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AUG 21 1991,

NO. 3-87-190-CV

IN THE

COURT OF APPEALS

FOR THE

THIRD SUPREME JUDICIAL DISTRICT OF TEXAS

AT AUSTIN

---

WILLIAM KIRBY, *et al.*,

Appellants

v.

EDGEWOOD INDEPENDENT SCHOOL DISTRICT, *et al.*,

Appellees

---

**BRIEF OF APPELLANTS EANES  
INDEPENDENT SCHOOL DISTRICT, ET AL.**

---

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ATTORNEYS FOR APPELLANTS

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v.

EDGEWOOD INDEPENDENT SCHOOL DISTRICT, *et al.*,

Appellees

---

**CERTIFICATE OF PARTIES**

In order that members of the Court may determine disqualification or recusal pursuant to Texas Rule of Appellate Procedure 74(a), Appellants certify that the following is a complete list of the parties and persons interested in the outcome of this case:

- (1) William N. Kirby, Interim State Commissioner of Education, Appellant
- (2) Texas State Board of Education, Appellant
- (3) Bill Clements, Governor and Chief Executive Officer of the State of Texas, Appellant
- (4) Robert Bullock, State Comptroller of Public Accounts, Appellant
- (5) State of Texas, Appellant
- (6) Jim Mattox, Attorney General of Texas, Appellant
- (7) Andrews Independent School District, Appellant
- (8) Arlington Independent School District, Appellant
- (9) Austwell Tivoli Independent School District, Appellant
- (10) Beckville Independent School District, Appellant
- (11) Carrollton-Farmers Branch Independent School District, Appellant
- (12) Carthage Independent School District, Appellant

- (13) Cleburne Independent School District, Appellant
- (14) Coppell Independent School District, Appellant
- (15) Crowley Independent School District, Appellant
- (16) DeSoto Independent School District, Appellant
- (17) Duncanville Independent School District, Appellant
- (18) Eagle Mountain-Saginaw Independent School District, Appellant
- (19) Eanes Independent School District, Appellant
- (20) Eustace Independent School District, Appellant
- (21) Glasscock County Independent School District, Appellant
- (22) Grady Independent School District, Appellant
- (23) Grand Prairie Independent School District, Appellant
- (24) Grapevine-Colleyville Independent School District, Appellant
- (25) Hardin Jefferson Independent School District, Appellant
- (26) Hawkins Independent School District, Appellant
- (27) Highland Park Independent School District, Appellant
- (28) Hurst Euleess Bedford Independent School District, Appellant
- (29) Iraan-Sheffield Independent School District, Appellant
- (30) Irving Independent School District, Appellant
- (31) Klondike Independent School District, Appellant
- (32) Lago Vista Independent School District, Appellant
- (33) Lake Travis Independent School District, Appellant
- (34) Lancaster Independent School District, Appellant
- (35) Longview Independent School District, Appellant
- (36) Mansfield Independent School District, Appellant
- (37) McMullen Independent School District, Appellant
- (38) Miami Independent School District, Appellant
- (39) Midway Independent School District, Appellant
- (40) Mirando City Independent School District, Appellant
- (41) Northwest Independent School District, Appellant
- (42) Pinetree Independent School District, Appellant
- (43) Plano Independent School District, Appellant
- (44) Prosper Independent School District, Appellant
- (45) Quitman Independent School District, Appellant
- (46) Rains Independent School District, Appellant
- (47) Rankin Independent School District, Appellant
- (48) Richardson Independent School District, Appellant
- (49) Riviera Independent School District, Appellant
- (50) Rockdale Independent School District, Appellant
- (51) Sheldon Independent School District, Appellant
- (52) Stanton Independent School District, Appellant
- (53) Sunnyvale Independent School District, Appellant
- (54) Willis Independent School District, Appellant
- (55) Wink-Loving Independent School District, Appellant
- (56) Edgewood Independent School District, Appellee
- (57) Socorro Independent School District, Appellee
- (58) Eagle Pass Independent School District, Appellee
- (59) Brownsville Independent School District, Appellee
- (60) San Elizario Independent School District, Appellee
- (61) South San Antonio Independent School District, Appellee
- (62) Pharr-San Juan-Alamo Independent School District, Appellee
- (63) Kenedy Independent School District, Appellee
- (64) La Vega Independent School District, Appellee
- (65) Milano Independent School District, Appellee
- (66) Harlandale Independent Schools District, Appellee

- (67) North Forest Independent School District, Appellee
- (68) Aniceto Alonzo, on his own behalf and as next friend of his children Santos Alonzo, Hermelinda Alonzo and Jesus Alonzo, Appellee
- (69) Shirley Anderson, on her own behalf and as next friend of her child Derrick Price, Appellee
- (70) Juanita Arredondo, on her own behalf and as next friend of her children Augustin Arredondo, Jr., Nora Arredondo and Sylvia Arredondo, Appellee
- (71) Mary Cantu, on her own behalf and as next friend of her children Jose Cantu, Jesus Cantu and Tonitius Cantu, Appellee
- (72) Josefina Castillo, on her own behalf and as next friend of her child Mareno Coreno, Appellee
- (73) Eva W. Delgado, on her own behalf and as next friend of her child Omar Delgado, Appellee
- (74) Ramona Diaz, on her own behalf and as next friend of her children Manuel Diaz and Norma Diaz, Appellee
- (75) Anita Gandara and Jose Gandara, Jr., on their own behalf and as next friends of their children Lorraine Gandara and Jose Gandara, III, Appellees
- (76) Nicolas Garcia, on his own behalf and as next friend of his children Nicolas Garcia, Jr., Rodolfo Garcia, Rolando Garcia, Graciela Garcia, Criselda Garcia and Rigoberto Garcia, Appellee
- (77) Raquel Garcia, on her own behalf and as next friend of her children Frank Garcia, Jr., Roberto Garcia, Ricardo Garcia, Roxanne Garcia and Rene Garcia, Appellee
- (78) Hermelinda C. Gonzalez, on her own behalf and as next friend of her child Angelica Maria Gonzalez, Appellee
- (79) Ricardo Molina, on his own behalf and as next friend of his child Job Fernando Molina, Appellee
- (80) Opal Mayo, on her own behalf and as next friend of her children John Mayo, Scott Mayo and Rebecca Mayo, Appellee
- (81) Hilda Ortiz, on her own behalf and as next friend of her child Juan Gabriel Ortiz, Appellee
- (82) Rudy C. Ortiz, on his own behalf and as next friend of his children Michelle Ortiz, Eric Ortiz and Elizabeth Ortiz, Appellee
- (83) Estela Padilla and Carlos Padilla, on their own behalf and as next friends of their child Gabriel Padilla, Appellees
- (84) Adolfo Patino, on his own behalf and as next friend of his child Adolfo Patino, Jr., Appellee
- (85) Antonio Y. Pina, on his own behalf and as next friend of his children Antonio Pina, Jr., Alma Pina and Anna Pina, Appellee
- (86) Reymundo Perez, on his own behalf and as next friend of his children Ruben Perez, Reymundo Perez, Jr., Monica Perez, Raquel Perez, Rogelio Perez, and Ricardo Perez, Appellee
- (87) Patricia A. Priest, on her own behalf and as next friend of her children Alvin Priest, Stanley Priest, Carolyn Priest and Marsha Priest, Appellee
- (88) Demetrio Rodriguez, on his own behalf and as next friend of his children Patricia Rodriguez and James Rodriguez, Appellee
- (89) Lorenzo G. Solis, on his own behalf and as next friend of his children Javier Solis and Cynthia Solis, Appellee
- (90) Jose A. Villalon, on his own behalf and as next friend of his children Ruben Villalon, Rene Villalon, Maria Christina Villalon and Jaime Villalon, Appellee
- (91) Alvarado Independent School District, Appellee
- (92) Blanket Independent School District, Appellee
- (93) Burleson Independent School District, Appellee

- (94) Canutillo Independent School District, Appellee
- (95) Chilton Independent School District, Appellee
- (96) Copperas Cove Independent School District, Appellee
- (97) Covington Independent School District, Appellee
- (98) Crawford Independent School District, Appellee
- (99) Crystal City Independent School District, Appellee
- (100) Early Independent School District, Appellee
- (101) Edcouch-Elsa Independent School District, Appellee
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- (103) Fabens Independent School District, Appellee
- (104) Farwell Independent School District, Appellee
- (105) Godley Independent School District, Appellee
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- (144) Weatherford Independent School District, Appellee
- (145) Ysleta Independent School District, Appellee
- (146) Connie DeMarse, on her own behalf and as next friend of her children Bill DeMarse and Chad DeMarse, Appellee

- (147) B. Halbert, on his own behalf and as next friend of his child Elizabeth Halbert, Appellee
- (148) Libby Lancaster, on her own behalf and as next friend of her children, Clint Lancaster, Lyndsey Lancaster, and Britt Lancaster, Appellee
- (149) Judy Robinson, on her own behalf and as next friend of her child, Jena Cunningham, Appellee
- (150) Frances Rodriguez, on her own behalf and as next friend of her children, Ricardo Rodriguez and Raul Rodriguez, Appellee
- (151) Alice Salas, on her own behalf and as next friend of her child, Aimee Salas, Appellee

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**REQUEST FOR ORAL ARGUMENT**

Appellants request  
Oral Argument upon submission of this Cause.

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**BRIEF FOR APPELLANTS EANES  
INDEPENDENT SCHOOL DISTRICT, ET AL.**

TO THE COURT OF APPEALS:

Appellants Eanes Independent School District, Sheldon Independent School District, Arlington Independent School District, Carthage Independent School District, McMullen Independent School District, Lago Vista Independent School District, Rockdale Independent School District, Klondike Independent School District, Riviera Independent School District, Beckville Independent School District, Pinetree Independent School District, Miami Independent School District, Rankin Independent School District, Eustace Independent School District, Lake Travis Independent School District, Austwell Tivoli Independent School District, Hardin Jefferson Independent School District, Hurst Eules Bedford Independent School District, Grapevine-Colleyville Independent School District, Eagle Mountain-Saginaw Independent School District, Cleburne Independent School District, and Longview Independent School District, respectfully submit this brief in appeal of the judgment rendered by the 250th Judicial District Court, Travis County, Texas, Harley Clark, Judge Presiding, in Cause No. 362,516 in which Appellants Eanes Independent School District, *et al.* were Defendant-Intervenors, William Kirby, *et al.* were Defendants, and Edgewood Independent School District, *et al.* were Plaintiffs.

**PRELIMINARY STATEMENT**

This is an appeal from the judgment of the trial court below declaring the Texas School Finance System to be unconstitutional.

This action was originally filed on May 23, 1984 by eight school districts and certain residents of those districts against the State of Texas and various state officials. Plaintiffs challenged the Texas school finance system as violating the Texas Equal Protection Clause, TEX. CONST. art. I, § 3;<sup>1</sup> the Texas Equal Rights Amendment, *id.*, §

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<sup>1</sup>"All free men, when they form a social compact, have equal rights, and no man, or set of men, is entitled to exclusive separate public emoluments, or privileges, but in consideration of public services."

3(a);<sup>2</sup> the Texas Education Clause, *id.* art. VII, § 1;<sup>3</sup> and the Texas Uniform Taxation Provision, *id.* art. VIII, § 1.<sup>4</sup> [Tr. 536] The case was initially abated to await the actions to be taken by the Texas Legislature in a special session called in May 1984. That session ultimately passed House Bill 72, a comprehensive package of education reforms including school finance reforms vigorously supported by Plaintiffs. Nevertheless, in March 1985 Plaintiffs filed an amended petition which again urged that the Texas system of school finance was unconstitutional. [Tr. 37] In September and November 1986 additional school districts and individuals intervened as Plaintiffs. [Tr. 213, 219, 231, 241, 282, 316, 322, 329, 335, 339, 366, 416] Thereafter, from November 1986 to January 1987, numerous school districts, including the present Appellants, intervened as Defendants.<sup>5</sup>

After a bench trial, the trial court ultimately entered judgment pursuant to the Declaratory Judgment Act, TEX. CIV. PRAC. & REM. CODE ANN. § 37.004 that the Texas system of school finance (which it defined as TEX. EDUC. CODE § 16.01, *et. seq.* "implemented in conjunction with local school district boundaries that contain unequal taxable property wealth for the financing of public education") violated the Texas constitutional guarantees of equal protection, equality under the law, and privileges and immunities guarantees of TEX. CONST. art. I, §§ 3, 3(a), 19, and 29, respectively. [Tr. 502] The thrust of the trial court's holding was that the Texas School Finance System failed

to ensure that each school district in this state has the same ability as every other district to obtain, by state legislative appropriation or by local taxation, or both, funds for education expenditures, including facilities and equipment, such that each student, by and through his or her school district, would have the same opportunity to educational funds as every other student in the state, limited only by discretion given local districts to set local tax rates . . . .

[Tr. 502]. Appellants have perfected the present appeal from the trial court's judgment.

<sup>2</sup>"Equality under the law shall not be denied or abridged because of sex, race, color, creed, or national origin. This amendment is self-operative."

<sup>3</sup>"A general diffusion of knowledge being essential to the preservation of the liberties and rights of the people, it shall be the duty of the Legislature of the State to establish and make suitable provision for the support and maintenance of an efficient system of public free schools."

<sup>4</sup>"Taxation shall be equal and uniform. . . ."

<sup>5</sup>Hereafter, both Plaintiffs and Plaintiff-Intervenors will be referred to collectively as "Plaintiffs." Defendants and Defendant-Intervenors will be referred to collectively as "Defendants."

## POINTS OF ERROR

POINT OF ERROR NO. 1: The trial court erred in applying strict scrutiny to evaluate the Texas School Finance System; since neither a fundamental right nor a suspect classification is implicated by the Texas system, it was improper for the court to apply this standard of review. (Tr. 546)

POINT OF ERROR NO. 2: The trial court erred in holding that education is a fundamental right under the Texas Constitution, since, for purposes of equal protection analysis, education is not a fundamental right under Texas law so as to subject a governmental classification to strict scrutiny. (Tr. 539-547, 592)

POINT OF ERROR NO. 3: The trial court erred in holding that wealth is a suspect category, since, for purposes of equal protection analysis, classifications based upon wealth are not suspect classifications so as to subject a governmental classification to strict scrutiny. (Tr. 542)

POINT OF ERROR NO. 4: The trial court erred in entering judgment that the Texas School Finance System violated the equal protection clause of the Texas Constitution on the basis of its finding that no rational basis exists for the Texas School Finance System, since there is no evidence, or in the alternative, insufficient evidence to support this finding. (Tr. 549, 594-98).

POINT OF ERROR NO. 5: The trial court erred in entering judgment that the Texas School Finance System is not an efficient system of free public schools as required by Texas Constitution art. VII, §1, since there is no evidence, or in the alternative, insufficient evidence to support this finding. (Tr. 599-603)

POINT OF ERROR NO. 6: The trial court erred in finding that the Texas School Finance System does not provide an adequate education, since there is no evidence, or in the alternative, insufficient evidence to support this finding. (Tr. 558-73)

POINT OF ERROR NO. 7: The trial court erred in holding that the equal protection clause of the Texas Constitution mandates equal access to funds by local school districts. (Tr. 502, 538)

POINT OF ERROR NO. 8: The trial court erred in defining equal protection in terms of the standing of school districts rather than the rights of students. (Tr. 536, 503)

POINT OF ERROR NO. 9: The trial court erred in finding that the Texas School Finance System violated the due process clause of the Texas Constitution, art. I, § 19 and 29, since there is no evidence, or alternatively, insufficient evidence to support such a finding. (Tr. 503, 609)

POINT OF ERROR NO. 10: The trial court erred in finding that boundary lines of school districts in Texas are irrational and unconstitutional, since boundaries are a political question not subject to judicial review. (Tr. 502, 573-75)

POINT OF ERROR NO. 11: The trial court erred in holding that all school taxes are state taxes since art. VIII, § 1 of the Texas Constitution prohibits a state ad valorem tax. (Tr. 547)

POINT OF ERROR NO. 12: The trial court erred in finding that the Texas School Finance System serves no compelling state interest because such a finding is incorrect as a matter of law, or alternatively, is against the great weight and preponderance of the evidence. (Tr. 575-92)

## STATEMENT OF FACTS

Texas has been, since early in its history, committed to a dual approach to the financing of public schools. The Constitution of 1836, under which the Republic of Texas was governed, stated that it would be the duty of Congress, "as soon as circumstances will permit, to provide by law, a general system of education." Constitution of 1836, General Provisions, § 5. Subsequently, when Texas was admitted to the Union, the Constitution of 1845 also contained provision for the establishment of free public schools.<sup>6</sup> But by 1883, it became clear that the meager support that education had previously received from the State was not sufficient, and the Constitution was amended to provide for the creation of local school districts to share in the task of financing public education. *See generally* Plaintiff-Intervenors' Exhibit 235 at 2-5 [hereinafter cited as *The Basics of Texas Public School Finance*]. These local school districts were given authority to levy property taxes for the erection of school buildings and for the "further maintenance of public free schools." TEX. CONST. of 1876, art. VII, § 3, as amended, Aug. 14, 1883.

Thus, in 1883, support for local public schools consisted of a combination of state and local support. State support came in the form of flat per student distributions from the state's Available School Fund.<sup>7</sup> Local support was made possible by constitutional provisions allowing rural common school districts to levy an ad valorem tax of up to 20 cents per \$100 and town schools to levy a tax of up to 50 cents per \$100. *See generally The Basics of Texas Public School Finance* at 5.

<sup>6</sup>TEX. CONST. art. X, § 1 (1845): "A general diffusion of knowledge being essential to the preservation of the rights and liberties of the people, it shall be the duty of the legislature of this State to make suitable provision for the support and maintenance of public schools." *See id.*, § 2: "The Legislature shall, as early as practicable, establish free schools through the State, and shall furnish means for their support by taxation on property . . . ."

<sup>7</sup>Pursuant to the Constitution of 1876, the Available School Fund consisted of income from a Permanent School Fund, a maximum of one-fourth of the general revenue, and a portion of the state's dog tax. TEX. CONST. art. VII, § 3 (1876). The Permanent School Fund consisted of all funds previously allocated to education but not spent, a permanent endowment established in 1845, and half the public domain—a value in excess of \$42 million. *See generally The Basics of Texas Public School Finance* at 5.

Over the next seven decades, a number of factors combined to result in ever-increasing differences in the amounts being spent by local school districts. One such factor was the constitutional provision of 1883 which allowed town schools to tax at a higher rate than rural schools. The differences in educational spending between districts was also accounted for in part by differing willingnesses to tax. *See The Basics of Texas Public School Finance* at 4-5. Texas was gradually moving from a primarily agrarian economy in which the property wealth of the State was fairly evenly distributed throughout the State to an industrial economy, where wealth was more concentrated and the population shifted from rural areas to the cities. *See San Antonio Independent School District v. Rodriguez*, 411 U.S. 1, 9, 93 S.Ct. 1278, 1283, 36 L.Ed.2d 16 (1973).

Although some effort was made in Texas to ease the growing disparity in educational spending between rural and urban areas in the early part of this century, *see generally The Basics of Texas Public School Finance* at 6-8, the major change to the Texas school finance system came in 1949. In that year the Texas legislature, following a national trend in the area of school finance [SF 4894-95], adopted a school finance plan, known as the Gilmer-Aiken Act, which included a Minimum Foundation Program. [SF 42] This program guaranteed certain basic educational elements to be available to all school districts which participated in the program, regardless of the local wealth of the school district. [SF 42] This program called for state and local contributions to a fund set aside for teacher salaries, operating expenses of schools, and transportation costs; the state paid 80 percent of the cost of this fund and the local school districts paid 20 percent of the cost. [SF 42] This share of the local school districts, called the Local Fund Assignment, was apportioned among the school districts under a formula designed to reflect each district's relative ability to raise taxes. *See Rodriguez*, 411 U.S. 9-10, 93 S.Ct. at 1284, 36 L.Ed.2d 16.

The design of this complex system was twofold. First, it was an attempt to assure that the Foundation Program would have an equalizing influence on expenditure levels between school districts by placing the heaviest burden on the school districts most capable of paying. Second, the Program's architects sought to establish a Local Fund Assignment that would force every school district to contribute to the education of its children but that would not by itself exhaust any district's resources.

*Id.*, 411 U.S. at 10, 93 S.Ct. at 1284, 36 L.Ed.2d 16 (footnotes omitted).

The Texas system of school finance as it exists today is a refinement of the original Minimum Foundation Program. In 1975, the Texas legislature revised the Foundation School Program to add equalization aid directly aimed at alleviating relative differences among districts in their ability to raise funds for education. Major reform came, however, in 1984 under House Bill 72. In a special session lasting from June 4 to July 3, 1984, the Texas legislature met to consider sweeping changes to all aspects of education in Texas, including education finance. The result, House Bill 72, was characterized by Dr. Richard Hooker, Plaintiffs' lead expert witness, as "the most comprehensive reform bill passed in the United States by any state." [SF 52] In terms of school finance, House Bill 72 provided great increases in funding to property poor school districts and actually reduced state funding to some 200 wealthy school districts, a reduction that was practically unheard of in the annals of school finance reform, where wealthy school districts are almost always guaranteed by school finance reform legislation that they will at least not lose any money. [SF 54]

It was this historic reform that Plaintiffs below attacked as unconstitutional and which the trial court struck down. For the reasons stated below, and as incorporated from the briefs filed by Appellants William N. Kirby, *et al.*; Andrews Independent School District, *et al.*; and Irving Independent School District, the trial court erred in so holding and its decision should be reversed and judgment entered that Appellees take nothing.<sup>8</sup>

### ARGUMENT AND AUTHORITIES UNDER POINTS OF ERROR NOS. 1, 2, AND 3

**POINT OF ERROR NO. 1: The trial court erred in applying strict scrutiny to evaluate the Texas School Finance System; since neither a fundamental right nor a suspect classification is implicated by the Texas system, it was improper for the court to apply this standard of review.**

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<sup>8</sup>For economy of argument, the numerous Appellants have addressed different points of error in their briefs. Appellants Eanes Independent School District, *et al.* have focused their arguments on the trial court's finding that the Texas system of school finance violated the equal protection guarantee of the Texas Constitution, a finding challenged in points of error 1, 2, 3, and 4. Said Appellants hereby adopt by reference the arguments under the remaining points of error submitted to this Court by the other Appellants listed above.

**POINT OF ERROR NO. 2:** The trial court erred in holding that education is a fundamental right under the Texas Constitution, since, for purposes of equal protection analysis, education is not a fundamental right under Texas law so as to subject a governmental classification to strict scrutiny.

**POINT OF ERROR NO. 3:** The trial court erred in holding that wealth is a suspect category, since, for purposes of equal protection analysis, classifications based upon wealth are not suspect classifications so as to subject a governmental classification to strict scrutiny.

## I.

### GENERAL STANDARDS APPLICABLE TO EQUAL PROTECTION ANALYSIS

The equal protection clause of the Texas Constitution, like its federal counterpart,<sup>9</sup> defines the limits of governmental action which has the effect of classifying individuals differently. That a legislature can legitimately employ classifications that result in differential treatment is undisputed. *See, e.g., Railroad Commission of Texas v. Miller*, 434 S.W.2d 670, 673 (Tex. 1968)(state may classify its citizens into reasonable classes and apply different laws, or its laws differently, to the classes without violating equal protection); *Sullivan v. University Interscholastic League*, 616 S.W.2d 170, 172 (Tex. 1981)("[S]tate cannot function without classifying its citizens for various purposes and treating some differently than others."). But legislative classifications are subject to judicial review to guarantee that such classifications remain within proper bounds. This review proceeds, however, on the presumption that a statute is valid. *See Spring Branch Independent School District v. Stamos*, 695 S.W.2d 556, 559 (Tex. 1985). Moreover, it is presumed that the legislature has not acted unreasonably or arbitrarily and a mere difference of opinion, where reasonable minds could differ, is not sufficient grounds to strike down legislation as being arbitrary or unreasonable. *See Smith v. Davis*, 426 S.W.2d 827, 831 (Tex. 1968).

Several decades of development in the area of equal protection in the federal courts and in Texas courts have resulted in a straightforward test for determining the validity of a governmental classification. Such classifications will not be struck down so long as they are rationally related to a legitimate state interest unless (a) the classification implicates a

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<sup>9</sup>"No State shall . . . deny to any person within its jurisdiction the equal protection of the laws." U. S. CONST. amend. XIV, §1.

"fundamental interest" or (b) the classification affects a "suspect class." See *Spring Branch Independent School District v. Stamos*, 695 S.W.2d 556, 559 (Tex. 1985); *Eanes Independent School District v. Logue*, 712 S.W.2d 741, 742 (Tex. 1986).<sup>10</sup> In the latter two instances classifications must satisfy an exacting standard of review. Where a "fundamental interest" or a "suspect classification" is involved, it must be shown that the state has a compelling interest which the classification is the least restrictive means of achieving.

Therefore, crucial to the trial court's judgment in favor of Plaintiffs was its determination that education is a fundamental right under the Texas Constitution. As the following discussion demonstrates, the trial court erred in concluding that education is a fundamental right under the Texas Constitution.

## II.

### THE TRIAL COURT ERRED IN NOT FOLLOWING ESTABLISHED TEXAS PRECEDENTS TO CONCLUDE THAT EDUCATION IS NOT A FUNDAMENTAL RIGHT FOR PURPOSES OF TEXAS EQUAL PROTECTION ANALYSIS

Although subsequent argument will dramatically demonstrate that even had it been writing on a *tabula rosa*, the trial court should have concluded that education is not a fundamental right under Texas equal protection analysis, its preeminent error was that it ignored established precedents of the Texas Supreme Court and this Court, and simply rewrote the law.

The Texas Supreme Court has specifically held that the standard to be applied in reviewing legislative provisions for education mandated by TEX. CONST. article VII, § 1 is the rational basis test. In *Mumme v. Marrs*, 40 S.W.2d 31 (Tex. 1931), the Court considered a challenge to a legislative school finance enactment and, in upholding the

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<sup>10</sup> The United States Supreme Court has occasionally employed an intermediate degree of scrutiny between either of the two levels described in the text, in cases relating to gender, illegitimacy, and illegal alien status. See, e.g., *Craig v. Boren*, 429 U.S. 190, 197, 97 S.Ct. 451, 456-57, 50 L.Ed.2d 397 (1976) (gender); *Lalli v. Lalli*, 439 U.S. 259, 99 S.Ct. 518, 58 L.Ed.2d 503 (1978) (illegitimacy); *Plyler v. Doe*, 457 U.S. 202, 102 S.Ct. 2382, 72 L.Ed.2d 786 (1982) (illegal aliens). In these cases the Court has required that the classification, to be upheld, must be "substantially related" to an "important governmental objective." *Craig v. Boren*, 429 U.S. at 197, 97 S.Ct. at 456-57, 50 L.Ed.2d 397. There is neither federal nor Texas authority, however, for using the middle tier analysis to review classifications relating to education.

enactment, commented as follows

Since the Legislature has the mandatory duty to make suitable provision for the support and maintenance of an efficient system of public free schools, and has the power to pass any law relative thereto, not prohibited by the Constitution, it necessarily follows that it has a choice in the selection of methods by which the object of the organic law may be effectuated. The Legislature alone is to judge what means are necessary and appropriate . . . . The legislative determination of the methods, restrictions, and regulations is final, except when so arbitrary as to be violative of the constitutional rights of the citizen.

*Id.* at 36. By this reasoning the Court upheld what was essentially a school finance reform statute (a minor version of what House Bill 72, the legislative enactment attacked here, was in terms of finance reform) from an equal protection challenge. In the course of its analysis, it noted further that even the legislature was limited in its reform efforts by certain fundamental realities.

It is true that equality of educational opportunities for all may not be brought about by the law, but the inequalities which may continue will exist rather by reason of differences in population, wealth, and physical conditions of the school districts or communities, and a failure of local authorities to exercise their constitutional power of taxation, than from the law itself.

*Id.*<sup>11</sup> This holding essentially sets forth the rational basis test, a test that cannot be applied where a fundamental interest is implicated. Thus, the question of which level of scrutiny is commanded by TEX. CONST. article VII, § 1 (and, correspondingly, whether a fundamental right is implicated) has been answered and recently affirmed by the Texas Supreme Court.

It must be recalled that a determination of whether a right is fundamental is simply a prelude to the determination of what standard of review must be applied to a given classification. In *Mumme v. Marrs*, however, the latter determination itself was made; and therefore, as a matter of law, education cannot be a fundamental right under the Texas

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<sup>11</sup>The holding of *Mumme v. Mars* has recently been reiterated by the Texas Supreme Court in *Spring Branch I.S.D. v. Stamos*, 695 S.W.2d 556 (Tex. 1985). In *Stamos, id.* at 559, the Supreme Court held:

Section 1 of Article VII of the Constitution establishes a mandatory duty upon the Legislature to make suitable provision for the support and maintenance of public free schools. *The Constitution leaves to the Legislature alone the determination of which methods, restrictions, and regulations are necessary and appropriate to carry out this duty, so long as that determination is not so arbitrary as to violate the constitutional rights of Texas' citizens.* (Emphasis added, citation omitted.)

constitution. This is precisely the reasoning adopted by the Texas Supreme Court in *State of Texas v. Project Principle, Inc.*, 724 S.W.2d 387 (Tex. 1987). There Appellees argued that the provisions of House Bill 72 relating to teacher testing had to meet the strict scrutiny standard because statute impinged upon the fundamental right to practice a profession. The Court, however, looked to *Schwartz v. Board of Bar Examiners*, 353 U.S. 232, 239, 77 S.Ct. 752, 756 1 L.Ed.2d 796 (1957), in which the United States Supreme Court had stated that a state "can require high standards of qualification . . . before it admits an applicant to the bar, but any qualification must have a rational connection with the applicant's fitness or ability to practice law." The Texas Supreme Court then found that "[i]f a state's standards are required only to be rationally related to the state's purpose of licensing only those who are qualified, then a person's interest in practicing law is not a fundamental one. Likewise, we hold a person's interest in teaching is not a fundamental right." 724 S.W.2d at 391.

The reasoning in *Project Principle* should be followed here. In that case the Texas Supreme Court reasoned backwards, in a sense, to the fundamental right question. It had authority for the proposition that licensing requirements needed only meet a rational basis test; thus, the question of whether the right to teach was "fundamental" was necessarily determined. It could not be, given the already established standard of scrutiny. Appellants' argument here is the same. The standard of scrutiny for legislation dealing with education has already been determined by *Mumme v. Marrs*—the rational basis test. Thus, education cannot be a fundamental right.

Nor can *Mumme v. Marrs* be discredited merely because of its age. As indicated below, the test adopted by the Texas Supreme Court in that case is precisely the test recognized by a majority of the states that have considered the fundamental right question in relation to education since the early 1970s. Moreover, the test adopted and the Texas Supreme Court's reasoning in support of that test is consistent with the United States Supreme Court's treatment of education and related social and economic issues.

In addition to the holding of the Supreme Court in *Mumme v. Mars*, this Court has specifically held that education is not a fundamental right under either the United States or

the Texas Constitution. In *Hernandez v. Houston Independent School District*, 558 S.W.2d 121 (Tex. Civ. App.—Austin 1977, writ ref'd n.r.e.), this Court, citing *Rodriguez*, summarily determined that a "tuition-free education is not a 'fundamental right' guaranteed by the Constitution of the United States," and applied rational basis analysis to review a statute under the equal protection clauses of the United States and Texas constitutions. *Id.* at 124. Although the holding in *Hernandez* as to the construction of the federal equal protection clause was implicitly overruled by the United State Supreme Court's decision in *Plyler v. Doe*, 457 U.S. 202, 102 S.Ct. 2382, 72 L.Ed. 786 (1982), the Court in *Plyler* specifically affirmed the holding in *San Antonio v. Rodriguez* that education is not a fundamental right under the United States Constitution. Therefore, on the issue of whether education is a fundamental right under either the Texas or the United States Constitution, *Hernandez* still controls.

And finally, at least one other Court of Appeals has applied the rational basis test to review legislative classifications relating to education. In *Rodriguez v. Ysleta Independent School District*, 663 S.W.2d 547 (Tex. App.—El Paso 1983, no writ), the El Paso Court of Appeals reviewed a school district policy which prohibited a child whose parents did not reside in the district from attending public school, even though the child resided in the district. The plaintiffs in the case had challenged the policy as violating the equal protection clauses of both the United States and the Texas Constitutions. The court, however, found that the policy was one "reasonably related" to the needs of the school district and did not deny equal protection. In essence, then, the Court applied rational basis analysis and, thus, implicitly found that no fundamental right (e.g. education) was implicated.

Even if the trial court were free to reject the holdings discussed above, however, a proper understanding of equal protection principals should have led it to conclude that education is not a "fundamental right" under the Texas Constitution so as to subject the Texas School Finance System to strict scrutiny.

### III.

#### GENERAL CRITERIA FOR DETERMINING THE EXISTENCE OF A FUNDAMENTAL RIGHT

Before a court can determine whether education is a "fundamental right," it must first determine what it means for a right to be "fundamental" for purposes of equal protection analysis. Certainly, the issue is not whether education is of "fundamental" importance in some abstract sense. Rather, the question to be answered is whether, based on an understanding of equal protection analysis and the concerns the equal protection clause was intended to vindicate, education is "fundamental" in the sense necessary to justify the exacting scrutiny of law which that label carries in equal protection analysis. "[T]he inquiry is whether the affected interest . . . should enjoy that judicial protection necessary to vindicate the equal protection doctrine as drawn from constitutional text and history." *Chrysler Corp. v. Texas Motor Vehicle Commission*, 755 F.2d 1192, 1202 (5th Cir. 1985). Moreover, because a determination that an interest is fundamental invokes strict scrutiny review and virtually ties the hands of the legislature to deal with a given area, the question must also be: what kinds of interests must be essentially removed from the arena of legislative enactment? Thus, the determination that an interest is fundamental "involves a judicial determination that the text or structure of the Constitution evidences the existence of a value that should be taken from the control of the political branches of government." 2 R. ROTUNDA, J. NOWAK & J. YOUNG, TREATISE ON CONSTITUTIONAL LAW 327 n.21 (1986).<sup>12</sup>

These considerations counsel this Court to reject the simplistic tests urged by Appellees to determine that education is a "fundamental interest." The tests proposed by the Appellees below, and apparently adopted by the trial court, focused on two factors to find education "fundamental": (1) the general importance of education, and (2) the specific reference to education in the Texas Constitution, particularly in TEX. CONST. art. VII, §

<sup>12</sup>In view of the severe limitations placed upon legislative action when an interest or right is deemed fundamental, the list of such fundamental rights has remained closely limited. Construing the equal protection clause of the Fourteenth Amendment to the United States Constitution, the Texas Court of Criminal Appeals has indicated that fundamental rights include the right to privacy, the right to vote, rights guaranteed by the First Amendment, the right to procreate, and the right to interstate travel. See *Clark v. State*, 665 S.W.2d 476, 480 n.3 (Tex. Crim. App. 1984)(en banc).

1.<sup>13</sup> For the reasons discussed below, neither of these tests is an appropriate benchmark for equal protection analysis.

#### IV.

#### THE TRIAL COURT IMPROPERLY FOCUSED UPON THE "IMPORTANCE" OF EDUCATION AND REFERENCES TO EDUCATION IN THE TEXAS CONSTITUTION

##### A. The Importance of Education is not Determinative.

In *Dandridge v. Williams*, 397 U.S. 471, 90 S.Ct. 1153, 25 L.Ed.2d 491 (1970),<sup>14</sup> the United States Supreme Court considered a challenge to a Maryland welfare statute that apportioned welfare payments based upon the number of members of a family. As the number of family members increased, then, according to the statute in question, payments were proportionately reduced. This scheme was attacked in part on grounds that it violated the equal protection clause of the United States Constitution. Although the Court recognized that the case involved "the most basic economic needs of impoverished human beings," it nevertheless declined to subject the statute in question to the heightened scrutiny required when fundamental interests are involved. 397 U.S. 485, 90 S.Ct. 1162. When later urged in *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1, 33, 93 S.Ct. 1278, 1296-97, 36 L.Ed.2d 16 (1973), that education should be viewed as a

<sup>13</sup>Article VII, § 1 states as follows:

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

<sup>14</sup>Appellants are fully aware that Texas courts are not bound by federal case law in their construction of the Texas Constitution. See *Whitworth v. Bynum*, 699 S.W.2d 194, 196 (Tex. 1985). Nevertheless, in the identification of "fundamental" interests for equal protection analysis under the Texas Constitution, Texas courts have consistently relied upon federal precedents under the United States Constitution. For example, recently in *State v. Project Principle, Inc.*, 724 S.W.2d 387, 391 (Tex. 1987), the Texas Supreme Court summarily rejected the claim that the right to practice a profession was a fundamental right so as to subject to strict scrutiny a portion of House Bill 72 requiring testing of teachers. The Court simply looked to *Schwartz v. Board of Bar Examiners*, 353 U.S. 232, 239, 77 S.Ct. 752, 756, 1 L.Ed. 2d 796 (1957), which held that a classification involving the practice of law was subject to the rational basis test, likened the practice of law to the profession of teaching, and concluded that no fundamental right was implicated.

An example even more on point is this Court's opinion in *Hernandez v. Houston Independent School District*, 558 S.W.2d 121 (Tex. Civ. App.—Austin 1977, writ ref'd n.r.e.), which, citing *Rodriguez*, summarily determined that a "tuition-free education is not a 'fundamental right' guaranteed by the Constitution of the United States," and applied rational basis analysis to review a statute relating to education under the equal protection clauses of the United States and Texas constitutions. *Id.* at 124.

"fundamental" interest on the basis of its importance, the Court again cited the holding of *Dandridge* and noted that while the welfare benefits involved in that case were of "central importance" and involved "the most basic economic needs," the benefits were nevertheless not of such a fundamental nature as to require strict scrutiny. 411 U.S. at 33, 93 S.Ct. at 1296-97, 36 L.Ed.2d 16.

The Supreme Court's analysis would therefore reject as constitutionally significant the trial court's appeal to the central role that public education has played in this State. (Tr. 537). According to *Rodriguez*, centrality is not the issue. Importance is not the issue. It does not even matter whether, in common speech, the adjective "fundamental" might be used to describe a right or interest.<sup>15</sup> Instead, the Court found that before a governmental classification would be subjected to the exacting scrutiny required when "fundamental" rights are implicated, it had to be demonstrated that the right was either explicitly or implicitly guaranteed in the Constitution.

**B. That the Texas Constitution Makes Explicit Provisions for Education Does not Control Equal Protection Analysis.**

The trial court relied in part upon language from *Rodriguez* to determine that education is a "fundamental" interest for purposes of analyzing equal protection claims under the Texas Constitution. As noted above, the Court in *Rodriguez* specifically repudiated any attempt to identify "fundamental" interests according to their social importance. Rather, the Court found, the answer to the question of whether education was "fundamental" for purposes of federal equal protection analysis lay in assessing "whether there is a right to education explicitly or implicitly guaranteed by *the Constitution*." 411 U.S. at 33, 93 S.Ct. at 1297, 36 L.Ed.2d 16 (emphasis added). The trial court fastened upon this test used by the United States Court to interpret the requirements of the United States Constitution to understand the Texas Constitution. In so doing it fundamentally

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<sup>15</sup>See *Plyler v. Doe*, 457 U.S. 202, 102 S.Ct. 2382, 2397, 12 L.Ed.2d 786 (1982)(recognizing that "education has a fundamental role in maintaining the fabric of our society" but nevertheless reiterating the holding of *Rodriguez* that education was not a "fundamental" right). Thus, Plaintiffs' appeal to the dictionary to define "fundamental" (see Plaintiff-Intervenor's Ex. 203) or the trial court's reliance on the use of the adjective "fundamental" by Dr. William Kirby (Tr. 547), fail to recognize that "fundamental right" is a term of art in equal protection analysis that cannot be defined by reference to popular dictionaries or common-place usage.

erred.

The isolated language from *Rodriguez* adopted by the trial court was based on an analysis of *the United States Constitution*. The Supreme Court did not purport to lay down a principle to be used in the construction of *state* constitutions. To have done so, as the trial court did, would have demonstrated gross disregard for the fundamental difference between the United States Constitution and state constitutions, including the Texas Constitution.

Texas, like many other states, has many laws which are usually considered legislation inserted into its Constitution. Unlike the United States Constitution, which is a document of restricted authority and delegated powers, the Texas Constitution does not restrict itself to addressing only those areas that are fundamental. The Texas Constitution is, in this regard, similar to the constitutions of most other states. It is therefore not surprising that a majority of the states faced with the question of whether education should be found "fundamental" under their constitutions have held that it is not, and have declined to pluck the *Rodriguez* test out of its context and apply it to their state constitutions. See *Fair School Finance Council of Oklahoma, Inc. v. Oklahoma*, No. 56577 (Okla. Nov. 25, 1987)(unpublished decision); *Hornbeck v. Somerset County Board of Education*, 458 A.2d 754, 786 (Md. 1983); *Lujan v. Colorado State Board of Education*, 649 P.2d 1005, 1017-19 (Co. 1982); *Board of Education of the City School District of the City of Cincinnati v. Walter*, 390 N.E.2d 813, 818-19 (Oh. 1979); *Horton v. Meskill*, 376 A.2d 359, 371-73 (Conn. 1977); *Olsen v. State*, 554 P.2d 139, 144 (Or. 1976); *Thompson v. Engelking*, 537 P.2d 635, 644-45 (Idaho 1975); *Robinson v. Cahill*, 303 A.2d 273, 282-87 (N.J. 1973). Even the few states that have found their public school finance systems in violation of their respective state constitutions have largely rejected the "explicitly or implicitly guaranteed" test. See *Serrano v. Priest*, 557 P.2d 929, 952 (Ca. 1976); *Horton v. Meskill*, 376 A.2d 359, 371-73 (Conn. 1977).

Most frequently the rejection of the *Rodriguez* test is based upon the difference between the United States Constitution and state constitutions. Thus, the Colorado

Supreme Court in *Lujan v. Colorado State Board of Education*, 649 P.2d 1005, 1017 (Co. 1982), recently reasoned as follows:

[W]e reject the "Rodriguez test." While the test may be applicable in determining fundamental rights under the United States Constitution, it has no applicability in determining fundamental rights under the Colorado Constitution. This is so because of the basic and inherently different natures of the two constitutions as will be briefly discussed in the following paragraphs. The United States Constitution is one of restricted authority and delegated powers. As provided in the Tenth Amendment, all powers not granted to the United States by the Constitution, nor denied to the States by it, are reserved to the States or to the People. . . . Conversely, the Colorado Constitution is not one of limited powers where the state's authority is restricted to the four-corners of the document. The Colorado Constitution does not restrict itself to addressing only those areas deemed fundamental. Rather, it contains provisions which are both equally suited for statutory enactment, as well as those deemed fundamental to our concept of ordered liberty. Thus, under the Colorado Constitution, fundamental rights are not necessarily determined by whether they are guaranteed explicitly or implicitly within the document. [Footnote omitted.]

See also *Fair School Finance Council of Oklahoma, Inc. v. Oklahoma*, No. 56577 (Okla. Nov. 25, 1987)(unpublished decision)(inappropriate to use *Rodriguez* test because of "the basic and inherently different nature of the two constitutions"); *Board of Education of the City School District of the City of Cincinnati v. Walter*, 390 N.E.2d 813, 818 (Oh. 1979)(Ohio constitution "contains provisions which would be suitable for statutory enactment which are not considered fundamental to our concept of ordered liberty"); *Board of Education, Levittown, v. Nyquist*, 439 N.E.2d 359, 366 n.5 (N.Y. 1982)("The inclusion in our State Constitution of a declaration of the Legislature's obligation to maintain and support an educational system is not to be accorded the same significance for purposes of equal protection analysis as would a counterpart reference to education in the Federal Constitution."); *Olsen v. State*, 554 P.2d 139, 144 (Or. 1976)(*Rodriguez* test especially unhelpful in Oregon "where many laws which are usually considered legislation are inserted in the Constitution").

Some courts have questioned the usefulness of the *Rodriguez* test for equal protection analysis at either the federal or the state level, and have even doubted the usefulness of traditional principles of equal protection analysis to solve the social conundrums often posed by legislation relating to education. The New Jersey Supreme

Court, for example, has noted that the right to acquire and hold property is guaranteed by both federal and state constitutions, but is not a likely candidate for preferred treatment as a fundamental right. *Robinson v. Cahill*, 303 A.2d 273, 282 (N.J. 1973). See also *Horton v. Meskill*, 376 A.2d 359, 372-73 (Conn. 1977).

And finally, it has been suggested that the use of the *Rodriguez* test to interpret state constitutional demands would implicate other vital governmental services besides education. The court in *Robinson v. Cahill* observed:

It must be evident that the rudimentary scheme of local government is implicated by the proposition that the equal protection clause dictates statewide uniformity. This is so unless it can be said that the equal protection clause holds education to be a thing apart from other essential services which also depend upon local legislative decision with respect to the dollar amount to be invested. As to any service to which equal protection is found to apply, it would follow that if the moneys are raised by local taxation in a way which permits a different dollar expenditure per affected resident, the program is invalid as to the beneficiaries unless a State aid program fills in the gap. It would then follow that a State aid program which did not neutralize local inequalities would itself deny equal protection as to beneficiaries; and although it is not urged upon us that every federal statute must abide by that precept, we see no reason why that constitutional mandate would not also prevail at the federal level if the basic premise is sound. . . . It is undeniable that local expenditures per pupil do vary, and generally because other essential services must also be met out of the same tax base and the total demands exceed what the local taxpayers are willing or able to endure. But for that same reason similar discrepancies, both as to benefits and burdens, can be found with respect to the other vital services which the State provides through its local subdivisions. The equal protection proposition potentially implicates the basic tenet of local government that there be local authority with concomitant fiscal responsibility.

303 A.2d at 277, 286-87(citations and footnotes omitted):

Each of these objections to the use of the *Rodriguez* test may be urged with respect to the Texas Constitution. It also is different from the United States Constitution in that it contains provisions that could readily have been enacted as statutes, rather than constitutional provisions.<sup>16</sup> Matters are made the subject of guarantees that are not in any sense on the level of long recognized fundamental rights. Is there a fundamental right to a

<sup>16</sup>See, e.g., TEX. CONST. art. III, § 49-d (acquisition and development of water storage facilities); *id.* § 52e (payment of medical expenses of law enforcement officials); *id.* § 52f (private roads in small counties); *id.* art. X, § 2 (just tariff rates); *id.* art. XII, § 6 (guarantee against watered stock); *id.* art. XVI, § 24 (roads and bridges); *id.* § 37 (mechanics liens); *id.* § 49 (protection of personal property from forced sale).

mechanics lien,<sup>17</sup> to public roads,<sup>18</sup> to investment protection?<sup>19</sup> Each of these matters are guaranteed or made the mandatory duty of the legislature, but it would be hard to take seriously any suggestion that these matters be classified as "fundamental" rights and classifications implicating them subjected to strict scrutiny. The use of the "explicitly or implicitly guaranteed" test is simply inappropriate in view of the nature of the Texas Constitution.

**C. In Any Event, Education Is not "Guaranteed" by the Texas Constitution.**

Only by stretching language for a predetermined purpose is it possible to suggest that education is either explicitly or implicitly "guaranteed" by the Texas Constitution. The Texas Constitution makes a clear distinction between those rights "guaranteed" to individuals (as set forth in Article I's Bill of Rights) and declarations concerning Legislative responsibility (such as the declaration in Article VII, section 1 that 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"). *Compare Lujan v. Colorado State Board of Education*, 649 P.2d 1005, 1017 (Co. 1982)("On its face, Article IX, Section 2 of the Colorado Constitution merely mandates action by the General Assembly—it does not establish education as a fundamental right, and it does not require that the General Assembly establish a central public school finance system restricting each school district to equal expenditures per student.").

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<sup>17</sup>See TEX. CONST. art. XVI, § 37 ("Mechanics, artisans and material men, of every class, shall have a lien upon the building and articles made or repaired by them . . .").

<sup>18</sup>See TEX. CONST. art. 16, § 24 ("The Legislature shall make provision for laying out and working public roads, for the building of bridges, and for utilizing fines, forfeitures, and convict labor to all these purposes.").

<sup>19</sup>See TEX. CONST. art. XII, § 2 ("General laws shall be enacted providing for the creation of private corporations, and shall therein provide fully for the adequate protection of the public and the individual stockholders.").

V.

**CRITERIA THIS COURT SHOULD APPLY TO FIND THAT EDUCATION IS NOT  
A FUNDAMENTAL INTEREST SO AS TO SUBJECT THE TEXAS SCHOOL  
FINANCE SYSTEM TO STRICT SCRUTINY**

**A. Education is not on the Same Level as the Rights to Free Speech or  
Free Exercise of Religion, which have Long been Recognized as  
Fundamental Rights under Federal and State Constitutions.**

Faced with an equal protection challenge to the "no pass, no play" provisions of House Bill 72, TEX. EDUC. CODE ANN. § 21.920(b)(Vernon Supp. 1987), the Texas Supreme Court in *Spring Branch Independent School District v. Stamos*, 695 S.W.2d 556 (Tex. 1985), recently suggested the approach to be taken by a court seeking to determine whether a right is "fundamental" under the Texas Constitution. There the Court concluded that the alleged "right" to participate in extracurricular activities which was implicated by the "no pass, no play" rule did not "rise to the same level as the right to free speech or free exercise of religion, both of which have long been recognized as fundamental rights under our state and federal constitutions." *Id.* at 560.

It is precisely this approach that should determine the outcome of the present case. Education, while an important interest of the citizens of Texas, simply does not rise to the level of rights such as free speech or free exercise of religion, nor has it been long recognized as "fundamental." The trial court elevated an admittedly important interest in social legislation concerned with education into a right on a par with rights long recognized by both federal and state courts as fundamental, rights that do not depend for their existence upon public financial support. Furthermore, in so elevating the interest in education to a fundamental right, the trial court engaged in innovation, not the recognition of settled legal principles. It found within the text of the Texas Constitution a supposed fundamental right that has escaped the attention of more than a hundred years of Texas jurists.

At the heart of this reluctance to carve out new fundamental rights not recognized as such by federal courts, especially by the United States Supreme Court, is no doubt the belief that "fundamental" rights should be readily apparent from their long history of recognition as such. To having them popping up suddenly after years of jurisprudence

have neglected to note their existence suggests that they are not the product of settled principles, but the creation of individual jurists.

The Court in *Stamos* also noted that fundamental rights "have their genesis in the express and implied *protections of personal liberty* recognized in federal and state constitutions." *Id.* (emphasis added). Education, of course, is not a matter of personal liberty. It is, rather, a form of social or welfare benefit whose value the State of Texas has recognized and provided for. The right to free speech and free exercise of religion are, on the other hand, personal liberty interests. As such, the legislature's ability to impact them is rightfully circumscribed tightly by classifying these interests as fundamental and subjecting classifications implicating them to strict scrutiny review. Education is not a right in the strict sense. It is a benefit the State provides, and the State's provision of this benefit should not be subject to the same scrutiny warranted when the State legislates concerning a matter of personal liberty. See generally the discussion concerning the distinction between personal liberties and government assistance which is not a matter of constitutional entitlement in *Texas Department of Human Resources v. Texas State Employees Union CWA/AFL-CIO*, 696 S.W.2d 164, 171-72 (Tex. App.—Austin 1985, no writ).

**B. Education Should Fall within the General Rule that Social and Economic Legislation will not be Subjected to Strict Scrutiny.**

As noted above, in *Dandridge v. Williams*, 397 U.S. 471, 90 S.Ct. 1153, 25 L.Ed.2d 491 (1970), the Court upheld a provision of Maryland's Aid to Families with Dependent Children program that limited the monthly grant to any one family to \$250, regardless of its size or computed need. Although, as noted above, the Court recognized that the subsistence benefits were of "central importance" and involved "the most basic economic needs," it concluded the benefits were nevertheless not of such a fundamental nature as to require strict scrutiny. In so concluding, the Court remarked:

[H]ere we deal with state regulation in the social and economic field, not affecting freedoms guaranteed by the Bill of Rights, and claimed to violate the Fourteenth Amendment only because the regulation results in some disparity in grants of welfare payments to the largest AFDC families. For this Court to approve the invalidation of state economic or social regulation as "overreaching" would be far too reminiscent of an era when the Court thought the Fourteenth Amendment gave it power to strike down state laws

"because they may be unwise, improvident, or out of harmony with a particular school of thought." That era long ago passed into history . . . .

*Id.* at 484, 90 S.Ct. at 1161 (citations and footnote omitted).

Four years after its decision in *Dandridge*, in *Village of Belle Terre v. Boraas*, 416 U.S. 1, 94 S.Ct. 1536, 39 L.Ed.2d 797 (1974), the Court upheld a local zoning ordinance that restricted land use to one-family dwellings against a challenge by six unrelated college students. Again the Court found no fundamental right implicated. Instead, it viewed the challenged ordinance as falling into the category of "economic and social legislation where legislatures have historically drawn lines which we respect against the charge of violation of the Equal Protection Clause if the law be 'reasonable, not arbitrary' and bears 'a rational relationship to a [permissible] state objective.'" *Id.* at 6, 94 S.Ct. at 1540. Even in *Griswold v. Connecticut*, 381 U.S. 479, 85 S.Ct. 1678, 14 L.Ed.2d 510 (1965), in which the Court struck down a Connecticut law limiting the use of contraceptives and found a fundamental right to privacy within the "penumbras" of the Bill of Rights, the Court commented that it did not sit "as a super-legislature to determine the wisdom, need, and propriety of laws that touch economic problems, business affairs, or social conditions." *Id.* at 482, 85 S.Ct. at 1680 (quoted with approval in *Massachusetts Indemnity and Life Insurance Co. v. Texas State Board of Insurance*, 685 S.W.2d 104, 111 (Tex. App.—Austin 1985, no writ)).

The determination in *Rodriguez* that the Texas School Finance System did not constitute an equal protection violation was therefore rooted in the Court's steadfast refusal to give constitutional stature to wealth redistribution schemes under the guise of fundamental right analysis. The complex problems involved in addressing traditional social ills were to be left to legislatures. Thus, in *Rodriguez*, against the challenge that Texas impermissibly relied upon local property taxes to finance education, the Court observed:

No scheme of taxation, whether the tax is imposed on property, income, or purchases of goods and services, has yet been devised which is free of all 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.

411 U.S. at 41, 93 S.Ct. at 1301, 36 L.Ed.2d 16. And regarding the appropriate standard for reviewing legislative attempts to provide schooling to a state's children, the Court further noted:

The very complexity of the problems of financing and managing a statewide public school system suggests that 'there will be more than one constitutionally permissible method of solving them,' and that, within the limits of rationality, 'the legislature's efforts to tackle the problems' should be entitled to respect.

*Id.* at 42, 93 S.Ct. at 1301-02.

*Rodriguez* is therefore a reasoned justification, consistent with a broader range of cases, for a court to refrain from venturing into the realm of social legislation under the cloak of fundamental right analysis. As such, it should be decisive for this court's determination in the present case.<sup>20</sup> Moreover, other states which have considered this issue have repeatedly followed this federal precedents and found them persuasive in the context of their interpretation of state constitutional provisions. For example in *Lujan v. Colorado State Board of Education*, 649 P.2d 1005, 1018 (Co. 1982), the Colorado Supreme Court reasoned that it would be inappropriate for the court to "venture into the realm of social policy under the guise that there is a fundamental right to education which calls upon [it] to find that equal educational opportunity requires equal expenditures for each school child." Likewise, in *Hornbeck v. Somerset County Board of Education*, 458 A.2d 754, 786 (Md. 1983), the court observed that "[W]here social or economic legislation is involved, as here [system of public school finance], courts have generally avoided labeling a right as fundamental so as to avoid activating the exacting strict scrutiny standard of review." See also *Thompson v. Engelking*, 537 P.2d 635, 640 (Idaho 1975): "We reject the arguments advanced by the plaintiffs-respondents and the conclusions made by the trial court. To do otherwise would be an unwise and unwarranted entry into the controversial area of public school financing, whereby this Court would convene as a 'super-legislature', legislating in a turbulent field of social, economic and political policy."

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<sup>20</sup>The *Rodriguez* opinion was far more than a simple textual enterprise in which the Court looked for some explicit or implicit reference to education in the United States Constitution. On the contrary, it was a detailed probing of the relative competencies of the legislative and judicial branches of government to deal with issues of social and welfare legislation in general and education laws in particular.

**C. It is Inappropriate for a Court to Intrude upon Problems Relating to the Raising and Disposition of Public Revenues.**

The record amply illustrates the complex issues raised as soon as the suggestion is made to alter the present system of financing public education in favor of some other alternative. The trial court, having expressed an interest in hearing testimony relating to alternatives to the present system, heard evidence from Appellees on essentially two methods for obtaining a more "equitable" system of finance: massive consolidation of school districts and the creation of taxing jurisdictions. The evidence showed clearly that to the extent these two options were real legal possibilities, given the parameters set by the Texas Constitution, they simply created new problems and failed even to satisfy the criteria of equality ultimately adopted by the trial court.

This trial court, of course, was not the first occasion on which the judiciary has been called upon to consider the merits of the Texas public school finance system. In *San Antonio v. Rodriguez*, the United States Supreme Court also faced the difficult question of whether the Texas system as it existed in the early 1970s should be replaced by some more equitable scheme. That Court, however, quickly acknowledged its limitations in this area and suggested a principle that the trial court should have heeded.

[W]e stand on familiar grounds when we continue to acknowledge that the Justices of this Court lack both the expertise and the familiarity with local problems so necessary to the making of wise decisions with respect to the raising and disposition of public revenues. Yet, we are urged to direct the States either to alter drastically the present system or to throw out the property tax altogether in favor of some other form of taxation. No scheme of taxation, whether the tax imposed on property, income, or purchases of goods and services, has yet been devised which is free of all 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.

411 U.S. 1, 41, 93 S.Ct. at 1301, 36 L.Ed.2d 16 (footnote omitted).

**D. Education is a Complicated Subject Best Left to the Legislature.**

In *Eanes Independent School District v. Logue*, 712 S.W.2d 741, 742 (Tex. 1986), the Texas Supreme Court considered a mandamus action arising out of the trial court's issuance of a temporary injunction enjoining the State High School Baseball Tournament until two high school teams were able to complete a play-off series that had

been rained out. The injunction was sought by Richfield High School after the University Interscholastic League declared Westlake High School the winner of the play-offs, even though Westlake had only won one game before the series was rained out. The Supreme Court rejected Richfield's equal protection challenge to the UIL rule that allowed Westlake to be declared the winner, finding that no fundamental right was involved and that the rational basis test was satisfied. In a concluding observation, however, the Court suggested as follows:

In ruling as we do, we wish to remind trial courts of the following language from *Mercer v. Board of Trustees*, 538 S.W.2d 201, 206 (Tex. Civ. App.—Houston [14th Dist.] 1976, writ ref'd n.r.e.):

We must be wise enough to perceive that constant judicial intervention in some institutions does more harm than good. We believe that there are some areas in which our intervention does not offer a practical solution. We make this observation in full sympathy with Judge Wisdom's statement in his dissent in *Karr v. Schmidt*, 460 F.2d 609, 619 (5th Cir. 1972): "Individual rights never seem important to those who tolerate their infringement." However, in this case we find our heavy hand ample reason for withholding it.

712 S.W.2d at 742. This Court also has recognized that the provision of education to the children of Texas raises difficult problems best left in the hands of the legislature. "The complexity of the problems of financing and managing a statewide public school system suggests there may be more than one constitutionally permissible method of solving them and that within the limits of rationality the legislature's effort to solve those problems should be entitled to respect." *Hernandez v. Houston Independent School District*, 558 S.W.2d 121, 124-25 (Tex. Civ. App.—Austin 1977, writ ref'd n.r.e.). The United States Supreme Court recognized similarly in *Rodriguez*:

In addition to matters of fiscal policy, this case also involves the most persistent and difficult questions of educational policy, another area in which this Court's lack of specialized knowledge and experience counsels against premature interference with the informed judgments made at the state and local levels. . . . 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 educational problems and to keeping abreast of ever-changing conditions.

411 U.S. at 43, 93 S.Ct. at 1301-02, 36 L.Ed.2d 16 (citations and footnote omitted).<sup>21</sup> The complexity perceived by the United States Supreme Court in 1973 has not resolved itself in the intervening years. The same scholarly dispute as to whether money, over some minimal amount, had a significant impact upon educational quality was present before the trial court. [*see, e.g.*, SF 7084-7131] The complicated negotiations and delicate accommodations that produced House Bill 72 itself and its far reaching educational reforms was amply documented.

The trial court, nevertheless, did not shrink back from this complexity, but charged in with a heavy hand to undo the work of House Bill 72 and to vaguely suggest that some other undefined system might be better. In this it departed from the wise approach taken by the United States Supreme Court, and fundamentally erred.

**E. Defining Education as a "Fundamental Right" Would Expose the State and Local School Districts to Potentially Crippling Litigation.**

The result of labelling education a "fundamental" right for purposes of interpreting the equal protection clause will be that every legislative classification affecting education would have to withstand strict scrutiny—i.e., it would have to be demonstrated that each and every classification was justified by a compelling state interest and that the classification was the least restrictive means of achieving the interest. Does the state desire to target handicapped students with more educational dollars? Then it will have to demonstrate a compelling interest for doing so. Does it wish to make special provisions for students with AIDS or other contagious diseases? Then it will have to demonstrate a compelling interest and that the interest is being achieved through the least restrictive means possible. It may perhaps be said that compelling interests can readily be shown for such classifications as these, but the crucial point to be recognized is that not only these classifications but *every* classification that implicates education will be subjected to strict

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<sup>21</sup>*See also Board of Education, Levittown, v. Nyquist*, 439 N.E.2d 359, 363 (N.Y. 1982):

The determination of the amounts, sources, and objectives of expenditures of public moneys for educational purposes, especially at the State level, presents issues of enormous practical and political complexity, and resolution appropriately is largely left to the interplay of the interests and forces directly involved and indirectly affected, in the arenas of legislative and executive activity. This is of the very essence of our governmental and political policy.

scrutiny. As noted at the beginning of this brief, under traditional equal protection analysis, to categorize a given interest as fundamental is to virtually remove that interest from the legislative sphere. But education, of all interests, must remain in the political arena. It is not a liberty interest, but the provision of a governmental service. It is a creature of legislative budgets, and it automatically comes packaged in at least a certain amount of state regulation. It simply cannot survive under the heavy judicial hand of strict scrutiny.

The use of the test suggested by Appellees to make education a fundamental right would also raise the possibility of creating a constitutional cause of action on the part of individual students against local school districts, or against the State itself, for educational malpractice in the administration of this allegedly "fundamental" right. The Plaintiff districts have not all given sufficient thought to the burden under which they will be placed once subjected to a raft of suits complaining that students have not received that which by right they are "fundamentally" entitled. This Court must think further ahead for them. Nor is the specter of educational malpractice a mere phantom created by Appellants. It has received scholarly support as a viable cause of action on the part of students, and it can only be hastened to reality in Texas by raising education to "fundamental" status. *See, e.g., G. Ratner, A New Legal Duty for Urban Public Schools: Effective Education in Basic Skills*, 63 TEX. L. REV. 777 (1985).

Moreover, although Appellees proposed certain alternatives to the present system of public school finance to the trial court which would purportedly equalize tax bases without requiring that school districts tax themselves at equal levels, once education is deemed a fundamental right it is almost certain that districts would not be allowed to levy varying rates. If education is a fundamental right, then how can its provision to students be gauged by the willingness of taxpayers to tax themselves? The attempt to say that "equality of opportunity" would satisfy the demands of the equal protection clause once education is deemed fundamental is wholly unsupported by traditional equal protection analysis.

**F. To Determine that Education is a Fundamental Right Would Ignore the Provisions and History of the Texas Constitution.**

The attempt to find a fundamental right to education under the equal protection clause conflicts with the clear historical intent of TEX. CONST. art. VII, § 1. Although Plaintiffs have fastened upon the requirement in that section that the legislature provide "an efficient system of public schools" to justify finding education a fundamental right under the Texas Constitution, this phrase was inserted by way of an amendment in 1876 for purposes exactly opposite those suggested by Plaintiffs. In the Constitutions of 1845, 1861, and 1866, section 1 had stated as follows:

A general diffusion of knowledge being essential to the preservation of the rights and 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.

The Reconstruction Constitution of 1869 stated, however:

It shall be the duty of the Legislature of this State, to make suitable provisions for the support and maintenance of a system of public free schools, for the gratuitous instruction of all the inhabitants of this State, between the ages of six and eighteen years.

The insertion into the Constitution of 1876 of the language relating to the Legislature's responsibility to provide an "efficient" system of free public schools was a deliberate limitation upon the State's role in the provision of education. The new provision was designed to diminish the constitutional significance of education, not turn it into a fundamental right. Moreover, the attempt to amend this section in 1976 to make the Legislature's responsibility that of providing for "the *equitable* support and maintenance of an efficient system of free public schools" which would furnish each individual with "an equal educational opportunity," was rejected by voters of the State.<sup>22</sup>

The path charted by the trial court is the product of a disregard for the precedents of the Texas Supreme Court and this Court, a simplistic appeal to *San Antonio v. Rodriguez*, a rejection of the broader context of that opinion, a departure from the decisions of a majority of state courts, an ignorance of the historical intent of the Texas Constitution, and a willful disregard of the certain and alarming consequences of the designation of education

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<sup>22</sup>For a full discussion of the history of TEX. CONST. art. VII, § 1, see argument under Point of Error No. 5, in the brief of Appellant Irving Independent School District.

as a fundamental right. This Court need not abandon education and its importance in order to remain consistent with the overwhelming weight of authority declaring that in spite of its importance, education is not such a "fundamental" interest as to subject a state's financing scheme to strict scrutiny.

## VI.

### THE TRIAL COURT ERRED IN HOLDING THAT WEALTH IS A SUSPECT CLASSIFICATION

In holding that wealth is a suspect classification for purposes of equal protection analysis, the trial court simply ignored established precedent and forged a new and utterly unworkable rule. The United States Supreme Court in *Rodriguez* specifically addressed claims that wealth was a suspect classification so as to subject the Texas School Finance System to strict scrutiny. The Court decisively rejected these claims. 411 U.S. at 29, 93 S.Ct. at 1294, 36 L.Ed.2d 16. *See also Maher v. Roe*, 432 U.S. 464, 471, 97 S.Ct. 2376, 2381, 53 L.Ed.2d 484 (1977)(Court has "never held that financial need alone identifies a suspect class for purposes of equal protection analysis."); *Chrysler Corp. v. Texas Motor Vehicle Commission*, 755 F.2d 1192, 1203 (5th Cir. 1985)("Of course, wealth is not a suspect criterion . . .").

The authors of R. ROTUNDA, J. NOWAK & J. YOUNG, TREATISE ON CONSTITUTIONAL LAW 548 (1986) summarize the prevailing rule regarding wealth classifications:

The constitutional protection for classifications burdening poor persons, sometimes called wealth classifications, can be described as nothing more than the protection given to any other classification of persons or business entities which are described by criterion which the Court does not regard to be suspect. The Court will uphold legislative actions which burden poor persons as a class under the equal protection or due process guarantee if the actions have any rational relationship to a legitimate end of government. So long as these laws do not involve the allocation of fundamental rights, the Court will consider them to be regulations concerning economic and social welfare policy. As such, these laws have no relationship to values with constitutional recognition so as to merit active judicial review under the strict scrutiny-compelling interest standard.

The trial court therefore erred in holding that wealth was a suspect classification.

## ARGUMENT AND AUTHORITIES UNDER POINT OF ERROR NO. 4

**POINT OF ERROR NO. 4:** The trial court erred in entering judgment that the Texas School Finance System violated the equal protection clause of the Texas Constitution on the basis of its finding that no rational basis exists for the Texas School Finance System, since there is no evidence, or in the alternative, insufficient evidence to support this finding.

### I.

#### THE TEXAS SCHOOL FINANCE SYSTEM IS RATIONALLY RELATED TO THE LEGITIMATE STATE INTEREST IN MAINTAINING SOME DEGREE OF LOCAL CONTROL OVER EDUCATION

The burden of Plaintiffs below in demonstrating that the Texas School Finance System failed to meet the rational basis test was heavy. As this Court has noted, "every reasonable intendment and presumption will be made in favor of the constitutionality of the enactment; and if there could exist a state of facts justifying legislative classifications or restrictions, the reviewing court will assume its existence." *Massachusetts Indemnity and Life Insurance Co. v. Texas State Board of Insurance*, 685 S.W.2d 104, 109 (Tex. App.—Austin 1985, no writ). See also *Rose v. Doctors Hospital Facilities*, 735 S.W.2d 244, 253 (Tex. App.—Dallas 1987, writ granted).<sup>23</sup> A court should not overturn a legislative classification unless "the varying treatment of different groups or persons is *so unrelated* to the achievement of any combination of legitimate purposes that we can only conclude that the legislature's actions were irrational." *Id.* at 110 (quoting *Vance v. Bradley*, 440 U.S. 93, 97, 99 S.Ct. 939, 942, 52 L.Ed.2d 171 (1979)).

The trial court determined that even if education was not a fundamental interest, the State of Texas had failed to demonstrate that the classifications inherent in the Texas School Finance System were rationally related to a legitimate state interest. It made this determination in the face of evidence offered at trial and established precedents that have held that State's interest in fostering local control is a legitimate interest that is rationally

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<sup>23</sup>See *Littlefield v. Hays*, 609 S.W.2d 627, 629 (Tex. Civ. App.—Amarillo 1980, no writ)(citation omitted):

When considering the constitutionality of an act of the Legislature, we begin by presuming that the act is valid and the Legislature has not acted unreasonably or arbitrarily. Certainly a mere difference of opinion, where reasonable minds could differ, is not a sufficient basis for striking down legislation as arbitrary or unreasonable.

related to the dual local/state system of school finance.<sup>24</sup> The Supreme Court in *San Antonio v. Rodriguez*, 411 U.S. 4, 37-39, 93 S.Ct. 1278, 1298-1300, 36 L.Ed.2d 16 (1973), specifically held that the Texas system met the rational basis test. It did so on the basis of its finding that the state's interest in preserving a measure of local control was a legitimate interest that was rationally related to the use of a funding scheme that relied in part upon local funding to finance the cost of education. *See id.* 411 U.S. at 44-55, 93 S.Ct. 1302-08, 36 L.Ed.2d 16.

Other states whose systems of public school finance have been challenged as violating their constitutional guarantees of equal protection have also overwhelmingly pointed to the state's legitimate interest in maintaining some degree of local control. *See Hornbeck v. Somerset County Board of Education*, 458 A.2d 754, 786 (Md. 1983); *Lujan v. Colorado State Board of Education*, 649 P.2d 1005, 1017-19 (Co. 1982); *Board of Education of the City School District of the City of Cincinnati v. Walter*, 390 N.E.2d 813, 818-19 (Oh. 1979); *Olsen v. State*, 554 P.2d 139, 144 (Or. 1976); *Thompson v. Engelking*, 537 P.2d 635, 644-45 (Idaho 1975); *Robinson v. Cahill*, 303 A.2d 273, 282-

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<sup>24</sup> *See* 19 TEX. ADMIN. CODE § 165.1(a): "The [State Board of Education] believes that education is a responsibility of the state and should allow as much local control as possible."

The trial court's finding that the State's interest in maintaining some degree of local control is not embodied in statute or constitution [Tr. 575] is neither accurate nor determinative of the equal protection analysis. It is not accurate because the State's commitment to a dual system of finance and control of public education, a system involving both state and local involvement, is of constitutional stature. The Texas Constitution makes specific provision for and reference to local school districts, and in doing so reveals the State's legitimate interest in local control. *See, e.g.*, TEX. CONST. art. VII, §§ 3, 3a.

The court's finding is not determinative of equal protection analysis because it is not necessary that a State's interest, to satisfy the rational basis test, be embodied in the Constitution or a statute. Neither this Court nor the Texas Supreme Court has required such a narrow focus for the rational basis test. As noted in the text above, this Court has looked to see whether "any combination of legitimate purposes" was related to the legislative classification. *Massachusetts Indemnity and Life Insurance Co. v. Texas State Board of Insurance*, 685 S.W.2d 104, 109 (Tex. App.—Austin 1985, no writ). Moreover, in two recent cases upholding legislative classifications under the rational basis test, the Texas Supreme Court simply stated a legitimate interest related to the classifications without pointing to any constitutional or statutory provision in which the interest was embodied. *See State v. Project Principle, Inc.*, 724 S.W.2d 387, 391 (Tex. 1987); *Eanes Independent School District v. Logue*, 712 S.W.2d 741, 742 (Tex. 1986).

Finally, it is particularly inappropriate to look only to the legislature's stated purpose in TEX. EDUC. CODE §16.001 to judge the entire public school finance system. [Tr. 590] Section 16.001 declares the stated purpose (i.e. the provision of access to appropriate programs and services that are "substantially equal to those available to any similar student, notwithstanding varying local economic factors") for one portion of the Texas school finance system--i.e., the state's contribution to that system. The focus of appellees attack upon the system, however, are local school district wealth and boundaries: Section 16.001 neither establishes nor attempts to justify Texas historical reliance upon local school districts to help finance public education. The reason for this reliance must therefore be sought and discovered elsewhere--i.e., in Texas' historical commitment to the values of local control.

87 (N.J. 1973).<sup>25</sup>

What is frequently referred to by courts as the interest of the State in preserving "local control" is perhaps more accurately understood as a panoply of values the State has an interest in preserving. First, the State has an interest in insuring that, at least to some degree, local citizens direct the business of providing public education in their district. *See Lujan v. Colorado State Board of Education*, 649 P.2d 1005, 1021 (Co. 1982). *See also Thompson v. Engelking*, 537 P.2d 635, 645 (Idaho 1975)("In the American concept, there is not greater right to the supervision of the education of the child than that of the parent."). Second, the State has an interest in allowing localities some measure of discretion as to how local funds will be distributed among various governmental services such as education, police or fire protection, road construction, public transportation, etc. *See id.*, 537 P.2d at 646. Third, the State has an interest in fostering a climate in which school districts have the opportunity for "experimentation, innovation, and a healthy competition for educational excellence." *See id.* *See also Board of Education of the City School District of the City of Cincinnati v. Walter*, 390 N.E.2d 813, 820 (Oh. 1979)(local control allows "freedom to devote more money to the education of one's children [and] also control over the participation in the decision-making process as to how those local tax dollars are to be spent").

The trial court had before it undisputed evidence supporting the conclusion that, as *Rodriguez* and the other state cases cited recognized, the state does indeed have a legitimate interest in maintaining some degree of local control over education. For example, Dr. Richard Kirkpatrick, superintendent of Copperas Cove Independent School District, one of the Plaintiffs below, testified that local participation in educational decision-making was important to the operation of a school district in a democratic society. [SF 5235] And he admitted that his own school district had a measure of autonomy in implementing a philosophy of instruction, teaching, dealing with children, and testing. [SF 5240] Examples of other kinds of control exercised by local school districts included decisions

<sup>25</sup>The New Jersey Supreme Court has, in fact, suggested that the State's interest in the institution of local government might even constitute a "compelling" interest sufficient to satisfy strict scrutiny review. *See Robinson v. Cahill*, 303 A.2d at 286.

relating to the selection of textbooks, whether a district would emphasize academic over vocational programs, student discipline, selection of sites for new schools, etc. [SF 5282-87] Dr. Dan Long, superintendent of Carrollton-Farmers Branch Independent School District, also affirmed the importance of local control in education. He observed that there is a great deal of variation in community attitudes toward and expectations concerning public education in Texas, variation that ultimately expresses itself in the decision-making processes of local school districts. [SF 5975-76]. This local participation and control has a direct impact upon educational quality. [SF 5992] *See generally* SF 6223-44, 6669-71, 6723-24, 6837-44, 5406-07.

The trial court heard no evidence contradicting the previous testimony, and a significant amount of testimony on the same theme. But, in support of its departure from the holdings of *Rodriguez* and the state cases cited, it made the following findings:

1. Local control of school district operations in Texas has diminished dramatically in recent years, and today most of the meaningful incidents of the education process are determined and controlled by state statutes and/or State Board of Education rule.
2. The element of local control that remains undiminished is the power of wealthy school districts to fund education at higher levels than property poor districts. The property poor districts have little or no local control because of their inadequate property tax base; the bulk of the revenues they generate are consumed by the building of necessary facilities and compliance with State mandated requirements.
3. Local control is largely meaningless except to the extent that wealthy districts are empowered to enrich their educational programs through their local property tax base, a power which is not shared equally by the State's property poor districts.
4. Local control would not be compromised by a funding system which insured equalized opportunity for local districts to fund their educational programs. [Tr. 576]

This findings, however, simply reurge arguments rejected by the Supreme Court in *Rodriguez*, and which are not determinative of the equal protection analysis. The trial court's findings concerning the diminished degree of local control exercised in Texas is but an echo of Justice Marshall's dissenting opinion in which he suggested that the state of Texas lacked good faith in asserting its supposed interest in local control insofar as the State regulates "the most minute details of local public education." 411 U.S. at 126, 93 S.Ct. at 1345, 36 L.Ed. 16. The majority, however, citing the numerous areas in which local school districts continued to exercise discretion and control, decisively rejected the assertion that local control did not exist in any meaningful degree.<sup>26</sup>

The finding that local control has diminished in recent years is but a testimony to the competing objectives being sought after by the State. On the one hand it has sought to preserve a measure of local control in keeping with traditional regard for the importance of such control on education. On the other hand, it has endeavored, through centralized administration and guidance, to bring improvement to all of the school districts in the State of Texas. *Compare School Board of the Parish of Livingston v. Louisiana State Board of Elementary & Secondary Education*, 830 F.2d 563, 572 (5th Cir. 1987)(Louisiana's allocation of educational funds responsive to two competing and legitimate state goals of assuring each child an opportunity for a basic education on an equal basis and permitting and maintaining some measure of local autonomy over public education). The trial court did no more than attempt to call into question the legislative wisdom behind the precise blend between centralization and local control that currently exists. A state system may not

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<sup>26</sup>See 411 U.S. n.108 at 51, 93 S.Ct. at 1306 (citations omitted):

This assertion, that genuine local control does not exist in Texas, simply cannot be supported. It is abundantly refuted by the elaborate statutory division of responsibilities set out in the Texas Education Code. Although policy decision making and supervision in certain areas are reserved to the State, the day-to-day authority over the "management and control" of all public elementary and secondary schools is squarely placed on the local school boards. Tex.Educ.Code Ann. §§ 17.01, 23.26 (1972).

The Court continued by listing examples of local discretion set for in the Education Code. A review of current statutes relating to education demonstrate that local school district continue to exercise substantial control of the content and operation of their public schools. A list of statutory provisions setting for areas of local discretion and control has been collected as Appendix "A" to this brief.

be condemned because it imperfectly effectuates the state's goals. *See id.* (citing *Rodriguez*, 93 S.Ct at 1306; *Dandridge v. Williams*, 397 U.S. 471, 90 S.Ct. 1153, 1161, 25 L.Ed.2d 491 (1970)). *See also Ex Parte Robbins*, 661 S.W.2d 740, 743 (Tex. App.—El Paso, no writ)("Imperfections, lack of mathematical precision achieving the goal, some inequality of result from one citizen to the next, and the existence of alternative or more effective means do not invalidate [an legislative act on equal protection grounds].").<sup>27</sup> This kind of second-guessing has consistently and properly been rejected by the courts of the State of Texas. "The wisdom or expediency of the law is the Legislature's prerogative, not ours." *Smith v. Davis*, 426 S.W.2d 827, 831 (Tex. 1968). And as noted above, the test adopted by this Court is whether a legislative classification is "so unrelated to the achievement of any combination of legitimate purposes" that it must be concluded that the legislature's actions were irrational. *Massachusetts Indemnity and Life Insurance Co. v. Texas State Board of Insurance*, 685 S.W.2d 104, 110. No such showing was made before the trial court, and its findings that the Texas School Finance System does not met the rational basis test should be firmly rejected.

## II.

### **IF THE TEXAS SCHOOL FINANCE SYSTEM IS STRUCK DOWN AS FAILING TO SATISFY THE RATIONAL BASIS TEST, THE PROVISION OF OTHER SERVICES BY LOCAL GOVERNMENTAL UNITS WILL BE IMPERILED**

The thrust of the trial court's determination that the Texas School Finance System failed to satisfy the rational basis test was that it was arbitrary and irrational for the State to allow the provision of education to hinge upon the "irrational accident" of school district lines. [Tr. 61].<sup>28</sup> Although this conclusion has a certain intuitive appeal, it is ultimately shortsighted. Certainly, "[a]ny scheme of local taxation—indeed the very existence of identifiable local governmental units—requires the establishment of jurisdictional boundaries that are inevitably arbitrary." *Rodriguez*, 411 U.S. at 53-54, 93 S.Ct. at 1307,

<sup>27</sup>"As long as the state's means of achieving its objective is not so irrational as to be invidiously discriminatory, the financing scheme does not fail merely because other methods of serving these goals exist that would result in smaller interdistrict disparities in school support expenditures." *School Board of the Parish of Livingston v. Louisiana State Board of Elementary & Secondary Education*, 830 F.2d at 572.

<sup>28</sup>The court had no basis in fact or in law to find school district boundary lines to be irrational, as is more fully set out in the brief of Andrews Independent School District, *et. al* under Point of Error No. 10.

36 L.Ed.2d 16. The real question, however, is whether viewed collectively, there is any justification for the existence of local governmental units themselves, with their necessarily attendant boundaries. The answer to this question must clearly be "yes". The idea that local governmental participation in the provision of services is a valuable asset to our political system runs deep. As one court has observed, "[i]nherent in the concept of local government is the belief that the public interest is furthered when the residents of a locality are given some voice as to the amount of services and expenditures therefor, provided that the cost is borne locally to stimulate citizen concern for performance." *Robinson v. Cahill*, 303 A.2d 273, 286 (N.J. 1973).

If, however, the trial court was correct in finding a lack of rational basis for a school finance system that relied in part upon local school districts to finance a portion of the cost of education, there is no conceptual basis for not also finding a lack of rational basis for allowing the provision of any government service to be based in any part upon local boundaries. In essence, then, the trial court's finding would strike down the state's reliance upon local governments to provide police and fire protection, construction and maintenance of roads, judicial functions, transit services and any other services funded in part by local tax revenues.

### III.

#### **IN VIEW OF THE CONSTITUTIONAL FRAMEWORK UNDER WHICH EDUCATION EXISTS IN THE STATE OF TEXAS, THE COURT SHOULD FIND THAT THE SYSTEM SATISFIES THE RATIONAL BASIS TEST**

The Texas School Finance System is not simply a free-form playground for academic theorists. It is a system carefully constrained by competing constitutional interests that define the forms that public education in Texas, and the financing of this education, can take. For example, it is constitutionally impossible to simply eliminate state funds for education to property wealthy districts. TEX. CONST. art. VII, § 5 specifically provides that each school district in this State is entitled to receive money from the Available School Fund. This constitutional provision is not subject to change by either the Courts or the legislature.

Similarly, it is not an option in Texas to accomplish school finance reform by simply abolishing the local property tax and substituting a state property tax in its stead, the revenues from which could be apportioned according to the dictates of equality. TEX. CONST. art. VIII, § 1-e flatly prohibits a state-wide property tax. Nor can local school districts simply be stripped of their ability to levy local property taxes. TEX. CONST. art. VII, § 3 grants this power, and neither legislature nor court can take it away.

Finally, local school district boundaries have been specifically validated by the Texas Constitution. TEX. CONST. art. VII, § 3a, *as amended* (1909), *repealed* (1969).<sup>29</sup>

Each of the above constitutional provisions participates in forming a matrix for Texas education. Possibilities for school finance which scholars have suggested and which some states could perhaps even adopt are simply not available in Texas. The rational basis test must be viewed not from some abstract notion of possible varieties of equitable systems, but from the flesh-and-blood realities of the Texas constitutional system, and the school finance system that draws its blood from the Texas Constitution. Once viewed in this light, the present system must prevail as against Appellees challenge. Within present constitutional restraints and the generous, but not unlimited, commitment of the Texas budget to school finance, the current school finance formulas are highly equalizing [SF 6646-47], and little further equity can be achieved without the influx of more dollars for education [SF 2077, 2097]. Moreover, the goal of equalized educational funding is only one of many legitimate state educational goals. *See* Defendants' Exhibit No. 68—"1986-1990 Long Range Plan of the State Board of Education for Texas Public Education."

Both the legislature and the courts of Texas are restrained by the Texas constitution—all of it, not just one clause removed from its historical and legal context and turned into a master before which equally legitimate clauses must bow down. The Texas School Finance System is therefore rationally related to legitimate state goals and interests and to the restraints inherent in the Texas Constitution.

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<sup>29</sup>Although article VII, § 3a was repealed in 1986, the provision repealing this section stated that "it [is] specifically understood that the repeal of these sections shall not in any way make any substantive changes in our present constitution." H.J.R. No. 3, Acts 1969, 61st.

**ARGUMENT AND AUTHORITIES UNDER  
POINTS OF ERROR NOS. 5 THROUGH 12**

**POINT OF ERROR NO. 5:** The trial court erred in entering judgment that the Texas School Finance System is not an efficient system of free public schools as required by Texas Constitution art. VII, §1.

**POINT OF ERROR NO. 6:** The trial court erred in finding that the Texas School Finance System does not provide an adequate education.

**POINT OF ERROR NO. 7:** The trial court erred in holding that the equal protection clause of the Texas Constitution mandates equal access to funds by local school districts.

**POINT OF ERROR NO. 8:** The trial court erred in defining equal protection in terms of the standing of school districts rather than the rights of students.

**POINT OF ERROR NO. 9:** The trial court erred in finding that the Texas School Finance System violated the due process clause of the Texas Constitution, art. I, § 19 and 29, since there is no evidence, or alternatively, insufficient evidence to support such a finding.

**POINT OF ERROR NO. 10:** The trial court erred in finding that boundary lines of school districts in Texas are irrational and unconstitutional, since boundaries are a political question not subject to judicial review.

**POINT OF ERROR NO. 11:** The trial court erred in holding that all school taxes are state taxes since art. VIII, § 1 of the Texas Constitution prohibits a state ad valorem tax.

**POINT OF ERROR NO. 12:** The trial court erred in finding that the Texas School Finance System serves no compelling state interest because such a finding is incorrect as a matter of law, or alternatively, is against the great

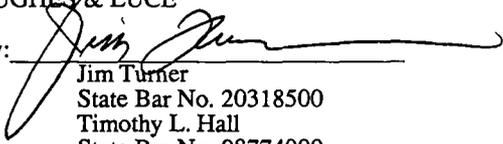
Appellants Eanes Independent School District, *et al.* hereby incorporate by reference the argument and authorities presented by Appellants Irving Independent School District with respect to Point of Error No. 5 ; Appellants William Kirby, *et al.* with respect to Points of Error Nos. 6 through 10; and Appellants Andrews Independent School District *et al.* with respect to Points of Error Nos. 10 through 12.

**CONCLUSION**

For the reasons set forth above, Appellants Eanes Independent School District, *et al.* respectfully request that the judgment of the trial court be reversed and rendered in favor of Appellants, or, alternatively, reversed and remanded to the trial court, with Appellants being granted their costs on appeal and for such other relief to which it is justly entitled.

Respectfully submitted,

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DISTRICT, ET AL.

**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that a true and correct copy of the foregoing was served upon all counsel of record pursuant to the Texas Rules of Civil Procedure on this 8th day of January, 1988.



**APPENDIX A**  
**TEXAS EDUCATION CODE PROVISIONS**  
**RELATING TO LOCAL DISCRETION AND CONTROL**

Local school boards may

1. Perform all educational functions not specifically delegated to the Central Education Agency. TEX. EDUC. CODE ANN. [ hereinafter "TEC" ] § 11.01 (Vernon Supp. 1987).
2. Elect to provide community education for all age groups and upon application and pursuant to regulations prescribed by the Central Education Agency be reimbursed for such costs from state funds. TEC § 11.201.
3. Either utilize or refuse the services provided by Regional Service Centers with respect to use of citizen volunteers in public schools. TEC § 11.202(b).
4. Elect to develop a program of career education consistent with a statewide plan developed by the State Board of Education. TEC § 11.203.
5. Jointly approve, with a participating college or university, the supervisors of student teachers. TEC § 11.311(c).
6. Elect to be served by and participate in a regional education service center. TEC § 11.32.
7. Through the district school trustees delegate, under such terms as they deem best, to their employees power to requisition and distribute books and to manage books so long as such actions are not in variance with provisions of the Education Code or the rules for free textbooks adopted by the State Board of Education. TEC § 12.65(a).
8. Prescribe reasonable requirements for teachers for achieving professional improvement and growth. TEC § 13.110(2).
9. At its discretion where a charge has been made as to the inability or failure of a teacher to perform his assigned duties, establish a committee or classroom teachers and administrators before whom the teacher may request a hearing. TEC § 113.12(b).
10. Volunteer for pilot studies relating to supplemental contracts for math and science teachers. TEC § 13.117(f).
11. Determine the number of teacher appraisers to be used beyond the minimum number required . TEC § 13.303(b).
12. Reinstate a teacher whose reassignment to a lower career ladder resulted from performance appraisals that were influenced by extraordinary personal circumstances and who receives a clearly outstanding performance appraisal in the year following reassignment. TEC § 13.312(c).
13. Make final decisions with respect to career ladder determinations to be reviewed only if the decisions are arbitrary and capricious or made in bad faith. TEC § 13.319.

14. Develop guidelines by which the principal organizes the leadership structure in each school. TEC § 13.352(a).
15. Determine whether to develop and implement a program for employing qualified but noncertified persons to teach mathematics, science, computer science, and related technological subjects in the secondary schools of the district. Modify or abolish at any time a comprehensive plan adopted to establish such a program. TEC § 13.502.
16. Determine whether to require additional qualifications for noncertified instructors participating in the program described in TEC § 13.502.
17. Determine whether to require noncertified instructors to meet with parents or guardians of students to discuss students' grades or progress in courses as a condition of employment. TEC § 13.503.
18. Terminate the employment of the noncertified instructors participating in the program described in TEC § 13.502 whenever the board of trustees determines that the best interests of the school district are served thereby. TEC § 13.503(d).
19. Determine whether to use any federal, state, or local funds not specifically dedicated to another purpose by statute or contract to implement the provisions of TEC § 13.502. TEC § 13.505.
20. Determine whether to adopt a policy providing for placing an employee on leave of absence for temporary disability if, in the judgement of the governing board of a school district and in consultation with a physician, the employee's condition interferes with the performance of regular duties. TEC § 13.905(c).
21. Establish a maximum length, not less than 180 days, for a leave of absence for temporary disability. TEC § 13.905(f).
22. Require, within certain guidelines, a teacher entitled to a duty-free lunch to supervise students during lunch if necessary because of a personnel shortage, extreme economic shortage, extreme economic conditions, or an unavoidable or unforeseen circumstance. TEC § 13.909(c).
23. Acquire computer software for classroom use other than that which has been approved by the State Board of Education. TEC § 14.023.
24. Have the authority of transferring any school children who cannot be provided for by the district of their residence to any public school district maintaining adequate facilities and standards. TEC § 11.28(e).
25. Grant to a person who has served as superintendent, principal, supervisor or in any administrative position a continuing contract to serve as a teacher. TEC § 13.108.
26. Consult with teachers with respect to matters of educational policy and conditions of employment. TEC § 13.901.
27. Have full authority to establish a uniform retirement age for its professional and supportive personnel. TEC § 13.903.
28. Provide additional sick leave beyond the minimum. TEC § 13.904(a).

29. Use a portion of their support allocation to pay transportation costs, if necessary. TEC § 16.156(g).
30. Expend local maintenance funds in excess of the amount assigned to a district for any lawful school purpose or carry such funds over to the next school year. TEC § 16.253.
31. Vest general management and control of public free schools and high schools in each county, unless otherwise provided by law, in a board of county school trustees. TEC § 17.01(a).
32. Perform any other act consistent with law for the promotion of education in the county through the county school trustees. TEC § 17.31.
33. Provide for the protection, preservation, and disposition of all lands granted to the county for educational purposes through the commissioners court. TEC § 17.81.
34. Enter into all necessary agreements with the Employees Retirement System of Texas for qualified persons through the county school trustees. TEC § 17.91.
35. Provide funding for the office of county school superintendent through a voluntary agreement among the independent school districts of a county. TEC § 17.98.
36. Create an additional county-wide school district for the purpose of adopting a county-wide equalization tax for the maintenance of public schools. TEC § 18.01-18.31.
37. Assume the indebtedness of another district without an election on assumption of the indebtedness. TEC § 19.004(d).
38. Issue refunding bonds for bonds of another district assumed without an election. TEC § 19.004(e).
39. Sell and deliver any unissued bonds voted in a district prior to a change without an election and levy and collect taxes in the district as changed for the payment of principal and interest on bonds. TEC § 19.004(f).
40. Choose to participate in a single appraisal district if the annexed territory of a receiving district is located in two or more counties. TEC § 19.007(b) and (c).
41. Create an enlarged district by annexing one or more common or independent school districts. TEC § 19.021.
42. Detach territory from a school district and annex such territory to another school district, through petition of the commissioners court. TEC § 19.022.
43. Consolidate independent and/or common school districts through an election on the question. TEC § 19.051-19.058.
44. Dissolve any consolidated school district through an election on the question. TEC § 19.059.
45. Create a county-wide independent school district through an election on the question. TEC § 19.081-19.087.

46. Separate any municipal school district from municipal control, to become an independent school district, after hearing and an election on the question. TEC § 19.101-19.106.
47. Incorporate for school purposes any common school district, to become an independent school district, through an election on the question. TEC § 19.121-19.126.
48. Abolish any independent school district through an election on the question. TEC § 19.151-19.155.
49. Abolish any common school district through action of the commissioners court. TEC § 19.171-172.
50. Adjust common boundaries of any two contiguous school districts by agreement. TEC § 19.201.
51. Issue bonds, and levy and pledge ad valorem taxes to pay the principal and interest on said bonds, for the construction and equipment of school buildings and the purchase of necessary sites. TEC § 20.01.
52. Levy ad valorem taxes for the further maintenance of public free schools in the district. TEC § 20.02.
53. Refund or refinance all or any part of a district's outstanding bonds by the issuance of refunding bonds payable from ad valorem taxes. TEC § 20.05.
54. Acquire, purchase, construct, improve, enlarge, equip, operate and maintain gymnasias, stadia or other recreational facilities for and on behalf of a district, located within or without the district. TEC § 20.21.
55. Issue revenue bonds for the purpose of providing funds to acquire, purchase, construct, improve, enlarge and/or equip gymnasias, stadia or other recreational facilities. TEC § 20.22.
56. Fix and collect rentals, rates and charges from students and others for the occupancy or use of recreational facilities. TEC § 20.23.
57. Pledge all or any part of the revenue from recreational facilities to the payment of bonds. TEC § 20.24.
58. Refund or otherwise refinance any revenue bonds issued in connection with recreational facilities. TEC § 20.25.
59. Use bond proceeds issued for the statutory purpose of construction and equipment of school buildings to pay the cost to connect water, sewer or gas lines. TEC § 20.41.
60. Invest bond proceeds not immediately needed for the purposes for which such bonds were issued. TEC § 20.42.
61. Issue interest-bearing time warrants to make certain purchases and improvements if the district is financially unable to make such purchases and improvements out of available funds. TEC § 20.43.

62. Pledge delinquent school taxes levied for local maintenance purposes as security for a loan.
63. Levy an additional ad valorem tax for the purpose of paying the cost of the purchase, construction, repair, renovation, or equipment of public free school buildings and necessary sites therefor. TEC §§ 20.46 and 20.47.
64. Dedicate a specific percentage of the local tax levy to the use of a junior college district for facilities and equipment or for the maintenance and operating expenses of the junior college district. TEC § 20.48(e).
65. Invest or retain a gift, devise, or bequest made to a school district to provide college scholarships for graduates of the district. TEC § 20.482.
66. Borrow money for the purpose of paying maintenance expenses. TEC § 20.49.
67. Enter into a contract for the use of any stadium or other athletic facility owned by or under the control of any corporation, city, or any institution of higher learning of the State of Texas. TEC §. 20.50.
68. Issue time warrants sufficient to obtain funds to properly operate and maintain the district's schools, if the district is entitled to certain federal aid. TEC § 20.51.
69. Issue certificates of indebtedness for the erection and equipment of school buildings or refinancing outstanding certificates. TEC § 20.51.
70. Create an athletic stadium authority to include any two independent school districts. TEC § 20.51.
71. Issue, sell and deliver authorized but unissued bonds for another purpose after an election on the question. TEC § 20.52.
72. Require payment of fees in various areas including membership dues in student organizations, security deposit for return of materials, personal physical education and athletic equipment, and other specified areas. TEC § 20.53.
73. Seek the guarantee of eligible bonds by the corpus and income of the permanent school fund, upon approval by the commissioner. TEC § 20.901 - 20.913.
74. Sell surplus real property owned by the district and issue revenue bonds payable from the proceeds of the sale. TEC § 20.922.
75. Enter into contracts for the constructing or equipping of school buildings or the purchase of necessary sites therefor payable in installments to correspond with receipts of proceeds under a sale agreement or from the sale of any bonds to be issued. TEC § 20.924.
76. Issue, sell, and deliver revenue bonds with the principal and interest on such bonds to be payable from the sale of surplus real property. TEC § 20.925.
77. Change the name of a school district by resolution of the board of trustees. TEC § 21.006.

78. Operate for either two or three semesters during each school year. TEC § 21.008(a).
79. Charge tuition for the attendance of a student who is not domiciled in Texas and resides in military housing that is exempt from taxation by the district. TEC § 21.0312.
80. Elect a school attendance officer. TEC §§ 21.036-21.039.
81. Admit pupils either over or under the school age, either in or out of the district. TEC § 21.040.
82. Approve and agree in writing to the transfer of any child from his school district of residence to another Texas district. TEC § 21.061.
83. Approve the transfer of any child to a public school in a district of a bordering state. TEC § 21.073.
84. Transfer and assign pupils from one school facility or classrooms to another within the school district's jurisdiction. TEC § 21.074.
85. Arrange for the transfer and assignment of pupils between two or more adjoining districts or two or more adjoining counties, including the transfer of school funds proportionate to the transfer of pupils. TEC § 21.079.
86. Provide by contract for students residing in the district who are at grade levels not offered by the district to be educated at other accredited districts. TEC § 21.082.
87. Vary from the required curriculum as necessary to avoid hardship to the district. TEC § 21.101(e).
88. Conduct and supervise vocational classes and expend local maintenance funds as deemed necessary. TEC § 21.111.
89. Contract with another school district, or trade or technical school, to provide vocational classes for students in the district. TEC § 21.1111.
90. Employ vocational personnel on 10-, 11-, or 12-month contracts, and assign vocational teachers to teach other subject areas in which the teacher is certified. TEC § 21.112(h) and (i).
91. Use vocational program facilities and equipment for nonvocational instructional programs. TEC § 21.112(j).
92. Call an election to determine whether the district shall establish and maintain a kindergarten as part of the public free schools of the district. TEC § 21.132.
93. Operate public school kindergartens on a half-day or full-day basis at the option of the district. TEC § 21.135.
94. Make emergency purchases of school buses. TEC § 21.162.
95. Purchase school buses with funds provided by gifts, profits from athletic contests, or other school enterprises not supported by tax funds. TEC § 21.164.

96. Issue interest-bearing time warrants to purchase school buses if the district is financially unable to make immediate payment. TEC § 21.166.
97. Furnish transportation by school bus to the nearest college or university for residents of the district who are enrolled at the college or university. TEC § 21.172.
98. Establish and operate an economical public school transportation system within the district. TEC § 21.174.
99. Use school buses for transportation of pupils and personnel on extracurricular activities, and contract with nonschool organizations for the use of school buses. TEC § 21.175.
100. Contract with a public or commercial transportation company for all or any part of the district's public school transportation. TEC § 21.181.
101. Choose not to renew the employment of any teacher employed under a term contract effective at the end of the contract period. TEC § 21.203.
102. Provide by written policy for a probationary period not to exceed the first two years of continuous employment. TEC § 21.209.
103. Adopt a plan for microfilming records and reports to accurately and permanently copy, reproduce or originate records and reports on films. TEC § 21.259.
104. Suspend a student or remove a student to an alternative education program. TEC § 21.301.
105. Expel a student from school for more than six school days within a semester. TEC § 21.3011.
106. Close the school or suspend operations, or request assistance through military force to maintain law, peace and order in the operation of the public schools. TEC § 21.305
107. Employ security personnel for use in any school. TEC § 21.308
108. Contract with the county to provide joint library facilities under certain circumstances. TEC § 21.351
109. Approve participation by a student who does not have limited English proficiency in a bilingual education program. TEC § 21.455(g)
110. Transfer a student of limited English proficiency out of a bilingual education program if the student is able to participate equally in a regular all-English program. TEC § 21.455(h)
111. Join with other districts to provide bilingual education programs. TEC § 21.457
112. Promulgate rules and regulations for the safety and welfare of students, employees, and property as may be deemed necessary. TEC § 21.482
113. Employ campus security personnel and authorize any officer to bear arms. TEC § 21.483

114. Provide for the issuance and use of vehicle identification insignia. TEC § 21.487
115. Refuse to allow persons having no legitimate business to enter school property, and eject any undesirable person from school property upon a refusal to leave peaceably on request. TEC § 21.489
116. Employ special education personnel on a full-time, part-time, or consultative basis, or on a 10-, 11-, or 12-month basis. TEC § 21.504
117. Operate joint special education programs with other districts. TEC § 21.505
118. Contract with a public or private facility, institution or agency for the provisions of services to handicapped students. TEC § 21.506
119. Adopt and administer criterion and assessment instruments in addition to those adopted by the Central Education Agency. TEC § 21.554
120. Establish a school-community guidance center. TEC § 21.601
121. Develop cooperative programs with state youth agencies for children found guilty of delinquent conduct. TEC § 21.602
122. Obtain a district court order requiring a parent to comply with an agreement in connection with a student admitted to a school-community guidance center. TEC § 21.606
123. Establish a program for gifted and talented students. TEC § 21.652
124. Contract for the replacement or repair of school buildings and equipment when it is determined that the competitive bidding process would prevent or impair the conduct of classes or other school activities. TEC § 21.901(e)
125. Purchase computers and computer-related equipment without submitted the purchase to competitive bidding, if the equipment is on an approved equipment list. TEC § 21.901(f)
126. Provide late afternoon and evening session school programs. TEC § 21.902
127. Secure insurance against bodily injuries sustained by students participating in interschool athletic competition. TEC § 21.906
128. Establish a health care plan for employees of the district and dependents of employees. TEC § 21.922
129. Order that trustees of any independent school district are to be elected from single member districts. TEC § 23.024
130. Through the board of trustees of an independent school district, acquire and hold real and personal property, sue and be sued, receive bequests and donations, have exclusive power to manage and govern the schools of the district, vest in all rights and title to school property, and adopt rules, regulations and bylaws as deemed proper. TEC § 23.26
131. Employ by contract a superintendent, principals, teachers, or other executive officers. TEC § 23.28

132. Sell minerals in land or any part thereof belonging to an independent school district. TEC § 23.29
133. Authorize the sale of any property, other than minerals, held in trust for school purposes. TEC § 23.30
134. Exercise the right of eminent domain to acquire fee simple title to real property for any purpose deemed necessary for the independent school district. TEC § 23.31
135. Consolidate the assessing and collecting of taxes of two or more independent school districts. TEC § 23.97
136. Create a rehabilitation district to provide education, training, special services, and guidance to handicapped persons. TEC § 26.01 - 26.73
137. Establish county industrial training school districts to provide vocational training. TEC § 27.01 - 27.08
138. Local school boards are the best agencies for managing and controlling operations in school districts. 19 TEX. ADMIN. CODE [hereinafter "TAC"] 33.3.
139. Select a board member or school professional to be a representative of the district on the join committee of the regional education service center. 19 TAC 53.22.
140. Establish the holidays to be observed by the district. 19 TAC 61.162.
141. Allow students to earn credit in grades nine - twelve by taking correspondence courses from another educational institution. 19 TAC 75.163.
142. Develop experimental courses designed to enable students to master knowledges, skills, and competencies not included in the essential elements of the curriculum. 19 TAC 75.164.
143. Offer one or more courses for local credit only which may not be counted toward state graduation requirements. 19 TAC 75.165.
144. Allow students enrolled in grades nine - twelve to be awarded credit toward high school graduation for completing college level courses. 19 TAC 75.167.
145. Establish summer school programs. 19 TAC 75.168.
146. Apply for special dispensation because of extreme hardship with the implementation of provisions relating to curriculum. 19 TAC 75.171.
147. Report grades as numerical scores or letter grades. 19 TAC 75.191(d).
148. Allow students to take courses in addition to local graduation requirements on a pass/fail basis. 19 TAC 75.194.
149. Operate a preschool, summer school, and extended time program for limited English proficient students. 19 TAC 77.363.
150. Elect to discontinue a district's participation in a media services program provided through the education service center. 19 TAC 81.43.

151. Retain out-of-adoption textbooks to be used by the school for reference, teaching aids, or library use. 19 TAC 81.154.
152. Include as student services home/school coordination, school psychological services, school lunch, and child nutrition, and transportation. 19 TAC 85.1(b).
153. Enter into a contract with, or accept money from, an agency of the federal government. 19 TAC 113.1.
154. Activate a noncertified instructor's permit for an individual assigned to teach in a technology education program. 19 TAC 141.300(a).
155. Determine the number of paraprofessionals and level of job performance desired for the operation of the school district's program. 19 TAC 141.362(b).
156. Include a teacher's 45-minute planning and preparation period within the extended school days in districts which extend the school day beyond seven hours. 19 TAC 145.44(c).
157. Provide a developmental leave program for teachers and other certified personnel. 19 TAC 145.45.
158. The state should allow as much local control as possible. 19 TAC 165.1(a).

The Central Education Agency itself is subject to the Texas Sunset Act. Unless continued in existence as provided by that Act, the agency will be abolished September 1, 1989. TEC § 11.011.