Court decide on a specific standard, when the experts themselves were in conflict? Arthur Wise for example, author of *Rich Schools, Poor Schools*, the first and leading advocate of school finance reform, favored equalization of both school finance resources and tax rates. Professor Frank Michelman, another advocate of school finance reform, alleged that the Coons fiscal neutrality approach would result in inequities, and favored centralized state funding of education instead, even if the courts could not specify what was a constitutionally acceptable minimum education. As long as all the educational resources of a state were pooled "in such a way that equal sacrifice levels give rise to equal withdrawals," under the Michelman formula, each family would be guaranteed access to an average amount of a state's educational coffers if the district exerted an average tax effort.  

The brief cited three more legal commentators with even more definitions of equal educational opportunity. Professor David Kirp suggested that school wealth equalization meant "a greater financial effort in those school districts whose needs are greater because their school children are less well prepared for school." The state had a constitutional obligation to compensate "as fully as possible for inequalities of prior training and background." A report estimated that the cost of compensatory education was three or four times the ordinary child. This said Kirp, was "well worth the cost." Equal educational opportunity compelled "*effective* equal opportunity."

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103 Ibid., 8. For further discussion of the necessity of compensatory funding, see David L. Kirp, "The Poor, the Schools, and Equal Protection," 38 Harvard Educational Review (Fall 1968): 31. According to Kirp, "Equal school inputs will not produce equal school outputs."
The attorneys general complained about the wide variety of views concerning the
definition of equal educational opportunity—"It is clear that there are as many versions of
what the Constitution requires as there are professors of law and education." If the
Supreme Court chose to embroil the judiciary in the subject of equal school funding on
the state and local level, it would open the courts to a "barrage of conflicting law suits"
by these various reformers. Furthermore, the egalitarianism of the new equal protection
proposals came to no stopping point, and could come into conflict with private property
rights. In the future, the application of an egalitarian wealth principle in education
obligated a state "to eliminate the effects of differences in private means of individuals,
let alone differences in average private means of the subdivisions in which individuals
reside." This was in opposition to one of the purposes of the Fourteenth Amendment
which was to recognize and protect private property.\(^{104}\)

School finance reformers had overlooked the inherent exemplary qualities of the
property tax, the attorneys general asserted. Although it had become "unfashionable," a
tax on property is highly visible and difficult to conceal. A shift away from the tax to
other funding, especially a state income or sales tax, would be regressive and could prove
onerous to the poor, a windfall for corporations.\(^{105}\)

The implementation of the *Rodriguez* fiscal neutrality rule would have negative
consequences, not only on wealthy, but also on urban and minority districts. In May
1971, the Advisory Commission on Inter-Governmental Relations, at a conference on
state financing of public schools, reported that early experiences with equal opportunity
solutions had limited local initiatives in education, had a negative impact on district

\(^{104}\) Ibid., 8, 11, 13.
\(^{105}\) Ibid., 23-26.
school board leadership, and had resulted, in some cases, in a “leveling down” of
curriculum, rather than a “leveling up.” Imposing a ceiling upon expenditures in
“wealthier” districts, the attorneys general warned, would encourage the tendency for
parents to resort to private schools. This phenomenon had been noted after the abolition
of the track system in the District of Columbia, following one of the first school finance
cases, *Hobson v. Hansen*.\textsuperscript{106}

Full state funding of education would limit educational innovation on the local
level. A study conducted by the United States Office of Education in 1972, found that
only 29 out of 84 urban school systems would receive more education funding under an
equalization plan. Not only would large cities not benefit from *Rodriguez*, but a United
States Civil Rights Commission study failed to find racial discrimination in existing
school finance systems in California, Arizona, New Mexico and Colorado. Even Coons,
Clune, and Sugarman admitted that “In California, over half the minority pupils reside[d]
in districts above the average in assessed valuation per pupil.”\textsuperscript{107}

To improve conditions in large city schools, the attorneys general brief cited a
recommendation by Seymour Sacks, that federal programs needed to pinpoint the
financial needs of large cities and other areas with concentrated poverty, and create
national programs funded by the national resource base. The 1972 President’s
Commission on School Finance estimated that the cost elevating all school districts to a
level of ninetieth percentile or above, would cost the nation from 6.2 billion to 8.8 billion
dollars. The attorneys general pointed out that in the words of school finance litigator
John Silard, *Serrano* and *Rodriguez* had opened “a very large door.” Judges and lawyers

\textsuperscript{106} Ibid, 48,51.
\textsuperscript{107} Ibid., 90, 93-94.
might do well to take heed from the words of Judge Learned Hand on the deference that judges should pay to the legislative branch. Group conflicts were “inevitable in all society,” and can find “a relatively harmless outlet in the give and take of legislative compromise after the contending groups have had a chance to measure their relative strength.” The outcome might not be the best attainable, or the solution might not be one the judges would have chosen, “but the political stability of such a system and the possible enlightenment which the battle itself might bring, were worth the price.”

The reading of the Rodriguez briefs brings the equal educational opportunity debate to a close. Neither friends nor foes had providence on their side. Each presented forceful arguments for the principles of liberty and equality, bed-rock values in our constitutionalism since the beginning. All the forces, public and private, awaited the Rodriguez decision of the Supreme Court. The next chapter interprets the Rodriguez decision, its meaning for the Warren Court’s egalitarian revolution, and its future imprint on the school finance reform revolution.

\[108\] Ibid. 98, 100, 106.
Chapter Five: The Battle of the Dicta

*Rodriguez* and the two divergent Standards of Equal Protection

Nothing this Court holds today in any way detracts from our historic dedication to public education. We are in complete agreement with the conclusion of the three-judge panel below that “the grave significance of education both to the individual and to our society” cannot be doubted. But the importance of a service performed by the State does not determine whether it must be regarded as fundamental for purposes of examination under the Equal Protection clause. Mr. Justice Harlan, dissenting from the court’s application of strict scrutiny to a law impinging upon the right of interstate travel, admonished that “[v]irtually every state statute affects important rights.” In his view, if the degree of judicial scrutiny of state legislation fluctuated depending on a majority’s view of the importance of the interest affected, we would have gone “far toward making this court a ‘super-legislature.’” We would, indeed, then be assuming a legislative role and one for which the court lacks both authority and competence.


To begin, I must once more voice my disagreement with the Court’s rigidified approach to equal protection analysis. The Court apparently seeks to establish today that equal protection cases fall into one of two neat categories which dictate the appropriate standard of review—strict scrutiny or mere rationality. But this Court’s decisions in the field of equal protection defy such easy categorization. A principled reading of what this Court has done reveals that it has applied a spectrum of standards in reviewing discrimination allegedly violative of the Equal Protection Clause. This spectrum clearly comprehends variations in the degree of care with which the Court will scrutinize particular classifications, depending, I believe, on the constitutional and societal importance of the interest adversely affected and the recognized invidiousness of the basis upon which the particular classification is drawn. I find in fact that many of the Court’s recent decisions embody the very sort of reasoned approach to equal protection analysis for which I previously argued—that is, an approach in which “concentration [is] placed upon the character of the classification in question, the relative importance to individuals in the class discriminated against of the governmental benefits that they do not receive, and the asserted state interests in support of the classification.”


\(^1\) Justice Marshall is quoting here from his dissenting opinion in *Dandridge v. Williams*, 397 U.S. 520-521. Marshall disagreed with this Burger Court (1969-1986) ruling that declared constitutional a Maryland welfare program that placed a ceiling on AFDC payments, regardless of family size. In his majority opinion, Justice Stewart denied that a fundamental right was involved. Stewart therefore used the “traditional” or restrained standard of judicial review applied by the Court to most statutes involving economic and social legislation. In this lower “tier” of equal protection review the Court invalidates
"The poor people have lost again."

On March 21, 1973, by a five to four vote, the Justices reversed the United States District Court for the Western District of Texas and decided that the proper constitutional standard to apply in *Rodriguez* was the traditional two-tier review under the equal protection clause. Despite "conceded" imperfections in Texas school funding, Justice Lewis F. Powell Jr. speaking for the majority and adhering to the lower scrutiny level required by the traditional test, found in *Rodriguez* that no "suspect" class had been disadvantaged and that no fundamental right had been involved. Furthermore, Powell agreed that the Court should defer to state legislatures in areas of educational policy and local taxation, and emphasized the case's implications for "the principles of federalism." Powell made two central points in *Rodriguez*—the Constitution did not "explicitly or implicitly" guarantee a fundamental right to education and the use of the property tax to fund schools in Texas furthered the "legitimate state purpose or interest" of local control over education.²

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² *San Antonio Independent School District v. DeMetrio P. Rodriguez* 36 L. Ed 2d (1973) 16, 17, 43,54. During the Progressive Era, a conservative Supreme Court declared unconstitutional legislation intended to regulate the economy. For example, in *Lochner v. New York* 198 U.S. 45 (1905) and *Adkins v. Children's Hospital* 261 U.S. 525 (1923) the Court, under the due process clause of the Fourteenth Amendment,
Concurring were Chief Justice Warren E. Burger and Justices Potter Stewart, Harry A. Blackmun and William H. Rehnquist. Observing a retreat from the Warren Court’s judicial activism, court watchers were quick to point out that the four Nixon appointees, Burger, Blackmun, Powell and Rehnquist all voted to uphold the Texas financing system. *The New York Times* was inaccurate, however, when it labeled the majority as “the five Republicans,” for Powell was a southern Democrat and a long-time loyalist of Senator Harry Flood Byrd.  

invalidated state laws setting minimum wages and maximum hours. By the 1940s, in response to the New Deal, the Court began a less aggressive judicial review of economic regulation. For example, Justice William O. Douglas, appointed by Franklin D. Roosevelt, stated in *Railway Express Agency v. New York* 336 U.S. 106 (1949) that “the problem of legislative classification is a perennial one, admitting of no doctrinaire definition. Evils in the same field may be of different dimensions and proportions, requiring different remedies.” This approach to constitutional law was the beginning of “rational basis review.” This traditional equal protection standard, or low-level review, applied by Justice Powell in *Rodriguez*, a Virginia Democrat, was ironically, first the jurisprudence of New Deal liberals. The result of this approach to the law was the protection of legislation directed toward the regulation of the economy during the Depression. The two main tenets of traditional or first-tier review were: respect by the Court of legislation even if it classified citizens differently, and an affirmance by judges of legislation as long as a reasonable relationship could be discerned between the purpose of the legislation and its ends. The courts, proponents of the New Deal contended, should not interfere with the results of legislative struggles between competing interest groups. A “second” tier of equal protection review was begun in 1938, when the Court began to see race as an exception to the rational basis test. Justice Harlan Fiske Stone articulated a new approach to cases dealing with minorities in his famous Footnote Four in *United States v. Carolene Products* 304 U.S. 144 (1938). The court would apply a higher level of “scrutiny” when the equity claim involved discrimination against “discrete and insular minorities” who lack access to the ordinary political process to overcome discrimination. In 1942, Justice Douglas added a second element to this “emerging law of equality.” In *Skinner v. Oklahoma* 316 U.S. 535 (1942), a statute that required the sterilization of defendants convicted of certain crimes was under scrutiny. The punishment in *Skinner*, Douglas contended, dealt with the right to marriage and procreation, rights, rights “fundamental to the very existence and survival of the race.” Therefore, if a case involved a fundamental right, the courts were also required to give “strict scrutiny” to any laws treating people unequally. Strict scrutiny was rarely involved before the 1960s, and Justice Powell refused to apply the standard in *Rodriguez*, finding neither a fundamental right nor a suspect class involved. Mark V. Tushnet, *Making Constitutional Law: Thurgood Marshall and the Supreme Court*, 1961-1991 (New York: Oxford University Press, 1997), 95.

3 Warren Weaver Jr., “Court S-4, Backs Schools in Texas On Property Tax,” *New York Times*, 22 March 1973, p. 1, col. 1. Byrd’s organization controlled Virginia politics for forty years. From 1926-1970, all but one of Virginia’s governors were Byrd loyalists. Byrd sponsored a “massive resistance” to *Brown* beginning in 1956. While on the Richmond School Board and the State Board of Education, in eighteen years in public office, Powell was silent on desegregation. According to John Jeffries “Powell was ambitious, more ambitious than he would confess, and he wanted to play a role outside Virginia.” He was “genuinely and passionately opposed to massive resistance,” and “Powell knew that defiance of the Supreme Court was a losing proposition.” But at the bottom, Powell had a strong sense of allegiance. His “powerful instincts for duty and loyalty pulled him toward cooperation with a political community with which, on massive resistance, he fervently disagreed.” John C. Jeffries, *Justice Lewis F. Powell, Jr.* (New York:Charles Scribner’s Sons, 1994), 134, 180.
Voting in the minority were the four Democrats: Justices Byron R. White, Thurgood Marshall, William O. Douglas, and William J. Brennan. Marshall, the one African-American Justice, in a fiery 68-page dissent joined by Justice Douglas, cited Rodriguez as a “retreat from our historic commitment to equality of educational opportunity and . . . unsupportable acquiescence in a system which deprives children in their earliest years of the chance to reach their full potential as citizens.” Marshall’s dissent criticized the Court’s “rigidified” two-tier approach to equal protection review. All equal protection cases, he said, do not fall into “two neat categories that dictate the appropriate standard of review—strict scrutiny or mere rationality.” Real cases defy such “easy categorization.” “A principled reading of what this Court has done,” Marshall pointed out, “reveals . . . a spectrum of standards in reviewing discrimination allegedly violative of the Equal Protection Clause.”

While Powell’s opinion preserved two-tier traditional equal protection analysis, Marshall proposed, as he had in Dandridge v. Williams, a “sliding-scale” or “nexus” approach to equity interpretation—a “new” new equal protection interpretation. Marshall agreed with the Burger Court majority that “not all fundamental interests are constitutionally guaranteed.” The task in every case should be for the Justices to determine “the extent to which constitutionally guaranteed rights are dependent on interests not mentioned in the Constitution.” The degree of judicial scrutiny should increase “as the nexus between the specific constitutional guarantee and the nonconstitutional interest draws closer.”

5 Ibid., 83. Dandridge v. Williams 397 U.S. 486-487, 520. (1970). Welfare rights lawyers argued that the equal protection clause required the states to expand their public assistance to the poor. In Dandridge, the Appellees were large-family recipients under the Aid to Families with Dependent children (AFDC). Under
The Rodriguez dissent, observed law professor and former Marshall law clerk Cass Sunstein, was the Justice’s “greatest opinion.” Nominated in 1967 by Lyndon Johnson, Marshall was a Great Society liberal who considered Johnson “his president” because the Great Society combined “New Deal liberalism with a deep devotion to the interests of African-Americans that distinguished him from his predecessor John Kennedy.” Marshall “supported the expansive use of national power...particularly on behalf of minorities and claims for traditional civil liberties.” Legal historians view Marshall as a “lawyer-statesman,” a Justice “possessed of great practical wisdom” who brought the “real world” to the Supreme Court’s marble palace. Marshall most frequently applied his sliding-scale analysis to cases where constitutional fundamental civil rights intersected with the issues of race and poverty. His was always at his most impassioned when faced with a question about the government’s role in regulating the lives of the poor.6

Maryland regulation, a ceiling of about $250 per month was given, regardless of the size of the family or its actual need. Justice Stewart, speaking for the Court, applied the rational basis test, and held that in the “area of economics and social welfare, a State does not violate the Equal Protection Clause merely because the classifications made by its laws are imperfect.” If the classification had some “reasonable basis,” it did not offend the Constitution. The Court found “a solid foundation for the regulation...in the State’s legitimate interest in encouraging employment and in avoiding discrimination between welfare families and the families of the working poor.” Marshall found the welfare case defied “easy characterization” in terms of the Court’s two-tier review. He pointed out in his Dandridge dissent that the development of the rational basis test had resulted from a “healthy revulsion” to “the Court’s earlier excesses in using the Constitution to protect powerful business interests. The welfare case, however, involved the “vital interests of a powerless minority—poor families without breadwinners.” It was “far removed from the area of business regulation” and demanded that “concentration must be placed upon the character of the classification in question,” and “the relative importance to individuals in the class” of the “governmental benefits that they do not receive.” Marshall’s suggestion later became know as the “sliding scale” equal protection analysis. When Marshall could not convince the Court to apply his “balancing” equal protection standard, he suggested applying a “heightened” scrutiny or intermediate standard of review as a fall-back position. Intermediate scrutiny would be at least somewhat more protective of the civil rights of minorities and other “suspect” classifications than lower tier “rational basis” scrutiny, which was applied by the Court to economic and social legislation. The Court usually confirmed a state statute as constitutional if it was logically (rationally) related to a constitutionally permissible end. This traditional equal protection test began in the late 1930s during the New Deal.

In San Antonio, upon hearing of the Texas school finance decision, Demetrio Rodriguez, the original signer of the petition that led to *Rodriguez*, told the *New York Times*, “I cannot avoid at this moment feeling deep and bitter resentment against the supreme jurists and the persons who nominated them to that high position.” “The poor people have lost again, Rodriguez said, “not only in Texas but in the United States, because we definitely need changes in the educational system.”

When reached at his office in Berkeley, law professor John E. Coons, the author of the “novel” theory of fiscal neutrality said, “It hurts, when it’s so close.” “I think that eventually the principle will be vindicated.” “After all, one vote, think of the power in that one vote, Coons speculated. “If [former Justice Abe] Fortas and [former Justice Arthur] Goldberg had been on the court, there wouldn’t be a shadow of a doubt about it. Who knows, maybe next time.” Coons reiterated that he had never viewed *Rodriguez* as a racial case. “Rich and poor alike”, he pointed out, are getting shellacked by this nutty establishment.” The Court had given its stamp of approval “to a weird beast in which the quality of education depends on whether or not you live next to an oil well. School finance reform forces would eventually triumph, Coons predicted, because people would not continue to tolerate “the only fiscal structure in the world which operates to separate people in this way by class.”

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bankruptcy to pay a $50 filing fee. Kros alleged he could not afford the filing fee because he needed to pay for the medical care of his sick child. Marshall did not agree with Blackman’s opinion, that the fee could be easily paid in monthly installments at the rate of $1.50 a week. Marshall argued that “no one who has had close contact with poor people can fail to understand how close to the margin of survival many of them are.” “It is perfectly proper for judges to disagree about what the Constitution requires, he admonished the Court. “But it is disgraceful for an interpretation of the Constitution to be premised upon unfounded assumptions about how people live.”

Arthur Gochman, the chief counsel for the Edgewood School District, viewed the
Rodriguez decision as a return by the Court to the doctrine of “separate but equal
enunciated in 1896 in Plessy v. Ferguson. The American public, he maintained, “is going
to get two or three classes of schools in the next 50 years.” “The Texas Legislature is
going to go on discriminating,” Gochman warned. “I don’t see them changing. It’s going
to get more discriminatory than it is.”

Governor Dolph Briscoe, who had encouraged the Texas Legislature to do
nothing until the Supreme Court ruled, acknowledged that the inequalities in Texas
school funding had to be corrected. It was “encouraging to know,” the Governor stated,
that Texas would not “have to do this under the pressure of court edicts which could have
disrupted our entire public school system.” “Every child,” he said, “should have the
opportunity for a quality education.” State Senator Oscar Mauzy, chairman of the Senate
Education Committee agreed, “There is work to be done, there is equity to be established,
there is reform to be effectuated. The time is now,” Mauzy emphasized. “Let us be
about the public’s business of enacting an equitable, constitutional form of ad valorem
taxation to finance our system of public school education.”

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10 May 23, 1984, parents from the Edgewood School District in San Antonio refiled their lawsuit this time
in state court, asserting the Texas school finance system was unconstitutional because poor districts were
still underfunded. In 1987, Edgewood v. Kirby went to trial in 205th District Court in Travis County
(Austin) before Judge Harley Clark. June 1, 1987, Clark ruled the Texas school finance system violated the
Texas Constitution. The court found that education was a fundamental right under the Texas Constitution
and wealth was a suspect classification in the context of the school finance system. December 14, 1988,
the Texas Third Court of Appeals reversed Judge Clark by a 2 to 1 vote, stating while the system was
unfair, it was constitutional. Edgewood and other property poor school districts joining in the suit,
appealed to the Supreme Court of Texas, the final authority in civil matters. At the time of Edgewood I,
Oscar Mauzy was one of six Democrats on the Texas Supreme Court. Three of the nine were Republicans.
On October 2, 1989, the Texas Supreme Court declared the school finance system unconstitutional under
the efficiency clause of the Constitution and set a deadline of May 1, 1990 for the state legislature to create
a constitutional system. (Article VII, section 1 of the Texas Constitution mandates that the Legislature
make “suitable provision for the support and maintenance of an efficient system of free public schools.”)
Following the *Rodriguez* decision, the State Board of Education, the Texas State Teachers Association (TSTA), and the state legislature made equalization proposals. Most school lobbyists predicted that any equalization would require an addition of $650 million a year to the Minimum Foundation program. L. P. Sturgeon, the executive director of TSTA, suggested that all district programs should be as good as those in the top 20 percent in Texas. Any additional cost should be split 50-50 between the state and local districts, TSTA recommended. This would make the local district’s share of the total operating and maintenance cost about 30 percent of the budget, and the state’s, 70 percent.\(^1\)

*The Houston Chronicle* "welcomed" *Rodriguez* and labeled it a "landmark" decision. The Court’s recognition that the state should have "authority to control its own affairs" brought a renewed challenge to Texas officials to assure "that all state residents [were] paying equal property taxes to support the schools." But, the paper warned, "It takes no great legal scholar" to recognize that the words of the decision "contains seeds which could grow into many a hassle in the whole broad range of education-discrimination issues."\(^2\)

David Kirp, an early advocate of school finance reform, pointed out that even though Justice Stewart, in a separate concurring opinion, found the Texas school funding

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\(^2\)A welcome decision," *Houston Chronicle*, 23 March 1973, sec. 4, p. 10. At the time of the *Rodriguez* decision, the highest spending district in Harris County was Alief ($1136.37 per student), the lowest was North Forest ($475 per student). Houston inner city HISD was spending $625 per student, Spring Branch,
system, “chaotic and unjust,” the Court still declared it did not violate the Constitution of
the United States. Kirp, a former associate of Mark G. Yudof, an associate counsel for the
Appellees, perceived Powell’s opinion to be “strangely mechanical.” It ignored the
“inextricable links between education and such constitutionally secured rights as voting
and free speech.” Rodriguez, in Kirp’s view, “nipped in the bud what . . . may well have
been perceived as an emerging egalitarian revolution.” Rodriguez was “10 years before
its time (or, given the venturesomeness of the Warren court, five years after its time.”
Kirp foresaw little change in school funding litigation in the future: “The rich districts
will successfully resist change, just as they have for over a century.” Demetrio
Rodriguez, he predicted, whose cause was dismissed by the Supreme Court, would
simply have to accept that his children would continue to have a second-rate education.13

The List of Suspects Gets Smaller:
Justice Powell and the Beginning of a Newer-Old Equal Protection

The Rodriguez case was “in many respects a battle of dicta,” Mary Mannix
explained. Both Justice Powell, speaking for the majority, and Marshall in his dissent,
sought to instruct the outside audience. While dicta, an additional comment by a judge, is
unnecessary for the decision and not binding as precedent, in Rodriguez the opinions

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13David L. Kirp, San Antonio Independent School District v. Rodriguez “Chaotic, Unjust and
Constitutional,” Journal of Law and Education 2 (July 1973): 461-462. For an understanding of Kirp’s
eyears early views on equal educational opportunity see Kirp, “The Poor, the Schools, and Equal Protection,”
and Yudof were both associated with the Harvard Center for Law and Education, a national center
established by the Office of Economic Opportunity to reduce poverty by reforming the schools. The
Harvard Center also published the quarterly Inequality in Education, which reported on school litigation
cases.
reflect the ongoing struggle within court over the proper approach to equal protection review.

Rodriguez occurred during the transition period between an activist and a more moderate Court. While not entirely reversing the Warren Court’s equal protection direction, the Burger Court was advancing to a position closer to the older traditional equal protection interpretation. Brown, and its subsequent desegregation decisions, had “set the tone of the Warren Court’s activism,” but its race cases proved to be a “culmination,” rather than the beginning “of the strict scrutiny and suspect class development in a “new equal protection revolution.”14 Rodriguez was an essential part of that culmination.

Beneficiaries of the Great Society naturally viewed the poor as the next “discrete and insular minority” under the Carolene Products paradigm. “Indeed,” Tushnet claims the rights of the poor “were often asserted” by the very lawyers “for the legal services programs that received Great Society funds.” As the Democratic political coalition disintegrated, liberals on the Burger Court like Marshall could no longer view themselves “as one branch of a coordinated national government dedicated to reducing economic disparities.” The new Nixon Republican appointees, “found themselves in the happy situation in which their political interests coincided with the general attitude of judicial restraint.”15

Justices Powell and Rehnquist joined prior Nixon appointees Burger and Blackman on the Supreme Court in January 1971. Rehnquist, a disciple of Barry

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Goldwater and a veteran of John Mitchell’s Department of Justice was expected with Powell to assure Burger of four conservative votes to stem the “new” equal protection tide.\textsuperscript{16} In his first term on the Court, Powell applied Justice John Marshall Harlan II’s “balancing model,” Jeffries explains. “Justice Powell’s performance is not yet a master of the approach; he does not consistently extract general guidance from close examination of the particular.” But Powell revealed “the single most important trait for responsible “balancing”: the capacity to identify and evaluate separately each analytically distinct ingredient of the contending interests.”\textsuperscript{17}

Justices William O Douglas, William J. Brennan Jr., and Thurgood Marshall were “three outspoken liberals.” Douglas, who had conquered polio as a young boy, was “easily the Court’s quickest intellect.” When he anticipated he would be in the minority, Douglas would dictate a dissent on the same day as oral argument, and it would later immediately follow the circulated oral opinion. Brennan, at the time of \textit{Rodriguez}, was half-way through what would be thirty-four years on the Court. A son of a New Jersey Irish immigrant brewery worker and labor activist, Brennan “championed civil rights and civil liberties, especially the freedoms of speech and press,” the expansion of criminal

\textsuperscript{15} Tushnet, \textit{Making Constitutional Law}, 97.
\textsuperscript{16} Blackmun was a childhood friend of Burger’s. They grew up together in St. Paul, Minnesota. He labeled himself “old number three” because he was Nixon’s third choice after failing to get Senate approval of two conservative southern judges. Labeled “the Minnesota Twin” because of his faithful following of Burger, in his last years on the Court he migrated to the left, and ended up “an aging liberal on an increasing conservative Court.” Jeffries, \textit{Justice Lewis F. Powell, Jr.}, 252.
\textsuperscript{17}Ibid., 252, 263.Gunther, “The Supreme Court 1971 Term,” 7. Harlan, a Republican, was a critic of the Warren Court’s new equal protection doctrine. “In upholding the equal protection argument, the Court has applied an equal protection doctrine of relatively recent vintage: the rule that statutory classification which either are based upon certain “suspect” criteria or affect “fundamental rights” will be held to deny equal protection unless justified by a “compelling” government interest.” “The criterion of “wealth” apparently was added to the list of “suspects” in \textit{Harper v. Virginia Board of Elections}. . . in which Virginia’s poll tax was struck down. . . I think that this branch of the “compelling interest” doctrine is sound when applied to racial classifications for historically the Equal Protection Clause was largely a product of the desire to eradicate legal distinctions founded upon race. However, I believe that the more recent extensions have been unwise. . . I do not consider wealth a “suspect” statutory criterion.” See \textit{Shapiro v. Thompson} 394
due process rights, and “favored federal power over states’ rights and judicial authority”
over the legislative branch.18

Justice Marshall was the Rodriguez Court’s third liberal. A great-grandson of a
slave and veteran civil rights litigator with the NAACP Legal Defense and Education
Fund, Marshall argued thirty-two cases before the Supreme Court and won twenty-nine.
In 1954, his greatest LDF case, Brown v. Board of Education, ended the “separate but
equal” system of racial segregation in America’s public schools. In 1961, President
Kennedy named Marshall, “Mr. Civil Rights,” to the Second Circuit Court of Appeals.
He was appointed by President Johnson Solicitor General in 1965, the federal
government’s chief lawyer before the Court. Two years later, Johnson chose Marshall to
be the first black Justice of the Supreme Court, where he served 24 years. “The southern
judges and lawyers who had humiliated and tried (unsuccessfully) to intimidate Thurgood
Marshall now had to do what he said.” He now was the one interpreting the Constitution
which they were sworn to defend.19

When he arrived on the Court in 1967, Marshall was in the “right place” and the
“right time”—it was the high point of the Warren Court. Chief Justice Warren and
Justice Brennan, appointed by Eisenhower, were joined by Douglas and, at times Justice
Hugo Black, both New Dealers appointed by Roosevelt. Abe Fortas, a former New Deal
lawyer appointed by Johnson, also voted with the liberal bloc. With Marshall’s arrival,
there were at least five solid votes in the Warren Court’s liberal bloc.

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18 Jeffries, Justice Lewis F. Powell, Jr., 253-258. When Brennan retired he said, “I have sat now with
about a fifth of all the Supreme Court Justices there have been, and I have never had a cross word with one
of them. Not with a single one of them.”
The Warren Court's conservatives were led by Justice John Marshall Harlan, usually joined by Eisenhower appointee Potter Stewart, and at times Justice Byron White, President's Kennedy's first appointee. White supported expansion of federal power and civil rights, but voted with the conservatives on most criminal procedure issues. Stewart "paid careful attention to briefs and oral argument" and according to a former clerk, his "most consistent philosophy was his skepticism about the virtues of apparently consistent philosophies." A moderate Republican, Stewart later became Powell's closest friend on the Court. By the time of the Rodriguez case in 1973, Warren had retired and been replaced by Burger. Fortas resigned and was replaced by Harry Blackmun. When Black and Harlan both left the Court because of ill health in 1971, Nixon appointed Powell and Rehnquist in 1972 then to take their place.\(^{20}\)

In 1972, Powell's first year, the Burger Court split five to four in twenty-one decisions. The voting pattern was usually the four Nixon appointees on one side of an issue, with Douglas, Brennan, and Marshall on the other. It was predicted that White and Stewart would hold the balance of power. The liberals would have to attract two of the swing votes, the Nixon four only one. "What was not apparent in 1972 was that Stewart and White would share the middle ground with Powell and also with Blackmun." The Justices that decided Rodriguez in 1973, began a new era in equal protection interpretation. It was "neither consistently liberal nor consistently conservative but decidedly mixed. It began an era of that has been christened one of "judicial balance."\(^{21}\)

\(^{20}\) Ibid., 262-265. Tushnet, Making Constitutional Law, 28. Fortas was forced to resign from the Court in 1969 after the media revealed that while on the bench he had accepted remuneration for summer law school seminars at American University, funded by his former law partner and clients. Fortas had also accepted a continuing fee from a foundation funded by a financier convicted of securities violations.
Portraits in Contrast: *Rodriguez* and

the Art of Equal Protection Interpretation

Comparison of Justice Powell’s opinion and Justice Marshall’s lengthy dissent in *Rodriguez* provides insight into the divergent opinions over Equal Protection interpretation in the Supreme Court during the early 1970s, a divergence that continues even until today. Speaking for the majority, Powell based his interpretation on four major findings. First the Court found “no showing that any definable category of poor persons” or “suspect class” had been discriminated against. Secondly, no fundamental right to education was “explicitly” guaranteed by the Constitution, and there was, therefore, no denial of equal educational opportunity. Despite “imperfections”, the Texas school finance system was rationally related to local control of the schools. Finally, since education is within the province of the states, the Texas school finance system required the lowest standard of equal protection review. Traditionally the Court defers to the state legislatures in the areas of taxation and educational policy. *Rodriguez* was a retreat from the Warren Court “new” equal protection and a reinforcement of the “old” two-tier equal protection review.\(^{22}\)

In contrast, Marshall found the Texas children residing in property-poor districts an identifiable “suspect” class. Such a classification by the state demanded upper tier, or “strict scrutiny” on the part of the Court, the Justice argued. Also, if a fundamental right of significant constitutional and societal importance such as education is involved, the Court should not defer to the state legislature. The defense’s argument that the property tax provided for local control of education was a sham, “an excuse” rather than “a

\(^{21}\)Je:\fries, *Justice Lewis F. Powell, Jr.*, 265.

\(^{22}\) *San Antonio v. Rodriguez*, 36 L Ed 2d 16-17.
justification for interdistrict inequality.” Texas offered no means of local control of education because residents had no way to supervise the amount of taxable property in their school districts. Last, Marshall held that a wide disparity in taxable district property-wealth, on which the local property school tax depended, was a violation of the Equal Protection rights of every school child in a property-poor district.23

The equal protection interpretation of Justices Powell and Marshall compared four different areas: wealth as a suspect class, education as a fundamental right, the virtues of old versus new equal protection review, and their opposing views on the future implications of a school finance reform. The conversation between Marshall and Powell revealed a different philosophical approach to the issue of a continued expansion of equality and fundamental rights. Rodriguez, according to Court observers at the time, “marked the demise of the [Warren Court’s] new equal protection,” and echoed “the continuing debate among the Justices concerning the proper role of the Court in American society.”24

The Discussion on Poverty in Rodriguez

Powell argued that the wealth discrimination discovered by the Rodriguez District Court, and several other lower courts laws in school finance cases, was “quite unlike any of the forms of wealth discrimination” reviewed by the Court. Using a “simplistic process of analysis,” the previous state decisions “assumed” the existence of a suspect classification entitled to strict judicial scrutiny. Rodriguez, Powell maintained, failed two of the requirements for a poor, suspect class finding: first, there was no definable

23 Ibid., 18, 97.
category of poor people present, and second, no class had suffered an "absolute deprivation" of education. Critics pointed out that Powell's establishment of an absolute deprivation requirement was new and it would "so limit the applicability of the Equal Protection Clause as to effectively reduce it to a meaningless phrase." Marshall, as we shall see later, agreed.

Precedents, like *Griffin v. Illinois* and its progeny, invalidated state laws that kept an indigent criminal defendant from acquiring a transcript, or an adequate replacement for a transcript for use in the many stages of the trial process, Powell argued. The poor in these cases were distinguished, because they were "completely unable to pay for some desired benefit," and they "sustained an absolute deprivation of a meaningful opportunity to enjoy that benefit." Similarly, in 1963 in *Douglas v. California*, the Court established the right of a poor defendant to a court-appointed lawyer for a case on appeal. Again, in *Douglas*, the Court dealt only with those unable to pay, or a class that suffered a complete deprivation. *Douglas* did not provide for those with minimal resources, nor did it take into account the relative differences in the quality of counsel.

Powell found that even a "cursory" examination showed that neither of the two distinguishing characteristics of wealth classification were present in *Rodriguez*. The appellees failed to prove that the Texas school funding system discriminated against the poor or that it operated to the disadvantage of a class "composed of persons whose

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incomes” were “beneath any designated poverty level.” In fact, the majority believed that the poorest families were “not necessarily clustered in the poorest property districts.”28

Powell argued next that, unlike the poor in previous wealth cases, the Rodriguez plaintiffs had not suffered from “an absolute deprivation” of education. The appellees had not even argued that Texas school children were receiving no schooling, instead they maintained that they were receiving “a poorer quality education than that available to children with assessable wealth.” In response, Powell pointed out that “the Equal Protection Clause does not require absolute equality or precisely equal advantages.” Expressing a reluctance to judge what “infinite variables” affect the educational process, Powell ruled that the Texas Minimum Foundation plan provided “an adequate education.” The Texas legislature supplied each child with twelve years of schooling, free books, teachers, transportation, and operating funds. There was no proof that the plaintiffs had disproved the State’s assertion that “every child in every school district” was assured of “an adequate education.”29

The plaintiffs asked the Court to “extend its most exacting scrutiny to review a system that allegedly discriminates against a large, diverse, and amorphous class, unified only by the common factor of residence in districts that happen to have less taxable wealth than other districts.” The suggested disadvantaged class, a property-poor district, had none of the traditional qualities of a suspect class—it was not “saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to

28 Ibid., 37. The Court argued that, in a recent Connecticut study, the “poor”, defined as those below the Bureau of Census poverty level, tended to cluster around commercial and industrial areas—“those same areas that provide the most attractive sources of property tax income for school districts.” The study Powell cited was in “Note, A Statistical Analysis of the School Finance Decisions: On Winning Battles and Losing Wars,” Yale Law Journal 81 (1972): 1303, 1328-1329.
such a position of political powerlessness" that it commanded extraordinary protection from the Supreme Court.

As to the appellee's theory that the "quality" of education varied directly with the amount of funds expended, and that a claim of denial of equal protection could be based on the simple determination of the difference in per-pupil expenditures between districts, Powell declined to decide a question that was under considerable dispute among educators and commentators themselves. Powell also pointed out that school finance reformers offered little guidance as to what kind of school funding system should replace the Texas foundation plan. "In such circumstances, the judiciary is well advised to refrain from imposing on the States inflexible constitutional restraints that could circumscribe or handicap the continued research and experimentation so vital to finding even partial solutions to education problems and to keeping abreast of ever-changing conditions."31

In response to Powell's wealth argument, Marshall agreed that before *Rodriguez* "no previous decision [had] deemed the presence of just a wealth classification to be a sufficient basis to call forth rigorous judicial scrutiny." Wealth was in a different category

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30 If elementary and secondary education were available in the State only to those able to pay tuition, then, Powell said, there would be a "clearly defined class of 'poor' people—definable in terms of their inability to pay the prescribed sum—who would be absolutely precluded from receiving an education." Ibid., 38.


31 Ibid., 48. Powell mentioned that Coons, Clune, and Sugarman in *Private Wealth and Public Education* had suggested an "alternative scheme known as 'district power equalizing.'" Regardless of the district's tax base, DPE required a state to guarantee a particular property tax rate would yield a stated number of dollars. Subsidies to property-poor districts would be financed from funds diverted from "wealthier" districts with higher property values. Powell noted that finance experts were in disagreement about the effect of DPE, and that the Supreme Court was "not the place to weigh the arguments for or against DPE."
than race or alienage. For example, members of the Court might not view the poor as politically powerless as certain other "discrete and insular" minorities. Poverty Marshall said, does not entail the "same social stigma" historically allotted to other racial or ethnic groups; it is not a "permanent disability and its shackles may be escaped." More importantly, Marshall argued, it must be recognized that some legislation "must frequently take cognizance of the economic status of our citizens." Because of these considerations, Marshall pointed out, the Court had "generally gauged the invidiousness of wealth classifications with an awareness of the importance of the interests being affected and the relevance of personal wealth to those interests." For example, the Court struck down an annual Virginia poll tax of $1.50 because it not only drew "lines...on the basis of wealth or property," but it also interfered with a fundamental interest, the right to vote.\(^\text{32}\)

Harper, the Virginia poll tax case, proved that the Justices did not always require an "absolute" deprivation before subjecting a wealth classification to strict scrutiny. The Court, in Harper, struck down the poll tax in its entirety--it did not order that those merely too poor to pay the tax be exempted. In the Court's view, a tax on voting affected more than just the poor; complete poverty clearly did not determine "the limits of the disadvantaged class." In addition, in Douglas and Griffin, the right to appeal was not "absolutely" denied to those too poor to pay, but because the cost of a transcript and a lawyer, the appeal would be a substantially less meaningful right for the poor than for the

rich." In both these cases, Marshall maintained, the Court to better the conditions of the poor, not to rectify the denial of an absolute deprivation.

Although there may not be any social stigma to district group wealth, it should still be subjected to strict judicial scrutiny, Marshall advocated. School district discrimination served no rational state interest, granted the individual taxpayer no significant control over education, did not a reflect an individual’s character or ability, denied the disadvantaged school districts a proper access to the legislative process, and was a result of deliberate wealth discrimination on the part of the state. Because of these special characteristics, Marshall pointed out, group wealth discrimination was as invidious as individual discrimination. In fact, it might be more hurtful, because it was inescapable.

While Powell rejected Marshall’s theory of district wealth discrimination, the majority did not deny that individual wealth could be found a “suspect” classification. Stewart, for example, pointed out that although there were other classifications besides race that the Supreme Court considered as “suspect”—national origin, alienage, or illegitimacy, “indigency” meant actual or functional indigency, it did not mean “comparative poverty versus comparative affluence.”

In turn, Marshall in his dissent was well aware that for the Court to declare wealth, or poverty a “suspect” classification, in the future the burden of proof required more than just a showing of indigency. In his new equal protection interpretation,


34 Ibid., 59.
discrimination against the poor would have to be coupled with a consideration of the
fundamentality of the right being denied.

**Powell and Marshall on Education: Is it a Fundamental Right?**

Powell agreed with Marshall that in *Brown v. Board of Education* the Court recognized that “education is perhaps the most important function of state and local governments.” In the context of racial discrimination, Powell contended that *Brown’s* statement of the relationship between education and “good citizenship,” its role in “awakening” the child to cultural values, and in the preparation for later professional training, had “lost none of its vitality.” “Nothing this Court holds today,” Powell argued in *Rodriguez*, detracted from the Court’s “historic dedication to public education.” But the importance of the service performed, “does not determine whether it must be regarded as fundamental for purposes of examination under the Equal Protection Clause.”

Powell reminded the Court of Justice Harlan’s view, that “[v]irtually every state statute affects important rights.” If the Justices adjusted its degree of scrutiny of state legislation depending on the majority’s view of the importance of the interest involved, in essence, they would have gone “far toward making this Court a ‘super-legislature.’”

In a series of wealth decisions immediately before *Rodriguez*, the Burger Court had found no basis for applying strict scrutiny to statutes affecting the poor. The majority found these classifications constituted, instead, economic and social welfare legislation, which merited instead only traditional equal protection review. For example, in *Lindsey v. Normet*, Powell explained, although the Court invalidated an undue burden placed on poor tenants seeking hearing appeals, it did so without accepting an expansion of
fundamental rights to include a need for decent shelter. Justice White's analysis in
*Lindsey* was instructive on equal protection theory according to Powell: "We do not
denigrate the importance of decent, safe, and sanitary housing. But the Constitution does
not provide judicial remedies for every social and economic ill." The answer Powell
posed, was not "to create substantive constitutional rights in the name of guaranteeing
equal protection of the laws." But to assess "whether there is a right to education
explicitly or implicitly guaranteed by the Constitution."³⁶

Education, according to Powell, should not be considered fundamental because it
was not "explicitly" guaranteed by the Constitution. Powell did not dispute Marshall's
contention that there existed a link between an educated citizen and his effective exercise
of First Amendment freedoms and the vote. But in Powell's view, the Court had "never
presumed to possess either the ability or the authority to guarantee to the citizenry the
most *effective* speech or the most *informed* electoral choice." The Court had no indication
that Texas provided a public education that fell short—the issue was one of "relative
differences in spending." Texas granted each child the opportunity to acquire "the basic
minimal skills necessary for the enjoyment of the rights of speech and of full
participation in the political process." Further extension of fundamental rights under the
"new" equal protection was rejected by Powell because its "logical limitations" were
"difficult to perceive." Were not housing, food, clothing equally as important to the poor
as education?³⁷ Where would be the stopping point for challenges under the Equal
Protection clause?

³⁵Ibid., 41.
³⁶ Wealth discrimination cases cited by Powell included *Dandridge v. Williams* 397 U.S. 471 (1970),
³⁷ Ibid., 45.
Marshall, dissenting, viewed *Rodriguez* as a "retreat" by the Court "form our historic commitment to equality of educational opportunity and an unsupportable acquiescence in a system which deprives children in their earliest years of the chance to reach their full potential as citizens." The majority placed their hopes in an unpredictable future that might or might not bring a legislative solution to the poor children of Texas. This solution Marshall found insufficient. The remission of appellees to the "vagaries of the political process" would fail because legislatures had "proved singularly unsuited to the task of providing a remedy for this discrimination." "Countless children" would "unjustifiably receive inferior educations that 'may affect their hearts and minds in a way unlikely ever to be undone.'"  

To Marshall, the appellants' suggestion that the quality of education was unrelated to money was "absurd." Even though the authorities disagreed about the significance of pupil spending variations, the Court's purpose was "not to resolve disputes over educational theory, but to enforce the Constitution." It was an inescapable fact that if one district had more funds available than another, it had more choice in future educational planning. The Court needed to look at what each state provided its children, not at what "the children are able to do with what they receive." "Indeed," Marshall argued, "who can ever measure for such a child the opportunities lost and the talents wasted for want of a broader, more enriched education."  

Marshall agreed with Powell that the Court had "never deemed the provision of free public education to be required by the Constitution." "Nevertheless," Marshall continued, "the fundamental importance of education is amply indicated by the prior

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38Ibid., 65. Justice Marshall here was quoting from the *Brown v. Board of Education* decision, 347 U.S. 494.
decisions of this Court, by the unique place accorded public education by our society, and by the close relationship between education and some of our most basic constitutional values." The importance of education was clearly borne out by the fact that all fifty states mandate the provision of public education in their state constitutions. Marshall also pointed out that in forty-eight of the fifty states, students were required by compulsory attendance laws to attend school for eight years or more. Recently, the Court had also recognized that education is necessary to "prepare citizens to participate effectively and intelligently in our open political system, and that education prepared the individual to be a self-reliant and self-sufficient" participant in society.40

Marshall took issue with Powell's point that the appellees were seeking "the most effective speech, the most informed vote, or the most expensive education. Instead the appellees were seeking "an end to state discrimination resulting from the unequal distribution of taxable district property wealth." A tax system that impaired "the ability of some districts to provide the same educational opportunity that other districts" could provide was unconstitutional. The issue was discrimination--a denial of equal protection that affected the "quality of education" that Texas had "chosen to provide its children." What the appellees asked the Court was to rule that education "must be made available to all on equal terms." The Justices, Marshall was persuaded, had already previously made that decision in Brown.41

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40Ibid., 89. Marshall is referring to the Court's Wisconsin v. Yoder decision 406 U.S. 205. In Yoder, the Burger Court allowed the Amish to exempt their children from compulsory state attendance laws after the eight grade because attendance in high school, in an environment that emphasized competition, sports, and non-Amish practices might endanger their religious beliefs. Marshall was quoting from parts of the decision that affirmed the importance of public education.
Powell and Marshall on Equal Protection Review in Rodriguez

After disposing of the Edgewood plaintiffs’ claim as a suspect class, and failing to find education a fundamental constitutionally protected right, Justice Powell applied the traditional rational basis equal protection test to the Texas school funding system. Traditionally, in applying this minimum standard of review, the Court deferred to the state’s justification for its legislation, and generally upheld a statute if any classification it created bore a logical relationship to a constitutional end. Justice Marshall, in contrast, found the majority’s equal protection standard too “rigidified.” The choice, he declared, should not be between traditional or strict judicial scrutiny, but “between identifying and not identifying constitutionally suspect classes and fundamental rights,” or “between the old and new equal protection.” Marshall instead suggested that a “sliding scale” or “balancing” test should apply to equal protection cases. The judicial standard of review would vary according to the fundamentality of the interests at stake. “The task in every case,” Marshall suggested, “should be to determine the extent to which constitutionally guaranteed rights are dependent on interests not mention in the Constitution.” “As the nexus between the specific constitutional guarantee and the nonconstitutional interest draws closer,” Marshall proposed, “the nonconstitutional becomes more fundamental” and the degree of judicial scrutiny “must be adjusted accordingly.” Justice Marshall’s test was coined by some Court observers a “new” version of the new equal protection, adjusting adjudication according to the specific nature of the case.42

41 Ibid., 91. Brown v. Board of Education 347 U.S. 493. The opportunity of education “where the state has undertaken to provide it, is a right which must be made available to all on equal terms.”
In defense of his application of the rational basis test, Justice Powell argued that *Rodriguez* differed from other strict scrutiny cases. Each previous case “deprived,” “infringed,” or “interfered” with the free exercise of some “fundamental personal right or liberty.” Powell agreed with Brennan, that “a statute is not invalid under the Constitution because it might have gone farther than it did,” . . . “that a legislature need not ‘strike at all evils at the same time,’ . . . and that ‘reform may take one step at a time.’ ” Searching judicial scrutiny, Powell pointed out, was “reserved for laws that create suspect classifications or impinge upon constitutionally protected rights.” Such was not the situation in *Rodriguez.*

*Rodriguez*, Powell argued, was a decision that reflected the importance of federalism. The Court, he argued, should scrutinize the Texas finance system under “judicial principles” that were “sensitive to the nature of the State’s efforts and to the rights reserved to the States under the Constitution.” The traditional standard of review required only that Texas show “some rational relationship to a legitimate state purpose.” Powell suggested that school finance reform involved the Court in an area it was ill-equipped to adjudicate—taxation, a function traditionally left to the state legislators, who were more familiar with local conditions. Also, no scheme of taxation had yet been devised that was free of discriminatory impact. “In such a complex arena in which no perfect alternatives exist, the Court does well not to impose too rigorous a standard of scrutiny lest all local fiscal schemes become subjects of criticism under the Equal Protection Clause.”

Powell emphasized the rational relationship between the Texas school finance system and local control of education. The “foundation grant” theory upon which Texas

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43 Ibid., 47.
legislators based the 1949 Gilmer-Aikin reforms, was intended to guarantee minimum statewide educational program for every child, without sacrificing the vital element of local parent control and participation. "In an era that has witnessed a consistent trend toward centralization of the functions of government," Powell pointed out that "local sharing of responsibility for public education" had survived. Parents retained the freedom to dedicate more money to their own child's education, each locality was responsible to tailor its school curriculum to local needs, and the pluralistic structure of American education which fostered "experimentation, innovation, and healthy competition" remained. Powell referred to the work of education scholar, James Conant as confirmation of the need of parental control in education. "Unless a local community, Conant had written "through its school board, has some control over the purse, there can be little real feeling in the community that the schools are in fact local schools." The Texas plan was not the result of "hurried, ill-conceived legislation," a product of "purposeful discrimination." The school-funding program therefore met the rational relationship standard of traditional, low-level, equal protection review. "The constitutional standard under the Equal Protection Clause, " in Powell's view, was "whether the challenged state action rationally furthers a legitimate state purpose or interest." The majority in Rodriguez held that "the Texas plan abundantly" satisfied "this standard.""44

In its conclusion, the Court majority evidenced a reluctance to overturn the traditional foundation structure of financing public education, operating at the time in practically every school district in the nation. Powell also took note that, in Texas, it was estimated that an additional funding of $2.4 billion would be required to equalize school

\*44 Ibid., 52-56.
expenditures. Powell accepted the argument in the Amicus Brief of the Attorneys General in Thirty States that a majority of the states would suffer “severe financial stringency” if the Edgewood plaintiff’s class-action was upheld. Fundamental reform in education and state taxation was a matter best left to the state legislatures, the Court declared. Powell warned, however, that the Court should not be “viewed as placing its judicial imprimatur on the status quo.” Justice Stewart concurring, stated that “[t]he method of financing public schools in Texas, as in almost every other State, has resulted in a system of public education that can fairly be described as chaotic and unjust.” It did not also follow, however, that the school funding plans were unconstitutional under the Equal Protection Clause of the Fourteenth Amendment. The need for reform was apparent, but the ultimate solutions needed to come not from the Supreme Court, whose role in education Powell viewed as limited, but from “the lawmakers and the democratic pressures of those who elect them.”

Marshall assailed the Rodriguez majority opinion for its adherence to traditional two-tier approach to equal protection review. “I must once more voice my disagreement with the court’s rigidified approach to equal protection analysis,” Marshall dissented. “The Court apparently seeks to establish today that equal protection cases fall into one or two neat categories which dictate the appropriate standard of review—strict scrutiny or mere rationality.” But, Marshall argued recent equal protection cases decided by the Court defied such easy categorization. In reality, his analysis of recent legal

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controversies revealed that what the court had actually applied to many cases was a “spectrum of standards” without recognizing it. 46

Marshall’s “sliding scale” equal protection approach recommended that the Justices first concentrate on the particular classification in question, then analyze the relative importance of the governmental benefit, and finally, evaluate the interests the state asserted in support of the discrimination. Marshall then “balanced” the value of the interests of the individual against the interests of the state, and came to a constitutional recommendation. “Concentration,” Marshall explained, is “placed upon the character of the classification in question, the relative importance to individuals in the class discriminated against of the governmental benefits that they do not receive, and the asserted state interests in support of the classification.” Although Marshall’s critics maintained that his approach lacked the “consistency” of Powell’s two-tier standard, some viewed predictability of equal protection review as “unworthy of perpetuation.” The advantages of Marshall’s approach, advocates agreed, was that it acknowledged “the complexity of equal protection analysis” and required the plaintiff’s classification and claim be measured against the interest of the government in every individual case. The spectrum approach was superior, according to Marshall, “because all facts are weighed and balanced, not just the two polar characterization as fundamental or non-fundamental interests and suspect or non-suspect classifications.” 47

Marshall disagreed with Powell that the Court’s test of a fundamental interest in the past had been whether it was explicitly or implicitly guaranteed by the Constitution.

46 Ibid., 81.
Where, for example, was it listed that the Constitution granted criminals the right to procreate (Skinner v. Oklahoma), to vote in state elections (Reynolds v. Sims), or to appeal a criminal conviction (Griffin v. Illinois)? The process for selecting new fundamental rights need not be “unprincipled” or “subjective” as Powell suggested. Agreeing that “the determination of which interests are fundamental should be firmly rooted in the text of the Constitution,” Marshall maintained that “As the nexus between the specific constitutional guarantee and the nonconstitutional interest draws closer the nonconstitutional interest becomes more fundamental and the degree of judicial scrutiny applied . . . must be adjusted accordingly.” Such interests as procreation and the right to contraceptives can therefore still be deemed fundamental because of their close approximation to individual fundamental rights stated in the Constitution.  

Marshall agreed with the Rodriguez majority that the Court had established only three highly suspect classifications that merited close judicial scrutiny by the Court: race, nationality, and alienage. The reasons for the Court’s preference for these particular classes rested on their relative lack of access to the political process. But three recent decisions, Marshall argued, showed the Court, in certain circumstances, was willing to expand its list of “insular, and discrete minorities.” In Reed v. Reed (1971), for example, the Court struck down a state statute which stated a preference of men over women in the assignment of estate administrators. Although the Court claimed to apply the rational relationship test only in striking down the sex discrimination, Marshall pointed out that, even though the classification was in a certain sense reasonable because of male business

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48 Ibid. 83. For example, Marshall argued, the Court struck down a state statute that denied unmarried persons access to contraceptive devices on the same basis as married persons. Eisenstadt v. Baird 405 U.S. 438 (1972). Marshall viewed the Court’s action as appropriate because the use of contraceptives bore a
experience, the Court still found the classification arbitrary. Similarly, in *James v. Strange* (1972) the Court held unconstitutional a state statute that discriminated between indigent criminal debtors and civil judgement debtors. Both *James* and *Reed* indicated to Marshall that, in certain instances, the Court would pause to scrutinize, with more than traditional care, the rationality of a state discrimination. It was therefore clear, that the Court had not simply applied two-tier analysis to several recent equal protection cases, but instead had applied his sliding-scale. "In summary," it seemed to Marshall clear that the Court had "consistently adjusted the care" with which it would "review state discrimination in light of the constitutional significance of the interests affected and the invidiousness of the particular classification." *Rodriguez*, then, was clearly out of step with recent equal protection precedents. It ignored the state's invidious classification of property-poor school districts, and failed to subject the Texas school finance system to the heightened scrutiny it deserved. 49

Powell's suggestion that an adequate provision of educational services was constitutionally permissible, was "unintelligible and without directing principle" according to Marshall. Agreeing with Powell, Marshall also noted that the Constitution does not require precise equality in its treatment of persons. But, this was not to suggest that the state might provide some "adequate" level of benefits to all, that "discrimination in the provision of services is therefore constitutionally excusable. The Equal Protection

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Clause, claimed Marshall, is not a “minimal sufficiency” clause. It mandates “nothing less than equal treatment for “all persons similarly circumscribed.”

Where did the majority find its expertise “to divine” what entailed an “adequate educational opportunity?” asked Marshall. And even if the Equal Protection Clause encompassed some theory of constitutional adequacy, Marshall argued, the provision of educational opportunity would be “a poor candidate for its application.” Neither the Court’s majority, nor the appellants had presented a judicially manageable standard from which to determine “how much education was enough.” In Marshall’s view, it was “inequality—not some notion of gross inadequacy—of educational opportunity” that raised the “question of denial of equal protection of the laws.” The plaintiff-appellees had made a substantial showing of wide disparity in school district wealth. There was ample evidence of equal protection discrimination.

Rodriguez illustrated the need for the application of close judicial scrutiny, according to Marshall, both because of the “constitutional importance of the interest affected (education), and the invidiousness of the particular classification.” Although he agreed that local control of education is a “very substantial state interest,” and “had deep roots in the inherent benefits of community support for public education,” in the Texas school finance case, property-poor districts were left with no local options.

In 1967-68, for example, Edgewood ISD, after contributing its share to the Local Fund Assignment raised only $26 per pupil through its local property tax, while Alamo Heights raised $333 per pupil. With the state’s Foundation Plan providing only for

50 Ibid., 75,76.
minimum professional salaries, transportation, and operating costs, it was “not hard to see,” said Marshall, a “lack of local choice with respect to higher teacher salaries to attract more and better teachers, physical facilities, library books, and facilities, special courses, or participation in special state and federal matching fund programs.” Edgewood, to obtain the same tax yield of Alamo Heights, would have to tax itself almost nine times as heavily. Local control of education, according to Marshall, was a “myth” for the property-poor school districts of Texas. The state needed to present “something more than the mere sham now before us.”

None of the “untoward consequences” suggested by Powell would result from an affirmance of the District Court’s decision, Marshall observed. Reform of the state’s school finance systems would not be the “death knell” for local control of education. It need not decree “centralized decision-making”, nor federal court intervention in the operation of the public schools. Rodriguez involved “only a narrow aspect of local control . . . ‘local control in the raising of educational funds.’” Even if central educational financing was adopted by a state, “an entire gamut of local educational policymaking—

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51 Ibid. 75,76, 97.
52 Ibid., 98. Marshall depended on the Affidavits of Joel A. Berke and Dr. Jose Cardenas. Berke at the time was of Rodriguez was Director of the Educational Finance & Governance Program at Syracuse University Berke and served as an expert witness in the Rodriguez case. See his article Joel S. Berke, Anthony P. Carnevale, Daniel G. Morgan Jr., and Ron D. White, “The Texas School Finance Case: A Wrong in Search of a Remedy,” Journal of Law and Education 1 No. 4 (October 1972): 659. Dr. Cardenas was Superintendent of the Edgewood Independent School District. After Rodriguez, James Vasquez became Superintendent in 1978 when Edgewood still had no air-conditioning in most of its 26 schools. In 1984, with the leadership of Vasquez, Edgewood refiled the Rodriguez case in the 250th Travis County District Court. Now entitled Edgewood v. Kirby (Edgewood I), the suit pitting the school district, later joined by 50 other poor districts, against the Texas Education Commissioner William Kirby, named as the defendant. Edgewood asked the state legislature to develop a more equitable school funding system. MALDEF lead attorney, Al Kauffman said Edgewood was again selected as the lead plaintiff because of the energy and leadership of Vasquez. Craig Foster, the director of the Austin-based Equity Center, a group representing poor school districts, later said, “the district that takes the first step is the one taking the most risk. It takes a lot of guts to get involved in that kind of litigation.” Vasquez retired in August 1991. He joined his old professor Dr. Cardenas at the Intercultural Research Development Association in San
teachers, curriculum, school sites,” and the entire allocation of resources among various policy choices were left to local direction.\(^5^3\)

In addition, Marshall supported any one of three other constitutional school finance solutions: district power equalizing, district wealth reapportionment, or the transfer of commercial, industrial, and mineral property from local tax to state tax rolls. He labeled “no particular alternative” as “constitutionally compelled.” The “breadth of choice” indicated that school finance decisions remained with the state legislature, not the courts. The elimination of interdistrict disparities in wealth was the only equal educational opportunity requirement.\(^5^4\)

The *Rodriguez* Court sought “solace for its action today in the possibility of legislative reform,” Marshall warned. But “considering the vested interests of wealthy school districts in the preservation of the status quo, school finance reform remained unlikely. This was unfortunate because, in *Rodriguez*, the Justices were “presented with an instance of such discrimination, in a particularly invidious form, against an individual interest of large constitutional and practical importance.” The justification by the State for continued discrimination against the poor school districts in Texas, was at best “ephemeral.” The wide disparities in taxable district property wealth were violative of the Equal Protection Clause, and the Court was under a “duty” to eliminate the unjustified state discrimination.\(^5^5\)

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Antonio, planning to continue to develop programs that benefit the poor and minorities. See *Edgewood Independent School District v. Kirby* (777 S.W. 2d 391 (Tex. 1989)).

\(^5^3\) Ibid., 99-100.

\(^5^4\) Ibid., 99-100.

\(^5^5\) Ibid., 101.
Aftermath in Texas

When the Supreme Court reversed the lower court Rodriguez decision on March 21, 1973, it granted the state legislature a "stay of execution", and although one equalization measure passed the Texas House, it met a "swift demise." In a more "deliberate movement toward school finance equity," Governor Briscoe formed an Office of Educational Research and Planning. Research conducted by this group was eventually incorporated into law in 1975 when the Legislature enacted House Bill 1126. It changed the Minimum Foundation Program (MFP) to the Foundation School Program (FSP). It was the FSP that was later declared unconstitutional in 1989 by the Texas Supreme Court in Edgewood v. Kirby (Edgewood I). House Bill 1126 was, according to Lieutenant Governor Hobby, "the first major equity reform in Texas public school finance since the 1949 Gilmer Aikin bills." The newly reconstituted foundation plan was an expansion of the MFP; a second-tier of equalization aid was grafted onto the 1949 foundation program and targeted for property-poor districts.56

56 William P. Hobby, Jr. and Billy D. Walker. "Legislative Reform of the Texas Public School Finance System: 1973-1991," Harvard Journal on Legislation 23 (1991): 388, Rocha and Webking, Polities and Public Education, 13 and 27, Edgewood v. Kirby, 777 S.W. 2d 391(1989). The new FSP took into account the actual value of the property in each district in deciding how much the district received in state funds, as recommended by many of the interim studies. This reform lead to the provision of more state aid to poor districts. In the 1978-1979 school year for example, 67 percent of the funds spent in Edgewood ISD came from the state, while in the county's wealthiest district, Alamo Heights, only 32 percent of the funds spent came from the state. There was still, however, a great disparity in spending per student between Alamo Heights and Edgewood. Edgewood, the poorest ISD raised through local property taxes under 10 percent of its total budget, or $139 per student. Alamo Heights raised 63 percent, or $1,302 per student. The state average spending per student was $1,930, and in Bexar County it was $1,749 with Edgewood ISD spending $1,424 per student and Alamo Heights spending $2,054 per student. The facts used in the Edgewood I. first tried in 1987, were based on the 1985-86 school year. At that time Edgewood ISD had $38,854 in property wealth per students as a tax base, while Alamo Heights had a tax base of $570,109 per student. The Edgewood plaintiffs argued in the Texas Supreme Court that 20 percent of the students in the wealthiest districts spent two-thirds more on their education than 20 percent of the students in the poorest districts. By the time Rodriguez had reappeared in the form of Edgewood, the Foundation School Program was providing for public education in two levels or "tiers." The first tier was the basic allotment, designed to provide a minimum education for each child. In 1989, the allotment was set at $1500 per student, below
School finance reform in Texas faced the changed economic and political environment of the 1980s and 1990s. Leaders who hoped to "level up" rather than "level down" school aid faced the fact of sharp deterioration in the state's economy and loss of revenue. Forced to consider an increase in state taxes, the 1983 legislature met pressure from both conservatives and liberal to retackle school finance. Texas businessmen became increasingly convinced that more taxes should be tied to education reform. Governor Mark White in June appointed a Select Committee on Public Education, chaired by businessman H. Ross Perot to investigate public school financing. After numerous public hearings, in April 1984 the committee recommended replacement of the elected State Board with an appointed Board, a state funding system based on number of students rather than adjusted personnel units, increased teacher salaries, a career ladder program for teachers based on performance, smaller classes for early grades, a longer school day and year, restrictions on extracurricular activities, and the institution of new programs such as pre-kindergarten.

In a special session in July 1984, the Texas Legislature enacted House Bill 72, which incorporated most of the Perot Committee reforms.57 "Perot made the most significant impact," according to Lieutenant Governor Hobby, "by using personal funds to marshal a cadre of influential lobbyists." Curiously it was the non-school finance reforms that occupied most of the legislative agenda. More than 200 pages long, the bill

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57 1984 Tex. Sess. Law Serv. 28 (Vernon).
touched on all aspects of public education in the state. House Bill 72, however, was not the cure-all for Edgewood ISD.

In 1984, James Vasquez, the new Superintendent of Edgewood, replaced Dr. Jose A. Cardenas and found the district again short of the funds necessary to provide a quality education. The *Rodriguez* lawsuit was refiled on May 23, 1984, but because the special session considering House Bill 72 was to begin in June, the Edgewood plaintiffs agreed to withdraw the suit and allow the Legislature to try and work a remedy. When it became clear that the reforms instituted by House Bill 72 would not fundamentally change the school funding system, the *Rodriguez* case, now reconstituted as *Edgewood* was filed in State District Court in Austin on March 4, 1985. Justice Mauzy would not render the Texas Supreme Court’s favorable opinion until four years later when it declared the newly restructured Foundation School Plan unconstitutional under the Texas Constitution.\(^58\)

The Mexican American Legal Defense and Education Fund this time around provided the Edgewood plaintiffs with legal and financial support. The Fund’s San Antonio staff attorney, Albert H. Kauffman, now became the lead counsel, replacing Gochman. Although MALDEF had not directly participated in the first *Rodriguez* cases, by the 1980s the public interest law firm was established and had been successful in several education cases. The most prominent was the fund’s *Plyler v. Doe* challenge in

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\(^{58}\)Rocha and Webking, *Politics and Public Education*, 28, Hobby and Walker, “Legislative Reform of the Texas Public School Finance System,” 384, 389-393. House Bill 72 included a hodgepodge of educational directives. The bill changed the distribution of aid to school districts from adjusted personnel units to weighted pupils. The formula took into consideration differing pupil needs, for example, a district’s allotment was adjusted upward from the average pupil cost to account for number of special education students, or regional cost variations. Bilingual education aid was increased, a career ladder with salary supplements was established for teachers, and a pre-kindergarten program was instituted for the disadvantaged. These are only a few of the non-school finance directives in this wide-ranging bill, which took its inspiration from the Perot committee’s recommendations.
1982 to section 21.03 of the Texas Education Code which denied a free public education to children of illegally admitted aliens.

In *Plyler*, the U.S. Supreme Court noted that although education was not a fundamental right guaranteed by the United States Constitution, neither was it comparable to other governmental benefits such as welfare. In determining whether the deprivation of education to innocent children was rational, the Court ruled that, "in light of these countervailing costs, the discrimination . . . can hardly be considered rational unless it furthers some substantial goal of the State."59 *Plyler*, in the view of school finance litigators, established a middle or "heightened" level of scrutiny for judicial equal protection analysis of education-related cases, as suggested previously by Marshall in *Dandridge* and *Rodriguez*.

Despite its success in the *Plyler* case, MALDEF sought to challenge the Texas Foundation School Plan under the equal protection clause of the state Constitution, rather than the national Constitution.60 Joining the parent and student plaintiffs in *Edgewood I* were other property-poor school districts in Texas: South San Antonio ISD, La Vega ISD near Waco, and Brownsville, Eagle Pass, and Pharr-San Juan-Alamo ISDs from South Texas. MALDEF lawyers reasoned that the addition of these school district plaintiffs added a serious tone to the lawsuit. In addition, Demetrio Rodriguez was again among the parent plaintiffs in the *Edgewood* litigation.

In *Edgewood I*, the Texas Supreme Court ruled that Texas’ school financing system violated the state constitutional requirement that an "efficient" system of public

education be created to provide for the "general diffusion of knowledge". The Court, according to Kauffman, after studying sources dating from the 1876 Constitution to the 1883 amendments, concluded that the term "efficiency" means "non-wasteful and productive, " repudiating the defendants’ contention that it meant "cheap" or inexpensive."

The Texas Legislature responded by passing Senate Bill 1 in June 1990. The school districts renewed their challenges in district court, holding that the school finance system remained unconstitutional. On direct appeal, the Texas Supreme Court held the school funding system remained "inefficient," and noted the "overall failure to restructure the system." Senate Bill 351 was then crafted, creating 188 county education districts (CEDs) to carry out the taxing function. In 1992 in Carrollton-Farmers Branch ISD v. Edgewood (Edgewood III), the Texas Supreme Court held that the state property tax was now unconstitutional because it was in violation of Article VII, section 3 of the Texas Constitution which required local voter approval of local property taxes.

Frustrated and uncertain, the Texas Legislature turned to the people and submitted for approval a constitutional amendment upholding the CED plan. This was rejected by the voters in the spring of 1993, along with two other proposals designed to help poverty-poor districts. The Supreme Court allowed the CEDs to operate for the 1992-1993 school year and gave the legislature until June 1, 1993 to again revise the finance system. After that date, the judges ruled, the school funding in Texas would cease.

On May 28, 1993, just days before the deadline, the 73rd Texas Legislature passed Senate Bill 7. Senate Bill 7 was labeled a "Robin Hood Plan" because the law required

school districts above a certain wealth level to reduce their tax base by transferring wealth to poorer school districts. It was immediately challenged by hundreds of property-rich and property-poor school districts. The plaintiffs again included Edgewood ISD. Wealthy districts included Carrollton-Farmers Branch ISD, Coppell ISD, Sterling City ISD, Stafford Municipal School District, and Humble ISD.\textsuperscript{64}

On January 30, 1995 the Texas Supreme Court in a 5-4 decision upheld Senate Bill 7, the state’s school finance system. With the first Republican majority in modern history in control, the \textit{Rodriguez} saga temporarily came to a close. There were however, strong dissents from three of its most conservative Republican judges, and one liberal Democrat.\textsuperscript{65} The Court ruled that Senate Bill 7 provided an efficient system of education, but Justice John Cornyn, a Republican, writing for the majority, warned, in Edgewood IV: “Our judgment in this case should not be interpreted as a signal that the school finance crisis in Texas had ended.”\textsuperscript{66}

Senate Bill 7 placed a cap on a district’s taxable property at a level of $280,000 per student, to be phased in within three years. The education bill both reformed the state’s school finance system, and articulated seven goals of public education.\textsuperscript{67} In the

\textsuperscript{63} \textit{Carrollton-Farmers Branch ISD v. Edgewood} 826 S.W. 2d 489 (Tex. 1992) (\textit{Edgewood III})
\textsuperscript{64} Chapter 347 1993 Tex. Gen. Laws 1479
\textsuperscript{65} Dissenting were Democrat Rose Spector, Republicans Nathan Hecht, Craig Enoch, and Priscilla Owen.
\textsuperscript{66} \textit{Edgewood v. Mano} 893 S.W. 2d 450,459. (Tex. 1995) (\textit{Edgewood IV}).
\textsuperscript{67} The fundamentals of the Texas school finance system were still the same, with schools still dependent upon local property taxes as the most important element of funding. \textit{Edgewood I} had set the Texas constitutional requirement that students were to have equal access to education funds regardless of local property values. Senate Bill 7’s solution was to take tax revenue from the wealthy districts and transfer it to funds raised by the poorer districts. The approximately 100 wealthy districts could chose from five options to reduce their property wealth: consolidate with another district, detach commercial property, purchase average daily attendance credit, contract for the education of nonresident students, or consolidation of the tax base with another district. The last three options required voter approval. The seven goals of public education in Texas stated in Senate Bill 7 were:
“Goal A: All students shall have access to an education of high quality that will prepare them to participate fully now and in the future in the social, economic, and educational opportunities available in Texas.
1995 school year, 96 of the state’s 1,045 school districts shared their wealth. With the passage of Senate Bill 7, the gap between rich districts and poor districts was closed, 28-1, the court majority noted. Deer Park, for example, in the 1995 school year, the wealthiest school district in Harris Count gave $32.5 million to its Pasadena neighbor to be in compliance with the new finance law. 68

Plyler and Edgewood both show that in the post-Rodriguez, years, the U.S. Supreme Court did not foreclose the application of the federal equal protection clause to education cases, nor did it bring litigation under state education and equal protection clauses to a end. Although Rodriguez “can be read as a retreat from the looming egalitarianism of the late Warren court, or as a generalized rejection of activist jurisprudence” on the national level, it remitted the school finance reform cases to the state courts. Powell’s decision contributed to the revitalization of the old traditional equal protection, now labeled as “new.” Although Marshall failed to convince the Court

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

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

Goal D: A well-balance and appropriate curriculum will be provided to all students.

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

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

Goal G: Instruction and administration will be improved through research that identifies creative and effective methods. Demonstration programs will be developed and local initiatives encourage for new instructional arrangements and management techniques. Technology will be used to increase the equity, efficiency, and effectiveness of student learning, instructional management, staff development, and administration.” Edgewood v. Meno 893 S.W. 2d 461-461(1995).

to expand the list of “suspects,” to expand fundamental rights in the name of minorities and the poor, and convince the Court to adopt a “sliding scale” equal protection analysis, his call for a more heightened scrutiny for non fundamental rights and non suspect classes was adopted.

According to Professors Judith Areen and Leonard Ross, “the Court’s language in Rodriguez suggested a narrowing of both the great boulevards of the “new” equal protection, “suspect classifications” and “fundamental interests.” But in a less gloomy review, legal scholars point out that the Supreme Court faced an all or nothing alternative in Rodriguez: the Serrano-Private Wealth fiscal neutrality solution or non-intervention. The Court, in a 5 to 4 opinion, chose to return the school financing question to the states.

In this chapter, the 1973 Rodriguez U.S. Supreme Court decision (Rodriguez I) illuminated the contrasting equal protection views of the two Justices who shaped it--Justice Powell, the author of the majority opinion, and Justice Marshall, the creator of a forceful dissent.⁶⁹ Both viewed the equal protection clause of the Fourteenth Amendment from perspectives that reflected lifetimes of separate and dissimilar experiences. Both opinions reveal the enduring and complex history of Fourteenth Amendment interpretation.

While the new majority on the Burger Court brought the extension of fundamental rights under “strict scrutiny,” particularly in poverty cases, to a stopping point, two-tier equal protection review proved inadequate, as Marshall predicted in dealing with such new constitutional questions as gender, alienage, and illegitimacy. After Rodriguez,
Powell and the other Justices searched for a new equal protection standard to deal with the pressing issues of abortion and affirmative action. After Rodriguez, the Burger Court adopted a new, intermediate standard of review in gender-discrimination cases, but it never went as far as accepting poverty or gender as suspect classifications, or wholly adopted Marshall’s sliding-scale analysis.\textsuperscript{70}

"Equal citizenship," the Justices decided in Rodriguez, does not also "guarantee" economic leveling. The Supreme Court’s egalitarian revolution went so far and no farther. As Kenneth Karst points out, the "new" equal protection eventually and inevitably came to an end. Jeremy Bentham once observed that equality is an insatiable abstraction, and the "stopping-place problem" was "implicit in any constitutional guarantee" of the ideal. The Burger Court continued to grant some new claims of access to equal treatment, but at times, rested them on due process or procedural fairness. Some equal protection claims were rejected outright, others, especially those from middle-class women received a more friendly reception.\textsuperscript{71}

**The National Aftermath:**

**Powell, Gender, and the New “Heightened” Scrutiny**

In response to the women’s movement, following Rodriguez, the Burger Court became nearly united in finding unconstitutional most legal distinctions between men and women. It did not, however, declare sex a suspect classification under the equal protection clause, as proposed by Justices Brennan and Marshall. In a memo to Brennan, Powell observed that women were no longer "a discrete minority barred from effective

participation in the political process.” It would, therefore, be difficult for him to apply the highest scrutiny to gender cases.

In 1976, the Court decided that Oklahoma did not have the right to sell beer to women at a younger age than men (Craig v. Boren). Craig was the first case in which the majority of the Court openly announced that gender-based discrimination was suspect. Justice Brennan decided that for such a classification to be constitutional, it “must serve important governmental objectives and must be substantially related to achievement of those objectives.” Brennan’s pronouncement later became known as the Craig rule. A majority of the Court now agreed on a specific definition for what became known as an intermediate level of review in gender-discrimination cases. In most cases following Craig, the Court established the principle that to withstand constitutional challenge, a law that classifies by gender must serve an important governmental object, and must be substantially related to the achievement of those objectives.

Concurring with Brennan, Powell explained the Court’s difficulty in setting this intermediate standard of review for gender discrimination cases. “As is evident from our opinions,” Powell pointed out, “the Court has had a dilemma concerning the proper standard of equal protection analysis that can be applied consistently to the wide variety of legislative classifications.” There were “valid reasons,” Powell argued, for dissatisfaction with the “two-tier approach that has been prominent in the Court’s decisions in the past decade.” While he did not “welcome” a further subdivision of “equal protection analysis,” “candor” compelled Powell to recognize that the “relatively differential ‘rational basis’ standard of review normally applied takes on a sharper focus

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when we address a gender-based classification.” Although Powell was still unwilling to accept Marshall’s sliding-scale analysis, the author of *Rodriguez*, three years after the decision, accepted a new equal protection accommodation toward women.\(^73\)

The major emphasis in the post-*Craig* cases has been the elimination of legislative classifications that arbitrarily burden one gender’s economic or political rights. “The Court, for example, “invalidated a law excusing women from jury duty unless they volunteered; rejected a distinction in the duration of child support for daughters and sons; and struck down a law allowing husbands to dispose of jointly held property without their wives’ consent.”\(^74\) In Powell’s view, these statutes all flunked the test of reasonableness.

During the post-*Rodriguez* years, however, Powell, unlike Marshall and Brennan, supported special protections if they favored women. When benefits were “accommodations to social reality,” they should be sustained. If they perpetuated “outmoded stereotypes of female inferiority,” they should be opposed. Powell, for example, voted to uphold “a law giving widows but not widowers a partial exemption from property taxes, to allow a state to “punish men but not women for consensual sexual intercourse with an adolescent,” sustained “a provision requiring men but not women to register for the draft,” and supported the maintenance of an all-female nursing school.\(^75\)

In *Mississippi University for Women v. Hogan*, Justice O’Connor, for the majority, declared that since Mississippi justified single sex admissions on the basis of

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73 Ibid., 211.
past discrimination against women, the fact that women were over-represented in nursing, undercut the state’s argument. The admissions program, therefore, was unconstitutional. Powell, writing for the minority, stated that the decision would inevitably lead to the prohibition of single-sex schools. He made a convincing case for single-sex education: “Left without honor, Powell wrote, “indeed, held unconstitutional—is an element of diversity that has characterized much of American education and enriched much of American life.” “Coeducation, historically, is a novel educational theory,” he continued. The “Seven Sister” institutions established a “parallel standard of excellence for women’s colleges,” and “Harvard and Radcliffe maintained separate admission policies as recently as 1975.” Simply because coeducational institutions were more numerous, did not mean that the individual’s preference for single-sex education “was misguided or illegitimate, or that a State may not provide its citizens with a choice.”

Rodriguez preserved the Court’s two-tier equal protection review tradition and signaled a retreat from the expansion of fundamental rights under the Fourteenth Amendment. Three years later, in Craig v. Boren, the Justices added an intermediate tier, then confined to gender-based classifications. Rodriguez tried to limit judicial determination in the “subjective enterprise of selecting new fundamental interests. Craig added a new unpredictability to traditional two-tier equal protection interpretation. Justice Powell, after Rodriguez, took a centrist position on the Court and revealed a willingness to establish a more flexible standard of equal protection review, never going as far as Marshall and Brennan, but further than his colleague, Rehnquist. Although

(1981) (Men are required to register for the draft but not women.) Mississippi University for Women v. Hogan, 458 U.S. 718 (1982) (All female nursing school unconstitutional.)
Powell choose not to accept Marshall's entreaty in *Rodriguez* to expand the fundamental rights of the poor, but he did so later, in regard to women.\(^77\)

The *Craig* three-tier standard of equal protection review still stands, but as in the past, equal protection review remains in transition. As recently as 1996, in *United States v. Virginia*, Rehnquist, in a concurring opinion stated, "Two decades ago in *Craig v. Boren*, we announced that "to withstand constitutional challenge . . . classifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives. We have adhered to that standard of scrutiny ever since." Justice Ginsberg proposed a new requirement in her majority opinion, however, when she suggested that a state must offer an "exceedingly persuasive" argument for its justification of any unequal treatment of women. While Ginsberg did not maintain that "sex" was "a proscribed classification," Rehnquist argued, her reformulated equal protection standard was too restrictive, and lacked "content" and specificity." In spite of his dissatisfaction with the opinion, Rehnquist concurred with Ginsberg that both Virginia and the Virginia Military Institute had failed to provide comparable public resources for a women’s military facility, and this constituted a denial of equal protection.\(^78\)

In his 1976 *Craig* decision, Justice Powell recommended that the reader consult Gerald Gunther’s article on the 1971 term of the Supreme Court for a “thoughtful

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\(^76\) *Mississippi University for Women v. Joe Hogan* 458 U.S. 735,737,738 (1982).


\(^78\) *United States v. Virginia* 116 S. Ct. 2264 (1996). In his concurring opinion Rehnquist said, “Had Virginia made a genuine effort to devote comparable public resources to a facility for women, and followed through on such a plan, it might well have avoided an equal protection violation . . . “But [neither] the governing board of VMI nor the State took any action after 1982. If diversity in the form of single-sex, as well as coeducational, institutions of higher learning were to be available to Virginians, that diversity had to be available to women as well as to men.”
discussion on equal protection analysis.” Published in the *Harvard Law Review* in November 1972, one year before *Rodriguez*, Gunther conceded that the Burger Court had not lived up to the high expectations of conservatives in the Nixon administration. The Burger Court had shown a discontent with “new” equal protection review and this was heartening. The Court, Gunther suggested, should continue to expand the use of the Equal Protection Clause, but it should not subject statutes or state action to strict scrutiny analysis. Instead, the Court should apply a new standard to equal protection cases, something between minimum scrutiny, which had generally been applied to economic legislative activities, and strict scrutiny.\(^7\)

Gunther proposed a “newer” model, or an additional “bite” to the old equal protection. The new standard would “take seriously a constitutional requirement” that the Court had “never been formally abandoned--the prerequisite that a state’s legislative

\(^7\) *Craig v. Boren* 429 U.S. 211. In *Craig v. Boren* 429 U.S. 190 (1976) the Court would hold that an Oklahoma statute that allowed the sale of beer to females under the age of 18, but not to men until the age of 21, unconstitutional. Powell wrote a concurring opinion that noted the Court’s difficulty “in agreeing upon a standard of equal protection analysis that can be applied consistently to the wide variety of legislative classifications.” Powell, three years after *Rodriguez*, found the dissatisfaction with two-tier equal protection analysis valid, but did not welcome the subdivision of equal protection to include a “middle tier.” In *Massachusetts Board of Retirement v. Murgia* 427 U.S. 307 (1976) the Court upheld a Massachusetts statute that required all state police officers to retire at the age of fifty. The Court majority, including Powell, agreed the statute should be subjected to low level equal protection review. Only Marshall voted to invalidate the statute, and continued in *Murgia* to reject the two-tier equal protection analysis. He recommended again that the court should adopt his sliding-scale standard. The difficulty was, according to Marshall, there were rights not classified as fundamental that remained vital to a free society, and there were classes not recognized as suspect that were unfairly burdened by discrimination. The Court should drop the pretense and recognize that not all fundamental interests and suspect classes were the same. In *Murgia*, however, Powell and Brennan in circulated memos over the opinion, showed that they were willing to reconfigure two-tier equal protection review. Although the majority never clearly said that it abandoned two-tier analysis, nearly a decade later in *City of Cleburne v. Cleburne Living Center* 473 U.S. 432 (1985), the Court ruled that the denial of a “special use permit” for the operation of a group home for the mentally retarded was unconstitutional under the rational basis test. Marshall, however, pointed out in his dissent that the Court had in essence employed his sliding-scale approach. It had applied a heightened judicial attention, or intermediate tier review, to “outmoded statutes” that “continue to stymie recognition of the dignity and individuality of retarded people.” The Court should continue to act, Marshall said, when a group has been “the target of the sort of prejudiced, thoughtless, or stereotyped action that offends principles of equality.”

means must substantially further its legislative ends.” This was exactly the standard the Court adopted later in Craig. Law professors and law journal articles are frequently referred to in Supreme Court opinions. Powell’s reference to the Gunther article, and the implementation of his equal protection standard later in Craig, is suggestive of their powerful influence.

Gunther’s “newer” equal protection would be more interventionist than the Warren Court’s application of the “old” or traditional equal protection, but less strict than its application of the “new” equal protection. This invigorated traditional equal protection scrutiny would not require a judge to decide whether a fundamental interest was involved in decision-making, which rested on shaky constitutional roots. In the newer-old equal protection interpretation, a state could select any means to further its legislative purpose. The new model or intermediate standard of modest intervention would assure rationality of means, but would impinge less on legislative prerogatives regarding ends. The new model did not end strict scrutiny analysis; it would still be applied in cases involving fundamental interests or suspect classifications. But the legislative means test would be more onerous than the “old” two-tier equal protection. The means had to be more than reasonable; they had to be viewed as necessary, as the least restrictive alternative possible. The Burger Court would not likely expand the list of fundamental interests or suspect classifications, but when classifications infringed on race, or intersected with interests such as freedom of speech, by adopting a newer-old equal protection, Gunther suggested, an even tighter rein on the legislative branch would be appropriate. Justice Marshall had moved the Burger Court to the left in equal protection analysis, but possibly not as far as he, or other Warren court liberals would have hoped.
Lessons Learned from the School Finance Reform Revolution

The History of Education Since the industrial revolution shows a continual struggle between two forces: the desire by members of society to have educational opportunity for all children, and the desire of each family to provide the best education it can afford for its own children. Neither of these desires is to be despised; they both lead to investment by the older generation in the younger. Professor James Coleman, 1970\textsuperscript{81}

The great political and social questions in America almost invariably reach the Supreme Court. During the 1960s and 1970s, two important political forces in public education, parents desiring the best education possible for their children and supporters of equal educational opportunity fought over scarce resources. Reformers and public interest litigators regarded education as a key component in promoting social and economic progress, a principle deeply embedded in American law and ethics. Following Brown, a second-wave of education lawsuits began in conjunction with the movement to end “separate but equal schooling.” If court-ordered desegregation failed, advocates believed, then at least, the provision of equal access to school funding and resources might guarantee better educational opportunity for the disadvantaged, particularly those trapped in deteriorating property-poor urban districts.

An ideal difficult to define, equality or equal educational opportunity was troublesome in application. School finance litigators were frequently occupied with the process of finding a simple, comprehensible standard of equality for jurists to administer. But 1996, state lawsuits following Rodriguez, usually brought against state finance systems under the theory of “fiscal neutrality,” had met with only limited success. Found unconstitutional were public school funding systems in some fourteen states including

\textsuperscript{83} Gunther, 14-24.
California, New Jersey, Connecticut, Washington, West Virginia, Texas, Kentucky, and Montana. But reform challenges were unsuccessful in another fifteen states, and even where some legislative effort toward equalization occurred, the quality of educational opportunities, particularly in urban centers, remained “shockingly poor.”

The Texas’s three Republican and six Democratic Supreme Court Justices on October 2, 1989, unanimously declared the state’s school funding system unconstitutional on narrow grounds. Justice Oscar Mauzy, writing for the majority, found that the Texas Constitution’s Article VII, section 1 mandated that the Legislature “make suitable provision for the support and maintenance of an efficient system of free public schools.” The court ruled that this does not mean, as the defense argued, a “cheap or inexpensive system,” but rather “one where students [have] substantial equal access to funding despite local property values in their school districts.”

Mauzy’s 1989 Edgewood I opinion was limited in scope. The Justices based the Texas Supreme Court’s decision solely on the education “efficiency” provision of Article VII, section 1 of the Texas Constitution, and left open the question whether education is a fundamental right, or wealth a suspect class under the state constitution. Justice Powell and the Supreme Court, in 1973, had already decided both points in the negative under the federal constitution in San Antonio v. Rodriguez.

In May 1993, the Texas legislature discovered that it was politically and financially difficult to fund complete equality. In Senate Bill 7, passed to meet court-

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ordered equity standards, the local property tax remained the most important funding element, but the Legislature, to accomplish equalization, had to direct approximately 100 wealthy districts to choose one of five options to reduce their property wealth.\textsuperscript{84} Senate Bill 7 was ruled constitutional by the Texas Supreme Court in \textit{Edgewood v. Meno} (Edgewood IV) in January 1995, but the “Robin Hood” plan continues to be controversial with teachers, state officials, and spokesmen for rich and poor districts alike.

Michigan has devised a much different school finance solution—equally controversial. In April 1994, 70 per cent of Michigan voters ended their state’s traditional reliance on local property taxes by referendum. They centralized funding of education by increasing the state sales tax (4 to 6 percent) and the cigarette tax (25 cents to 75 cents a pack). Each school district received a minimum of $4,200 per pupil. But wealthy districts, which previously spent up to $10,000 per pupil, were limited as to how much they could supplement the base spending. Some school officials expressed concern that innovative programs would have to be cut back to stay within constitutional limits.\textsuperscript{85}

Recent school finance reform in Vermont has proved even more controversial. In 1997, the State Supreme Court declared the educational system unconstitutional and the Legislature passed Act 60 that “siphons school funds from property-rich ‘gold towns’ like Stowe to property-poor ‘receiver towns like Worcester.’” Under the new finance plan, all property owners will pay a state property tax of $1.10 per $100 of full market value. The state then parcels out money to schools equitably, according to an “involved formula that

\textsuperscript{83} \textit{Edgewood v. Kirby} 777 S.W.2d 398 (Tex. 1989). “An efficient system does not preclude the ability of communities to exercise local control over the education of their children. It requires only that the funds available for education be distributed equitably and evenly.”


\textsuperscript{85} Charles C. Euncher, “Tax Revolt Meets School Equity,” \textit{Baltimore Sun}, 17 April, 1994, 1E.
boils down to an average of $5,010 per student for the coming year.” To maintain their high per-pupil expenditure, wealthy communities will have to raise property taxes drastically, and return part of the proceeds to the state. The result of Vermont’s school finance reform has been controversy. “Gold town” school budgets are being cut, teachers fired, and libraries thinned. Opponents are currently challenging school finance reform in court, and social harmony between communities is fraying.86

Legal scholars have become disillusioned with the quantitative and qualitative results from recent school equity lawsuits. Because of the unsatisfactory and controversial results from equal protection challenges, some school finance litigators are shifting their focus from equality in per-pupil spending to the “adequacy” of the education provided. “Adequacy arguments, according to Frank Macchiarola and Joseph Diaz, “instead of asking comparative questions about the unequal resources or opportunities available to children in poor and rich districts, look directly at the quality of the educational services delivered.” This litigation strategy has proved successful recently in New Jersey, Connecticut, Alabama, Massachusetts, and Pennsylvania, and a failure in Kansas and Illinois.87

The advantage of the new adequacy litigation is that judges are not asked to reallocate tax dollars in search of an equitable method of distribution. Instead, adequacy is a return by scholars to the minimum ideal, a revitalized foundation funding approach.

86 Elinor Burkett, “Don’t Tread on My Tax Rate,” The New York Times Magazine, 26 April, 1998, 42-45. Annual spending in some property rich schools reached as high as $13,000 per student per year. “Why are we spending so much money?” Dorset resident Mary Barrossee said. “We’re not asking for [foreign] aid.” “All we’re asking is that we be allowed to preserve our school.”

The state’s focus turns to bringing all districts up to an “acceptable minimum service level,” not on the elimination of distortions in property wealth.

Efforts to equalize school resources have meet strong resistance. Some states are beginning to acknowledge that school finance reforms should not constrain high-spending districts in order to compensate poor districts. The arguments over equal educational opportunity have often come into direct conflict with parental and school district rights to control spending and local curriculum. Enrich calls this the “menacing” aspect of equality. The central critique of the equalization of school resources has been the failure of equal protection to resolve this tension between equality and local autonomy.88

Critics of fiscal neutrality or other equalization solutions point to their rigidity, the lack of accommodation and harmonization that comes when an equity standard is applied. Proponents of reform argue that a new standard, one that can be universally utilized, one that will raise educational standards for the poor and minorities must be found. Adequacy, they argue, may be such a choice.

Kentucky has already proceeded to follow the adequacy path. In 1989, the Kentucky Supreme Court, in *Rose v. Council for a Better Education*, declared the state’s entire education system unconstitutional. Texas Supreme Court Justice John Cornyn, concurring and dissenting in *Edgewood III (Carrollton-Farmers Branch ISD v. Edgewood)* pointed to *Rose* as a decision which attempted not to equalize expenditures, but strove to define an adequate or “minimum” education. An “efficient” system of education, the Kentucky Justices proposed, provides school children with seven substantive capacities: “oral and written communication skills,” “knowledge of
economic, social and political systems, “understanding of governmental processes,” “self-knowledge of mental and physical wellness,” “grounding in the arts,” readiness for advanced training in academic or vocational fields, and preparation for competition in the future job market.\(^8\) The Massachusetts Supreme Court borrowed from Kentucky these same seven substantive capacities when it articulated its adequacy standards in 1993.\(^9\)

It remains unclear if courts can apply constitutional language generated by the Kentucky “substantive capacities” and other state legislatures. Education experts and court opinions, it is hoped, will in the future offer a wide variety of different minimal educational standards from which judges and politicians can choose. The adequacy standard, Enrich suggested, provides a more tractable, a more reasonable and appropriate yardstick with which to achieve results.

School reformers presently seek to set educational standards of adequacy that aim at excellence, not just “minimal” sufficiency. After three decades of school finance reform, Enrich argued, “it is unlikely” that a legislature when “called upon to define standards for a state’s school system,” will “set its sights too low.” But, experience suggests that there is no guarantee that the political process will provide acceptable educational reform without the prompting of the judiciary. “The need remains for a judicial determination that the legislature or the executive has not satisfied its responsibilities.” The best course is for the judicial and legislative branches to continue to collaborate in addressing school finance reform, and take care that parents and school districts are provided effective means to maintain local responsibility and control.

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Parents and their children need to retain ownership of their own schools. The litigation search continues for a simple, reasonable, appropriate yardstick by which to measure the equal educational opportunity ideal. Will equity mean continue to mean access to equal funding or will the provision of adequate minimal education replace it? The question remains open.

After *Rodriguez*, many school finance litigators and reformers realized the limits of equality. "Even if courts decide that these issues are appropriately within their scope of review," an education expert pointed out, "much of the remedial nature" of educational equity cases remains in the hands of parents and legislative bodies. The courts, critics contend, simply lack an enforcement capacity to solve the persistent equity problem.\(^9^1\)

Journalists report that the recent strength in the economy has lawmakers in several states negotiating budgets with substantial increases in education spending. David Liebschutz, associate director of the Center for the Study of the States in Albany, estimated that current per-pupil spending of $6,564 per pupil will continue to rise at twice the rate of inflation (4 to 5 percent), and that state education spending will increase 5 to 7 percent next fiscal year. A strong economy may bring what future school finance litigation may not, more dollars for more pupils. With a new baby boom entering the schools and new skills needed for the workforce, increased education spending is now "in vogue."\(^9^2\)

Contrasting views of equality are expressed in the legal briefs, scholarly journals, and judicial opinions from the 1960s and 1970s *Rodriguez* school finance battle. This

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\(^9^1\) Enrich, "Leaving Equality Behind," 579

mountain of material provides insight into the egalitarian arguments proposed by public interest lawyers supporting the extension of "suspect" classes and new fundamental rights, and by those litigators seeking to protect individual liberty and local control. These arguments continue to reappear in school finance struggles and although the answers remain unresolved, the questions remain universal. Arthur Wise, James Coleman, Philip Kurland, Arthur Gochman, Charles Alan Wright, Mark Yudof, Thurgood Marshall, and Justice Powell have illuminated how avidly reformers sought to extend the ideal of equal educational opportunity, and how intelligently those who believed the Warren Court egalitarian revolution had gone too far challenged them. Public interest lawyers and reformers who debate these issues may also benefit from studying the intellectual battle over Rodriguez.

Rodriguez v. San Antonio was filed in the United States District Court on July 30, 1968. A temporary conclusion occurred on January 30, 1995 when the Texas Supreme Court declared Senate Bill 7 constitutional. The longest-running lawsuit of its kind, Rodriguez shadowed five Texas governors and dozens of special and regular sessions of the Texas Legislature. Rodriguez was the first fiscal neutrality school finance lawsuit to reach the U.S. Supreme Court. It was a part of a second-wave egalitarian revolution in which the 1960s and 1970s advocates asserted that education would be declared a fundamental right and poverty a suspect class under the Equal Protection Clause of the Fourteenth Amendment. Public interest litigators were convinced that Arthur Gochman and the Edgewood parents brought the case too soon. In actuality they brought Rodriguez too late; the era of the Warren Court had passed, and another had taken its place.
Rodríguez ended the expansion of fundamental rights and suspect classes. Justice Powell, speaking for the majority, influenced by the arguments for local control, and fearful of the disruption of school finance reform, returned the intricate problem to the state courts and legislatures. Equal protection conversations continued within the Court. The Justices, persuaded by the arguments of Marshall and others, began to modify two-tier traditional equal protection review, particularly in regard to gender. Marshall’s ideas influenced Justice Powell and the Court, and conversations and modifications continue, as evidenced by the issue of admission of women to Virginia Military Institute. The umbrella of equal protection will probably continue to grow, but at a slower pace than Marshall and other Great Society reformers desired.

Since 1973 school finance reform has brought more funds to poor school districts in Texas, and greater equalization of access to state resources. But stringent equal protection standards have locked legislatures and courts into funding formulas that take resources and political power away from parents and districts. This solution has proved controversial and in, some instances, politically unfeasible. Governors and legislatures are currently striving to develop alternative standards under the principle of adequacy that avoid such controversy. But adequacy alternatives revisit the same fundamental problems of fiscal neutrality and old arguments like the cost-quality debate. In addition, a definition of adequacy can be as elusive as equal educational opportunity.

The clash of public forces over the issue of public education continues, and as James Coleman states in his foreword to Private Wealth, the results of this clash has brought rewards, and the resulting discussion and struggle is bringing more dollars to needy schools, rich or poor. All school children can benefit from the heightened
standards that the present concern over education and new funding dollars may bring. Rich schools and poor schools need to work together to bring this new revolution.

World War II and the postwar War on Poverty impelled a generation to rebuild the educational structure. Today reformers face a new challenge, the costs and instructional needs of the second industrial, technological revolution. The current forces at work, like their predecessors, continue the battle for equal educational opportunity and scarce resources. The political forums and legal arguments seem familiar.
Selected Bibliography

Books


Articles


Karst, Kenneth L. “*Serrano v. Priest: A State Court’s Responsibilities and Opportunities*


Martinez, George A. “Legal Indeterminacy, Judicial Discretion and the Mexican-


Liberty versus Equity – the Fight over Funding of the Public Schools in Texas 1968-1995

July 30, 1968  Parents in the Edgewood Independent School District file a class action lawsuit in the U.S. District Court for the Western District of Texas on behalf of all school children residing in property poor school districts or who are members of minority groups.

August 23, 1968 Serrano v Priest  A group elementary and high school pupils and parents from property-poor school district file a class action suit in the Superior Court of Los Angles County claiming that the California school finance system, which relied heavily on local property taxes, was unconstitutional under the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. The California school funding system provided plaintiff school children with a “substantially inferior educational opportunity.”


October 21, 1971 Serrano v. Priest  The Supreme Court of California holds that the states school finance system is unconstitutional and a violation of the equal protection clause of the Fourteenth Amendment and the analogous provision of the California Constitution. Justice Sullivan using a “sliding scale” equal protection analysis declares that educational is a fundamental interest that may not be conditioned on wealth. The court also finds that a “legislative classification which discriminates on the basis of wealth violates the equal protection clause of the Fourteenth Amendment.”

December 23, 1971 Rodriguez v. San Antonio Independent School District  A three-judge United States District Court, with Judge Adrian Spears writing for the majority, rules that the Texas public school finance system is unconstitutional. The Court decides that the state method of financing education constitutes a denial of a “student’s equal protection guaranteed by the Fourteenth Amendment to the United States Constitution.”

May 1972  The U.S. Commission on Civil Rights, as part of its Mexican American Education Study, reports that the school systems of the Southwest had not “recognized the rich culture and tradition of the Mexican American students.” The report also declares that the schools used a “variety of exclusionary practices” which denied the Chicano

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student the use of his language, a pride in his heritage, and the support of his community.”

Charles Alan Wright, for the State of Texas, and Arthur Gochman representing the Edgewood School District argue before eight justices of the Burger Court. Marshall is ill. San Antonio ISD and other defendants including the State Board of Education and the Attorney General of Texas are the appellants, Rodriguez, and other parent plaintiffs, the appellees. Rodriguez is a class action suit and the appellees claim to speak for all other children living in Texas school districts that are members of minority groups or who are poor.  

In a 5-4 decision the Burger Court overrules the U.S. District Court. Justice Powell, writing for the majority, proves reluctant to find education a fundamental right or poverty a suspect class: “We are unwilling to assume for ourselves a level of wisdom superior to that of legislators, scholars, and educational authorities in 50 States.” The proper equal protection standard to apply, Powell states was “whether the challenged state action rationally furthers a legitimate state purpose or interest.” The Court holds “the Texas plan abundantly” satisfies “this standard.” Rodriguez, proponents of equity in school funding believe, “halted in its tracks the drive to equalize the public education system through the federal courts.”

April 3, 1973 The New Jersey Supreme Court in Robinson v. Cahill rules that the state school finance system is in violation of the “thorough and efficient” education clause of the state constitution, avoiding a reliance on equal protection arguments. Inequality of funding as a denial of equal educational opportunity is the primary focus of Robinson I.  

December 30, 1976 In Serrano II, the California Supreme Court declares school funding based on district wealth in violation of the state constitution’s equal protection provisions.  

1977 The U.S. Commission on Civil Rights reports in The Unfinished Education that minority students in the Southwest do not have public education benefits equal to their Anglo classmates.  

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8 Robinson v. Cahill 69 N.J. 473 (1973 (Robinson I). Every state’s constitution contains some kind of education provision which provides for some standard. The provisions usually require that the schools be “uniform”, “thorough”, “efficient”, “adequate”, or “sufficient.” These provisions recently have provided courts with the constitutional grounds to determine the adequacy of public education in the state.
9 Serrano v. Priest 18 Cal. 3d 728 (1976) (Serrano II).
1983 Publication by the National Commission on Excellence in Education of *A Nation at Risk* spurs public interest in school reform and equity issues. Education spending increases in many states. "If an unfriendly foreign power had attempted to impose on America the mediocre educational performance that exists today," the report warned, "we might well have viewed it as an act of war."

May 23, 1984 Eight property-poor school districts, including Edgewood refile their suit in Texas District Court. As the state legislature, guided by Governor Mark White, was in the process of calling a special session to tackle the problem of school finance, the suit was withdrawn.

July 13, 1984 The Texas Legislature enacts House Bill 72 which makes equity improvements in school finance but does not fundamentally reform the school finance system.

March 4, 1985 The Edgewood case is refiled as *Edgewood v. Kirby* in the 205th District Court in Travis County, Austin, Texas. Nineteen other property-poor districts joined Edgewood in the suit against the defendants: William Kirby, the Texas Commissioner of Education, the state’s Board of Education, Governor Mark White, the Comptroller, and the Attorney General.

June 1, 1987 District Judge Harley Clark finds education a fundamental right under the Texas Constitution and that the state lacks a compelling reason to justify the state’s discriminatory school finance system. The school finance system fails to provide, Judge Clark declares, an "efficient system of free public schools." The state appeals his decision.

December 14, 1988 The Texas Court of Appeals reverses the Travis County District Court in a two to one decision. The appellate court declines to apply the "strict scrutiny"equal protection standard and finds the finance system meets the rational relationship test. The use of local property taxes advances the local control of education. Edgewood involves "a political question not suitable for judicial review." The property-poor school districts appeal to the Texas Supreme Court.

June 1989 *Kentucky in Rose v. Council for Better Education* The Supreme Court of Kentucky declares the state’s entire educational system inequitable and also inadequate under the education clause’s mandate that requires the establishment of an "efficient system of common schools. In one of the first "adequacy" cases, the Justices list seven "substantive student capacities" that constitute an

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12 Property poor school districts did receive more money, but because of unfunded state mandates, coupled with a decline in the state’s economy due to a crash in oil prices, the plaintiffs’ districts remained disadvantaged.

13 *Edgewood v. Kirby*, No. 362516 (Travis County Dist. Ct., Tex.) (June 1, 1987).

"efficient" education. They range from providing "sufficient knowledge of economic, social, and political systems," "grounding in the arts," to "sufficient levels of academic or vocational skills" and "literacy." In 1993, Massachusetts in McDuffy v. Secretary of Executive Office of Education, also would rest its decision on the education clause and the failure of the financing system to provide an adequate education to public school children. In setting qualitative school standards, Massachusetts borrowed Kentucky's seven standards.\(^{15}\)

October 2, 1989 Edgewood I The Texas Supreme Court reverses the Court of Appeals and upholds the trial court's decision that the Texas school funding system violates the "efficiency" clause of the Texas Constitution's education article. Justice Oscar Mauzy, speaking for a unanimous court, rejects the state's argument that the word "efficient" means "a simple and inexpensive system." Instead it is interpreted to read "effective or productive results." The Supreme Court does not consider the issue of whether the finance system violated the equal protection provision in the state constitution.\(^{16}\)

June 7, 1990 Senate Bill I passes the Texas legislature. Taxes are raised to fund new educational programs. Wealthy districts are exempt from the new finance plan. Senate Bill 1 establishes a system in which 95 percent of the public school students in Texas will have access to equal levels of educational funding from a combination of state and local funds. A standard of equity that raised all districts up to the level of the wealthiest was rejected as more than the state can afford. The result according to Rocha and Webking was an "expensive band-aid... without fundamental change."\(^{17}\)

September, 1990 District Judge Scott McCown rejects the "adequacy" argument of Senate Bill I. McCown, who assumed responsibility for enforcing Edgewood after Judge Clark resigned, holds hearings on Senate Bill 1, and decides that the statute does not meet the constitutional requirements of the Edgewood I decision of the Texas Supreme Court. The issue, Judge McCown decides, was not an

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\(^{15}\) Rose v. Council for Better Education 790 S.W. 2d 212 (1989). McDuffy v. Secretary of Executive Office of Education 615 N.E. 2d 544 (1993). See Peter Enrich, "Leaving Equality Behind: New Directions in School Finance Reform," Vanderbilt Law Review 48 (1995): 174-175, 188, 112-113. The basis for the new adequacy opinions, according to Enrich, comes from many sources—constitutional history, expert opinion, case precedent, and dictionaries. Most of these opinions are accompanied by an effort on the part of the state legislatures to also define an adequate education. The adequacy model views the role of the state as the "guarantor that each district can provide its students with an acceptable basic level of educational services." The primary tool, Enrich points out, is the "foundation funding approach."

\(^{16}\) Edgewood v. Kirby 777 S. W. 2d 393,397 (Tex.1989). Prior to his election to the Texas Supreme Court in 1986, Justice Mauzy served in the Texas Senate (1967-1985) and was involved in school finance reform. Legislative efforts only resulted in putting more money into the present system, Justice Mauzy declared, "A Band-Aid will not suffice; the system itself must be changed." See William E. Sparkman and Michael P. Stevens, "Commentary: Texas School Finance System Unconstitutional," West's Education Law Reporter 57 (1990): 336-338.

adequate education, but an equal one: “under Senate Bill 1 the rich districts are left rich, the poor districts poor. “The poor, he points out, “will receive state funds to equalize the difference, but only up to a level of bureaucratically and legislatively determined ‘adequacy,’ not to the level of real difference in educational opportunity.”

January 22, 1991  Edgewood II  Both the plaintiffs and the defendants appeal Judge McCown’s September ruling and the Texas Supreme Court agrees to hear the case immediately. Chief Justice Tom Phillips, a Republican, speaking for a unanimous Supreme Court rules that “Even if the approach of Senate Bill 1 produces a more equitable utilization of state dollars, it does not remedy the major causes of the wide opportunity gaps between the rich and poor districts.” The judges do not prescribe the means by which the Legislature will have to comply to design a constitutional system. The state is given until April 1 to formulate a new plan. The deadline is later extended until April 15.\(^{18}\)

February 25, 1991  A divided Texas Supreme Court (5-4), in an opinion on a motion for the rehearing of Edgewood II, explains to the Legislature that the Texas Constitution allows local enrichment once the state has provided an “efficient system of free public schools.” Court observers find this dicta unusual because it is not the custom for courts to advise political officials as to what is constitutionally feasible before a statute is passed. Justice Gammage grumbles that the “majority’s gratuitous action” is “unnecessary and inappropriate”--an action that amounts to “an advisory opinion.”\(^{19}\)

April 11, 1991  The 72\(^{nd}\) Texas Legislature approves Senate Bill 351 which divides the State into 188 County Education Districts (CEDs.) No CED is to have taxable property wealth greater than $280,000 per student. The statute reduces the 716 to 1 disparity in school district property wealth (1990-91) to 6-1 between the CEDs (1991-92). Each CED is required to set a tax rate of 72 cents per $100 valuation, and in return each school is guaranteed $2,200 per student in state and local funds. School districts are allowed to add on to the CED tax up to 45 cents. Also, a district can add additional funds (Optional Local Enhancement) for experimental programs and payment of district debt.\(^{20}\)

August 7, 1991  Travis County District Judge Scott McCown finds the CEDs imposed by Senate Bill 351 constitutional.

January 30, 1992  Carrollton-Farmers Branch Independent School District  v. Edgewood Independent School District  (Edgewood III)  Wealthy school districts who lost significant funding with the passage of Senate Bill 351 are joined by several taxpayers in challenging the CED system in Edgewood III. Edgewood ISD, now the

\(^{18}\) Edgewood  v. Kirby  804 S.W. 2d 496 (Tex. 1991) (Edgewood II)

\(^{19}\) Rocha and Webking, Politics and Public Education, 77-78.

\(^{20}\) The CEDs were created to avoid a directive by the Texas Supreme Court in 1931  (Love  v. City of Dallas) that money raised in one district can not be spent in another. The CED is constitutional, the Legislature believes, because it takes tax revenue from the wealthy districts within each CED and transfers it to poorer districts. See Love  v. City of Dallas  120 Tex. 351 (1931).
defendant, is joined by its previous opponent, the state government. In a 7-2 decision written by Justice Raul Gonzalez, the Texas Supreme Court decides that Senate Bill 351 violates the provisions of the Texas Constitution prohibiting a statewide property tax and voter approval of school property taxes. The ruling gives the legislature until June 1, 1993 to create another school financing system.\(^{21}\)

**February 15, 1993** The Texas Senate gives final approval to place education proposals on the ballot. One proposal allows a shift of property taxes from rich districts to poor, the second restricts lawmakers from imposing educational mandates on schools without providing funding, and a third amendment permits the state to sell bonds to finance the construction of additional school buildings. Governor Ann Richards encourages voters to pass the amendments.

**May 1, 1993** Voters turn down the three education-related constitutional amendments.

**May 28, 1993** Senate Bill 7 passes the Texas Legislature. Senate Bill 7 is a “multiple-choice public-school funding plan which gives school districts with property wealth of more than $280,000 per student five options for sharing their money with property-poor districts.”\(^{22}\)

**August 19, 1993** Michigan Governor John Engler, Republican, signs a law eliminating the property tax as the source of school funding for the 1994-95 school year.

**December 9, 1993** Judge Scott McCown of the 205th Texas District Court in Travis County (Austin) in a 77-page decision upholds Senate Bill 7. “The judiciary owes the Legislature the respect of giving (the law) a chance to work,” Justice McCown decides. The District Court sets a new deadline for the Legislature (September 1, 1995) to come up with an equitable way to pay for school facilities, including new building and construction. Unless the issue is resolved, McCown pledges to stop the issuance of new school bonds. Poor districts complain of an equity gap of up to $1,000 between what a wealthy district and a poor district can raise per student. MALDEF requests that McCown rule Senate bill 7 unconstitutional and appoint a court master to devise a more equitable system. The Carrollton-Farmers Branch School Board, the wealthy Dallas

\(^{21}\) Dissenting, Justice Lloyd Doggett a Democrat, said “Our school children have long suffered from the failure of the school finance system. Today they suffer anew from the failure of the justice system to deliver on the promise of the Texas Constitution. The majority offers our children only delay, and they have already had plenty of that.” *Carrollton-Farmers Branch Independent School District v. Edgewood ISD* 826 S.W. 2d 576 (Tex. 1992).

\(^{22}\) The five options to reduce district property wealth in Senate Bill 7 were: 1) sending property taxes above the $280,000 level to the state for sharing with property poor districts 2) contracting of wealthy districts with a poorer district to share revenue above the $280,000 level 3) district consolidation of property tax base but not administration 4) creation of a new school district with a property tax base of under $280,000 per student 5) transference of commercial property from the tax rolls of a wealthy district so that property values do not exceed $280,000 per student. Solutions 3-5 required voter approval. Senate Bill 7 created a school funding system where “the rich got poorer and the poor got richer.” In 1995, 96 of the state’s 1,045 school districts shared their tax wealth by selecting either options one and two. Kathy Walt, “Court upholds Texas school-funding law,” *Houston Chronicle* 31 January 1995, sec. 1, p.1.
school district that challenged Senate Bill 351, also announces that it plans to challenge
the new legislation.\textsuperscript{23}

\textbf{March 1994 Michigan voters} overwhelmingly approve proposal A ending reliance on
the property tax to fund schools. Under the new plan, the state will give each district a
minimum of $4,200 per pupil; wealthier districts are limited on supplementing this base,
and state sales taxes and cigarette taxes are increased. Under the old system, the property
tax funded 62 per cent of spending and per-pupil expenditure varied from $3,200 to
$10,000 per pupil. Under the new plan, the state will fund 90 percent of the school costs,
ending the traditional reliance on the property tax.\textsuperscript{24}

\textbf{January 30, 1995 Edgewood v. Meno (Edgewood IV).} With its first Republican
majority in modern history, the Texas Supreme Court, in a 5-4 decision, declares Senate
Bill 7 constitutional. Justice John Cornyn, writing for the majority, rules that the 1993
“share-the-wealth” financing system approved by the Legislature meets the equal
protection standard for providing an efficient system of public education. Governor
George W. Bush responds, “The Supreme Court’s ruling makes it more important than
ever that the state acts to relieve pressure on local property taxes by making education
funding our number one priority and gradually increasing the state’s share of funding for
our schools.” Justice Cornyn warns that the issue of funding public school construction
could land the state back in the courtroom.\textsuperscript{25}

\textbf{May 4, 1995: Edgewood High School} The Edgewood School District formed a 15-
member task force to study the future of Edgewood High School, the 1950s-era campus
located in the heart of San Antonio’s property-poor West Side, and the subject of the 26-
year school-funding battle. A $2.7 million school renovation is underway; the funding
raised from bond sales approved by voters in 1992. District officials are considering a
proposal to shift the focus of the school’s curriculum from a traditional plan to a fine arts
and communications magnet school. Residents accuse district officials of targeting the
41-year-old school because of publicity from the Texas school finance case. Trustees
have said the school will not be closed, but students and parents find even this temporary
shuttering unacceptable. Declining enrollment, it is believed, may shift students to the
district’s other two high schools, Memorial and Kennedy, permanently. Roger Caballero,
a board trustee said, “we cannot justify spending resources operating three high schools
as we traditionally know them.” Adrian Gonzales, an Edgewood High School senior told
reporters, “My parents came here. I came here, and I want my kids to come here too.”\textsuperscript{26}

\textbf{September 15, 1996} The Houston Chronicle reports that Texas had the 12\textsuperscript{th}
property tax in the nation and Governor Bush’s 17-member Citizens’ Committee on
property Tax Relief is searching for ways to reform the state’s tax structure. The absence
of a state personal income tax, however, imparts a high degree of “inelasticity” to Texas’

\textsuperscript{23} Houston Chronicle 10 December 1993.
\textsuperscript{24} Charles Euchner, “Tax Revolt Meets School Equity,” Baltimore Sun, 17 April 1994, I(E).
\textsuperscript{25} Edgewood v. Meno 893 S.W. 2d 450 (Tex. 1995). Kathy Walt, “Court upholds Texas school-funding
\textsuperscript{26} Scott Huddleston, “Panel gives Edgewood one more year,” San Antonio Express News, 4 May 1995, 1.
tax system. An increase in the sales tax is unlikely because it also ranks among the highest in the nation. Harris County’s 20 school districts in the 1994-1995 school year spent $2.76 billion, up from $1.61 billion in 1986-87. But the state’s demographer, in a report prepared for the Texas Legislative Council, expresses concern over the rapidly growing Texas population and the coming demands it will place on the public sector for education and social services.27

January 8, 1997 Lieutenant Governor Bob Bullock believes that the Texas Legislature might scrap or soften the controversial “Robin Hood” law that forces wealthy school districts to share their local tax revenue with poor districts. Senate Bill 7 remains controversial, particularly among the newly elected Republican majority of the State Senate and Governor George Bush. By 1997, about 100 of the states 1,000 plus school districts were sharing their local tax revenue. The total cost of public education in Texas amounts to about $20 billion a year, including state and federal funds. Governor Bush encourages the Legislature to cut local school taxes by $1 billion over the next two years, and increase the state’s burden of public education costs. Property tax reduction, Bush proposes, might be achieved by raising taxes on business and sales.28

December 17, 1997 The New Hampshire Supreme Court rules that the state’s school finance system based on the local property tax is unconstitutional. The Justices announce that it is the state’s duty to provide school children with an adequate education and guaranteed funding. The decision leaves open the question as to how the Legislature will revise the school funding system.29

March 11, 1998 The Tax Research Analysis Center (TRAC) urges the New Hampshire law makers to learn from Michigan’s successes and failures in devising a new school finance structure for the state. TRAC suggests that property tax reformers focus on designing a fiscal policy to ensure adequate funding for schools. Abandoning the property tax base in Michigan and placing dependence on sales and excise taxes has resulted in a revenue loss of more than $158 million for state schools. Additional loses have also come from a reduction in sales tax revenue ($6.3 million) and personal income taxes due to cut backs in the workforce. TRAC recommends that any state contemplating future changes in school funding should adopt a simple, effective plan unencumbered by “political agendas and trendy taxes.” Michigan reforms, TRAC argues, are unique and probably not easily duplicated by other states. TRAC’s Larry Grau states that “Establishing an equitable and adequate school funding mechanism is a politically and financially complicated task which becomes more complex when states look for ways to reduce property taxes—a main staple of education funding.” In addition, any legislator

27 Murdock, the state demographer, predicts that by 2030 an additional 2 million students will be in public schools while college enrollment will jump by 370,000. Bernard L. Weinstein, “Texas, Our Taxes: May be unpopular but income tax is way to go,” Houston Chronicle 15 September 1996, 1C.
28 Clay Robison, “State’s school-finance law may be altered, Bullock says,” Houston Chronicle, 8 January 1997, 16A.
29 “Use of Property Tax for Schools Illegal in N.H.,” Los Angeles Times, 18 December 1997, 46 A.
seeking school funding reform should also implement policies to enhance and strengthen the state’s overall economy.\textsuperscript{30}

**March 16, 1998** In response to a strong economy, the Education Commission of the States, a nonprofit group that tracks education issues, predicts that lawmakers in many states will substantially increase education spending. The result will be, the Commission predicted, that states will take on a larger responsibility for education financing, in place of local districts. “In 1994-95, states provided 47 percent of all education spending; local districts 46 percent, and the Federal Government 7 percent.” In the coming year, the state’s share will likely increase due higher enrollment (nearly 47 million) and increased per-pupil spending ($6,564 in 1997.) In recent years, overall education spending has increased at a rate greater than inflation, 4 to 5 percent a year. “Education is in vogue, David Liebschutz, associate director for the Center for the Study of the States in Albany said, “A lot of this is the economy, but a lot is demographics . . . [y]ou have all the baby boomers with kids in school.” Chris Piphoto the Education Commission of the States points out that New Hampshire, Colorado and Ohio are still currently involved in school finance litigation. “If there was ever a year to be optimistic,” 1998 is it.\textsuperscript{31}


Glossary

Ad Valorem Tax: A tax imposed on property values. The Texas Constitution prohibits the state from imposing a property tax without an election by those who are to be taxed. A tax that is imposed on only a percentage of the value of the good.

Appellant: The party that appeals a case from a lower court.

Appellee: The party against which an appeal is taken.

Amicus Curiae: Latin for “friend of the court.” Courts sometimes permit nonparties with a strong interest in a case, for example the federal government or the American Civil Liberties Union (ACLU), to file a brief presenting their views on the issues before the court. Amicus briefs are usually filed in appellate courts on matters of broad public interest.

Article VII of the 1876 Texas Constitution: Required the state Legislature to provide and maintain “an efficient system of public free schools,” since “the general diffusion of knowledge” is essential to the preservation of the rights and liberties of the people.” It was amended in 1883 to allow school districts to tax themselves within certain limits to support education. In addition, it called for the disbursement of education funds on a per-student basis.

Coleman Report, The Equality of Educational Opportunity Report (EEOR) July 4, 1966: Produced by a team headed by James S. Coleman of Johns Hopkins University. Undertaken in report to a request by Congress to be used a tool for legal actions against racial discrimination. The Civil Rights Act of 1964 required that an investigation be made into the extent of inequality (by race, religion or nation) in the nations’ schools. 600,000 students in 3000 schools across the United States were surveyed. The study found that schools did not determine a student’s achievement, families and peer groups were the primary determiners of performance variations. “The findings constitute the most powerful empirical critique of the myths (the unquestioned basic assumptions, the socially received beliefs) of American education ever produced,” according to Frederick Mosteller and Daniel P. Moynihan.¹

De jure: “By law” Is used to describe a classification or a situation that is the result of law or official governmental action.

De facto: “In fact” Is used to describe a situation that actually exists, for example a racial classification caused by where people choose to live.

Dictum, or pl. dicta: Comes from Obiter dictum, pl. obiter dicta or Lation for an “incidental statement or passing comments by a judge that were unnecessary for the opinion.

Equal Protection:

The Rational Relationship Test or Traditional Equal Protection Review

This first tier stand of equal protection review of a state’s legislative classification was developed by the United States Supreme Court in the late 1930s to review general economic statutes. In these cases the justices show deference to the power of the legislative branch. In review, the Court asks only if the classification created by the state’s action bears a rational relationship to an end of government which is not prohibited by the Constitution.

The Compelling State Interest or Strict Scrutiny Test

A second tier or standard of judicial review was developed by the Supreme Court to apply to a case when fundamental rights or suspect classifications are involved. In employing this test, justices do not defer to the legislative branch of government, but instead require that the classification created by the legislation is related to a compelling state interest. The end of the legislation must justify the limitation it might place on constitutional rights.

The new standard of review stems from Justice Harlan Fiske Stone’s famous Footnote Four in United States v. Carolene Products 304 U.S. 144, 152 n. 4 (1938) in which he said, “There may be a narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten amendments, which are deemed equally specific when held to be embraced within the Fourteenth...Nor need we enquire...whether prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry...” According to legal historian Melvin Urofsky, Footnote Four was “practically ignored” at the time, but later became the basis for the strict scrutiny test, “one of the contemporary Court’s strongest weapons in its defense of individual rights.”

Equalized Tax Rates

Tax rates in school finance cases have to be adjusted for the difference in the way properties are assessed in school districts. To compare the property taxes between two districts, and to evaluate the tax effort made by parents in that district, it is necessary to

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take into account not only the property tax rate levied, but the rate at which the property in the district is assessed.

For example if the market value of a property in District A is $100,000, and it is assessed at $50,000, its assessment ratio is .50. If District B assesses a $100,000 property at $100,000, its assessment ratio is 1.00. In order to compare the tax effort of different school districts, it is then necessary to equalize the tax rate, i.e. to multiply the assessment ratio, for example, .50 by the tax rate (.10), to find a property tax rate that is comparable. In this example, the equalized tax rate is .05.

Joel S. Berke, Director of the Educational Finance and Governance Program at the Syracuse University Research Corporation and an expert witness for the plaintiffs in *Rodriguez*, found that when he equalized tax rates for Texas districts, those communities which had "the least money for their schools [were] the very districts which tax themselves most heavily to raise school revenues." The richer the district, the less it needed to tax, and the more it could raise in revenue. Referring to actual tax rates in the Public School Directory of the Texas Education Agency for the years 1967 to 1968, Berke found an inverse relationship between the wealth of a district and its equalized tax rate. For example, 26 Districts with a market value of taxable property per pupil from $100,00 to $50,000 had an equalized rate on $100 of .38, while forty districts with a market value of taxable property per pupil in the $30,000 to $10,000 range had an equalized rate on $100 of .72.3

Gilmer-Aiken Bills 1949

From January 11 to July 6, 1949, the Fifty-first Legislature of Texas enacted three bills that completely reorganized the Texas public school system. Senate Bill 115 created the Central Education Agency composed of the State Board of Education, the state commissioner of education, and the State Department of Education.

Senate Bill 116 set up the Minimum Foundation School Program (MFP) to guarantee each child in Texas equal educational opportunity and schooling was guaranteed for nine months of the year. The MFP authorized eight types of professional positions (classroom teacher, vocational teacher, special service teachers, etc.) and allocated these professionals to each school according to its average daily attendance rate for the preceding year. Salaries for professionals were fixed and base pay was determined by education completed and degrees earned. Depending on the size of the school, current operating expenses ranging from $350 to $400 per classroom were granted to each school in the district. Districts also received an allotment for transportation costs. Funding depended on density of the pupil population and number of students transported more than two miles. At the time of *Rodriguez*, Texas provided 80% of the MFP, school districts provided the remaining 20%.

The districts' share, known as the Local Fund Assignment, was first divided among Texas' 254 counties according to a complicated economic index that took into account each county's contribution to the state's total income from manufacturing, mining and agriculture. The county's share of state payroll and also its share of property

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in the state were taken into account. The county assignment was next divided among its school districts on the basis of each district’s assessable property share within the county. The school district paid its share of the Local Fund Assignment out of revenue from local property taxes. Gilmer-Aiken reforms were to force every school district to contribute to the education of its children. In 1935-1936, the Texas State Board of Education Survey, for example, found that over 400 common and independent schools districts levied no local property tax.

Senate Bill 117 provided for the transfer of funds to the Foundation School Fund and created a Foundation School Fund Budget Committee.

In 1975, the MFP was renamed the Foundation School Program (FSP). It was the FSP that was declared unconstitutional by the Texas Supreme Court in Edgewood Independent School District v. Kirby, October 2, 1989 (Edgewood I). The Edgewood case was a continuation of the Rodriguez, but in the state court arena. It was refiled on May 23, 1984, after the United States Supreme Court denied equal protection relief to the San Antonio plaintiffs in 1973.

The Economic Index

A controversial feature of the MFP created by the Gilmer-Aiken Bills, the economic index determined the amount of money to be contributed to the MFP by local school district property taxes. The index was composed of three parts: the assessed value of property in the county (20%), the county school population (8%), and county income from such sources as manufacturing, mineral production, agricultural products, wholesale establishment pay-roll, and service establishment payroll. In August 1968 Governor John Connally’s Committee On Public School Education found the economic index to be “imperfect” and the index was cited by the plaintiffs in Rodriguez. The economic index was an attempt by Gilmer-Aiken reformers to solve the problem of discrepancies in local property assessment tax rates. Although the State Constitution required equal and uniform assessment of all property according to its market value, this taxation standard was never enforced. In 1949, the Texas legislature decided that the economic index was the best method available to measure one county’s ability to support schools relative to other counties in Texas.

The Foundation School Program (1975)

The Minimum Foundation Program created by the Gilmer-Aiken bills in 1949 was changed to the Foundation School Program (FSP) in 1975. With minor corrections, this program was declared unconstitutional by the Texas Supreme Court in the post-Rodriguez-Edgewood cases. In 1989, the Texas Supreme Court found the changes in the FSP did not “cover even the cost of meeting the state-mandated minimum requirements.” The legislature had provided no allotments for school facilities or for debt service, and also, the basic allotment for transportation and a career ladder salary supplement was underfunded.4

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Justiciability. A case is justiciable if one that poses a legal question that judges are capable of solving. Some questions, such as political issues, are left to the legislative or executive branches. At times, judges interpret a fine line between what is a legal or a political question.

Personnel Units

School finance litigators criticized the Texas school finance program because the Minimum Foundation Plan guarantees to districts were based on teacher salary schedules rather than on student needs. This gave great aid to districts that hired teachers having advanced degrees. The result was rich districts which could afford to hire a greater number of experienced teachers received more money from the state.

_Serrano v. Priest_ 5 Cal. 3d 584 (1971)

The first state school finance ruling in which the California supreme court found the state’s school finance system unconstitutional and in violation of the federal equal protection clause because it made "the quality of a child’s education a function of the wealth of his parents and neighbors. Two years later the _Rodriguez_ decision ended challenges to state school finance systems under the Fourteenth Amendment of the United States Constitution.

Sui generis: Latin for "of its own kind," unique or one of a kind.

Three-judge Court

Since the turn of the century, Congress has provided for extraordinary federal trial courts composed of three judges in certain important cases. Antitrust and railroad cases were the first in this category. The 1964 Civil Rights Act provided for three-judge courts in several kinds of cases. Also, suits that challenged the constitutionality of state or federal statutes required an expanded judicial bench.