Race, Class and Federalism: A History and Analysis of *San Antonio Independent School District v. Rodriguez* (1973)

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Abstract

The plaintiffs in *San Antonio Independent School District v. Rodriguez* (1973) challenged the constitutionality of the school finance system existing in all states except Hawaii. The Supreme Court, by a 5-4 decision, denied the plaintiffs' claims. *Rodriguez* did not precipitate immediate change and thus its historical significance was not immediately identifiable. As a result, historians have mostly overlooked the case. The significance of the case, however, lies in the reasons for the Court's rejection of the plaintiffs' claims. Where *Brown v. Board of Education* dealt with the rights of black children, *Rodriguez* dealt with the rights of poor children. The plaintiffs sought a political weapon with which to fight class discrimination. The reliance upon the property tax for school funding ensured that the expenditure per pupil reflected the wealth of the surrounding neighbourhood. According to the plaintiffs, the school finance system discriminated on the basis of race and class, thereby violating the equal protection clause of the Fourteenth Amendment. According to the defendants, however, plaintiffs' claims challenged one of the fundamental features of federalism: the right of the state to choose localism in education. The rejection of the plaintiffs' claims marked the Supreme Court's refusal to further extend constitutional guarantees of equality. It determined that economic rights were not protected by the Constitution, thereby defining the outer parameters of constitutional equality. The opposing arguments encapsulated the contrasting political ideologies of the period, and this dissertation places *Rodriguez* within the broader historical environment in order to illustrate its historical significance. The case emerged from the new definition of equality that had resulted from the activism of the 1960s, yet the issues it raised extended far beyond its original context. *Rodriguez* held vast ideological implications regarding the congruity between race and class within American society, it raised institutional considerations of the appropriate role of the Supreme Court within the political process, and it seemingly challenged localism within education. The forces of race, class and federalism were being redefined in the late 1960s and the early 1970s. An examination of *Rodriguez* provides an insight into the nature of these changes and the manner in which society reacted to these changes.

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Abbreviations

A.C.L.U.P.	*American Civil Liberties Union Papers* Seeley G. Mudd Manuscript Library Princeton University
J.P.C	*Judge Albert Pena Papers* Institute of Texan Cultures San Antonio, Texas
P.P.	*Lewis Powell Papers* Washington and Lee University Lexington, Virginia
M.A.	*MALDEF Archives* Stanford University
D.P.	*William O. Douglas Papers* Library of Congress, Manuscript Division Washington D.C.
M.P.	Thurgood Marshall Papers Library of Congress, Manuscript Division Washington D.C.
C.W.P.	*Charles Alan Wright Papers* Private Papers University of Texas at Austin Law School

INTRODUCTION

On 21st March 1973, the Supreme Court overturned the district court decision in *San Antonio Independent School District v. Rodriguez*.[1] The plaintiffs had challenged the constitutionality of the public school finance systems existing in all states except Hawaii. According to the plaintiffs, this was a logical extension of *Brown v. Board of Education* into the socio-economic sphere: where *Brown* had dealt with the rights of black children to equal educational opportunity, *Rodriguez* dealt with the rights of poor children.[2] The plaintiffs sought to extend the constitutional guarantees of equality to ameliorate the effects of class inequalities in education. They also challenged the school finance system on the basis of race; the majority of students in the economically deprived school district in San Antonio were either black or Mexican American. The defendants' case centred on the importance of local control of education, and questioned the appropriateness of involvement by the federal judiciary in this area. Thus, the opposing arguments in *Rodriguez* encapsulated two strands of political ideology: federalism and equality. The case raised broader social issues of whether the U.S. Constitution required that guarantees of equality extended to economic acts of government. The district court had upheld the plaintiffs' contentions, but the Supreme Court, by a 5-4 vote, overturned the decision.

The decision was widely perceived as the Burger Court's rejection of the implications of the egalitarian revolution of the Warren Court.[3] With its decision, the Court halted the further extension of constitutional equality, and restricted the future use of the equal protection clause of the Fourteenth Amendment. It marked a turning point in the fight for equality. The *Rodriguez* plaintiffs challenged the school finance structure on the basis of race, class and according to the defendants, in doing so attacked the American system of federalism. The plaintiffs, a group of Mexican American parents from an economically deprived area in San Antonio, challenged the use of the local property tax to raise educational revenues. The tax resulted in a wide disparity in funds available in Texas. The plaintiffs challenged the constitutionality of this disparity. They contrasted two local school districts to illustrate the financial inequalities inherent within the system. Edgewood school district, with a student body 90% Mexican American, 6% black, raised

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[1] 411 U.S. 1 (1973).
[2] 347 U.S. 483 (1954).
[3] See, for example, J.Harvie Wilkinson, *From* Brown *To* Bakke (New York, 1979), Jose Cardenas, *Texas School Finance Reform,* (San Antonio, 1997), Judith Areen and Ross Leonard: "The *Rodriguez* case: Judicial Oversight of School Finance, *Supreme Court Review,* Volume 1, pp.33-35, Jennifer L. Hochschild, *The New American Dilemma*, (New Haven, 1984).

$26 per child per annum through the local property tax for the academic year 1968-1969. Alamo Heights, with a student population of 19% Mexican American and less than 1% black, raised $330 per student per annum. Consequently, Alamo Heights provided four times as many books per child as Edgewood, 52% of Edgewood teachers did not have full teaching certification, compared to 4% at Alamo Heights, class size was larger by approximately 15 students.[4] It was no accident, according to the plaintiffs, that standard of functional illiteracy among the Mexican Americans of the area was 44%, compared to the national average of 23%. This dramatic disparity in financial expenditure and the resulting variation in educational conditions, caused by the school finance system, lay at the heart of the plaintiffs' case. The plaintiffs' legal argument had developed from contemporary legal scholarship, which asserted that education was a fundamental interest and wealth a suspect classification. According to this analysis, education had the status of a right guaranteed under the Constitution. Thus, the constitutional rights of poor children were violated by the school finance system that prevented them from receiving an education equal to the children in the richer districts.

At the time of the Supreme Court decision, *Rodriguez* was one in a series of school finance cases which were at different stages in the state courts. At the end of 1972, 51 suits were pending in 36 states. The legal reasoning employed by the *Rodriguez* plaintiffs had already been tried in different states, and had met with mixed success. The California Supreme Court rendered the first ruling upholding the legal arguments.[5] The California decision was followed the following year by rulings from the District Court in the *Rodriguez* case, a federal district court in Minnesota, and the Supreme Court of New Jersey.[6] Only one decision rendered between the California decision and the Supreme Court *Rodriguez* decision rejected the plaintiffs' plea.[7] *Rodriguez*, the first of the school finance cases to reach the Supreme Court, was part of a much broader litigation environment which might lead to plaintiffs overturning all but one state educational finance system.[8] The plaintiffs sought a federal ruling to enhance the possibility of

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[4] The average class size in Alamo Heights was 30, compared to an average of 45 in Edgewood.
[5] *Serrano v. Priest*, 5 Cal 3rd 584 (1971).
[6] *Rodriguez v. San Antonio* 337 F.Supp. 280 (1971), *Robinson v. Cahill* 118 N.J. 223 (1972), *Van Dusartz v. Hatfield* 334 F.Supp. 180 (1972).
[7] *Shoftstall v. Hollins*, 110 Ariz 88 (1973).
[8] Hawaii had a state controlled system of financing and thus would be unaffected by a ruling. All other states followed ostensibly the same system of financing in which the federal government provided 10% of funds, state government provided 50% and local government provided 40% of funding, of which

legislative redress. An affirmative ruling would also give national uniformity to school finance reform. The Supreme Court, however, rejected the plaintiffs' claims.

The opinion, written by Justice Lewis Powell, rejected the central tenets of the plaintiffs' case. Education was not a right guaranteed within the Constitution, nor was wealth a suspect classification. The majority consisted of the four Nixon appointees, Warren Burger, Harry Blackmun, Lewis Powell and William Rehnquist and one Warren Court justice, Potter Stewart. This clear distinction between Warren Court and Burger Court justices fuelled the argument that this was an indication of the growing conservatism of the court. The argument of the plaintiffs relied upon Warren Court precedents, and thus the Court opinion appeared to be a rejection of Warren court ideals. However, this contention overlooked the complexities of the issues raised by the case. The plaintiffs relied upon Warren Court rhetoric, not actual guarantees. They sought an extension, not an affirmance of equal protection guarantees. They wished for the Supreme Court to join the fight against economic discrimination in education, as it had against racial discrimination in education. Thus, the plaintiffs wished for the Court to become involved in a new sphere of inequality.

Rodriguez is significant for at least two reasons. First, the ideals of the two opposing sides encapsulated the dominant themes and attitudes of the time. The suit was filed in 1968 and the decision rendered in 1973. Thus, an analysis of the ideological basis of the case, the ideals of the plaintiffs, the arguments of the defendants, and finally the Supreme Court opinion collectively provides a lens through which the broader political environment can be viewed. In this respect, the historical context of *Rodriguez* is vital in order to understand the issues under consideration and, in turn, enhances understanding of the significance of the case. Second, the reasons for the failure of the plaintiffs' claims must be considered in order to comprehend the significance of the case. The decision was not a rejection of Warren Court ideals, but a refusal by the Court to extend constitutional guarantees to economic inequality and so the case defined the parameters of constitutional equality. Economic inequality in education was not subject to the same constitutional treatment as racial inequality. The Court's rejection of the plaintiffs' claims was not simply a conservative reaction to liberal claims. Instead, it highlighted the inherent

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approximately 35% came from the local property tax. The exact breakdown varied between states, but these figures were average.

contradiction that lay at the heart of American society. The principal reason for the Supreme Court's refusal of the plaintiffs' claims lay in the degree of equalisation requested. According to the defendants, the plaintiffs' claims contradicted principles of localism. The use of the local property tax was premised upon localism in governance. Each district had different needs, and thus required varied expenditure. Ideals of diversity and individualism lay at the heart of American ideology, as did equality. However, equality and individualism must ultimately be balanced in order to co-exist; too much of either ideal would negate the other.

As the Court denied the plaintiffs' claims, the finance system of forty nine states remained intact. Its failure to affect society immediately has resulted in a lack of historical attention. Historians have mostly overlooked *Rodriguez*, yet the implications of the case and the reasons for its ultimate failure provide an important indication into the nature of American society at the time. In addition, the topic of school finance has also warranted little historical attention. In part, this is a reflection of the different issues contained within it. The variety of ideological and political factors contained within the case means that it is not critical to a particular historical perspective. The multitude of critical issues within *Rodriguez* account in part for both its historical importance and its exclusion from many historical interpretations of this period.

Historians of the civil rights movement mostly omitted *Rodriguez* from their analysis. Much of the literature on the movement is written by social historians, which examines the civil rights movement during the period of mass activism of the 1960s and often examines specific geographical areas or individuals.[9] Political histories of the movement either do not consider the years beyond 1970 or concentrate upon busing and Affirmative Action during the 1970s.[10] Historians of the movement who focus upon the

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[9] For example, Andrew Young, *The Civil Rights Movement and the Transformation of America*, (New York, 1998), Howell Raines, *My Soul is Rested: Movement Days in the Deep South Remembered,* (Chapel Hill, 1983), Taylor Branch, *Parting the Waters: America in the King Years: 1954-1963* and *Pillar of Fire: America in the King Years: 1963-1965*, (New York, 1988), Townsend Davis, *Weary Feet: Rested Souls,* (Chicago 1998), Vicki L. Crawford, *Women in the Civil Rights Movement: Trailblazers and Torchbearers*, (New York, 1992).

[10] For examples see Harvard Sitkoff, *The Fight for Black Equality: 1954-1980,*(Cambridge, 1985), Robert Cook, *Sweet Land of Liberty*, (London, 1998), Steven Lawson, *Debating the Civil Rights Movement 1945-1968*, (Boston, 1998), Robert Weisbrot, *Freedom Bound: A History of America's Civil Rights Movement*, (Chicago, 1991), Thomas Brooks, *Walls Come Tumbling Down: A History of the Civil Rights Movement 1940-1970,* (London, 1990), Gary Donaldson, *Second Reconstruction: A History of the Modern Civil Rights Movement*, (Philadelphia, 2000). The accompanying anthology to the PBS series *Eyes on the Prize: The Civil Rights Movement 1950s-1990* also makes no mention of school finance, despite considering the educational problems of the 1960s/early 1970s.

ideological changes and the increasing radicalism within the movement do not consider the school finance litigation.[11] This reflects the ultimately conservative nature of the action; the case employed traditional methods and did not, therefore, reflect the rise of political radicalism. It was an ideological, not a practical, progression of aims. Thus, historians whose primary concern was the increasing radicalism would not include *Rodriguez* in their interpretation. Historical accounts of the civil rights movement with an emphasis upon class also overlook *Rodriguez.*[12] The peripheral role of the NAACP and the ethnicity of the plaintiff marginalised its importance for historians of black progress. Despite the emphasis upon minority education in general within the case, the movement for educational integration receives priority in historical interpretations of this period after 1968. Even legal historians of the civil rights movement give only sparse attention to the case. One of the best known legal histories, J.Harvie Wilkinson's, *From* Brown *to* Bakke, briefly mentions *Rodriguez* on two occasions.[13] Although this could be attributable to Wilkinson's personal involvement in the case, it also illustrates that busing and affirmative action remain the priority for legal interpretations of civil rights issues in the 1970s.[14]

Thus, *Rodriguez* remains beyond the scope of much civil rights movement material. Although the case reflected recent ideological developments, it was not an action engineered by black activists and therefore was of peripheral importance to histories of black political activism. However, histories of Mexican American civil rights movement also give only scant attention to *Rodriguez*. General histories of Mexican American activism of this period focus primarily upon the Chicano Movement and the reasons for the rising activism amongst Mexican American youth.[15] The material with a more specific

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[11] For example, see James Geschwender, *The Black Revolt: The Civil Rights Movement: Ghetto Uprisings and Separatism,* (London, 1989), James Moony, *Northern Protest,*(Chicago, 1993), James Max Frenrich, *The Legacy of the Civil Rights Movement,* (New York, 1993).

[12] For example, Jack Bloom, *Class, Race and The Civil Rights Movement*, (Chapel Hill, 1988), Manning Marable, *Race, Reform and Rebellion,* (New York, 1991) and *How Capitalism Underdeveloped Black America: Problems in Race, Political Economy and Society*, (New York, 2000).

[13] New York, 1979. "In *San Antonio v. Rodriguez*, the Court held states under no constitutional obligation to overcome disparities in the expenditures of school districts within their borders." p. 179. "*Milliken* posed, in short, a way for the Court to soften the fiscal blow it dealt the dispossessed in *Rodriguez*." p. 198.

[14] Wilkinson's involvement in the case will be discussed at a later point.

[15] See, for example, Fransisco A. Rosales, *Chicano: The History of The Mexican American Civil Rights Movement*, (Austin, 1997), Olga Rodriguez, *The Politics of Chicano Liberation*, (Denver, 1977), *The Crusade for Justice: Chicano Militancy*, Ernesto B. Vigil, (Denver, 1994), Armando Navarro, *Mexican American Youth Organisation: Avant Garde of the Chicano Movement in Texas*, (Boulder,1995) and *La Raza Unida: A Chicano Partisan Challenge*, (Boulder, 2000).

emphasis upon Texas still only briefly considers *Rodriguez.*[16] The lack of involvement of key Mexican American activists or organisations and the many other examples of Mexican American activism of this period means that *Rodriguez* does not attract a great deal of attention. The brief consideration it receives from historians of Mexican American movement in Texas is also attributable to its ultimate failure to elicit broad changes. However, *Rodriguez* also receives only sparse attention in *Let All of Them Take Heed: Mexican Americans and the Campaign for Educational Equality in Texas, 1910-1981.*[17] Despite the relevance of *Rodriguez* to the subject of this book, the author, Guadalupe San Miguel, considers the case in two paragraphs. His primary focus is the desegregation struggle with Texas, not school finance. Thus, the literature on Mexican American activism does not consider *Rodriguez* in detail, as much of the literature emphasises different features of Mexican American activism.

However, *Rodriguez* does appear in some historical material. The most recent consideration of *Rodriguez* appeared in *Brown v. Board of Education: A Civil Rights Milestone and its Troubled Legacy* by James T. Patterson.[18] This 2001 publication examined the long term effect of *Brown* and the ensuing desegregation struggle. Patterson acknowledged the impact of *Rodriguez* on the continuing quest for educational equality: "As a result of *Rodriguez,* cross-district differences persisted, thereby subverting the American dream of equality of opportunity.....With few exceptions, the Burger Court thereafter avoided judicial activism on racial and educational matters."[19] However, the most notable historical examination of *Rodriguez* appeared in J.R. Pole's *The Pursuit of Equality in American History.* He considered the implications of *Rodriguez* for the attainment of equality within American society. Pole commented: "The implications of the case were portentous. If unequal systems of school finance were held to be unconstitutional, reorganizations of vast scale and infinite complexity might well be expected to follow."[20] He then commented:

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[16] Manuel G. Gonzales, *Mexicanos in Texas: A History of Mexican-Americans in Texas*, (Indianapolis, 2000), David Montejano, *Anglos and Mexicans in the Making of Texas, 1900-1986*, (Austin, 1987).
[17] Austin, 1987.
[18] Oxford, 2001.
[19] James T. Patterson, *Brown v. Board of Education: A Civil Rights Milestone and Its Troubled Legacy,* (Oxford, 2001), p. 178.
[20] J.R. Pole, *The Pursuit of Equality in American History,* (Oxford, 1978), p.182.

> The Supreme Court now faced the problem of whether the egalitarian principles of the Constitution demanded that the educational consequences of American economic history were to be undone, to be replaced, as far as the public sector was concerned, with a system of equal educational opportunity. It was not an impossible demand; generations of racial history had been set in reverse by *Brown* less than twenty years earlier.[21]

Pole thereby acknowledged the implications of the case and the potential consequences for the socio-economic structure of the U.S. The significance was also noted by Jennifer L. Hochschild in *The New American Dilemma*. She commented: "Ever since *Brown,* equal educational opportunity has taken on the coloration of a constitutional mandate...the Supreme Court set limits to that mandate in *San Antonio v. Rodriguez.*"[22] Both Pole and, to a lesser extent, Hochschild, identified the ideological effect of the case and the manner in which *Rodriguez* halted the further expansion of constitutional equality. Peter Irons, the legal historian, also noted the importance of *Rodriguez* by its inclusion in his book *May It Please The Court*: *The Most Significant Legal Arguments Made before the Supreme Court since 1955* and *The Courage of Their Conviction: Sixteen Americans Who Fought Their Way to The Supreme Court.*[23] Thus, the legal and ideological importance of the case has been noted. However, all of these accounts consider *Rodriguez* from a particular perspective. Pole's account was concerned with the changed definition of equality throughout American history. It dealt with ideals and rhetoric rather than history. Similarly, Hothschild's primary focus was busing and the impact of *Rodriguez* on that issue. Thus, the inclusion of *Rodriguez* in these texts helps to illustrate its importance, but it does not adequately explain the importance. Similarly, the exclusion of *Rodriguez* from many histories of the civil rights movement, whilst explicable, also belies the historical importance of the case. Its connection to the quest for equality in the 1960s is, therefore, underestimated.

The best known account of *Rodriguez* appeared in Jonathon Kozol's bestselling book *Savage Inequalities*, published in 1992.[24] This book was a sequel to his original bestseller, *Death at an Early Age,* published in 1964, which helped to reveal the state of

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[21] *Ibid.,* p.432.
[22] Jennifer L. Hochschild, *The New American Dilemma: Liberal Democracy and School Desegregation*, (New Haven, 1984), p. 219.
[23] Chicago, 1992 and New York, 1988.
[24] Jonathon Kozol, *Savage Inequalities: Children in America's Schools*, (New York, 1992).

American education in the 1960s. Kozol's 1992 book described the appalling level of inequities that still existed in American education. His final chapter, entitled "The Dream Deferred Again, in *San Antonio*", detailed the impact of the decision on American education. In his conclusion, Kozol wrote "The 5-4 decision in *Rodriguez* ushered in the ending of the era of progressive change and set the tone for the subsequent two decades which have left us with the present day reality of separate and unequal public schools."[25] However, Kozol considered the importance of the case from an educational and social, not historical, perspective. He traced the inequitable funding system which currently exists in many states to the Court's decision in 1973. The educational importance of *Rodriguez* is widely documented, but this minimises its connection to the broader social and political trends. This is further illustrated by *The Brethren* by Bob Woodward and Scott Armstrong. This controversial book, published in 1979, focused upon the Supreme Court between 1969-1975. The authors noted the importance of the case: "It was a monumental case, billed as promising massive educational upgrading for poor children everywhere."[26] However, the case was only considered briefly, in the context of interchamber relations, and the authors did not place the case in any broader context. Much of the current literature considers the case from a narrow educational or social policy perspective. Its inclusion in social science literature and its exclusion from historical literature reflect the contemporary dimensions of school finance and its continuing importance to educators and social policy makers. However, it ignores the connection between *Rodriguez* and the quest for equality in the late 1960s and early 1970s.

The most detailed and thorough accounts of *Rodriguez* were, therefore, written by constitutional lawyers and scholars immediately following the Supreme Court opinion. The reasoning employed in the decision had a profound influence upon the use of the equal protection clause, and this influence was noted at the time.[27] *Rodriguez* was also

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[25] *Ibid.*, p.219.
[26] Bob Woodward and Scott Armstrong, *The Brethren*, (New York, 1979), p.306.
[27] Judith Areen and Ross Leonard: "The *Rodriguez* Case: Judicial Oversight of School Finance", *Supreme Court Review,* Volume 1 (January term, 1973), pp. 33-55, Paul Carrington: "Financing the American Dream: Equality and the School Taxes", *Columbia Law Review,* Volume 73 (1973), pp. 1227-1260, Paul Diamond: "Strict Construction and Judicial Review of Racial Discrimination under the Equal Protection Clause", *Michigan Law Review,* Volume 80, (1981-1982), pp. 464-511, David Richards, "Equal Opportunity and School Financing: Towards a Moral Theory of Constitutional Adjudication", *University of Chicago Law Review,* Volume 41, (1973-1974), pp. 855-947, Peter Roos, "The Potential Impact of *Rodriguez* on Other School Finance Litigation", *Law and Contemporary Problems,* Volume 38, No. 3, Winter-Spring 1974, pp.455-505. J.Harvie Wilkinson III, "The Supreme Court, The Equal Protection

analysed as an example of Lewis Powell's opinion writing and judicial philosophy as it was one of the most important opinions in his early Supreme Court career.[28] As a result, in the narrow world of constitutional law, *Rodriguez* became well known and well analysed. Those involved in the school finance struggle, including educational policy makers and lawyers, also examined *Rodriguez* closely.[29] Activists and lawyers in all states examined the implications of *Rodriguez* on school finance reform in their particular state, and used it to formulate alternative litigation strategies.[30] In Texas, *Rodriguez* was analysed particularly closely, as the decision, although upholding the finance system, supported the need for immediate reform.[31]

In the ten years following the decision, constitutional lawyers and lawyers involved in school finance litigation continued to publish articles which noted the significance of *Rodriguez* upon constitutional law and the future of school finance litigation. Both types of articles, therefore, considered the legal significance of *Rodriguez.* The most recent articles have continued this analysis, but included more discussion of its effect on educational policy.[32] Public policy analysts have also considered the

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Clause, and the Three Faces of Constitutional Equality", *Virginia Law Review,* Volume 61, Number 5, (June 1975), pp. 945-1030.

[28] George Freeman, "Justice Powell's Constitutional Opinions",. *Washington and Lee Law Review*, Volume 45, (1988).pp. 345-390, J. Harvie Wilkinson III, "Honorable Lewis Powell Jnr: Five Years on the Supreme Court: An Overview", *University of Richmond Law Review,* Volume 11, Number 2 (Winter 1977), pp.320-375. Larry Yackle, "Thoughts on *Rodriguez*: Mr Justice Powell and the Demise of the Equal Protection Analysis in the Supreme Court," *University of Richmond Law Review,* Volume 9, Number 2 (Winter 1975), pp. 80- 127.

[29] Joel Berke, *Answers to Inequity: An Analysis of New School Finance,* (California, 1974), Larry Simon, "The School Finance Decisions: Collective Bargaining and Future Finance Decisions", *Yale Law Journal,* Volume 82, January 1973, pp. 295-325.

[30] James Gifford, "Legal, Technical, Financial and Political Implications of School Finance Reform in New York City," *Tulane Law Review,* Volume 55 (1980-1981), pp. 606-638, Special Volume of *Law and Contemporary Problems,* Winter-Spring 1974 (Entire volume dedicated to school finance). Tamar Sobel, "Strategies for School Finance Reform Litigation in the post-*Rodriguez* era", *New England Law Review,* Volume 21, Number 4, (1985-86), pp. 817-847.

[31] Daniel Morgan, *School Finance Reform in Texas: A Brief History and an Evaluation of Present Conditions,* (San Antonio, 1974). Daniel Morgan and Mark Yudof, *"Rodriguez v. San Antonio ISD:* Gathering the Ayes of Texas: The Politics of School Finance Reform", *Law and Contemporary Problems*, Winter-Spring 1974, pp. 545-600.

[32] See, for example, William Clunes, "New Answers to Hard Questions Posed by *Rodriguez*: Ending the Separation of School Finance and Educational Policy by Bridging the Gap Between Wrong and Remedy", *Connecticut Law Review,* Volume 24, Number 3, (Spring 1992), pp. 721-755. Julie Underwood, "School Finance Litigation: Legal Theories, Judicial Activism, Social Neglect", *Journal of Educational Finance,* Volume 20 (Fall 1994), pp. 143-162. José Cárdenas, *Texas School Finance Reform: An IDRA Perspective* (1997). This book considered the development of the reform movement from the 1960s to the present. It examined the contribution of Cárdenas' own organisation, the Intercultural Development Research Organization (IDRA), which was formed in the wake of *Rodriguez.*

importance of the case for federal government involvement in education.[33] Thus, the impact of *Rodriguez* upon the federal role in education has been well documented. However, the primary concern of this literature considered the impact of *Rodriguez* upon current federal educational policy. It does not, therefore, relate the case to the broader political trends of the time.

There is, therefore, little historical material dealing with *Rodriguez* and school finance reform. In 1988, Peter Irons noted: "Sad to say, very little has been written about the significant issue of public-school financing and the legal challenges to the property tax system."[34] Although more literature has appeared since Irons made that comment, its focus has been public policy or legal history, not historical analysis. No account of the case relates it to the historical and political trends of the time. This dissertation will synthesise historical material concerning the legal course of *Rodriguez* between 1968 and 1973, in order to place the case in a historical perspective. The themes of race, class and federalism will provide the framework for the analysis, as they constituted the ideological core of *Rodriguez.* In order to assess the significance of *Rodriguez* upon the struggle for school finance reform, the reform movement in Texas after *Rodriguez* will also be considered. This dissertation uses *Rodriguez* as the tool through which to view the broader political and historical environment, and uses this information to draw conclusions regarding its importance.

In order to achieve this objective, the historical context of the case must be examined and the broader social and political context must be known. As G. Edward White noted: "judging is bound to reflect the governing social and intellectual assumptions of various periods in American history, and that its relation to its social context is one of total integration."[35] The key issues contained within *Rodriguez* were also the primary political issues of the time. The competing issues of race, class and federalism moulded political discourse for much of the 1960s and during the Nixon Administration. The case was the product of ideological and structural changes in the civil rights movement, which had become increasingly fragmented and localised during the 1960s. Race was, therefore, the first essential element of *Rodriguez.* The fragmentation of the movement was

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[33] See, for example, B.Guy Peters, *American Public Policy: Promise and Performance*, (New York, 1982) and Timothy J. Conlan, *From New Federalism to Devolution: 25 Years of Intergovernmental Reform,* (New York, 1998).
[34] Peter Irons, *The Courage of Their Convictions,* (New York, 1988), p. 428.
[35] G. Edward White, *The American Judicial Tradition,* (New York, 1976), p. 5.

precipitated in part by the changing objectives of activists. During the period of mass activism, from the Montgomery Bus Boycott in 1955 to the signing of the Voting Rights Act in 1965, political equality and the end to legal segregation had been the collective objective. The civil rights struggle occurred primarily in the South, gaining national attention, but attacking southern law and customs. After the elimination of legal segregation through the Civil Rights Act of 1964 and the achievement of political equality at law through the Voting Rights Act of 1965, the focus of the movement altered and divisions regarding objectives and tactics became apparent. The elimination of socio-economic inequality became the new goal, and the effectiveness of non-violent direct action was questioned. This new goal was reflected in the charge of racial discrimination in *Rodriguez*. The racial discrimination inherent in the school finance system in San Antonio was, according to the plaintiffs, caused by socio-economic and demographic factors rather than state intent. However, absence of discriminatory intent was insufficient justification, according to the plaintiffs, for the Edgewood Mexican Americans to receive substantially less school funding than the whites of Alamo Heights. This charge reflected the changes that had occurred since the civil rights suits of the 1950s, in which legal segregation in education had been the target. In *Rodriguez*, the implicit connection between race and poverty was under scrutiny, thereby challenging the dual notions of racial and class discrimination.

The concept of class discrimination, which transcended racial boundaries and encompassed all poor, was the second essential element of *Rodriguez*. The new direction of the civil rights movement after 1965 challenged essential features of American society and ideology. The changed strategy and objectives of Martin Luther King Jnr encapsulated the alteration amongst the majority of activists. In 1965, after rioting in the North followed the passage of the Voting Rights Act, King wrote an article entitled "Next Stop: North."[36] In this article, he outlined the inherent economic discrimination present within society and its effect upon the education of ghetto children:

> They were herded into ghetto schools and pushed through grades of schooling without learning. Their after-school life is spent in neglected, filthy streets that

[36] *Saturday Review*, 13th November 1965, pp.1-4.

> abound in open crime.....The Negro child who learns too little about books in his pathetic schools, learns too much about crime in the streets around him.[37]

The northern ghettos typified the broader socio-economic discrimination that provided the new target for the civil rights movement. The elimination of all forms of discrimination was imperative for the attainment of equality. Housing, welfare, employment and quality of education became the new focus for the civil rights activists. The changed focus resulted in the establishment of northern-based organisations, which focused solely upon economic inequality. Operation Breadbasket, a branch of the SCLC was the most prominent example of this. This organisation was established in Chicago in 1966 and attempted to tackle economic problems within the inner cities.[38] The NAACP also established the National Office for the Rights of the Indigent (NORI) in order to address the plight of the poor. Although particular emphasis was placed upon poor blacks, the cases filed were relevant to all poor. Issues of housing and welfare were universally relevant and not confined to simply poor blacks. Thus, activists called for a new coalition in which the impoverished joined together to fight economic discrimination. In his final book, *Where Do We Go From Here: Chaos or Community?,* King called for a "coalition of labour, Negro unemployed and welfare recipients" which would constitute "a new source of power and would ultimately lead to the reshaping of the economic relationship."[39] This new coalition attempted to unite the impoverished along class instead of racial lines. Black leaders continued the call for a new coalition after King's assassination. Jesse Jackson commented in 1969 that "the division of races and the pending fight between the poor must be avoided. This vertical fight between races must shift into a horizontal fight between the have nots and the have."[40] Increasingly, therefore, the civil rights struggle was becoming a class struggle, which, by its very nature, challenged traditional assumptions regarding American society. It increased activists' demands upon the political system and resulted in a gradual loss of white sympathy with their demands. The new direction, therefore, profoundly altered both the nature of the movement and the degree of support it attracted amongst whites. However, the new

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[37] *Ibid.*, p.2.
[38] Operation Breadbasket began as a food relief and employment aid programme but after King's assassination, under the guidance of Jesse Jackson, it became a programme for "black capitalism". Jackson sought to persuade corporations to purchase from and invest in black owned businesses.
[39] Martin Luther King, *Where do we go from here: Chaos or Community*?, (New York, 1967) p. 8.
[40] Jesse Jackson, Letter from Jail on Black Economic Opportunity, September 1969.

ideological direction of the civil rights movement occurred simultaneously with its fragmentation. The ideological changes, therefore, marked the end of the mass protest civil rights movement.

Rodriguez was a product of the changed direction of the civil rights movement. It employed the tactic of litigation to combat the socio-economic discrimination within education, which was an integral component in the fight to eliminate poverty. King noted the difference between black and white educational standards: "In elementary schools Negroes lag one to three years behind whites, and their segregated schools receive substantially less money per student than white schools. One twentieth as many Negroes as whites attend colleges, and half of these are ill-equipped Southern institutions."[41] These statistics were confirmed by the report of the National Commission on Civil Disorders, published in March 1968:

> The bleak record of public education for ghetto children is growing worse. In the critical skills- verbal and reading ability- Negro students are falling further behind whites with each year of school completed. The high unemployment and underemployment rate for Negro youth is evidence in part of the growing education crisis. [42]

The low standard of minority education had been an important component of President Lyndon Johnson's War on Poverty. The Elementary and Secondary Education Act of 1965 and Headstart were the federal government's attempts to improve the standard of minority education. Johnson had expressed his commitment to education in his Great Society speech, delivered at Ann Arbor in May 1964, in which he said "Poverty must not be a bar to learning, learning must be an escape from poverty."[43]

Thus, the federal government's rhetorical commitment to the improvement of educational standards had been evident since 1964. The subsequent failure of Headstart to achieve the desired results and the lack of funding given to the Education Act of 1964 did little to ameliorate the quality of minority education. The long hot summers of rioting, the emergence of black power militancy and the rising consciousness of other minorities such as Native Americans and Mexicans illustrated the limitations of federal government action

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[41] *Ibid.*, p.8.
[42] The Report of the National Advisory Commission of Civil Disorders, (Washington D.C., 1968), p. 18.
[43] Lyndon Baines Johnson, "The Great Society", Ann Arbor, 11th May 1964.

and the rising level of social frustration. Thus, despite the government's commitment to its improvement, the condition of minority education was a prominent issue for civil rights activists after 1965.

Rodriguez sought to obtain a ruling to combat one of the most obvious examples of economic inequality: school finance. The first element of the suit combined the broader objective to tackle class discrimination with the continuing concern for educational standards. The filing of the suit in July 1968 was also significant. The assassination of King in April and the failure of the Poor People's Campaign over the summer effectively marked the end of the mass high profile civil rights movement. The Poor People's Campaign, with the slogan of "jobs and income for all" suffered from a lack of organisation and a set of wide ranging but ultimately diffuse demands. At its height, 50, 000 people attended demonstrations, but this number was significantly lower than the 250,000 that attended the March on Washington five years earlier. This campaign, therefore, effectively concluded the mass protest civil rights movement. After this time, internal divisions, the lack of a leader, and different objectives led to the dissipation of a unified, mass movement. After the campaign activism did not cease, but became more localised. However, the campaign, although unsuccessful, illustrated an attempt to create a coalition amongst the minority poor; both Mexican Americans and Native Americans participated in the campaign. The campaign concluded a month before *Rodriguez* was filed and illustrated both the problems and changed ideology of the new movement.

The Fair Housing Standards (FHS) Act passed in May 1968 primarily as a tribute to King, marked the end of the civil rights legislation of the 1960s. The act aided in the advancement of the economic benefit of housing, which distinguished this act from other civil rights legislation. It compelled equal access to housing without regard to race. Political rights such as the franchise had provided the basis for federal legislation until this point. The federal government now acknowledged racial inequality inherent within certain economic spheres. The FHS Act did not receive adequate support or funding from the Nixon administration, which took office in 1969, to improve class discrimination significantly, but did, nevertheless, represent the legislative manifestation of the changed objectives. It represented the first significant government attempt to tackle economic inequalities. This legislation, therefore, provided a link to the view encapsulated within *Rodriguez*. Through the enactment of the FHS Act, the government had implicitly

recognised the class discrimination inherent within society, and *Rodriguez* sought to obtain an explicit constitutional recognition. The filing of *Rodriguez* in the summer of 1968, two months after the passage of the FHS Act, was a timely reflection of the fragmentation of the broader movement and the continuing use of courts as the forum for substantive change.

The race of the plaintiffs in *Rodriguez* was also a reflection of broader changes. The notion of racial discrimination had broadened beyond that of black and white and encompassed racial minorities in general. As a result of the raised consciousness and gains made by the first stage of the civil rights movement, the Mexican American movement emerged. The eradication of socio-economic discrimination was a common aim for all racial minorities, and thus transcended purely racial considerations. The emergence of the case from the Mexican American community of San Antonio reflected the rise of the new ethnic awareness. San Antonio, along with Los Angeles, was the main centre of Mexican American activity. The named plaintiff, Demetrio Rodriguez, symbolised the new ethnicity.

The rise of the new ethnicity further extended the link between race and class. The grievances of the Mexican American activists varied from those of the black civil rights activists. The majority of Mexican Americans were poor farmworkers in the rural South West and thus had different concerns to urban blacks. The activist Caesar Chavez and his foundation of the United Farm Workers' Union demonstrated the different issues facing Mexican Americans. This organisation, founded in 1964, taught newly arrived Mexican American migrants to read English, buy goods and manage their money. In September 1965, Chavez organised a grapepickers' strike in Delano, California in an attempt to gain union recognition and so help to improve working conditions. The strike continued for five years, during which time Chavez gained national recognition as a spokesman for Mexican Americans. Chavez's emphasis upon unionisation and the creation of co-operatives amongst migrant farmers differed from the strategies of black activists. Many of the grievances of Mexican Americans derived from their economic powerlessness and thus Chavez's strategy focused upon ameliorating this problem. The plight of the Mexican Americans, therefore, illustrated the way in which the problem of race was increasingly becoming a problem of class. This confluence between race and class

inequality lay at the heart of *Rodriguez* and thereby reflected the broader political and social trends.

Federalism was the third essential element of *Rodriguez*. The case raised the issue of federalism in two ways. On one level, it raised the political question of the balance of powers between federal and state governments in the area of education. The belief in the importance of localism in education formed an integral component of the defence of the school finance structure. The defendants' emphasis upon localism implied that an invalidation of the school finance system invalidated localism. On another level, however, *Rodriguez* also raised the notion of judicial federalism. The Supreme Court majority refused to impose a judicially engineered remedy on 49 states, which would be difficult to enforce. *Rodriguez* emphasised the institutional limitations of the Court as a facilitator of social and political change. As a result of the decision, school finance became a state issue, with state judiciaries becoming the primary source of redress. This led to broad national diversity, with differing degrees of reform within each state.[44]

The reluctance of the Supreme Court to impose a national solution to school finance was in keeping with the broader political ethos of the time. The period between the filing of the case in July 1968 and the rendering of the decision in March 1973 was also characterised by the changing perceptions in the role of the federal government. The Nixon Administration had advocated a policy of "New Federalism", in which President Richard Nixon was looking to reverse the centralising trend of the Kennedy and Johnson years and return more power to the states. Thus, the Supreme Court decision in *Rodriguez* slowed the judicial activism of the Warren Court and also enabled individual states to address the problem of school finance in their own manner, thereby preventing the further growth of the federal government. During the presidencies of Kennedy and Johnson, the activism and size of the federal government increased. The Great Society in particular, which frequently used specially created federal agencies instead of state governments to implement its policies, expanded the influence and presence of the federal government into new areas. The perceived failure of the Great Society programmes, the unpopularity and expense of the Vietnam War, and the urban riots combined to partially discredit the expansion of the federal government. This enabled Nixon to campaign upon a platform of "New Federalism", in which he promised to return power to the states, and

[44] See Appendix.

maximise upon the feeling of alienation amongst the "white majority": "the white majority is profoundly troubled....there is a heavy undertone of resentment- a dark suspicion that the rules are being changed in the middle of game, that the dice are loaded in someone else's favour."[45]

Thus, in July 1968, the time at which the *Rodriguez* suit was filed, the expansion of the federal government was at its height. During the next five years, the federal government began to implement Nixon's New Federalism in which he pledged that "resources and power will flow back from Washington to the people."[46] The events of the Johnson administration illustrated the necessity for this initiative: "We have reached the limit of what federal government can do. Our greatest need is now to reach beyond the federal government, to enlist the assistance of the states, and the legions of the concerned and the committed."[47] In order to fulfil this objective, therefore, Nixon sought to reverse the welfare state policies of the previous Democratic administrations. Many of the agencies and programmes created under the Great Society legislation were abolished and the number of cabinet departments was reduced. Nixon dubbed this change "The New American Revolution" which would begin with a "new partnership between the federal government and the states and localities- a partnership in which we entrust the states and localities with a larger share of the nation's responsibilities."[48] New Federalism championed the role of the local governments: "local government is the government closest to the people, it is most responsive to the individual person. It is people's government in a far more intimate way than the government in Washington can ever be."[49] Thus, New Federalism advocated the increased role of local government in order to make government more responsive to the needs of the people. It was, according to Nixon, "a new American revolution- a peaceful revolution in which power is turned back to the people- in which government at all levels was refreshed and renewed and made truly responsive."[50] The policy of New Federalism signalled a retrenchment in the role of the federal government. In order to implement his policy, Nixon proposed to Congress a five-year revenue sharing plan that would distribute $30 billion of federal revenues for the

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[45] "The Troubled American", *Newsweek,* 12th July 1968.
[46] Richard Nixon, First Inaugural Address, 20th January 1969.
[47] *Ibid.*
[48] Richard Nixon, State of the Union Address, 22nd January 1971.
[49] *Ibid.*
[50] *Ibid.*

states to use as they saw fit, which was passed in 1972. The New Federalism initiative was, therefore, an integral part of the conservatism of the Nixon administration. It enabled Nixon to present cuts in federal spending in welfare programmes positively, as part of making the actions of the federal government more responsive to the needs of the majority. The rioting of the very people the government sought to assist during the 1960s had discredited the notion of the direct federal governmental assistance for the disadvantaged. These events supported the argument to give federal money, instead of programmes, to the states, so they can address their own problems independently of federal interference.

The election of Nixon and his subsequent policy of New Federalism were signs of the growing conservative backlash against the turmoil of the 1960s. The reaction against the turmoil led to a partisan realignment that altered the political spectrum. The emergence of the "Silent Majority" or "Middle America" as a potentially powerful political grouping provided a target for the Republican Party in the election of 1968. This group, united in their opposition to the trends of the 1960s, provided further evidence of the polarisation of American society along lines of class and, in particular, race. The different components of the "Silent Majority" illustrated the divisive effect of the civil rights movement. The first component was the Southern white conservative Democrats, many of who were from the middle to upper class, which voted Republican in the election of 1968. The candidacy of George Wallace further polarised the political spectrum, as he attracted many of the votes of the poorer southern whites. According to the political strategist Kevin Phillips, Wallace was "the personification of the poor in white Deep South."[51] As a result of the white southern dissatisfaction with the civil rights policies of the Democrats, Hubert Humphrey attracted only 30% of southern votes, two-thirds of which were black voters. Nixon and Wallace split the southern vote equally, each won 34% each. The North was also becoming increasingly polarised along class lines. The traditional Democrat support base of ethnic workers was feeling increasingly alienated by the policies of Johnson and the increasing urban unrest. This was first illustrated by the success of Wallace in the 1964 primaries in blue collar precincts in Milwaukee, Baltimore and Cleveland, where he won 30-45% of the vote. The relative popularity of Wallace

[51] Theodore White, *The Making of the President, 1972* (Cambridge, 1973).

amongst blue collar northern whites illustrated the appeal of his conservatism amongst the white poor in general, regardless of regional origin.

The increasing alienation felt by many of the poor whites showed the difficulties with attaining a coalition of all poor along class lines. The continuing legacy of *de facto* segregation distinguished the poor minorities from the poor whites and thus, attempts to eradicate the legacy of *de facto* segregation also, by implication, eliminated feelings of unity amongst the poor. Nixon appealed to this feeling of alienation: "In a time when the national focus is concentrated upon the unemployed, the impoverished and the dispossessed, the working Americans have become the forgotten Americans."[52] After his election, Nixon worked to consolidate his support within the "Silent Majority" and thus pursued strategies and policies which would appeal to their sense of alienation and resentment. This was illustrated by the suggested policy of "benign neglect" of the race issue. Daniel Moynihan, Cabinet Advisor on Domestic Affairs, wrote to Nixon in a memo in 1970: "the time may have come when the issue of race could benefit from a period of benign neglect. The subject has been much too talked about."[53] The election of Nixon, therefore, marked a shift in federal government sympathy for black demands which in turn reflected the broader loss of sympathy amongst many whites.

The changes in the political environment between 1968 and 1973 had profound consequences for the *Rodriguez* plaintiffs. The case was filed before the election of Nixon and at a time in which the civil rights movement was still highly visible. During the five year passage of the case, the political environment altered and the dominant political mood became one of conservatism and a reluctance to enact further social change. The changes in the federal judiciary further altered the political environment. Nixon's appointment of four Supreme Court justices marked the end of the liberal Warren Court era and began a new chapter in the Court's history. The Burger Court confronted the implications of Warren Court decisions. By the time *Rodriguez* reached the Supreme Court in October 1972, it had altered significantly from the Court of July 1968. The changed composition of the Court adds a further dimension to the historical context of *Rodriguez.*

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[52] Theodore White, *The Making of the President, 1968* (Cambridge, 1969).
[53] Memo from D.P. Moynihan to Richard Nixon, January 1970. *Annuals of American History, 1969-1972,* Volume 16. (New York, 1985).

The Burger Court's desire to maintain continuity with the decisions of the Warren Court decisions enhanced the prominence of Supreme Court action. In light of this increased role, the Burger Court confronted the implications of the Warren Court amid sentiment of increasing resentment of judicial involvement in political affairs and a desire to reduce the role of the federal government. During the development of the *Rodriguez* litigation, the Court entered a new area of controversy with its busing decisions. The *Brown* decision, although symbolic, had not significantly altered the degree of educational segregation in schools. In 1964, the Court declared in *Griffin v. County School Board of Prince Edward County* that "the time for mere 'deliberate speed' has just run out."[54] This decision was intended to increase the speed of desegregation by illustrating the urgency of the issue.[55] In 1968, the year *Rodriguez* was filed, the Court progressed one step further and became more actively involved in the desegregation process. In *Green v. Board of Education of New Kent County*, the Court stated that "schools have the affirmative duty to take whatever steps might be necessary to convert to a unitary system in which racial discrimination would be eliminated root and branch."[56] If the school board failed in this duty, federal courts had authority to issue whatever order necessary to achieve immediate desegregation. This decision, one of the last of the Warren Court, illustrated that fourteen years after *Brown*, the Court had begun to directly address the process of desegregation.

During the period in which *Rodriguez* progressed from the district court to the Supreme Court, the Court become increasingly involved with desegregation. In 1969 the Burger Court delivered its first civil rights decision, *Alexander v. Holmes County Board of Education*. It established its commitment to the enforcement of desegregation.[57] The majority dismissed the "all deliberate speed" formula of *Brown* as a legitimate basis for desegregation plans: "the all deliberate speed formula has been abandoned.....The obligation of every school district is to desegregate at once...and immediately to operate as unitary school systems."[58] Thus, the Court expressed its commitment to the desegregation process to achieve the objectives of *Brown* and thereby had to determine

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[54] 377 U.S. 218 (1964).
[55] This case challenged the actions of a Virginia county which closed down its school system rather than desegregate. In addition to this expressed desire by the Court to increase the pace of desegregation, the Civil Rights Act of 1964 authorised the Justice Department to either sue or join private suits against still segregated school districts.
[56] 391 U.S. 430 (1968).
[57] 396 U.S. 1 (1969).
[58] *Ibid.*

the constitutionality of the methods used for desegregation, the most controversial of which was busing. In *Swann v. Charlotte Mecklenburg Board of Education* (1971), the Court upheld the constitutionality of busing as a means of achieving "the greatest possible degree of actual desegregation."[59] It acknowledged the inherent difficulties of busing, yet stated it was a necessary remedy:

> All things being equal.....it might well be desirable to assign pupils to schools nearest their homes. But all things are not equal in a system that has been deliberately constructed and maintained to enforce racial segregation. The remedy for such segregation may be administratively awkward, inconvenient,...and may impose burdens on some, but all awkwardness and inconvenience cannot be avoided in the interim period when remedial adjustments are being made to eliminate the dual school systems.[60]

As a result of *Swann*, the Court became embroiled in the busing controversy. The goals of the early civil rights movement, and of *Brown* were no longer shared by all. Instead, the loss of white sympathy and of King's charismatic leadership precipitated, in part, the fragmentation of the movement during the late 1960s. The desirability of integration was now increasingly questioned amongst blacks and whites alike. As a result, the Supreme Court's decision to uphold busing as a constitutional method of desegregation created an area of growing political controversy for the Court.

Swann was the subject of much criticism. Alexander Bickel, the eminent Yale law professor, for example, criticised the Court's decision as detracting from the central theme of *Brown*:

> We do not want to spend resources transporting children, when we would be better served teaching them to read.....No one is certain that integration is worth the cost. Therefore, we should proceed with education. Another element in *Brown* was the Supreme Court's concern not with race relations in general, but specifically with education in general.[61]

According to Bickel, therefore, forced integration detracted from the achievement of equal educational opportunity that lay at the heart of *Brown.* In Bickel's view, racial equality

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[59] 402 U.S. 1 (1971).
[60] 402 U.S. 1, at 5.
[61] Alexander Bickel, "Untangling the Busing Snarl", *New Republic,* 23rd September 1971.

was only one element of *Brown,* equal educational opportunity provided the philosophical foundation for the decision. He argued that the improvement of quality of education was central to *Brown*, and busing conflicted with this target.

Nixon shared this view. A year before *Swann* was handed down, Nixon issued a public statement in which he criticised the principles of busing. He stated:

> Freedom has two essential elements: the right to choose and the ability to choose. The right to move out of a mid-city slum, for example, means little without the means of doing so.....Similarly an "open" society is one of open choice- and one in which the individual has the mobility to take advantage of those choices....We cannot be free, and at the same time be required to fit our lives into prescribed places on a racial grid-whether segregated or integrated.[62]

Although this statement did not specifically mention busing, it indicated Nixon's dislike of forced integration. The rendering of *Swann* in April 1971, raised the profile of busing, making it an urgent national issue. According to Leonard Garment, Counsel to the President in the Nixon Adminstration: "busing went critical in the fall of 1971."[63] As a result, busing became a central issue in the election year of 1972. On 17th March 1972, Nixon clarified his earlier position with a clear statement against busing: "I am opposed to busing for the purposes of achieving racial balance in our schools. I have spoken out against busing scores of times over many years. And I believe most Americans- white and black- share that view. But what we need now is not just speaking out against more busing, we need action to stop it."[64] Busing was in conflict with Nixon's primary political objectives. It expanded the role of the federal government at a time in which Nixon sought to decrease its role. It also eliminated parental choice of schools, depriving individuals of decision-making power regarding their child's education. It favoured minorities over "Middle America" and thereby antagonised elements of the new Republican coalition.

Busing, therefore, was an important issue in the 1972 election campaign. The candidacy of George Wallace ensured that the remedies for segregation remained high on the political agenda. Wallace's anti-establishment platform included an attack on the Supreme Court: "The judges...have just about ruined this country....And the people

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[62] As quoted in Theodore H. White, *The Making of The President 1972,* (New York, 1973), p. 240.
[63] *Ibid.*, p. 241.
[64] *Ibid.,* p.242.

didn't elect them either, like they did me."[65] His extreme anti-busing message formed a central component of his platform, and, according to Theodore White, inflamed his audiences: "This senseless business of trifling with the health and safety of your child, regardless of his color, by busing him across state lines, and city lines and....into kingdom come-has got to go! This was social scheming imposed by anthropologists, zoologists and sociologists...the 'common people' should come together and say, 'Mr Nixon, our children are precious to us, and we want to stop this busing.'"[66] George McGovern, the Democratic candidate, however, supported busing: "All my political life I have fought for the principle of integrated schools.....and I will not change that position regardless of the political cost."[67] George Wallace's victory at the Michigan Democratic primary illustrated its importance to the 1972 presidential campaign. The subsequent assassination attempt on Wallace, which removed him from the campaign, cleared the path for Nixon to attract the vote of many Wallace supporters. The candidacy of the George McGovern, in contrast, consolidated the partisan realignment that had begun in the 1968 election: "he personified all of the forces that were the anathema to interests and ideals of middle income classes."[68] Nixon's subsequent landslide victory indicated that his anti-busing, New Federalism platform reflected the predominant national mood and McGovern's liberalism held little electoral appeal. The busing controversy during the election campaign raised the profile of the significance of Supreme Court decisions. The Court had been the subject of political debate during the "Law and Order" Republican campaign of 1968, and the high political prominence of the Court continued in the 1972 campaign. Thus, the judicially engineered solution of busing was a high profile national issue.

The busing controversy raised a number of important issues that affected *Rodriguez*. On one level, it brought the decisions of the Supreme Court under increased scrutiny, and raised questions regarding the desirability of judicial involvement in education. In addition, it challenged recent definitions of equal educational opportunity and questioned the elements required for the achievement of these aims. School finance reform was one of "two great battles looking to equalise educational opportunity."[69]

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[65] *Ibid.*, p. 95.
[66] *Ibid.*, p. 89.
[67] *Ibid.*, p. 95.
[68] Steve Fraser and Gary Gerstle (Eds), *The Rise and Fall of the New Deal Order 1930-1980,* (Princeton, 1989), p.262.
[69] Francis Overlan, "Schools and Taxes", *New Republic,* 12th October 1972.

Integration and school finance reform shared the same ultimate objective of equal educational opportunity, yet both issues invoked different methods to achieve their cause. Opponents of busing, such as Alexander Bickel and Charles V. Hamilton, the Black Power advocate and Columbia political science professor, suggested that the improvement of the quality of education was the key to the realisation of equal educational opportunity. Thus, instead of spending resources transporting children, the same resources should be invested in the schools, thereby improving the quality of education.[70]

The increasing importance of school finance as a political issue was, in part, a reflection of the condition of minority education. The standard of minority education, with significantly lower rates of financial expenditure, was a matter of national concern and was a prime concern of activists. In March 1972, for example, Senator Walter Mondale of Minnesota commented that: "For nearly two years, I have served as Chairman of the Select Committee on Equal Educational Opportunity in the Senate. It has been a painful two years and I am left with a deep conviction that American education is failing children who are black, brown or simply poor."[71] This finding was confirmed by the U.S Commission of Civil Rights (USCCR) in its findings on the state of Mexican American Education in the South West: "The ultimate test of a school system's effectiveness is the performance of its students. Under that test, our schools are failing."[72]

The increasing national importance of school finance was a reflection of its high profile at the state level. As a result, Nixon's pledge in his 1972 State of the Union Address to "resolve one of the crucial questions: how best to finance schools" reflected the necessity for action.[73] The subsequent presidential report on school finance in March 1972 gave the federal government a starting point for action. The report, entitled "Schools, People and Money", stated: "The system which has served our people so long and so well is today in serious trouble, and if we fail to recognize it, our country's chance to survive will all but disappear."[74] Its recommendations were numerous, suggesting

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[70] This criticism, however, overlooked the implication of a successful busing policy. If an equal mix of races is achieved, a more equalized funding level will soon follow. Busing, therefore, in the long term, would also improve educational resources.

[71] Walter Mondale, "Busing in Perspective", *New Republic,* 4th March 1972, p. 17.

[72] For further detail of these reports, see Chapter One, p. 48.

[73] Richard Nixon, State of Union Address, 20th January 1972.

[74] Neil McElroy,Submission Letter, "Schools, People and Money: The Need For Educational Reform", *The Presidential Commission on School Finance,* p. 2.

increased state control of educational funding, which would "have an effect on virtually all the people of this country- be they taxpayers, parents, students or government officials. We do not doubt that these reforms will be controversial and debated." [75] However, any controversy that resulted from its findings would increase the prospects for school finance reform: "If they can productively contribute to a national dialogue on one of the most pressing problems of the day, this Commission will have served its purpose."[76] This report, therefore, recognised the urgent need for substantial action.

The final reason for the increased political importance of school finance was its connection to the property tax that had become a political issue in its own right. Dissatisfaction with the property tax existed independently of its centrality to school finance. The *New York Times* reported in 1971 that the property tax was considered to be "unfair, regressive and inadequate" which puts a "bigger burden on the poor."[77] Reforms of the property tax "have been urged in studies dating back to the nineteenth century."[78] This view was shared by a *Newsweek* poll that found "78% of respondents believe the property tax to be the least fair tax in America."[79] As a result of this view, M.A.Farber of the *New York Times* commented: "The overwhelming reliance on property taxes so basically hinged to school financing today is regressive, anachronistic, and resting in inequality. The present system....cheats students and taxpayers alike."[80] The inequality of the tax derived from the discrepancy between the proportional contributions of the rich and poor: "those with an income of $2000 pay approximately 7% of income in property tax, whereas those with an income over $15000, pay approximately 3.4% of income in property tax."[81] The limitations of the property tax as a system of finance acquired additional significance during the "Year of the Crunch" of 1971. During that year, educational boards of major cities imposed drastic educational cuts. For example, Baltimore slashed book purchases, overtime and field trips, Los Angeles dismissed 400 janitors and ordered those that remained to sweep every other day, and New York City

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[75] "We recommend that each state assume responsibility for determining and raising on a statewide basis the amount of funds required for education, for the allocation of these school funds among the school districts of the state."*Ibid.*, p. 4.
[76] *Ibid.*, p. 4.
[77] Robert Cassidy, "The Problem with Property Taxes", *New York Times,* Tuesday 15th May 1971, p. 3.
[78] *Ibid.*
[79] "How to Cut Property Taxes", *Newsweek*, 27th August 1972, p. 5.
[80] M.A.Farber, "Budget Crisis Spurs Reappraisal of Basic Goals", *New York Times,* 10th January 1972.
[81] *Ibid.*, p. 2.

cut $75 million in expenses. Public schools in Ohio, Michigan and Pennsylvania were all threatened with closure due to a lack of funding.[82] The reason for the funding derived from the escalating costs of education that the finance system of most states could not meet. Increasingly, alternative sources of funding were sought which prompted a re-examination of the school finance structure. The increasing number of educational cutbacks revealed the weakness of the property tax as a source of educational funding.

Thus, the debate over busing, the growing dissatisfaction with the property tax, the continuing inadequacy of minority education and the growing desire to reduce the role of the federal government provided the contextual framework for *Rodriguez.* The plaintiffs' case reflected the continued desire for equal educational opportunity, yet it challenged an increasingly controversial finance system that was a matter of national concern. The inadequacies of the finance system had become increasingly apparent, and the abundance of reports coupled with political rhetoric indicated that the problem was now a subject for political debate. The plaintiffs in *Rodriguez* sought a constitutional ruling in order to compel legislative action to deal with the nationally recognised problem. Plaintiffs asked the federal judiciary to provide the constitutional justification for the reform of the school finance system at a time in which busing already disrupted the educational system in some areas. Thus, the desire to eliminate racial and class discrimination provided the original impetus for the case and thereby aligned it with broader trends in the civil rights movement in 1968. As the case progressed, however, the issues involved in *Rodriguez* became more complex and became part of the political agenda in their own right. Thus, *Rodriguez* continued to reflect the broader political environment and contained issues of growing political volatility.

The constitutional framework of *Rodriguez* emerged from Warren Court precedents and recent legal scholarship, and also constituted an important element of the case. Litigation against a different area of discrimination required the formulation of a distinctive constitutional argument. The constitutional argument represented the tools by which lawyers could fight socio-economic discrimination in education. The significance of *Rodriguez* in Constitutional law derived from the Court's response to the claims that wealth was a suspect classification and education was a fundamental interest.[83] The legal

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[82] "Year of the Crunch", *New York Times,* 12th January 1972, p. 1-E.

[83] A suspect classification is a classification that is deemed to violate constitutional guarantees. A fundamental interest is one that is explicitly or implicitly guaranteed within the Constitution.

strategy expanded upon concepts that had been key to the "egalitarian revolution" of the Warren Court. Thus, just as the ideological basis for *Rodriguez* emerged from the developments in the civil rights movement of the 1960s, the legal arguments also emerged from the developments in constitutional law of the 1950s and 1960s. The Court's subsequent finding that wealth was not a suspect classification, nor education a fundamental interest, effectively ended one chapter of Constitutional law which had begun during the Warren Court. The employment of the notions of fundamental rights and suspect classifications had enabled the Warren Court to emphasis personal rather than property rights and to expand the Bill of Rights guarantees through the equal protection clause of the Fourteenth Amendment.

The basis for the legal analysis stemmed from Justice Harlan Fiske Stone's Footnote Four of *U.S v. Carolene Products Co.,* in which he stated: "prejudice against discrete and insular minorities may be a special condition....which may call for a correspondingly more searching judicial inquiry."[84] Discrete minorities were permanent minorities; groups permanently excluded from the democratic political process and thereby worthy of special constitutional protection. This judicial inquiry would be "more searching" than that employed when the rights of a discrete minority were not at stake. A suspect classification infringed upon the rights of a discrete minority. The notion of two standards of judicial inquiry was further expanded in 1944 in *Korematsu v. U.S.,* in which the Court stated: "All legal restrictions which curtail the civil rights of a single racial group are immediately suspect....Courts must subject them to the most rigid scrutiny."[85] As a result of these findings, the Court gradually developed two standards of equal protection analysis. The first standard, strict scrutiny, was employed when a suspect classification or a fundamental right had been affected. A fundamental right was one which the Court deemed to be implicitly or explicitly guaranteed within the Constitution. Under the strict scrutiny test, the state must establish that a "compelling interest" must exist for the law under examination. This standard transferred the burden of proof to the state and resulted in the overturning of the law. If no fundamental interest or suspect classification existed, however, the Court employed the "rational basis" test, in which the state must simply

[84] 304 U.S. 144, 152, n.4 (1938).
[85] 323 U.S. 283 (1944).

prove that there is a rational basis for the law. Under this test, the proof of burden remained with the plaintiffs and resulted in the upholding of the law.

The Warren Court, through these standards, extended the scope and guarantees of the equal protection clause of the Fourteenth Amendment: "The Warren Court did more than merely apply the Bill of Rights to states: it also broadened the substantive content of the rights guaranteed, giving virtually all personal rights a wider meaning than they had therefore in American law."[86] The Court extended the list of fundamental rights to include the right to travel[87], the right to vote[88], the right of access to the judicial process.[89] The Court's finding for the Constitutional right of privacy in *Griswold v. Connecticut,* however, served as the most vivid example of the Warren Court's emphasis upon individual rights and expansive use of the equal protection clause.[90] In this decision, the Court declared the right to privacy to be fundamental, and thereby struck down a state law prohibiting doctors from prescribing contraceptives.[91] Thus, the Court declared that the right to privacy warranted constitutional protection in light of its relation to the First Amendment rights, and was thereby included in the Bill of Rights. At the time of its consideration of *Rodriguez*, the Burger Court had demonstrated its willingness to enforce the rights deemed fundamental by the Warren Court. The most notable example was *Roe v. Wade,* in which the Court used the right of privacy as the legal basis for finding abortion constitutional.[92] The legal analysis in *Rodriguez* combined Warren Court precedents with recent legal scholarship. The plaintiffs sought a ruling based upon the notion that education was an implicit constitutional right and classifications according to wealth infringed upon the rights of a discrete minority. According to the plaintiffs, therefore, the poor were a discrete minority and thereby warranted special constitutional protection. They implied that the Court should expand the coverage of the equal protection clause in matters of race and wealth as it had done with regard to privacy in *Griswold* and *Roe.* The poor would become a separate constitutional category and the

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[86] Bernard Schwartz, *A History of the Supreme Court,* (New York, 1993), p. 282.
[87] *Heart of Atlanta Motel v. United States*, 379 U.S. 241 (1964).
[88] *Reynolds v. Sims*, 377 U.S. 533 (1964).
[89] *Gideon v. Wainright*, 372 U.S. 335 (1962).
[90] *Griswold v. Connecticut*, 381 U.S. 479 (1965).
[91] Justice William O. Douglas declared: "The First Amendment has a penumbra where privacy is protected from government intrusion."
[92] 410 U.S. 113 (1973).

Constitution would, in effect, acknowledge the existence of class within American society.

However, by applying to the federal judiciary for redress, the suit challenged fundamental features of federalism. First, it brought another controversial political issue to the Supreme Court. If the Supreme Court upheld the plaintiffs' case, it would become involved in yet another area of controversy, and its second concerning education. Thus, institutional considerations regarding the potential consequences of further involvement provided an additional context for the decision. Second, plaintiffs sought federal government involvement into an area of state and local control, which would further undermine key federalist principles. National uniformity would detract from ideals of experimentation and variety which were key to the federal philosophy. This was particularly important in education, in which local control was considered to be a critical element of the educational structure. Increased federal intrusion into the daily lives of citizens was in conflict with the ideological objectives of the new administration, but this did not have a direct bearing on the Court's decision. The size of the local role in education had been reduced during the 1960s, thereby increasing the significance of state control. The Court upheld the right of the state to choose localism as the central component of the educational system.

The new personnel of the Court added a further dimension to the context of *Rodriguez.* The Nixon appointees were chosen for their general adherence to the broad principles of judicial restraint and strict constitutional construction.[93] These two judicial principles were commonly associated with political conservatism, as the liberal decisions of the Warren Court were founded upon the judicial principles of activism and broad construction.[94] The four new appointees were chosen for their political conservatism. Thus, judicial restraint was considered at this point to be the standard of a conservative

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[93] Judicial restraint in this context "consciously reduces the role to be played by the judiciary in the settlement of disputes." Richard Hodder Williams, "Litigation and Political Action", *Explaining American Politics,* Robert Williams (ed.), (London, 1990), p. 132. According to this theory, the Court is not the correct forum in which certain disputes should be settled and defer instead to the political process. Strict construction is defined as "a close or rigid reading and interpretation of a law." *Blacks Law Dictionary,* (New York, Abridged 6th Edition), p. 991. According to this definition, the guarantees of the Constitution are explicitly stated within its wording. This definition is opposite to broad construction, in which the guarantees of the Constitution are implicit and can be interpreted accordingly.

[94] "By the late 1960s the liberals were the judicial activists and the conservatives the exponents of judicial restraint." Tim Hames, *Governing America*, (Manchester, 1996), p. 136.

court and the new Nixon appointees were considered to be judicially as well as politically conservative.[95]

The changed personnel of the Supreme Court was also marked by developments in constitutional scholarship. *Rodriguez* occurred in the midst of academic developments which shaped interpretations of Court decisions and provided an additional academic context to the decision. The developments centred on the factors involved in Supreme Court decision making and the political nature of decisions. The basic debate focused on the political nature of judicial decisions and whether justices made decisions on the basis of legal interpretation or personal political preferences. According to traditional judicial theory, a strict construction of the Constitution considered the original intent of the framers and did not take into account to personal political preferences of the justices. To this degree, therefore, decisions considered to be strict interpretations of the Constitution were solely legal, not political decisions. However, many of the Warren Court decisions were premised upon broad interpretations of the Constitution and therefore modes of constitutional interpretation moved away from simply a consideration of the original intent of the framers. Increasingly, therefore, justices interpreted the Constitution in accordance with contemporary realities.

At the time of *Rodriguez*, the limitations of the strict intent interpretation were becoming clear. The Court's increasing involvement with contemporary social issues necessitated a move away from the original intent interpretation of the Constitution. The changed Court agenda, precipitated by the issues of contemporary society, raised the larger question of whether eighteenth century intent was applicable to late twentieth century society. Although constitutional interpretation according to the original intent of the framers may be in accordance with democratic principles, the ideals it protects may

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[95] The broad categorisation of "liberal" and "conservative" ignores the complexity of judicial decisions. The distinction between process and substantive liberalism or conservatism, therefore, must be emphasised. Process liberalism and conservatism refers to the methods in which justices decide cases. Process liberalism is active decision making: balancing competing interests and an "intellectual disinterestednes in the analysis of the factors involved in issues that called for decision." Process conservatism, however, is passive decision-making, adherence to broader political ideas which lends itself to a "results orientated" approach to law. Substantive liberalism and conservatism, on the other hand, refers to the consequences of particular decisions and the degree of social or political change that occurs as a result. Substantive liberalism, then, overturns governmental legislation and precipitates a significant degree of change. However, the nature of the legislation overturned determines whether substantive liberalism is aligned with political liberalism. Thus, substantive and process liberalism can be associated with political conservatism and vice versa. The classification of Nixon appointees as judicially conservative in this dissertation refers, therefore, to their adherence to principles of judicial restraint and strict constructionism rather than process or substantive conservatism.

conflict with contemporary notions of social or political justice. Increasingly, therefore, scholars recognised that personal preferences of the justices factored in the decision making process, and that, if the decisions supported democratic ideals, this also was compatible with democratic theory. However, this recognition also forced the acknowledgement of the Court as an inherently political, as well as legal, institution. At the time of *Rodriguez*, therefore, the increasingly prominent political role of the Court was being debated. The Court's growing involvement in social policy precipitated debate regarding the appropriate political role of the Court. The justices strove to strike the correct balance between the elements of legal principles and political preferences, in attempt to reconcile constitutional interpretation and political preferences with broader political and social issues. At the time of *Rodriguez*, institutional considerations regarding the increasing politicised role of the Supreme Court, provided an important context to the decision making process. However, the recognition that the decisions were based upon political, as well as legal, considerations emphasised the importance of understanding the political context in *Rodriguez*. The justices' own political beliefs, and the developments in the broader political environment, affected the outcome in *Rodriguez.*

The Court's decision demonstrated that its increasing political conservatism was apparent but not yet dominant. *Roe v. Wade*, decided in the same term as *Rodriguez,* provided a clear example of a controversial "liberal" decision reached by a predominately conservative Court. The Burger Court, in *Roe*, reached a controversial decision that placed the Supreme Court at the centre of another area of public concern. *Roe* also demonstrated the Court's capacity to employ an expansive reading of Constitutional guarantees. In June 1972 the Court had also declared the current practise of capital punishment to be unconstitutional in *Furman v. Georgia.*[96] Thus, *Roe* was the second decision rendered on a socially divisive issue, and both decisions extended federal power into new areas. A primary restraint upon the power of the Supreme Court is the necessity to stay within the broad spectrum of public approval. *Rodriguez* occurred at a time when the degree of public support for the Court was on the decline, and further decline had profound institutional considerations. Thus, fundamental political considerations, such as the role of the Court in the political process, also factored in the decision making process. The widespread support for judicial restraint and smaller government, and the judicial

[96] 408 U.S. 238 (1972).

conservatism of the Court majority was insufficient justification for the final decision. Localism, consideration of the federal balance, and increasing adherence to judicial restraint were important elements, but did not adequately account for the ultimate rejection of the plaintiffs' arguments. Instead, race and class, the additional elements of the case, provide the key to both the impetus for and the reasons for the eventual outcome.

The case represented the continued application of litigation as a tool to precipitate political action. The civil rights movement had begun in the courts, with the litigation that culminated in *Brown* in 1954. Thus, after the demise of the mass activist movement, litigation once again provided the principal means to advance civil rights claims. As a result, the emphasis upon economic equality now translated into a new area of legal claims. In 1968, King acknowledged that the civil rights movement was "approaching an area where the voice of the Constitution is not clear."[97] *Rodriguez* clarified the constitutional voice in the area of economic equality in education, determining that it did not warrant constitutional protection. School finance litigation was premised upon the notion that poor children were constitutionally entitled to an equal standard of education as rich children. The right to economic equality and the realisation of equality of opportunity provided the ideological basis for the plaintiffs' claims. This degree of equality conflicted with another central tenet of American philosophy: the principle of individualism.

Seeking equality within American society constitutes one of the central themes of American history. According to Eric Foner, "No one can think seriously about the American past without confronting the ideal of equality."[98] However, at the heart of the continued quest for equality lies an inherent contradiction. American society is also dedicated to principles of individualism. Thus, the achievement of equality is sought within an essentially individualistic society. According to J.R. Pole, "America wanted a society run on equal principles without wanting a society of equals."[99] The dedication to individualism makes the achievement of substantial equality, or equality of outcomes, impossible. Instead, the principles of equality and individualism must be balanced in order to accommodate both ideals. The notion of equality of opportunity balances both ideals:

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[97] Martin Luther King, *op.cit.,* preface, p. x.
[98] Eric Foner, Preface of *The Pursuit of Equality of American History* by J.R. Pole, (Oxford, 1978), p. x.
[99] J.R. Pole, *Ibid.* p. 132.

it seeks to create a society in which each individual has an equal chance to succeed. According to the *Rodriguez* plaintiffs, they sought to expand the notion of equality of opportunity further: a more equitable system of education would give poor children an equal chance to succeed as those of the rich children. According to the defendants, however, plaintiffs' demands extended beyond equality of opportunity and infringed upon economic equality, or equality of outcomes. These demands infringed upon the notion of individualism.

The plaintiffs in *Rodriguez,* seeking to advance the constitutional principles of equality, instead elicited an opinion which defined its limitations. The level of equality sought by the plaintiffs, in the view of the majority, clashed with principles of individualism. According to Jonathon Kozol; "the contest between liberty and equality in education has been translated between competing claims of local control on the one hand and federal intervention on the other."[100] The plaintiffs sought to equalise the benefits of an individualistic society, and sought a constitutional recognition that inherent discrimination against the poor existed within American society. According to the plaintiffs, class discrimination was an inherent feature of the educational finance system. The children of the poor were not given the opportunity of an equal start in life, and therefore would perpetuate the cycle of poverty. The "American Dream" with its meritocratic notions of self-improvement through personal ability had, according to the plaintiffs, ceased to be a realistic dream for many at the bottom of U.S. society. Federalism provided the rational basis for the finance system, but the political principles of federalism are premised upon the protection of the individual states against the excesses of federal government. Thus, individualism lay at the heart of federalism. Adherence to individualism, therefore, prevented the advancement of equality.

An analysis of *Rodriguez*, therefore, is an analysis of many fundamental themes and issues of American History. Dominant themes of American ideology as embodied in the Constitution provided the foundation for the arguments on both sides, and the surrounding political context provided the framework. This is not to suggest that the Supreme Court deliberately acted in accord with the philosophy of the Nixon Administration. Instead, the same ideals and concerns which resulted in Nixon's domestic policies influenced the majority opinion in *Rodriguez.* Both the Court and the President

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[100] Jonathon Kozol, *op.cit.* p.212.

were reacting to the civil rights movement in similar ways but from different perspectives. *Rodriguez* arose from its time; it encapsulated the primary political and ideological trends of the period. It represented the continued attempt by minorities to attain equality. It also, however, illustrated the increasing complexity of the goals of the movement. No longer was racial discrimination identifiable through its presence in the law books. Activists now challenged the fundamental structure of American society and, by implication, principles central to American ideology. The political environment provided the context for the case, but individuals also shaped *Rodriguez*, particularly the lawyers and justices. Ultimately, however, *Rodriguez*, and those involved in it, were products of the time. To ignore the context in which *Rodriguez* was decided would be to overlook factors that influenced its preparation, journey through the courts, eventual outcome and its impact on American society.

As *Rodriguez* is illuminated by the times so, too, *Rodriguez* allows us to understand the attitudes and clashing beliefs of those times. As there was no argument over matters of fact, the case embodies and reflects the political philosophies of the time. The forces of race, class and federalism were being redefined at this time, and all three elements were present in *Rodriguez.* The changes to these forces provided both the context for, and the content of the case. An examination of *Rodriguez* provides an insight into the way in which these forces were changing and the manner in which society reacted to these changes. It therefore clarifies competing attitudes of race, class and federalism in the late 1960s and early 1970s United States.

CHAPTER ONE:

The foundation of *San Antonio Independent School District v. Rodriguez* within the San Antonio community.

On Thursday 17th May 1968, approximately 400 students staged a walkout at Edgewood High School in San Antonio, in protest of the inadequate quality of teaching and facilities.[1] Students held placards which read "Everyone in America deserves a good education", and "better library, better education, better schools- we want an equal education."[2] The students, who were joined by parents and local community activists, converged on the Edgewood School District office and delivered a list of demands.[3] The demands ranged from the appointment of more qualified teachers and a higher level of academic courses and teaching facilities, to sufficient restroom supplies and more disciplined policing of buildings and grounds.[4] Willie Velasquez, a local political activist and the state co-ordinator of *La Raza Unida,* told reporters, "If the demands are not met, the students should not return to school."[5] The local newspaper reported an absence rate as high as 80% of the student body, although the school principal, Bernie Steinhauser, denied this figure.[6] Eventually, the crowd dispersed. The student absentee rate for the next day was 50%. By Monday 20th May, however, all students had returned to classes, even though no demands had been met. Instead, according to the Junior Class President James Castano, the demonstration finished because "Our parents have been pressured and threatened... and we have been labelled rabble rousers for doing what we think is right."[7]

The high school demonstration illustrated the growing dissatisfaction with the condition of the local schools. Students, parents and local community activists joined together to protest both the physical condition and educational standards present in the neighbourhood. The demonstration was the product of a heightened level of concern and precipitated a new wave of activism within the San Antonio community. The foundation of the Concerned Parents Association (CPA) was a manifestation of the increased level of activism. The CPA was founded to ensure the effective representation of parental views and concerns within the local community. The fifteen original members of the CPA included the

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[1] There is some discrepancy over actual numbers. Contemporary press estimates range between 300 and 400. *San Antonio Express* estimated 300, whereas the *San Antonio Light*, traditionally more sympathetic to Mexican Americans, estimated 400. Accounts published over 20 years later, estimated 600 students participated. See "Miracle on 34th Street; the Battle for Equal Funding" in *Edgewood News* Special Edition, November 1989.
[2] *Ibid.*
[3] The community activists who joined the students were Willie Velasquez and Father Casso.
[4] Doris Wright, "Edgewood Students Protest", *San Antonio Express,* Friday 17th May 1968.
[5] *Ibid.,* p. 1. *La Raza Unida* was a Mexican American political organisation, dedicated to further the political involvement of Mexican Americans and to increase the level of equality within society.
[6] Steinhauser reported only 100 students to be absent from afternoon classes. For further information, see Ron White, "Curbstone Class at Edgewood", *San Antonio Light*, Friday 17th May 1968.
[7] "Miracle on 34th Street; The Battle for Equal Funding", Special Edition of *Edgewood News,* November 1989, p. 1.

parents of Castano and Demetrio Rodriguez, a sheet metal worker at Kelly Air Force Base in San Antonio. Twelve of the fifteen original members of the CPA became plaintiffs in a legal suit that challenged the constitutionality of the school finance system for the state of Texas, and thus, by implication, the finance system for 48 additional states.

The original objective of the CPA was to pressure the local school board into appropriating more funds for Edgewood school district. The local school board, according to CPA members, was the primary reason for the lack of adequate funding.[8] The superintendent, a non-hispanic white, discriminated against the Mexican American district of Edgewood by allocating significantly more funds to Anglo districts. Through consistent pressure, the CPA hoped to alter this trend gradually and achieve equal funding between districts. However, soon after their formation, Willie Velasquez approached the group. He asked whether the members would be willing to speak to a local lawyer, Arthur Gochman, in order to obtain a different analysis of the funding problem. The parents agreed, and the first meeting occurred on 12th June 1968.

The meeting between the CPA and Arthur Gochman shifted the focus of the complaints away from the inadequacies of the local school board towards the entire Texan system of school finance. According to Gochman, the parents "came to my office to discuss the problem as they perceived it. They said that the school board was stealing money, especially on construction contracts. They looked at school buildings in other parts of the city and saw the differences in construction and maintenance."[9] Gochman, in response to these claims, explained the finance system, not the local school board, was responsible for the financial inequalities. One month later, on 15th July 1968, plaintiffs filed suit, starting the case *Rodriguez v. San Antonio Independent School District*.[10]

The filing of the suit signalled the turning point in the fight for educational equality among Mexican Americans, and therefore among all politically weak minorities. Until 1968, the litigation strategies of the Mexican American civil rights movement focused upon the elimination of *de jure* segregation.[11] During the previous three decades, grass roots political organisations, not lawyers, had fought against the inferior conditions of the local schools. Activism had been predominately local. The rise of the Chicano movement throughout the

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[8] *Ibid.*, p. 1.
[9] Interview with author, 10th December 1998.
[10] 337 F. Supp. 280.
[11] For an account of the legal struggle for desegregation in Texas, see Guadalupe San Miguel, *Let All of the Them Take Heed: Mexican Americans and the Quest for Equal Educational Opportunity in Texas 1918-1981* (Austin, 1987).

South West, however, illustrated the heightened political consciousness evident in Mexican American areas.[12] San Antonio reflected these broader political changes. Increased dissatisfaction existed with the traditional politics of accommodation, as the high school demonstration illustrated. The demonstration signalled a growing impatience with the lack of substantive political action and a desire to improve the level of equality present within San Antonio. The suit, therefore, applied a different tactic to a continuing battle.

The first element of the complaint was the differences between the standard of education in the predominately white districts and that of the Mexican American districts. Students in Edgewood complained of the "indifference on the part of the teachers and the inadequate physical plant", which included outdated textbooks passed on from the predominately white schools and no gymnasium facilities. The quality of teaching staff constituted the second element of the protest: "We had a lot of problems in that school, teaching problems and disciplinary problems; they didn't care what the kids were doing."[13] Approximately half of the teachers were not certified and possessed only emergency certificates. The final element of the complaint was the dangerous and dirty conditions which created an unsafe environment for all, not only children. The high school students, for example, demanded "the extermination of mice, rats, roaches, all crawling and flying insects; repair and installation of stair rails, fumigation of shower curtains and shower rooms, replacement of broken windows and installations of fire extinguishers."[14] The condition of the elementary school was also of major concern: "The Elementary School was an old, two storey building which had been condemned. It had lots of bats, so they could only use the first floor. Sometime bricks would fall down." [15]

The paramount concern for parents was the effect of the inferior educational conditions on their children's futures: "A lot of people realized that their kids were not getting a good education, like the kids on the North Side of San Antonio were getting, where the Anglos lived."[16] There was also a central concern regarding the safety of their children:

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[12] The definition of the Chicano Movement, according to one Mexican American historian was "a loose coalition of highly ideological and militant organisations such as the Crusade for Justice, the Brown Berets, *La Raza Unida*, and student organisations throughout the South West. Drawing their insipiration from the passionate rhetoric of leaders such as Rodolfo "Corky" Gonzàlez, José Angel Guitierrez, and Reis Lopez Tijerina, they sought to liberate their people from what they characterized as an oppressive system." Benjamin Marquez, *LULAC, The Evolution of a Mexican American Political Organisation,* (Austin 1993), p. 65.

[13] Peter Irons, *The Courage of Their Convictions,* (New York, 1988), p. 298.

[14] Ron White, "School Chief insists it's classes as usual", *San Antonio Light,* Friday 17th May 1968, p. 1.

[15] Peter Irons, *op.cit.,* p. 298.

[16] *Ibid.,* p. 298.

"it wasn't good for our kids to be in that sort of building, it was in such bad shape."[17] The conditions of the schools, however, were congruous with the conditions of the surrounding neighbourhood. The predominately Mexican American area in the west side of San Antonio was an economically deprived, physically run down area, where they "didn't have any drainage and the streets were all dirt."[18]

Two reporters travelling through San Antonio in April 1968, two months before the filing of the case, had described the contrasting environments between the rich and poor areas. In the West Side they observed "unpaved, undrained streets, homes without water, rural shacks in an urban ghetto, [and a] high infant mortality rate."[19] In the northern part of the city, there existed "an excellent system of freeways, fine new library, convention center, hotels, cafes, restaurants, old buildings."[20] In 1968, almost half the population of San Antonio was Mexican Americans.[21] The west side of the city remained undeveloped despite of the growing economic prosperity of the new "sunbelt" city.[22] Kelly Air Force Base provided the main source of employment for the Mexican American community.[23] The establishment of the Air Force Base attracted a consistently high number of Mexican Americans immigrants to the low-income area of town, most notably during the 1940s. As a result, "from 1939 to 1949, Edgewood's school population increased from 1586 to over 6600 students."[24] According to a 1966 report, San Antonio was described as "a sort of labor manifold within which the currents of seasonal migrational farmworkers sort themselves out."[25] The report concluded: "San Antonio has the spongelike quality of poverty and the migrant labor market. It has a high capacity for absorbing those who earn the least and the most in American society. Like water sopping in a sponge, the Mexican American poor who

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[17] Demitrio Rodriguez, Interview with author, 11th September 1997.
[18] *Ibid.*
[19] Robert Coles and Harry Huge, "Thorns in the Yellow Rose of Texas", *New Republic*, 19th April 1968.
[20] *Ibid.*
[21] In 1970, Mexican Americans composed 44.1% of the San Antonio population, blacks were 7.6% and Anglos, 48.2%. By 1972, the Mexican Americans were the majority.
[22] The dichotomy between rich and poor districts acquired additional significance during 1968. San Antonio was the setting for the 1968 Hemisfair, and the previous year had won the "Cleanest City" award. Both of these events helped to promote San Antonio as a prospering new "sunbelt" city, and, it was hoped, would attract new tourism and additional investment to the city.
[23] "The economic growth of San Antonio has been promoted through tourism, defense and service industries which generate mainly low skilled and low paying jobs for local workers". David Johnson (ed.) *The Politics of San Antonio: Community, Progress and Power*, (Austin, 1983), p. 27.
[24] *Ibid.*, p. 143.
[25] Ernest Galazara, *Mexican Americans in the South West,* (Santa Barbara, 1966), p. 10.

commute across the continent to San Antonio disappear into the thousands of cells in the barrios."[26] Consequently, "the self segregation of poverty left its mark on the schools."[27]

The conditions of the schools in the Mexican American district had been a focus for activists since the 1930s. The most prominent and important reform attempt was the foundation of the *La Liga Pro Defensa Ecolar* (loosely, The School Improvement League) founded in 1934 by Eleuterio Escobar. Between 1934 and the dissolution of the organisation in 1956, there was " a persistent crusade to improve and expand educational facilities for thousands of Mexican American children in the West Side barrio of San Antonio."[28] In 1934, research findings illustrated the different conditions that existed between the Anglo and Mexican American schools.[29] There were 12,334 Mexican American school age children, compared with 12,224 Anglos. Despite the slightly smaller number of Anglo children, 28 schools with 368 rooms were available to them, compared with 11 schools with 269 rooms for the Mexican American children. In these schools, students numbered approximately 48 per class, compared to the Anglo average of 33. The research illustrated the difference in financial expenditures; the Anglo school district spent $35.96 per child, compared to $24.50 spent in the Mexican American districts. The report concluded, "So long as these conditions are permitted to continue, and so long as the San Antonio Board of Education continues to neglect to remedy the situation, just so long will the advancement of all school children of the said 11 western elementary school districts be retarded."[30] These 1934 research findings illustrated the length of time the condition of the schools had been a central concern of the local community. The influx of Mexican immigrants into the Edgewood district during the 1940s exacerbated the conditions: "in the 1947 school year, more than 700 additional pupils enrolled at a time when no additional classroom space was available. Faced with a lack of funds and a rapidly expanding student population, Edgewood placed 2400 pupils and 70 classrooms on half day sessions beginning in 1949."[31]

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[26] *Ibid.*, p. 10.
[27] *Ibid.*, p. 10.
[28] Mario T. Garcia, *Mexican Americans: Leadership, Ideology, Identity, 1930-1960*, (New Haven, 1989) p.53. The level of concern that existed in the local community was clearly demonstrated on October 24th 1934 when between 10,000-13,000 locals gathered to hear the proposal for alleviating the congestion of Mexican American schools. This meeting was the "largest ever held by Mexican Americans in San Antonio." At this meeting, a key member of the school board agreed that "There is no question about it that those West Side children are being deprived of an adequate education by our state schools and are victims of abuse and discrimination and those injustices should be corrected." *Ibid.*, p. 10.
[29] Research conducted by LULAC's Committee for Playgrounds and School Facilities. Quoted in Garcia, *op. cit.*, p. 66.
[30] Guadalupe San Miguel, *op. cit.*, p. 84.
[31] Johnson *et al.*, *op. cit.*, p. 143.

As a result, in 1951, a state legislative committee declared the conditions in Edgewood "the worst we have ever encountered in any school district in this county."[32] Thus the school finance suit employed new tactics to an old fight, which had remained of central importance to the San Antonio Mexican community, at least on several occasions, for over thirty years.

The aims and actions of the older generation of Mexican American activists, combined with the broader changes in the Southern based civil rights movement at the national level, determined the ideological framework of the suit. The rise of the mass activist civil rights movement, led by Martin Luther King, raised the consciousness and levels of activism of other minority movements. The changed objectives of the mass civil rights movement, developing from the fight for political equality to include class discrimination, were reflected in the aims of the San Antonio activists. The passage of the Voting Rights Act in 1965 accelerated the fight to end the last vestiges of political inequality. The objectives of the movement changed. Manifestations of class discrimination became the target for the second phase of the civil rights movement. The importance of education and the achievement of equality of educational opportunity were central to both the Southern-based civil rights movement and the Mexican American activism. The attitude of Demetrio Rodriguez towards education encapsulated this view: "Education is the only way we can get ahead. And not us Mexican Americans, but everyone. Everyone needs an education, and this country needs educated people to get ahead."[33] The belief in the importance of education for socio-economic advancement was a significant feature of the Mexican American political activism from its formative stages in the 1930s. The student demonstration employed new tactics to achieve established aims. Further, the establishment of the CPA in the aftermath of the student demonstration indicated the enduring presence of grass roots organisations in the fight for educational equality, continuing the tradition established by *La Liga Pro Defensa Escolar.*

From 1930s to the rise of the Chicano movement, the two organisations which spearheaded Mexican American political activism advocated education as the primary means of advancement.[34] The League of United Latin American Citizens (LULAC) and

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[32] There were fourteen school districts in Bexar County. *Ibid.,* p. 143.

[33] Interview with author, 11th September 1997.

[34] Other organisations included Mexican American Movement (MAM), Pan American Progressive Association (PAPA). However, none of the other organisations achieved the same influential status as LULAC or AGIF In LULAC's statement of philosophy it says "We believe that education is the foundation for the cultural growth and development of this nation and that we are obligated to protect and promote the education of our people in accordance with the best American principles and standards." Benjamin Marquez, *op. cit.,* p.32. Similarly, AGIF shared LULAC's faith in the importance of education, reflected by its motto of

American G.I. Forum (AGIF), the major Mexican American organisations, engaged in a joint litigation struggle against segregated schools. Both LULAC and AGIF used a variety of tactics to improve the condition of Mexican Americans; litigation was just one element of a broader programme of change. These organisations were at the heart of Mexican American activism until the late 1960s. The Mexican American campaign against segregation differed in two important ways to that of the black desegregation struggle. The first difference derived from the distinctive educational needs of Mexican Americans. The language barrier faced by many Mexican American children affected their educational performance. Thus, the necessity for greater English language education justified, according to some school officials, the segregation of Mexican American children. Furthermore, the legal status of Mexican Americans further distinguished the litigation attempts. At the start of the litigation in 1940s, Mexican Americans were not a legally identifiable racial category. They were not considered a distinct racial category by the Court until *Keyes v. School District Number One, Denver Colorado* in 1973.[35] Until then, Mexican Americans were classed as "other whites." Thus, the legal arguments differed from those employed by the NAACP in this same period.

The distinctiveness of the Mexican American desegregation campaign was apparent from the start. In April 1947 the Ninth Circuit Court upheld a decision in which the segregation of Mexican Americans in Los Angeles schools had been declared unconstitutional and "a violation of the equal protection of the laws."[36] This decision acted as a catalyst in the campaign against school segregation in Texas. The Attorney General of Texas, Price Daniel, issued statement in which the separation of Mexican children "based solely upon race" was forbidden. However, he then added "based solely on language deficiencies and other individual needs and aptitudes demonstrated by examination, a school district may maintain separate classes in separate buildings if necessary."[37] Thus, despite the legal victory in California, segregation remained legal in Texas, provided the rationale was educational needs, not racial distinctiveness. Furthermore, even though the state did not mandate racial segregation in education, patterns of *de facto* segregation in housing further compounded the extent of educational segregation. In order to address this situation, lawyers

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"Education is our Freedom." American G.I. Forum Pamphlet, Judge Albert Pena Collection, housed at the Institute of Texan Cultures, San Antonio Texas. Box 25, Folder 1. Hereafter cited as J.P.C.

[35] 413 U.S. 189 (1973).

[36] *Mendez v. Westminster School District,* 212 F.Supp 34 (1947).

[37] *Digest of the Opinions of Attorney General of Texas,* p.39. As quoted in Guadalupe San Miguel, *op.cit.*, p.120.

for LULAC filed a complaint in 1948 in which four educational officials were accused of unconstitutionally segregating Spanish speaking children. The District Court for central Texas in *Delgado v. Bastrop Independent School District* upheld the complaint and determined that the segregation of "students of Mexican ancestry was arbitrary, discriminatory and illegal."[38] However, it did uphold segregation in the first grade "solely for instructional purposes". This decision, therefore, provided the focus for Mexican American activists for most of the 1950s. LULAC activists made several appearances before the state board of education to protest against the resistance of school officials to desegregate, but significant progress, despite the court ruling, remained slow. In 1957, LULAC lawyers won their second victory in Texas, in which the district court of Western Texas invalidated the segregation of First Grade children for educational purposes. Thus, by the end of the 1950s, the segregation of Mexican Americans, for either racial or educational purposes, was unconstitutional. Although the practise of segregation had far from ended, the first stage in the fight to equalise education had been successful.

Mexican American culture supported the belief that a decent and, by implication, integrated education was the solution to the oppression suffered by Mexican Americans. Litigation was only one element of the attempts to improve the educational performance of Mexican Americans. Other elements focused upon the improvement of English language instruction for Mexican American children. The formation of the Little Schools of the 400 in Houston in 1958 was the most prominent example of this. This program was designed to teach 400 essential English words to pre-school children in order to improve their educational performance. Two years after the program had been operating on LULAC funds, Texas passed the Pre-school Instructional Act in 1960, which established a state sponsored, pre-school English language programme for all Mexican American children. Although the programme was eventually superseded by Headstart and state funding gradually declined, the act raised the profile of Mexican American education and illustrated the potential for state action.

The increased political activism of the 1960s presented a new challenge to the tactics and beliefs of the older organisations, a challenge which both LULAC and AGIF tried to resist.[39] The educated liberal elite of the Mexican American community served as its leaders

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[38] 241 F.Supp. 45 (1948).

[39] For example, in 1963, the National President of LULAC, Paul Andow, criticised the increased activism of the blacks in the Deep South; "We have not sought solutions to problems by marching to Washington, Sit-ins or picketing or other outward manifestations. We have always gone to the source of the problem and discussed

until the 1960s.[40] The rise of the Chicano Movement precipitated a change in the broader composition of the Mexican American leaders, who came increasingly from low income backgrounds, most notably Cesar Chavez in California and Rodolfo "Corky" Gonzàlez in Denver, Colorado. The rise of increased radicalism was closely connected to the increasing popularity of the Chicano Movement. The rising national profile of Chavez especially increased awareness of Mexican American problems. The heightened national attention and the rising consciousness amongst Mexican Americans resulted in more widespread activism. For example, the student walk out in San Antonio occurred two months after similar action had been taken in California. On 3rd March 1968, over 10,000 students staged a walk out in East Los Angeles, which was "the first time students of Mexican descent had marched *en masse* in their own demonstrations against racism and for educational change."[41] The Brown Berets were founded in East Los Angeles in the wake of this protest, which illustrated the emergence of a militant element within the movement.[42] The Chicano Movement desired a more fundamental structural change to alleviate the discrimination of Mexican Americans.

In San Antonio, the new leaders were still well educated, but reflected the increased radicalism of the Chicano movement. It was not the background of the leaders which had altered, but their age and ideological beliefs. For example, the involvement of Willie Velasquez in the student demonstration added credibility to the cause. Velasquez, who had already reached an influential position in San Antonio's Mexican American community in 1968, was 24. José Angel Guttierez, who spearheaded the rise of the more radical element in San Antonio, was also 24, and had received a college education.[43] The emergence of the radical element led to increased dissatisfaction with the traditional method for reform. Guttierez typified the attitude of the radical element in San Antonio: "when all the doors are closed shut like they have been for a long time, you get tired of knocking, and you kick

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it in a calm and collected manner.....Mass meetings and mass gatherings often lead to mass hysteria." Benjamin Marquez, *op. cit.*, p. 64.

[40] The middle class status of its leaders also contributed to its conservative ideology, which failed to confront the root causes of discrimination. Guadalupe San Miguel has criticised the apparent ineffectiveness of the organisations to achieve widespread change on the basis of its conservative ideology. However, it must be questioned the extent to which a more radical critique of society was viable for the basis of a popular organisation in the period 1930-1960.

[41] Juan Gomez Quinoes, *Youth, Identity, Power,* (Albuquerque, 1992), p. 65.

[42] This was a militant organisation, based upon the idea of the Black Panthers, which emphasised revolutionary nationalism and self defence.

[43] In 1968, Gutteriez graduated from St. Mary's College in San Antonio with a Masters Degree in Political Science.

down the door."[44] The new leaders also denounced those whom the Anglo community considered to be the spokesmen for Mexican Americans.[45] However, men educated to the tertiary level still constituted the leadership for the Mexican American community.

The rise of the Chicano Movement, which precipitated the decline of the influence of LULAC and AGIF, forced a tactical dilemma. Adherence to aims that were increasingly viewed as outdated precipitated a decline in membership. In 1951, LULAC had 10,700 members and in 1967, this figure had declined to 3,900.[46] The conservative methods and reform aims of these organisations were no longer in tune with the ideas prevalent within the community. The organisations also demonstrated they were resistant to change. For example, Vincente Ximenes, whom Johnson had appointed as Chairman of the Interagency Committee on Mexican American affairs one year before, delivered the keynote address at the AGIF Annual Conference in 1968. His speech showed the continuing desire to seek political change through traditional means: "The problems facing the Mexican American Community are enormous, but more has been done by the Johnson Administration during the last year than has been done in any previous decade."[47] The leaders of the Chicano Movement, however, boycotted the hearings of the Interagency Committee in 1967. This was to protest the exclusion of prominent Mexican Americans leaders from the proceedings, most notably Cesar Chavez, as well as those prominent within San Antonio. Thus, the inclusion by AGIF of Ximenes as its keynote speaker illustrated the distance between AGIF and the popular sentiment of the Mexican American people.

The formation of a number of new organisations in San Antonio demonstrated the growing desire for direct action within the Mexican American Community. For example in 1967, the Federation for the Advance of Mexican Americans in San Antonio (FAMA) was established, which was designed to "promote and develop programs fostering economic, education, cultural, spiritual and social betterment of the Mexican American community."[48] Later in 1967, Guttierez was among a group of students who founded the Mexican

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[44] "Gringos blasted by MAYO chief", *San Antonio News,* 4th September 1969.

[45] For example, Henry B. Gonzalez, elected to the U.S. House of Representatives in 1961, had long been considered to be the local spokesman for Mexican American affairs. However, the growing divisions within the Mexican American community led to the denunciation of Gonzalez as accommodating the desires of the Anglo community. Guttierez commented: "We feel the Mexican American leadership doesn't know what they're talking about.....Efforts have been very commendable, but the results have been too meagre...We feel we must identify the problem, and their problem is a gringo...We as a people are so lost, so powerless that liberals who say we should not be a purveyor of hate are asking too much." "Gringo blasted by MAYO Chief", *San Antonio News,* September 4th 1968.

[46] Marquez, *op.cit.,* p. 157.

[47] 20th Annual Convention of American G.I. Forum Newsletter. Box 25, Folder 4, J.P.C.

[48] FAMA newsletter, April 1967. Box 25, Folder 1, J.P.C.

American Youth Organisation (MAYO).[49] This organisation reflected the growing activism of the students, and proposed that socio-economic reform was required in order to establish true equality of educational opportunity.[50] The South West Council of *La Raza Unida* was founded in February 1968. This was "a regional body designed to help the Mexican American community organise itself more effectively to close the social, civic, political and economic gap that exists between Mexican Americans in the Southwest and the rest of the nation."[51] Thus, the new organisation reflected the raised consciousness of the Mexican American community and the increasing desire for substantial political and social reform.

It was the foundation of Mexican American Legal Defense and Education Fund (MALDEF), however, which best characterised the ideological convergence of both traditional and new ideals and methods. MALDEF, premised upon the idea of NAACP Legal Defense and Education Fund, was established with the assistance of Jack Greenberg, Director-Counsel of the NAACP, and with a financial grant from the Ford Foundation. Pete Tijérina, LULAC member and San Antonio lawyer founded the organisation, on 1st May 1968. Its goal was "to fight for equality in all areas of life by engaging in a sustained legal attack against racism in the Southwest."[52] Unlike LULAC, MALDEF employed litigation as the primary rather than secondary weapon against discrimination. As the aims of the organisation suggested, its legal fight against discrimination encompassed a much broader area than that of LULAC. The timing of MALDEF and the filing of the school finance suit indicated that both of these events were influenced by the use of extralegal protest tactics and the rising political activism.

The student walk out in May 1968 was the first manifestation of the recent local political changes. This event illustrated the heightened political consciousness present at all levels of the community. High school students resorted to direct action for redress of their grievances. The reaction of the school officials demonstrated a lack of understanding of the students' motivation. Stenhauser, the school principal, stated "this is so clearly a Willie Velasquez inspired activity. Most of the students don't even know what they are unhappy about."[53] Steinhauser called Willie Velasquez a "professional agitator" and claimed the students "were misled and did not know what leadership they were following. It's a case of

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[49] Its founding members included Willie Velasquez and José Angel Guitteriez.
[50] MAYO newsletter, August 1968, Box 25, Folder 1, J.P.C.
[51] *Ibid.*
[52] Guadalupe San Miguel, *op. cit.*, p. 168.
[53] Ron White, *op.cit.*, p. 12.

adults grasping and seizing a situation and getting it all distorted."[54] However, the principal did not appreciate the heightened level of discontent present in the high school. A junior at Edgewood High School at the time of the walk out, Linda Bononcini, later interpreted the impetus for the walk-out differently: "In the class, we asked more and more questions. Our windows were broken, no one wanted to fix them. Our books were old. Anyone could see the differences. As a student I was not familiar with any political theory. I was not politically motivated. I simply wondered why, and I wanted an answer."[55] The rising discontent with the school conditions was channelled into organised action by student leaders and community activists and resulted in the student demonstration.

The poor level of education provided the catalyst, therefore, for the increased political activism. The consequences of a poor education meant that the chances for economic and social advancement among the next generation of Mexican Americans were minimal. For example, in the speech he delivered to the students at the demonstration, Willie Velasquez spoke of the effects of the inadequate facilities: "With the education you get at Edgewood, most of you are going either to Vietnam or will wind up as a ditch digger. There is little chance you will go to college. 85% of you will not go to college. Eighty dollars a week is the most you will earn for the rest of your life."[56] Thus, unless the standard of education in the Mexican American community improved, the cycle of poverty would not be broken. The eradication of the discrimination of the education system became the primary objective of San Antonio activists.

Concern for the condition of schools for the Mexican American had extended beyond the local community. Increasing pressure had been placed upon the state government to enact significant changes, with mounting criticism over recent inaction. On 16th April 1967, the newly formed state joint legislative Committee for Mexican American Affairs condemned Texas's failure to respond to the needs of its citizens.[57] The committee criticised the state government in general and the Texas Educational Authority (TEA) in particular for their inaction during the past decades.[58] The TEA had originally responded in 1955, when research was conducted into the condition of Mexican American education. However, it failed to publish the bulk of the research findings, or to conduct any additional

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[54] *Ibid.*
[55] Interview with author, 12th September 1997.
[56] *Ibid.*, p. 12.
[57] This Committee was formed in 1965 and was designed to address the specific issues and problems of Mexican Americans in Texas.
[58] This was the equivalent of a State Department of Education.

research. According to the Committee for Mexican American Affairs, the failure to publish research findings stemmed from TEA's implicit acknowledgement of the state of Mexican American education: "the education system for Mexican Americans is so bad that no major inquiry has been made because the results would be embarrassing."[59] The resolution of this committee stated: "The Committee for Mexican American Affairs deplores in the strongest terms the indifference manifested so far by both the government and the TEA towards the education of Texan children with Spanish surname."[60] This strong denunciation of governmental action reflected the increased attention given to the condition of the minority education during the 1960s. The existence of the committee, and its analysis of the problem, demonstrates a coherent white reaction to Mexican American problems. The dissatisfaction with the lack of action illustrated the limitations of the white reaction, yet it nonetheless shows the increased willingness to examine the nature of the problem.

The federal government had recently begun to address the problem of Mexican American education. In 1967, it passed the Bilingual Education Act which was similar to the Texas Pre-school Instructional Act of 1960. The federal government funded an English language programme for Spanish speaking children aged between 4-8 in certain school districts in the South West. The program did not receive enough funding to make a significant impact but it illustrated the increased federal awareness of the condition of Mexican American education, prompted by the rising political activism. It also, however, signalled increased federal involvement in the provision of education, particularly in the South West. The funding of a bilingual program, combined with increased funding in deprived areas generated by the Elementary and Secondary Education Act of 1965, increased the financial contribution of the federal government in deprived areas with a high percentage of Mexican American students expanded significantly. Thus, although the funding was insufficient to make a significant impact, the financial role of the federal government had, in theory at least, been increased. The federal government further acknowledged the increasing political prominence of Mexican Americans by establishing the Interagency Committee on Mexican Affairs, a body established to deal specifically with issues relevant to Mexican Americans.. Its first annual report focused upon the appalling condition of Mexican American education that existed in many areas:

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[59] Minutes from meeting of the Mexican American Joint Committee, 16th April 1967, Box 25, Folder 7, J.P.C.
[60] *Ibid.*

> The instructional personnel, the exalted and benevolent teacher who enkindles the enthusiasm of our children, arouse their interests and imparts wisdom and knowledge is substituted by incompetent, unqualified second year college students to do a haphazard job with antiquated material who neither know the language nor the culture of Mexican Americans.[61]

The problem was discussed in more specific terms during the Department of Health, Education and Welfare (HEW) National Conference on Educational Opportunity for Mexican Americans on 5th February 1968, held in Austin, Texas. This conference was attended by approximately 750 educators, legislators and commissioners, all of whom "were concerned with the improvement of Mexican American educational opportunity."[62] It focused upon the desperate need for increased HEW funds to "secure equal educational opportunity for Mexican Americans," and concluded that increased funds would be the first stage in the significant improvement of educational standards.[63] In addition to the HEW, the activities of the USCCR in 1968 also reflected the increased federal attention given to the educational problems of Mexican Americans. In February 1968 the Commission on Civil Rights published the first in a series of five reports which focused upon the educational plight of Mexican Americans.[64]

The first report, entitled *The Education of the Mexican American,* examined the condition of Mexican American education throughout Texas. Its findings illustrated the consequences of the contemporary educational conditions: "40% of all Mexican Americans are functionally illiterate," compared to 23% of non-hispanic whites.[65] The average dropout rate for predominately Mexican American high schools was 47.8%, in comparison to 26% non-hispanic whites. In its conclusion, the USCCR recognised the confluence between the condition of the school and the broader socio-political environment, stating "schools function more as mirrors of some of the more destructive elements of society."[66] The correlation between the poverty of the local area and the condition of the schools, recognised by the Commission, was a key factor in the growing focus upon the school

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[61] First Annual report of Interagency Committee on Mexican Affairs (1967). Box 25, Folder 8, J.P.C.
[62] Program of HEW Conference, Box 25, Folder 8, J.P.C.
[63] HEW Conference Report, Box 4 Folder 18, J.P.C.
[64] These reports were Report I: *The Education of Mexican Americans*, Report II: *Unfinished Education* (October 1971), Report III: *Excluded Students* (May 1972), Report IV: *Mexican American Education in Texas* (October 1972), Report V: *Differences with Teacher Interaction with Mexican American and Anglo Students* (September 1972), Mexican American Study Series, Washington D.C. Government Printing Office.
[65] U.S. Commission of Civil Rights, Plight of the Mexican American: Report I, *The Education of the Mexican American*, 1968.
[66] *Ibid.*

finance structure. The schools reflected the discrimination that existed within American society as a whole. Thus, as the findings of the HEW and the USCCR illustrated, the consequences of the discrepancy between school funding for rich and poor areas was becoming a growing area of concern. In addition to highlighting the appalling educational conditions present in many Mexican American communities, it also demonstrated the growing involvement of the federal government in minority education. The condition of Mexican American education in Texas had previously been an area of concern for the Texas School Board and the state legislature. The activities of the HEW and USCCR signalled federal government involvement in an issue that had previously been considered a state concern. Similarly the increased federal funding of minority education through the Bilingual Education Act and programmes such as Headstart, further demonstrated increased federal involvement in educational funding. These developments were in accordance with the broader political trends of the time, particularly the expansion of federal government through the Great Society legislation. It demonstrated the changed role of the federal government that had occurred during the 1960s.

However, it was the findings of the HEW and USSCR that were of most concern for activists and parents. An explanation for the discrepancy between the educational conditions of rich and poor children became increasingly important. Since the time of the activism in the 1930s, the local school board was believed to operate to the detriment of the Mexican American community by refusing it much needed funds. The CPA shared this belief. Soon after CPA was founded, its members met with the district superintendent in the hope of acquiring additional finance. He told them, however, "that's all the money we have. We don't have any more money."[67] Willie Velasquez then approached the CPA with the suggestion of meeting with Arthur Gochman. He informed them that: "there was a lawyer who wanted to see us. He wanted to help us with our problems."[68] When parents met with Gochman, he explained that the entire state school finance system was at fault, not the local school board. This was a difficult concept for the parents to grasp: "this was a hard thing for us to understand because none of us knew much about school financing then. We were not familiar with the way it worked."[69] The complexities of the school finance system rendered it incomprehensible to many. Its importance had been consequently marginalised due to the lack of understanding of its effects. Gochman asserted, however, that the school finance

[67] Demetrio Rodriguez, Interview with author, 11th September 1997.
[68] "Demetrio Rodriguez: the first to sign up for the fight", *Edgewood News,* November 1989, p. 3.
[69] *Ibid.,* p. 3.

system, not the prejudices of local administrators, was responsible for the present inequality. The dependence of school finance revenues on the local property tax was, according to Gochman, the prime reason behind the interdistrict inequities.

The Texas system of school finance had been an object of increasing political scrutiny. In 1965, the Governor's Committee on School Finance had investigated the failings of the system. The Gilmer-Aitken Committee had established the structure of school finance in 1948, which had in turn been appointed to rectify the failings of a finance system established in 1845. The task of the Gilmer-Aitken Committee was to "design a new finance system for public school education for the second half of the twentieth century."[70] Its recommendations were believed to be adequate to cope with the increased demands placed upon public education in the post war period. These recommendations had a simple premise: "every school age child should receive an equal minimal educational opportunity to be financed by an equalized tax effort among the school districts."[71] The resulting system, which succeeded in raising educational expenditure, also contained a number of flaws which exacerbated the difference between rich and poor districts.

The structure of the Texas school finance system revealed the significance of the property tax. Federal aid provided 10% of funds, and the state contributed 52%. Thus, the local district was responsible for 38% of total funding, of which 95% was raised by the property tax. Thus, approximately 36% of school finance expenditure was raised by the local property tax. This statistic lay at the heart of the subsequent litigation battle, as it profoundly affected the amount local communities raised. The difference derived from the unequal property tax base between communities. For example, in Texas, ten districts had more than $100,000 in taxable property wealth per pupil, compared to four with less than $10,000.[72] Furthermore, the property tax rate was capped, which meant that the poor districts, even if they wished to raise their rate of taxation to a significantly higher rate in order to equal that of the richer districts, were unable to do so. This added to the structural unfairness of the reliance upon the property tax. The state aid financial plan designed by the Committee was intended to equalise the effects of the property tax. The Gilmer-Aitkin committee designed a Minimum Foundation Program (MFP) to establish a defensible minimum of education. It covered all operational costs, salaries and student transportation,

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[70] Joel Berke, Anthony Carnevale, Ron White, Daniel Morgan, "The Texas School Finance Case: A Wrong in Search of a Remedy." *Journal of Law and Education,* Volume 1, Number 4 (October 1972), p. 135.
[71] *Ibid.,* p. 102.
[72] Joel Berke, "The Texas School Finance Case: A Wrong In Search of a Remedy", *Journal of Law and Education,* Volume 1, Number 4, (October 1972), p. 668.

of which salaries was the largest category. Transportation grants constituted about 2% of the total programme, and thus did not have a large impact. The operational costs were determined by a fixed grant which allowed a certain number of dollars per classroom teacher unit. These allowances amounted to approximately $16 per unit for the academic year 1967-1968.

Thus, the primary portion of the MFP was teachers' salaries, which constituted nearly 90% of the total programme costs. The allocation of grants for teachers' salaries was, therefore, the main reason for the failure of the MFP to rectify the inter-district financial inequalities. As salaries were awarded according to experience and qualification, those areas with the most qualified teachers received the largest share from the MFP. On one hand, this provision illustrated that the MFP was designed to treat all districts equally: wherever a teacher taught in the state, his/her salary would be awarded according to these criteria. Districts were also free to pay salaries above the State minimum, and would receive more grant if they did so. This provision was designed to provide an incentive for each district to attract the best-qualified teachers and to make teachers' salaries competitive. The Governor's Committee found, however, that one in three teachers in predominantly white districts held a master's degree, in comparison with one in five in Mexican districts.[73] Thus, affluent areas attracted better-qualified teachers and thereby received a higher proportion of state aid. As a result:

> Because many of them [teachers] find it difficult or unsatisfying to work with culturally disadvantaged children, many schools in crowded areas.... Have large numbers of young teachers not yet permanently certified. In districts where large numbers of culturally deprived children go to school, there are ten times as many temporarily certified teachers as in another type of district in the same city.[74]

Although the MFP was intended to rectify the disparities, the largest portion of its grants increased the inequality. A second weakness within the system was the concept of "local enrichment." Districts could supplement the MFP grants at a locally determined tax rate. The inequalities in tax bases that existed were compounded by this provision. It enabled property rich districts, with relatively little taxation effort, to raise substantial higher funds. However, this provision was premised upon the notion of local choice as it enabled districts to decide to spend more on education. The intention of the MFP, therefore, was to

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[73] *Ibid.* The definition of "predominately" was those with 80 per cent or more of a particular group.
[74] Daniel C. Morgan, *School Finance Reform in Texas: A Brief History and an Evaluation of Present Conditions,* Texans for Educational Excellence, (San Antonio, 1974), p. 20.

reduce the acute inequalities in the finance system, whilst simultaneously preserving the right of districts to increase expenditure in accordance with local desire. It did ensure that each district received increased state assistance. This assistance, however, was not determined by local wealth, but by the current expenditure of education in the particular district. This was the fundamental flaw of the programme, and as a result, the program preserved, and in some respects, exacerbated the existing financial inequalities.

The MFP, however, was only one element in the complex system of finance. The reliance upon the property tax was believed increasingly to be the primary cause of the financial inequalities, and state-aided assistance plans, such as the MFP, would not solve the level of inequalities. The flaws of the MFP compounded the existing problems of school finance system. The main problem lay with the surrounding environment of the school districts. The poor quality of housing which existed in Edgewood meant the school district had a far lower capacity for raising school funds compared to the affluent, white areas. Edgewood possessed the lowest assessed property rate per student at $5,429 in the year 1967-1968. Alamo Heights possessed the highest rate at $45, 095. It was this discrepancy that caused the interdistrict difference in educational facilities.

Edgewood school district's dire financial situation of the 1960s was a product of previous events. The consolidation of Edgewood with richer school districts might have solved some of its earlier financial problems. However, under the provisions of an 1884 law, the voters of each district had to approve the merger by referendum. Many of the affluent areas were unwilling to merge with economically disadvantaged areas. Additionally, because of racially restrictive covenants still in force during the period of mass immigration to San Antonio in the 1930s and 1940s, the new immigrants settled in the economically deprived Edgewood district. The explosion in school population that occurred in this period prompted the construction of "hastily built, poorly constructed houses with inadequate sanitation facilities in Edgewood."[75] The quick construction of poor housing decreased the value of property in the area. Therefore, Edgewood, despite a massive increase in school population, did not have an adequate financial system to accompany this rise: "the district possessed an assessed property value of only $300 per pupil, by far the lowest in the county."[76] The additional pressure placed upon the educational structure prompted the formation of the Gilmer-Aitken Committee, which was intended to rectify the worse of these conditions.

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[75] Richard Gambitta, "The Politics of Unequal Educational Opportunity", Johnson (ed.), *op.cit.*, p. 145.
[76] *Ibid.*, p. 144.

The consolidation of school districts also constituted an important part of the movement to improve educational conditions. In 1947, 43 common school districts and 6 independent school districts existed. By 1951, this number had been reduced to 14.[77] This early move for consolidation in order to improve educational conditions foreshadowed a debate that would become increasingly prominent during the 1960s and beyond. This was the notion that in order to improve educational conditions, increased central control was necessary. During the 1950s, centralisation was confined to school boards, yet it would later extend to include states and federal government. The move for consolidation at this point, however, purposely excluded Edgewood. In 1950, Edgewood attempted to join San Antonio Independent School District. During a meeting held between the two school boards, one member of the San Antonio School Board stated that although a "moral obligation might exist to share the city's tax resources among all the city's children, the law did not compel them to do so."[78] Thus, the political and economic isolation of Edgewood coupled with the fundamental school finance structure accounted for the startling interdistrict differences that existed in 1968.[79]

Subsequent events illustrated the increasing awareness of the inadequacies of the school finance system. In 1968, the local government proposed the construction of tax exempt housing projects in Edgewood in order to alleviate the housing shortage. This proposal had potentially disastrous consequences for the financing of public schools, and local opinion was against the project. The opposition to the construction of much needed housing indicated the increased awareness of the inadequacies of the school finance system.[80] The confluence between the local environment and the conditions of the local schools was now better understood, and the school finance system became the new focus of the continuing struggle for educational equality. The appointment of the Governor's Committee in 1965 was the first state attempt to confront the problems of the school finance structure, and illustrated the state's realisation that action must be taken to ameliorate the

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[77] *Ibid.*, p .144.

[78] *Ibid.*, p. 144.

[79] Edgewood became an independent school district in 1950s, the "one remaining avenue open to improving the district's position....By attaining independent status, Edgewood was allowed a higher tax ceiling". *Ibid.*, p. 146.

[80] A later report confirmed the potential consequences of the housing proposal: "Edgewood's plight has already been aggravated by the construction of low income housing.....These housing projects have increased the school age population of Edgewood without producing adequate revenues to upgrade the quality of education.....Public housing projects placed a most severe burden upon the financial resources of Edgewood School District." "The Effect of Multiple Housing in Edgewood ISD" by Ron Orr, delivered to Dr. George Benz of the San Antonio Community Project. Box 76 Folder 20, J.P.C.

school finance system. Thus, the Committee was "the first official body in the history of Texas to address itself in a logical, coherent and sympathetic fashion to the issues of inequalities in educational opportunity available to all of Texas' school children."[81] The Committee took three years to file its report, during which time the public dissatisfaction with the school system had increased, prompting the plaintiffs to file their suit one month before its publication.[82]

The appointment of the Governor's committee and its subsequent report was the only concerted political action taken at the time, which offered little hope for those in Edgewood. The report focused primarily upon improving the state's contribution, rather than the entire system of school finance.[83] Furthermore, its influence was limited. There was no guarantee that its recommendations would be enacted. The broader political environment within Texas had been described as, in 1966, "traditionalistic, with a strong emphasis upon states' rights, strong resentment of imported solutions, and a healthy respect for localism. The government role is to maintain the status quo."[84] A 1968 *New Republic* article had further illustrated the political conservatism of the Texas state government during the 1960s.[85] The article was precipitated by a recent series of tax cuts and reported upon the poor condition of welfare benefits and the widespread lack of reform impetus evident in Texas. As a result of the tax cuts, only three states (South Carolina, Mississippi, Alabama) ranked below Texas for welfare payments. The article revealed that "$12.50 is allocated monthly to feed, clothe, house and Medicare a child: $15 a month is allocated by the state for a guide dog."[86] The appointment of the Committee was the only political action taken at this point by the state government. The state had recognised the problem, and the existence of the Committee was evidence of this. Although this committee existed, however, there was no reason for the plaintiffs to presume it would result in any substantial changes in the near future. Instead, the filing of the suit reflected the change that had occurred within the Mexican American community during the late 1960s. Instead of waiting for the state government to enact the desired changes, thirteen members of the CPA, led by Demetrio

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[81] Daniel Morgan, *op.cit.*, p. 67.
[82] The Report, delivered in August 1968, was entitled *The Challenge and The Chance.*
[83] See *The Challenge and The Chance*, p. 24.
[84] Daniel Elazar, *American Federalism* (1966). Quoted in Joel S. Berke, *Answers to Inequity,* (New York, 1974), p. 24.
[85] Sue Horn Estes, "What the Poor Are Up Against in Texas", *New Republic,* 19th July 1968.
[86] *Ibid.*, p. 23.

Rodriguez, signed a petition for the plaintiffs, which Arthur Gochman filed.[87] Litigation was now employed to fight a different area of equal educational opportunity.

The school finance suit was, therefore, the product of different historical and ideological trends.[88] The timing of the suit was influenced by the new wave of activism and the filing of the complaint encapsulated the increasing complexity of the civil rights movement. On one level, the practical impulse for the case emerged from the political activity amongst Mexican Americans in San Antonio. The student demonstration, and the foundation of the grass roots political organisation, the CPA, were essential prerequisites to the framing of the suit. However, the timing of the suit also reflected the broader changes that were occurring within Mexican American activism throughout the South West. Increasingly, the Mexican American community had begun to employ tactics previously shunned by the leaders. The Chicano movement, with its strands of ideological radicalism, urged its supporters to resort to extra-legal methods in order to achieve full equality. San Antonio, with almost half its residents of Mexican descent, was a prominent centre of the new activism, illustrated by the foundation of numerous new organisations, and the increasing number of demonstrations which occurred in the prospering city. The dual concepts of race and class were inherent in the litigation. The effects of racial and class discrimination upon the broader Mexican American population, coupled with the heightened consciousness of the younger generation throughout the South West, provided the broader impulse for the increased activism. Thus, the factors that resulted in the filing of the suit in San Antonio were symbolic of the broader developments amongst Mexican American activism. However, the traditional beliefs of the Mexican American community provided the ideological content of the suit. The belief in the importance of education was the central tenet in the plaintiffs' case. Traditional beliefs provided the content, but the new activism provided the impetus for the suit. The timing of the suit also encapsulated the broader trends of the civil rights movement. The assassination of King and Bobby Kennedy heightened the feeling of alienation amongst the lower class minorities towards the political parties. The failure of the Poor People's Campaign in June 1968 further illustrated both the new ideological direction of the movement and the increasing fragmentation of the mass protest civil rights movement. The FHS Act was an acknowledgement by the federal government of

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[87] Rodriguez offered a modest explanation for his status as named plaintiff: "Gochman passed the petition round from left to right, and I happened to be on the left. Had he passed it to the right first, Mr Castano would be the name everyone knew". Interview with author, 9th September 1997.

[88] The legal context of the suit will be explored in the next chapter.

the type of inequality that the plaintiffs sought to redress. These events provided the broader framework to the case, not the impetus. However, the filing of the suit in July 1968 and its content reflected national political developments. The enlarged role of the federal government in minority education indicated the extension of federal government that had occurred during this period. Its findings had confirmed the grievances of activists and resulted in greater demands upon the political system. The emphasis upon the eradication of class discrimination, particularly in education, and the increased efforts to eradicate them, signalled the new direction of the civil rights activism.

The school finance suit, therefore, marked on one level the convergence of two characteristic features of the Mexican American activism: the use of the established tactic of litigation with the traditional aim of equal educational opportunity. However, this occurred amidst a new wave of activism that redefined the ideological beliefs and expectations of the Mexican Americans. On another level, the suit marked the increased demands of the Mexican Americans upon the political system and the changed ideas regarding their constitutional rights. The impetus for the suit, therefore, came from the unequal standards of education present within the community and the new political activism. However, the issues raised by the case went a great deal further than the state of local education. The case was perceived by the defendants and other disinterested observers to challenge integral features of American society, such as the value of local control of education, the extent of constitutional guarantees, the limitations of judicial authority, and the connection between race and class. *Rodriguez* was a response to the level of educational inequality in San Antonio, yet the issues it raised reached far beyond its original context.

CHAPTER TWO:

1967-1971

The Legal Context of *San Antonio Independent School District v. Rodriguez* Including An Examination Of The District Court Decision

On 12th July 1968, Arthur Gochman filed a complaint in the District Court for the Western District of Texas, on behalf of thirteen parents in the Edgewood School District. Gochman, relying on both recent decisions and legal commentators, argued that education was a fundamental interest and wealth was a suspect classification, and under this standard, the school finance system violated the equal protection clause of the Fourteenth Amendment. This complaint was part of a much broader intellectual and legal trend which had begun to consider the constitutionality of the material differences in education. Of central importance to the new wave of legal theory was the Supreme Court's opinion in *Brown,* in which the Court stated:

> Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is the principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, must be made available to all on equal terms.[1]

The implications of this statement provided the legal and part of the ideological foundation for the development of a legal theory which disputed the constitutionality of the school finance system of 49 states. The development of the theory, occurring concurrently with the progression of *Rodriguez* through the Texas courts, provided the contextual framework for the case.

The federal district court for the District of Columbia handed down *Hobson v. Hansen* on 19th June 1967.[2] The decision declared the District's educational system violative of the equal protection clause of the Fifth Amendment on the grounds of deprival of equal educational opportunity for "Negro and poor public school children."[3] The District showed no discriminatory intent and, since 1954, had implemented a

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[1] *Brown v. Board of Education*, 347 U.S. 483, 493 (1954).
[2] 269 F.Supp. 401 (1967).
[3] *Ibid.*

desegregation policy in the public schools.[4] However, through combining recent Supreme Court decisions with new trends in legal scholarship, the court found virtually all aspects of the structure and distribution of education in the District of Columbia unconstitutional. The court examined the tangible differences in educational resources and the inequitable effects of educational policies between the poor and rich districts, thereby bringing all aspects of the educational structure under judicial scrutiny. The opinion, written by Judge J. Skelly Wright, signalled a turning point in litigation seeking educational equality. *Hobson* extended equal protection guarantees beyond those of race to include economic classifications.

Gochman's interest in school finance litigation derived from his knowledge of *Hobson*. It was the first product of the new wave of federal court decisions that argued for the further extension of the equal protection clause into new areas of educational inequality. This decision enabled Gochman to apply a legal argument to the grievances of the CPA, and it thereby constituted the basis for the plaintiffs' suit filed in July 1968.[5] The legal arguments at this point, however, lacked coherence and precision. The continual refinement in legal scholarship provided the framework for the developments in the plaintiffs' case in *Rodriguez.* By the time of the plaintiffs' victory in the district court in December 1971, a coherent legal doctrine had emerged. The legal doctrine translated a complex economic and social issue into a constitutional question, thereby providing the means for judicial involvement. This provided the linchpin to the plaintiffs' case, anchoring its claims in well formulated, measured legal arguments, which were designed to answer judicial concerns. The emergence of a feasible legal strategy established the means by which victory could be achieved. It did not, however, provide the circumstances required for victory. Thus, to ascribe the outcome of the district court case solely to the plaintiffs' legal argument would overestimate the extent of its influence.

The reasoning of *Hobson* introduced a number of legal concepts which became central to school finance litigation. At the heart of the decision lay the right to equal educational opportunity. The evolving definition of this term constituted one of the central themes of the legal scholarship during this period. *Hobson* did not attempt to

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[4] The desegregation policy was initiated after the passing of *Bolling v. Sharpe* (347 U.S. 497), a companion case to *Brown v. Board of Education.*

[5] Interview with author, 10th December 1998. For information regarding the meetings between Gochman and the CPA, see previous chapter.

define equality. It focused upon the tangible differences in the educational environment and found that they affected educational quality. The decision thereby implicitly suggested that equal educational opportunity and the standard of educational environment were congruent. It determined that merely a lack of discriminatory intent was insufficient basis for finding for the constitutionality of a particular system. It also introduced important themes of the subsequent litigation regarding recent social science material. Recent findings challenged the components perceived necessary for educational achievement, and questioned the effects of financial expenditure.[6] Finally, *Hobson* ruled that equal educational opportunity had been denied on the basis of class as well as race: "The school system unconstitutionally deprives the District's Negro and the poor public school children of the their right to equal educational opportunity."[7]

Hobson v. Hansen provided the starting point for the formation of Gochman's legal strategy. Judge Wright had found both racial and economic discrimination present in the District of Columbia public school system. The opinion examined the reasons for the persistence of educational segregation, extending its analysis to include patterns of residential segregation.[8] Judge Wright also held the school board to blame for the present situation.[9] Absence of discriminatory intent was insufficient to absolve the school board; it had an affirmative duty to correct the inequitable situation. This finding extended the scope of judicial scrutiny of state actions beyond actual legislation to administrative inaction.

In the examination of the effects of segregation upon the school children, the court extended its analysis beyond *Brown v. Board of Education.*[10] In *Brown*, the Supreme Court concentrated upon the psychological and developmental implications of segregation. *Hobson* related segregation to the tangible inequalities in educational distribution, citing *Sweatt v. Painter.*[11] Judge Wright then combined the two approaches.

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[6]For example, the relationship between educational quality and financial expenditure, and teaching experience/qualifications with teaching quality.

[7] 269 F.Supp 406 (1967).

[8] The court concluded, "it is painful irony that in the very decade in which society has intensified its efforts in facing up to the race question, residential segregation has become yet more complete." *Hobson.* p. 13.

[9]The school board's response "has been primarily characterized- at best by indifference and inaction. School officials have refused to install actual integration as an objective for administration policy, or even to recognize that in the District segregation is a major problem."

[10] 347 U.S. 483 (1954).

[11] 339 U.S. 629 (1950). In this decision, the Court declared the inferior facilities available to blacks in the segregated law school denied black students a legal education equivalent to that offered white students, and

The court considered the difference in the age of the school buildings, the discrepancy in the physical condition, in resources such as the libraries, classroom overcrowding, quality of faculty, textbook availability, curriculum, tracking system, and per pupil expenditure.[12] In each category, the schools in the poor area were found to be inferior; "the median age of the ghetto school is almost 60 years. The comparable age for schools with predominately middle income neighborhoods is only 41 years."[13] Some inequalities were more acute; "the overcrowding in the predominately (85-100%) Negro schools is of fearsome dimensions. These schools are in, as one school official volunteered, an 'emergency situation.'"[14] The findings regarding teacher quality, based upon assessment of their experience and qualifications, were also indicative of the inequality pervasive within the system. Teachers in the middle income area had "significantly greater teaching experience" and had more graduate school degrees.[15]

The primary way in which the court broadened its focus of inequality beyond that of *Brown* and *Sweatt* was by its invalidation of the school tracking system. The tracking system was intended to provide different levels of education in accordance with the academic needs of the student. The court, however, found the system consigned Negro and poor students to an inferior standard of education, and inferior educational opportunities. The tracking system involved "the greatest amount of physical separation by grouping students in wholly distinct, homogeneous curriculum," thereby providing a "cushion against integration."[16] Although the tracking system intended to provide different levels of education in accordance with academic ability, it resulted in "enrolment which is related to the socio-economic status of a student."[17] In this aspect of the decision, the court accepted the congruence between race and class evident within the District. Judge Wright wrote that "for a majority of District schools and school children race and economics are intertwined: when one talks of poverty or low income levels one

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was, therefore, a violation of Fourteenth Amendment guarantees.

[12] The tracking system was intended to provide different levels of education in accordance with the academic need of the student. It grouped students according to academic ability.

[13] *Hobson*, p. 77.

[14] *Ibid.*, p. 81.

[15] The correlation between teacher salary and experience became an important component of the subsequent legal debate. The court responded to the defendants' charge that experience and qualifications were inadequate measures of teaching quality with the comment "experience is a real asset for a teacher as it is for any professional. The Washington school system's pay scale, in proportioning salary to the number of years teaching experience, is testimonial to this fact." *Ibid.*, p. 84.

[16] *Ibid.*, p. 5.

[17] *Ibid.*, p. 14.

inevitably talks mostly about the Negro."[18] The correlation between race and class provided a central tenet to the plaintiffs' case in *Rodriguez*, and progressed from the legal doctrine employed to end segregation in *Brown.* The court concluded that the tracking system "tends to separate students from one to another according to socio-economic and racial status, albeit in the name of minority grouping. Second, the students attending the lower income predominantly Negro schools.....typically are confined to educational limits of the Special Academic or General Track."[19] Thus, the court invalidated the tracking system on the basis of race as well as class, finding a congruity between the two groupings.

Consideration of the discrepancy in per pupil expenditure was only one aspect of the decision. It was this element, however, that constituted the central element of the subsequent school finance litigation. The exact relation between per pupil expenditure and academic attainment remained vague. The court found a significant discrepancy existed in the District of Columbia. A difference of $100 existed between per pupil expenditure in the middle income areas and the ghetto areas. Furthermore, "5 of the 8 highest cost schools were predominantly white, while of the 25 cheapest schools, 23 were predominantly Negro and all 25 were more than half Negro."[20] The difference in financial expenditure was one element of the inequality that existed. There was no suggestion in the opinion that this particular form of inequality was more important than any other. Therefore, the importance of the case for school finance litigation derived from its legal analysis. In both these areas, *Hobson*, in conjunction with recent legal scholarship, provided Gochman with the legal framework with which to mount a challenge in court.

The equal protection clause of the Fourteenth Amendment provided the legal basis for the decision, which had "consolidated its position as the cutting edge of our expanding constitutional liberty."[21] The legal reasoning of *Hobson* followed the pattern established in recent articles, which provided the conceptual framework for *Rodriguez.* These articles advocated the broadening of litigation beyond racial balance to include educational resources, and outlined the legal arguments in order to achieve this objective.[22] However,

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[18] *Ibid.*, p. 15.
[19] Special Academic was a track designed for "slow learners". General Track curriculum is for those students who "intend to go to work immediately upon graduation." *Ibid.*, p. 153.
[20] *Ibid.*, p. 91.
[21] *Ibid.*, p. 95.
[22] These articles were Peter Rousselot, "Achieving Equal Educational Opportunity for Negroes in the Public Schools of the North and West", *George Washington Law Review,* Volume 35, (Spring 1967), pp.

explicit connection between the equal protection clause and school finance inequality remained novel. Scholarship generally focused more broadly upon the relevance of the equal protection clause to the achievement of equal educational opportunity, the definition of which now transcended race and extended to tangible resources. One of the two articles cited in the opinion, written by Harold Horowitz, a University of California-Los Angeles law professor, became the starting point for much of the subsequent material. Horowitz also became a central figure in the development of litigation strategy.

His article, published in 1966, was the first time a legal scholar had argued in print for the broadening of the guarantees of the Fourteenth Amendment beyond racial inequalities in education in order to establish a broader constitutional principle of equal educational opportunity. Horowitz asserted that lack of discriminatory intent was insufficient basis for determining constitutionality, an argument that *Hobson* accepted. The constitutional importance of education provided the central ideological tenet of both Horowitz' article and *Hobson*, and remained central to the subsequent litigation. In light of the importance of education in the life of a citizen, the same constitutional analysis applied to racial imbalance should be broadened to include all areas of educational inequality.

Horowitz argued that the extension of the equal protection clause to equal educational opportunity "seems soundly to follow" recent developments in constitutional law.[23] The developments to which he referred centred upon the Warren Court's increasingly expansive reading of this clause. Horowitz asserted that the Court's commitment to education as illustrated in *Brown*, coupled with the decisions invalidating classifications on the basis of wealth, provided a clear precedent for judicial activity into this sphere.[24] In *Brown* the Court affirmed the "fundamental importance of public education and the right to equal educational opportunity."[25] This interpretation was critical in the development of school finance litigation. *Brown,* according to Horowitz, was predicated upon implicit assumptions regarding the importance of education in daily

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1230-1253 and Harold Horowitz, "Unseperate but Unequal- The Emerging Fourteenth Amendment Issue in Public School Education," *UCLA Law Review,* Volume 13, (Winter 1966) pp. 1147-1172.

[23] *Ibid.,* p. 1172.

[24] The cases referred to were *Griffin v. Illinois,* 351 U.S. 12 (1956), in which payment for a trial transcript violated the equal protection rights of indigent defendants and *Douglas v. California,* 372 U.S. 353 (1963) in which the appointment of counsel in appellate court was seen to be dependant upon whether the defendant could afford to hire counsel.

[25] Horowitz, *loc.cit.,* p. 1162.

lives. The combination of *Griffin v. Illinois*[26], *Douglas v. California*[27], *Carrington v. Rash*[28] with *Brown* meant that "it can be persuasively argued that the interpretation of the equal protection clause given effect in these cases should be applied in determining the constitutional validity of the inequalities in educational services discussed in this article."[29] The Supreme Court had demonstrated its commitment to education in *Brown*, and the other cases illustrated the unconstitutionality of classifications based upon wealth. The Warren Court, therefore, provided a clear line of precedent for the inclusion of equal educational opportunity into the protective sphere of the equal protection clause. Horowitz' article was at the forefront of the "new wave of scholarship" to which Judge Wright referred. *Hobson* was, therefore, the first decision that accepted the general principles, which Horowitz espoused.

However, the further extension of the equal protection clause conflicted with the traditional concept of constitutional federalism. The expansive use of the equal protection clause during the Warren Court had involved the Court in a number of areas traditionally reserved for the states, and had thereby upset the federal-state balance of authority. The values of federalism were, therefore, intertwined with the expansion of the equal protection clause and the apparent conflict between them lay at the heart of the future litigation struggle. The notion of federal experimentation was particularly pertinent to the evolving litigation. This was the belief that the less the Supreme Court imposes national standards, the more individual states will be able to experiment with solutions of their own. This theory was expounded by Justice Louis Brandeis in 1932: "One of the happy incidents of the federal system is that a single, courageous state may, if its citizens choose, serve as a laboratory and can try novel social and economic experiments without

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[26] 351 U.S. 12 (1956). *Griffin* determined that "refusal to provide a trial transcript to an indigent defendant for purposes of a criminal appeal was held to have violated both the due process and equal protection clauses by denying the same quality of appellate review to the indigent as to those who could afford a transcript." *Ibid.*, p. 1156.

[27] 372 U.S. 353 (1963). *Douglas* invalidated the "California policy of appointing counsel for indigent defendants who sought to appeal only when the appellate court concluded from an examination of the record that there was sufficient reason to provide counsel." *Ibid.*, p.1156. The Court determined this to be unconstitutional discrimination against the indigent.

[28] 380 U.S. 89 (1965). *Carrington* "held violative of the equal protection clause a Texas statute preventing any member of the armed forces who came to Texas during the course of his military duty from voting in an election in the state as long as he remained in the armed forces." The Supreme Court ruled that servicemen were "subjected to invidious discrimination violative of the fourteenth amendment." *Ibid.*, p.1157.

[29] *Ibid.*, p. 1156.

risk to the rest of the country."[30] This theory was later echoed by Justice Harlan: "One of the greatest strengths of the federal system is that we have, in the forty eight states, forty eight experimental social laboratories."[31] Thus, national uniformity deprived states from reaching a solution on their own terms. In addition, a judicially engineered reform also undermined fundamental federalist principles. According to this theory, the Court was never intended to be the primary agent of reform. Justice Harlan commented that the Constitution did not confer "on the Court blanket authority to step into every situation where the political branch may be thought to have fallen short."[32] Legislative reform should, according to this theory, emerge from the grass roots and work its way up, rather than vice versa. Traditional majoritarian political theory advocates policy and decision making from local political bodies. The notable exceptions to this theory are when fundamental individual liberties are under threat, which the Court is constitutionally compelled to protect. Local governments were considered to be the organs of democratic self-rule. Thus, the core federalist ideals of pluralism and state autonomy were contained within the litigation.

The balance of power between federal, state and local governments in the provision of education was particularly significant. Local governments were under the control of the state. State government determined the parameters of local government power in all areas, including education. Despite the ultimate authority of the state governments, however, local governments had significant control over the provision of education. The rationale for local control in education was predicated upon the assumption that decisions concerning educational policy and spending matters were best made by those with a vested interest in the system. This assumption formed the rationale for the entire educational structure in the U.S. and derived in part from traditional democratic theory:

> Government should ordinarily leave decision-making and administration to the smallest unit of society competent to handle them....This preference for low level decision making has furnished the common coin of political discourse since 1789. It speaks with many voices on many levels, but for present purposes, its most

[30] *New State Ice Co. v. Liebmann,* 285 U.S. 262 (1932). (Brandeis, J. dissenting).
[31] *Roth v. United States,* 354 U.S. 476 (1957), (Opinion of Harlan, J.).
[32] *Wesberry v. Sanders,* 376 U.S. 1, (1964). (Harlan J. dissenting).

> important application lies in local government. The rationale is simple: local people should support and run their own schools.[33]

Thus, since colonial times, education was believed to be principally a local, not state, responsibility. Local governments were closest to the people and were, therefore, most responsive to the peoples' concerns. Local citizens, whose children and neighbourhood would be directly affected by decisions, possessed a vested interest in the system, and therefore, local governments were the most appropriate body to deal with educational affairs. This encapsulated the view that schools were not simply a concern for those with children in the system, but also for the community in general. Parental involvement was, however, considered to be a critical component of local control. Those with the greatest investment in the system would strive for the highest quality. Schools also formed an integral social function and were part of the infrastructure of any community. Local control, therefore, ensured that local citizens could influence the education system of their community. The community could ensure the educational system was most responsive to local needs and desires. This provided the rationale for the prominent role of school boards. The Supreme Court had supported the rationale of local choice in the second *Brown v. Board of Education* decision in 1955, in which it considered possible desegregation plans. It stated: "the full implementation of these constitutional principles may require solution of varied local school problems. School authorities have the primary responsibility for elucidating, assessing and solving these problems."[34] Although the slow pace of desegregation eventually resulted in increased Court involvement, *Brown II* protected the right of local authorities to determine educational policy and further acknowledged the desirability of local control in education.

The ideal of local control were being practically applied at the time in which Horowitz' articles were published. Residents of the Ocean Hill-Brownsville section of Brooklyn, with a minority student population of 98%, had begun to demand increased community control of local schools. The failed attempts at integration had led parents and community activists to seek greater community control of schools in order to enhance the educational process for minority students. In June 1967, a governing board was created,

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[33] John Coons, William Clunes and Stephen Sugarman; *Private Wealth and Public Education,* (Cambridge, 1970), p. 14.
[34] *Brown v. Board of Education* 349 U.S. 294 (1955).

with the authority to appoint new principals, evaluate curriculum, and increase teacher accountability. A series of controversial decisions by the board, however, led to its dissolution in the summer of 1968. This experiment, although a failure, demonstrated the importance of community control to the provision of education. For the parents in Ocean Hill-Brownsville, local control, not integration, was considered to be the solution to the educational problems of their district. The problems of minority education were, therefore, widely acknowledged, but the solutions remained elusive. The evolving litigation strategy, begun by Horowitz' article and *Hobson*, was one solution. This solution, however, held implications for the federal balance, particularly within education, at a time in which it was already threatened.

As a result of the implications, criticism of both Horowitz' argument and the legal theory of *Hobson* abounded. The first wave of criticism prompted a refinement of the legal doctrine, but raised fundamental issues that remained pertinent throughout the development of *Rodriguez*. The limitations of Horowitz' legal doctrine derived from its innovative arguments, which, according to critics, exaggerated the implications of recent cases. Similarly, criticisms of *Hobson* centred upon its tenuous legal analysis and expansive scope of judicial scrutiny. Philip Kurland, the eminent law professor at the University of Chicago, levied the first conservative critique of Horowitz's theory. Much of Kurland's criticism centred upon the implications of the "egalitarian revolution," in particular its implication for the role of the judiciary in the legislative process. He also questioned the consequential effect of the further expansion of equality of educational opportunity. According to Kurland, continued expansion threatened the principle of excellence in schools, which would mean "the improvement of the worst at the expense of the best."[35] Too much equality would result in mediocrity of educational standards, thereby undermining individualistic principles central to American ideology.

Kurland also voiced an increasingly widespread conservative criticism of the continued expansion of Supreme Court mandated equality. The ideological implications of *Hobson* and Horowitz' articles extended far beyond the establishment of financial equality in educational expenditure. According to one legal commentator, "if the doctrine was extended indiscriminately, the states might one day find that the Constitution forbids

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[35] Philip B. Kurland. "Equal Educational Opportunity: The Limits of Constitutional Jurisprudence Undefined", *University of Chicago Law Review,* Volume 35 (1967-68), p. 586.

them to impose upon the poor any fee, whether for tuition, roads or licenses."[36] Conservative commentators viewed the implications of the "egalitarian revolution" as inevitably clashing with individualistic principles integral to American society. School finance litigation was interpreted by commentators such as Kurland as the first manifestation of the excess of equality precipitated by the Warren Court. It would mark the gradual equalisation of governmental services. These criticisms, therefore, fuelled the notion that the school finance litigation advanced equality to the detriment of individualism. The new demands of the civil rights activists did threatened key features of the political structure. They also lay the groundwork for much of the defence of the status quo to come.

However, irrespective of whether the developments in legal theory were viewed positively or negatively, commentators agreed upon one aspect. As Philip Kurland stated, "sooner or later the Supreme Court will affirm the proposition that a state is obligated by the equal protection clause to afford equal educational opportunity to all of its public school students."[37] This assertion was made after *Hobson*, when the sweeping implications of the recent legal developments had become evident in the District of Columbia. Kurland viewed the heightened level of judicial activism ominously, concluding "judicial activism feeds on itself. The public has come to expect the Court to intervene against gross abuses. And so the Court must intervene. The major break came in *Brown v. Board of Education* and the end of this spiral path is not in sight."[38] The ideological direction of the recent decisions contained profound implications for the federal balance and the institutional role of the judiciary, which would mean, according to Kurland, "a centralisation of governmental power within the states in order to secure uniformity of treatment in each of these categories."[39]

The conservative criticisms levied at the direction of the Court's decisions and at *Hobson* remained influential throughout the formulation of the plaintiffs' case in *Rodriguez*. The simplicity of the constitutional action sought, the limited power of the judiciary to implement its decisions, the questionable application of supporting precedents, were all aspects to which critics pointed as to the incapacity of the judiciary

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[36] Note "Discriminations against the Poor and the Fourteenth Amendment", *Harvard Law Review,* Volume 81 (1967-68), pp. 435-453.
[37] Philip B. Kurland, *loc.cit.,* p. 572.
[38] *Ibid.,* p. 585.
[39] *Ibid.,* p. 587.

to enter school finance. For example, the primary criticism of *Hobson* was the scope of its decision that was based upon, in the opinion of one commentator, tenuous legal analysis:

> The Courts have already undertaken a massive task in correcting racially motivated education policies, *Hobson* requires that they go further and correct policies which are not invidious but merely unresponsive to the educational needs of the Negro and the poor.....Unembarrassed by the shift from *Griffin* criminal law context to education, the Court seemingly uses the words poor and Negro interchangeably in its analysis of educational problems, and indicates that the practises which operate adversely to the poor should be subjected to the same close scrutiny applied to those which operate against the Negro....this approach is too facile.....[40]

Gochman was aware of the criticism surrounding the extension of the equal protection guarantees to include equal educational opportunity. As a result, he did not rely heavily upon *Hobson* for its legal analysis. The case appeared in footnotes, but was not cited extensively. It was imperative that the limitations of the plaintiffs' demands were established in order to detract from the criticisms of the broader ideological implications of the litigation. The primary weakness of the developing legal analysis was the absence of a precise definition of equal educational opportunity. For example, the first book published on the developing legal doctrine, Arthur Wise's *Rich Schools, Poor Schools* in 1968, described eight possible definitions of the term.[41] Thus, a more precise definition of the term was vital to the development of the litigation.

The shifting emphasis from racial imbalance to distribution of educational resources was one manifestation of attitudinal changes towards the definition of equality occurring at this time. Prior to *Brown*, litigants seeking equality of educational opportunity focused upon tangible, measurable inequalities in order to illustrate the vast discrepancy between facilities for blacks and those for whites. *Sweatt v. Painter* was the

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[40] Note, "Judicial Supervision of the Color Blind School Board", *Harvard Law Review*, Volume 81, (1967-68), p. 1525.

[41] The eight definitions were: negative, full opportunity, foundation, minimum attainment, levelling, competition, equal-dollars-per-pupil, maximum variance ratio and classification definition. These definitions varied between the vague and the precise. The concept of "full opportunity" was described as "duty of society is to nurture the maximum development of individual potential at every level of ability" whereas the "foundation definition" which "stipulates a satisfactory minimum offering, expressed in dollars, to be spent, which shall be guaranteed to every pupil." Wise, *Rich Schools, Poor Schools,* (Chicago, 1968), pp. 143-158.

most prominent example of the legal struggle for the equalisation of resources. *Brown* marked a logical culmination to the litigation by attacking the source of measurable inequalities. Ten years after *Brown,* however, the limitations of the decision became increasingly apparent. Despite the slow pace of desegregation, the realisation emerged that desegregation alone would not result in equality of opportunity. For example, Peter Cohen observed in 1964, "much of the interest of fiscal disparities arises precisely from despair over the evident failure of the efforts to resolve the two central problems - organization along racial lines, and the inability to reduce racial and class disparities in school outcomes."[42] This statement reflected the changing definition of equality of educational opportunity, in which racial equality was merely one component. Constitutional developments reflected, therefore, broader changes within the civil rights movement. The increasing focus upon the elimination of *de facto* segregation that had occurred after the Civil Rights Act of 1964 and the Voting Rights Act of 1965 coupled with the rising consciousness of Northern blacks had now translated into new constitutional arguments.

The heightened awareness of socio-economic inequalities precipitated a pervasive examination of structural inequalities hitherto ignored. The definition of equal educational opportunity slowly incorporated more than a basic integration of races, and gradually reverted to the same equalisation of resources sought before *Brown*. The changing definition reflected the broader struggle to tackle the inequitable education conditions that still existed despite desegregation attempts. Definitions of equal education opportunity centred around three main elements: equality of treatment between races, equality of resources, and equality of achievement. Theoretically, the first of these categories had been achieved through *Brown*. Litigants were increasingly focusing upon the second definition as their next goal. The fight against intangible inequalities had been won, at least in the eyes of the law. With this foundation, the fight against measurable aspects of inequality resumed. Thus, the new wave of legal analysis typified by Horowitz and accepted in *Hobson* provided an ideological and legal continuity with *Brown*.

The increasing emphasis upon material inequalities precipitated a debate regarding the extent of equality required. The most controversial theory of financial equality was

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[42] Peter Cohen, Professor of Economics at UCLA, *The Economics of Inequality*, quoted in Howard Glickstein, "Inequality in School Financing: The Role of Law", *Stanford Law Review*, Volume 25, 1972-3, pp. 335-402.

"equal dollars per pupil."[43] This was a variation of the "one man one vote" theory that lay behind the Court's reapportionment decision.[44] Many practical disadvantages existed with this definition: it failed to take into account the differences in student ability, geographical area, or other innate variations in educational requirements. Nonetheless, uniformity of expenditure was the assumed outcome of judicial involvement, and was the source of much criticism.[45] The subsequent litigation, however, did not seek uniform expenditures. Instead, this assumption emerged from confusion surrounding reformers' aims. The legal doctrine rested upon the assumption that increased financial expenditure was key to the achievement of full equal educational opportunity. Therefore, equal expenditure appeared to be, in essence, the aims of the reformers. Conservative critics had considered the broader implications of the arguments advanced by Horowitz and *Hobson*, which, coupled with the lack of clearly defined objectives, precipitated concerns that remained unanswered. Consequently, the possibility of uniform expenditure remained a central concern of the conservative critics throughout the development of the litigation.

Social science findings further increased the problems of mounting a legal challenge based upon financial inequality. New social science evidence questioned the effect of expenditure on educational differences. James Coleman, the eminent Harvard sociologist, had conducted extensive research into the degree of equality in education. The Coleman Report, published in 1965, spearheaded the new wave of social science evidence that examined the causes of educational inequality.[46] This controversial report became an important element in the subsequent litigation. The report found that financial expenditure was not the sole measure of educational quality, but additional factors, including family environment, the community, attitudes of peers and parents affected educational quality:

> Schools bring little influence to bear on a child's achievement that is independent of his background and general social context, and....this very lack of an independent effect means that the inequalities imposed on children by their home,

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[43] See for example, Paul Carrington, "Financing the American Dream: Equality and School Taxes," *Columbia Law Review*, Volume 73 (1973), pp. 1227-1260.
[44] *Baker v. Carr,* 369 U.S. 186 (1962).
[45] Kurland, for example, based his criticism upon the consequential effect of uniform expenditures.
[46] James Coleman, *Report on Equality in Education,* United States Commission of Health, Education and Welfare (1965).

> neighborhood and peer environment are carried along to become the inequalities with which they confront adult life at the end of school.[47]

These findings precipitated the "cost-quality" debate, in which social scientists disagreed over the relevance of money to educational quality. According to the critics, this development affected the source of the plaintiffs' original complaint: if financial expenditure has no significant bearing upon levels of educational achievement, how can the finance system profoundly affect the educational standards of the poor districts? Consequently, throughout the subsequent litigation fight, defendants used the Coleman Report as evidence of weakness in the plaintiffs' case. However, the methodology and findings of the Coleman Report were strongly criticised by other social scientists.[48] In addition, the author of the report, James Coleman, later supported the plaintiffs in school finance litigation: "Obviously, the current system is, at the extreme, wholly destructive of the goal of educational opportunity for all children, independent of their families' economic resources. The child's educational opportunity comes to be dependent on the economic resources of the local community."[49] Despite its limitations, the social science evidence contributed to the increasingly widespread criticism of the new legal doctrine. In addition to the Coleman Report, other publications had indicated a declining confidence in the ability of the public schools to equalise life chances.[50] The combination of these findings questioned the ideological essence of the plaintiffs' case: more per pupil expenditure may not result in increased equal educational opportunity. However, despite these concerns, the ambiguity of plaintiffs' complaints remained at the forefront of the criticism.[51]

The lack of established aims precipitated broad speculation regarding the potential scope of remedial action. The first school finance case, *McInnis v. Shapiro*, revealed the extent of the weaknesses of the legal doctrine and the necessity for a coherent set of

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[47] *Ibid.*, p. xvii.
[48] See for example, Bowles and Levin, "The Determinants of Scholastic Achievement: An Appraisal of Some Recent Evidence", *Journal of Human Resources,* Volume 3, 1968, pp. 875-897.
[49] James Coleman, Foreword, Clune, Coons and Sugarman, *Private Wealth and Public Education,* (Cambridge 1970), p. viii.
[50] See, for example, Jonathon Kozol's *Death at an Early Age* (1967), and Peter Schragg's *Village School Downtown* (1967).
[51] For example, *Hobson* was criticised on the grounds that "there is serious danger that judicial prestige will be committed to ineffective solutions and that expectations raised by *Hobson* will be disappointed." Note, *loc.cit.*, p. 1525.

objectives.[52] The ruling focused upon the weaknesses in the plaintiffs' legal analysis, and encapsulated the contemporary criticisms. *McInnis* was filed in the Federal Court for the Northern District of Illinois in 1967, and the decision was rendered on 15th November 1968, four months after the filing of *Rodriguez.* The court, in a brief opinion, ruled "the lack of judicially manageable standards makes this controversy nonjusticiable," and determined no cause of action existed.[53] The Supreme Court affirmed the decision, without an opinion, in 1969.[54] The failure of the case to make headway in the courts revealed the shortcomings of the legal doctrine and the plaintiffs' arguments.

The plaintiffs, members of the Chicago Community of Legal Services, had filed a class action on behalf of the poor in Chicago. They claimed that the school finance statutes "violate their fourteenth amendment rights to equal protection and due process because they permit wide variations in the expenditures per student from district to district thereby providing some students with a good education, and depriving others who have equal or greater educational need."[55] The plaintiffs, therefore, based their claim upon the subjective notions of good education and educational need. The court observed that "while the complaining students repeatedly emphasize the importance of pupil's educational needs, they do not offer a definition of this nebulous concept."[56] The ambiguous terminology was too vague to elicit judicial involvement, and the case lacked concrete terms with which the court could grapple. It highlighted the subjective nature of the legal doctrine; it was premised upon ambiguous concepts, the definition of which social scientists were debating. Further, the court ruled school finance should not become a judicial question, but should remain a legislative issue: "the allocation of public revenues is a basic policy decision more appropriately handled by a legislature than a court."[57] The ruling alluded to many of the conservative criticisms, and referred particularly to Kurland's article.[58]

The legal analysis employed in the court's decision distinguished the case at bar from those of *Brown* and *Hobson*: *"Brown* was primarily a desegregation case. Similarly

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[52] 293 F.Supp 327 (1968).
[53] District Judge Carl Decker wrote the opinion.
[54] aff'd mem. sub.nom. *McInnis v. Oglivie* 394 U.S. 322 (1969).
[55] *McInnis*, p.2.
[56] *Ibid.*, p. 3, fn. 4.
[57] *Ibid.*, p. 9.
[58] *Ibid.*, p. 19, fn.27.

Hobson struck down variations in expenditures because the classifying factor was race."[59] Thus, unlike the *Hobson* court, this court denied the existence of precedents which warranted a judicial ruling of this nature, finding that "there is little direct precedent because the contentions now presented are novel."[60] The *McInnis* court thereby rejected the continuity between recent Supreme Court decisions pertaining to wealth and the case at bar. This finding consequently invalidated the premise of the legal analysis. The District Court Judge's conclusion illustrated the lack of judicial standards: "The only possible standard is the rigid assumption that each pupil must receive the same dollar expenditures..... The desirability of a certain degree of local experimentation and local autonomy in education also indicates the impracticality of a single, simple formula.[61] Ultimately, the court concluded that "If the legislatures cannot solve these problems, surely the deep cutting edge of constitutional precepts is not the answer."[62] According to the court, continual innovation in constitutional law was an unsuitable method for ameliorating social ills.

McInnis illustrated the need for a comprehensive and clearly formulated litigation strategy. The plaintiffs had filed suit supported by limited legal scholarship and, according to the court, had a tenuous link with precedent. The court defended the educational finance system on the ground of localism, with which the ambiguously termed plaintiffs' demands appeared to clash. *McInnis* juxtaposed localism and school finance reform, implying that the new litigation threatened localism. This highlighted one of the central weaknesses in the legal doctrine as argued. The fate of *McInnis*, coupled with a similar fate that befell a Virginia case, illustrated the problems inherent with the application of equal protection guarantees to equal educational opportunity.[63] The weaknesses of the plaintiffs' case were such, according to the court, that no basis for adjudication existed. In the light of the failure of the doctrine to make significant headway, the legal scholarship developed in clarity and coherence during 1968 and 1969, and this development ultimately provided the necessary blueprint for the *Rodriguez* plaintiffs.

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[59] *Ibid.*, p. 20.
[60] *Ibid.*, p. 21.
[61] *Ibid.*, p. 24.
[62] *Ibid.*, p. 26.
[63] *Burrus v. Wilkinson,* 310 F.Supp 572 (W.D.Va 1969), in which the Court ruled, "Courts have neither the knowledge nor the means nor the power to allocate public monies to fit the varying needs of these students throughout the state."

The major developments in legal analysis occurred during late 1968 and 1969. The extent of the advances became evident in Texas in October 1969, when the federal court for the Western District of Texas denied the defendants' pre-trial motion to dismiss.[64] During that time, a coherent legal analysis had begun to emerge, which clarified and subsequently strengthened the plaintiffs' suit. The watershed in the school finance litigation was precipitated by events in California. There, plaintiffs had filed a similar complaint to *Rodriguez* in August 1968. The formation of the California suit had resulted from a meeting between John Serrano and the principal of an East Los Angeles *barrio* elementary school in June 1967. During the course of this meeting, the principal informed Serrano: "Your sons are very bright. If you want to give them a decent chance in life, take them out of this school."[65] The subsequent development of the case emerged from a coincidental meeting between Mr. Serrano and Derrick Bell, the civil rights lawyer and activist. A number of prominent legal scholars and lawyers became involved in *Serrano*, including Harold Horowitz, who, in 1968, had published a second article clarifying the arguments of his previous publication.[66] The case progressed more quickly than in Texas, and in January 1969, the Supreme Court of California dismissed the case, basing its decision upon *McInnis.*

In the light of the impact of *McInnis* upon the fate of the California case, the *Serrano* lawyers filed an *amicus* brief in *McInnis*, which was then on appeal to the Supreme Court. Sidney M. Wolinsky, the lawyer for the plaintiffs in *Serrano*, filed the brief on behalf of San Francisco Neighborhood Legal Assistance Foundation and the Western Center for Law and Poverty, the organisations which represented the plaintiffs in *Serrano.* The involvement of the lawyers for the *Serrano* plaintiffs illustrated the importance of the outcome of *McInnis* for the development of school finance litigation. The Supreme Court's affirmation of the lower court's judgement confirmed the necessity to refine litigation tactics of the remaining school finance cases. The *McInnis* opinion effectively rejected plaintiffs' argument on all counts. Thus, in order to turn that failure into a success in other states, a tactical change was necessary. The primary obstacle

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[64] See below, p. 83.
[65] David Kirp, "Judicial Policy-Making: Inequitable Public School Financing and the *Serrano* case", in *Policy and Politics in America*, Allan P. Sindler (ed.) (Boston 1973), p.185.
[66] Harold Horowitz and Diana L. Neitring, "Equal Protection Aspects of Inequalities in Public Education and Public Assistance Programs from Place to Place Within A State", *UCLA Law Review,* Volume 15, (1968), pp. 787-816.

facing plaintiffs in all states was the perceived conflict between increased educational equality and the principle of localism, which had to be addressed before significant advances could be made. The increased involvement of the federal government in education and the start of desegregation measures had prompted a growing defence of the principle of local control of education. The court in *McInnis* had affirmed the importance of localism: "effective, efficient administration necessitates decentralization so that local personnel, familiar with the immediate needs, can administer the school system."[67] Conservative critics also expressed concern for the implications of the doctrine upon local control. Kurland, for example, stated: "so long as tax paying power and spending power are left in the hands of local government units, for which, admittedly, only history and an outmoded concept of democracy speak, the required equality cannot be achieved."[68] Thus, it was commonly assumed that a more equitable school finance system was incompatible with localism. This incompatibility was particularly significant in light of the growing awareness of the value of localism in education. The success of school finance litigation was dependent upon answering the charge of incompatibility.

It was at this juncture that the legal theory of John E. Coons, William H. Clunes and Stephen D. Sugarman emerged.[69] Their theory provided school finance litigants with the clarification of aims and methods found lacking by the Court in *McInnis.* It combined the principles of localism with educational equality in order to answer the claims of incompatibility, asserting instead that localism and school finance reform were congruent. In 1966, the U.S. Civil Rights Commission had asked Coons to study the condition of public school finance in Chicago, and he enlisted the assistance of two of his students. The result was *Private Wealth and Public Education*, published in 1970 and described as "the most ambitious, eclectic and intelligently argued forays by lawyers into any educational policy realm."[70] Prior to publication, shorter versions of the book had appeared elsewhere which had already influenced the development of the California case.[71] The authors were involved in school finance litigation; they occupied a central role

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[67] *McInnis,* p. 25.
[68] Kurland, *loc.cit.*, p. 786.
[69] John Coons was Professor of Law at the University of California at Berkeley, Clunes was a graduate student of Coons, and was then appointed Assistant Professor of Law at Northwestern University. Sugarman was a member of Illinois Bar.
[70] David Kirp and Mark Yudof, "Whose Priorities for Educational Reform?", *Harvard Civil Rights-Civil Liberties Law Review,* Volume 6 (1971), p. 617.
[71] John Coons, William Clunes, Stephen Sugarman, "Educational Opportunity: A Workable

in *Serrano v. Priest*, and filed an *amicus* brief to the Supreme Court in 1968 on behalf of the plaintiffs in *McInnis*. The *amicus* brief outlined their central contention; namely that localism and equal educational opportunity were compatible. The authors' central contribution to school finance litigation was the development of a constitutional principle to support this argument.[72] The Supreme Court's affirmation of the lower court decision without opinion in March 1969 meant it did not considered the merits of the Coons theory.

There were two key elements to the Coons theory. The first was the principle entitled "Proposition One." This principle stated that "the quality of public education may not be a function of wealth other than the total wealth of the state as a whole."[73] This was a suggestion for a standard for the application of the equal protection clause, to create a framework to permit judicial involvement in school finance reform by establishing an enforceable standard. This principle would enable the Court to establish a clear constitutional standard whilst preserving local choice. Coons *et al.,* also created a proposed finance system based upon the ideal of Proposition One. This was the second key aspect of the Coons theory. The proposed school finance system sought to marginalise the effect of local district wealth on educational funds through promoting the idea of "fiscal neutrality." Under this system, "equal tax rates should provide equal spendable dollars."[74] The state would devise different tax rates, which the local districts would then select in accordance with the local desire for educational expenditure. The tax rates would be set in accordance with state wealth. Thus, local districts would be free to choose a higher tax rate, thereby preserving the principle of local choice, but the system would ensure that equal tax rates yielded equal returns. This system was called "District Power Equalising" as "Equal district power is the key." Different levels of expenditure would still exist, therefore, under District Power Equalising, but the differences would be a result of district choice, rather than district wealth.

Constitutional Test for School Finance Structures", *California Law Review,* Volume 57, Number 2, (April 1969), pp. 305-421.

[72] Wolinsky, in his *amicus* brief in *McInnis*, referred the Court to this brief, stating "several possibilities exist which will permit local control and still provide equal educational opportunity. A discussion of some of these alternatives is contained in the *amicus* brief of Coons, Clunes and Sugarman." p. 15. The emergence of this theory was, according to Wolinsky, additional reason to overturn the decision.

[73] Coons *et al., Public Wealth and Public Education*, (Cambridge, 1970), p. 304. This principle was also referred to as the no-wealth principle.

[74] Coons *et al., op.cit.,* p. 302.

Coons *et al.* provided an "oversimplified example" to illustrate the theory:

> Imagine a state divided into two school districts, A and B, each with 100 pupils. District A has a total wealth of $10,000 ($100 per pupil). District B has a total of $90,000 or $900 per pupil. Each decides to tax its wealth at the rate of 10% for schools, yielding respectively $10 and $90 per pupil. Under our basic value judgment, district A is $80 short- it tried just as hard so it should be able to buy just as good a school. The $80 must come from a state tax. Since the total wealth of the state is $100,000, in order to raise the $80 per pupil for district A the state chooses to levy a flat 8 % tax, producing $72 per pupil from district B and $8 from district A. Now look at the example from the other side. In gross taxes per pupil district A has paid $10 (local) plus $8 (state), or $18. District B has paid $90 (local) plus $72 (state), or $162. *As a percentage of local wealth, each total tax is exactly the same, while the redistribution of wealth has produced equal expenditures.* Each is taxed at 10% locally and 18% totally, each has $90 to spend – from each according to his ability, to each according to his effort.[75]

The system, therefore, provided the framework for equal expenditure, but it did not require it. The key to District Power Equalizing was the locally determined tax rate. This rate illustrated local desire. Thus, if a poorer district decided to tax itself at the same rate as the richer district, it was thereby entitled to the same expenditure. The state tax, imposed as a result of the inequities, would redress the imbalance. According to Coons *et al.,* "the system is imperfect, but it is feasible and it is vastly superior to any existing system as it preserves most aspects of the present system. It also takes advantage of an interesting phenomenon: poor districts show a tendency to tax themselves as hard or harder than rich."[76] Thus, the proposed system would eradicate the most negative aspect of the current system: "the right of the rich to have superior schools with less effort."[77] It would preserve, however, the positive aspects of the system, namely local choice.

Thus, Coons *et al.,* proposed both the means for judicial involvement and an alternative school finance system. Proposition One provided a principle that tried to guide courts in school finance reform. District Power Equalizing illustrated a way districts could translate the principle into reality. It was, they admitted, not the only way or a perfect way but, they argued, it was the best way in which local choice could be

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[75] *Ibid.,* pp. 34-35.
[76] *Ibid.,* p. 303.
[77] *Ibid.*, p. 307.

preserved and financial differences could be neutralised. They did not, however, have to be implemented simultaneously; courts could use Proposition One without the establishment of District Power Equalizing. Both the proposition and the method, therefore, were intended to assuage conservative reservations by promoting the merits of flexibility, simplicity, and, above all, localism.[78] They were also both based upon the ideal of "fiscal neutrality"; in which differences in local district wealth would no longer result in differences in educational expenditure. Above all, however, local districts would be free to select levels of educational expenditure.

One of the central weaknesses of the theory, however, was its failure to consider the effects of differing tax rates in sufficient depth. The authors stated that different tax rates would entitle districts to the corresponding difference in expenditure, but they did not illustrate this point in detail. However, using the same hypothetical districts as above, if District A established a tax rate of 15% and District B a rate of 10%, District A would be entitled to 5% more funds. District A would have a total expenditure of $94.50 in comparison to District B of $90. Assuming the state tax would remain at the same flat rate of 8%. The difference of 5% in expenditure did not, however, adequately account for the difference in tax contribution. In effect, District A paid 50% more tax than District B, but only received a 5% return. Thus, District Power Equalizing only allowed for the differing tax rates from a certain perspective. Overall, 5% additional funding appeared an accurate reflection of the different rate. For those people in District A, however, the 5% extra funds, or $4.50, did not accurately reflect their different tax effort. Thus, District Power Equalizing ameliorated, rather than eradicated, the effects of different tax efforts. It was, as Coons *et al.* suggested, an imperfect solution, but one which improved upon the existing system.

The authors also explained the failure of *McInnis* in order to illustrate the necessity for a principle with constitutional roots and methods to put it into effect. According to Coons *et al.*, the lack of opinion from the Court was simply a reflection of the weaknesses of the plaintiffs' case, and need not preclude Court involvement in subsequent cases. The *per curiam* affirmance, therefore, "need not imply the Court's permanent withdrawal from the field."[79] The reason for the failure of *McInnis*, which

[78] *Ibid.*, p. 306.
[79] *Ibid.*, p. 308.

"rose and fell like a flare," was the inadequate legal analysis on the part of the plaintiffs in support of their arguments. It was "the predictable consequence of an effort to force the Court to a precipitous and decisive action upon a novel and complex issue for which neither it nor the parties were ready."[80] The theory advanced by Coons *et al.,* was designed to provide the litigants with a workable, attainable definition of "equality" and to placate critics. They stated the essence of their theory from the start: "local control is not jeopardized under the above standard."[81] This was, therefore, an attempt to improve plaintiffs' argument in order to enhance chances of success. Coons attributed the *McInnis* decision to inadequate legal doctrine, not bad argument. However, the Court's criticism of the case was not simply based upon its inadequate legal doctrine, but also the nature of plaintiffs' arguments. *McInnis* was rendered before the retirement of Earl Warren and thus demonstrated that the Warren Court had also demonstrated a reluctance to become involved in the area of school finance.

The authors designed the proposed standards in response to the criticisms of the school finance litigation, and sought to combine these criticisms with the plaintiffs' objectives. The principle combined considerations of the judicial role, the values of localism, and the necessity for enforceability and flexibility. According to the Coons theory, the school finance structure would ensure that equal tax rates provided equal yield in dollars. Differences in yield would derive from the local decision to raise or lower the tax rate in accordance with local desire. The system was therefore designed to safeguard the principle of local choice.[82] They did not, however, consider the political context of the proposal. The marginal additional yield on significant tax increases would, in all probability, discourage districts from setting a tax increase significantly different to that of the national average.[83] The practical political consequences of District Power Equalizing were not considered. Instead, the authors devised a policy in response to the primary criticisms of the existing remedies. This illustrated the narrow focus of the theory. It was a social policy proposal, not a political programme designed to be broadly popular. It was, however, a policy designed to reconcile school finance reform with

[80] *Ibid.,* p. 301.
[81] *Ibid.,* p. 26, 304.
[82] In sum, district power equalizing was "a commitment by the state to the principle that the relationship between effort and offering will be the same irrespective of wealth and that the district is to determine the effort." Coons *et al, op.cit.,* p. 201. For a complete analysis, see Coons *et al., op.cit.,* pp. 201-242.
[83] For example, the chances of a population in a school district being content with a 50% tax increase but only a 5% return were extremely slim.

localism and thereby to tackle one of the primary obstacles to substantive change. It provided the theoretical means by which litigants could combat the increasingly widespread support of localism in education. The emergence of Proposition One and District Power Equalizing marked a watershed in the development of school finance litigation.

Coons *et al.,* addressed each criticism of school finance litigation. First, the authors not only affirmed the importance of localism in education, but argued that "the scandalous discriminations now tolerated in public education in our society are a consequence not of too much but of too little local control."[84] An increased level of localism was required in order to make the system truly equitable. Second, the authors considered the potential implications upon the judicial role. In order to respond to the criticisms that judicial activity in this realm would create impossible expectations, the authors argued that the Court should restrict the scope of its activity and "demonstrate with reasonable clarity and focus the nature of the Constitutional defect."[85] Coons *et al.,* thereby emphasised the importance of acknowledging the limitations of a judicial ruling:

> Perhaps the worst service the Court would render would be the elimination of a principle which would leave the state no flexibility in its choice of financial structure for education.....There is great virtue in the Court's confining itself whenever possible to minimal proscriptions in the interest of legislative flexibility.....We hope to demonstrate that Proposition One satisfies this criterion.[86]

Proposition One thereby incorporated the notion of judicial restraint. It simply established the inequality that was impermissible, rather than dictating any desired standards. The Proposition, therefore, limited action rather than mandated it. The proposed standard ensured other governmental branches, including localities, would be involved in determining the nature of remedial action, and District Power Equalizing showed how this could be the case. Therefore, it "may have its charms for a court with a lingering fondness for judicial restraint and a hope to be understood by its clientele."[87] It also incorporated the idea of flexibility: "the one predictable feature of the future structure

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[84] *Ibid.,* p. 319.
[85] *Ibid.,* p. 319.
[86] *Ibid.,* p. 325.
[87] *Ibid.,* p. 340.

is its unpredictability."[88] It would not impose a steadfast principle that destroyed legislative impulses. The authors argued that Proposition One was designed with the contemporary legal and political situation in mind, a realistic attempt at achieving an appropriate gloss on the equal protection clause that would be useful to courts involved. It was "tempered to the needs of the situation and the demands of the judicial role."[89] Through the establishment of coherent principles, the authors attempted to clarify the nature of the plaintiffs' case, and thereby prevent any misinterpretation.

The authors disagreed with certain elements of the current direction of litigation. According to the litigants in California and Texas, the school finance system discriminated on the basis of race as well as class. However, Coons *et al.,* disagreed with this notion. The alleged relation between race and financial inequality misrepresented the dynamics of school finance structure. The authors stated "there is no reason to suppose that the system of district based school finance embodies a racial bias."[90] Instead, "if there were no black people in America, the inequality within the system would in no way be diminished."[91] The inclusion of a race into the litigation strategy hindered, rather than enhanced, chances of success:

> The simple fact suggests the political unwisdom of turning this into a racial issue. There will surely be enough upset over this question on social and economic grounds without evoking all the fires of racism. It could well be that some very forces which would give the necessary political support to institute a positive legislative responses to the Court's decree would be paralysed or even set in opposition to reform if the affair was falsely cast in racial terms.[92]

Brown, the authors argued, remained the starting point for the claim that education was a fundamental interest, but "it is necessary to extricate education from race."[93] Therefore, the rhetorical allegiance to education expounded by the Court did not "establish any judicial doctrine about education", but instead was "a good description of an objective truth."[94] They emphasised that Proposition One would only "be relevant in school

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[88] *Ibid.,* p. 341.
[89] *Ibid.,* p. 341.
[90] Coons *et al., loc.cit.,* p. 127.
[91] Coons *et al., op.cit.,* p. 357.
[92] *Ibid.,* p. 357.
[93] *Ibid.,* p. 361.
[94] *Ibid.,* p. 381.

finance", thereby avoid the expansion of egalitarian guarantees any further into the social policy realm.

Taken in its entirety, Coons *et al.,* succeeded in offering an answer to conservative criticisms of school finance litigation and producing a legal theory to achieve liberal ends. The authors shared the plaintiffs' analysis of the inequity present in school finance, yet the proposal was ultimately a compromise between the conflicting theories of the time. Instead of viewing school finance litigation as the first step towards an increasingly equitable distribution of socio-economic resources, it was viewed solely in the context of school finance reform. Proposition One was an important ideological, as well as strategic, development in school finance litigation. It created a clearer objective and established the mechanism for judicial involvement. The ideological essence of the reforms advocated by Wise and Horowitz arose from a desire to overcome the inherent educational disadvantages resulting from broader socio-economic inequality. Proposition One and District Power Equalizing emphasised individual choice: the right to choose individual levels of education resources unaffected by wealth differences. Thus, Coons *et al.,* altered the emphasis of the litigation, focusing upon the principles underlying the finance system, rather than the result. It was ultimately conservative in orientation; it was designed to incorporate judicial restraint, prevent further centralisation of government, ensure decision making power remained within localities, and avoid the precipitation of broader questions regarding socio-economic inequalities by disputing the relevance of race. [95] Furthermore, the authors expressed a desire for the Court to clarify the criteria for equal protection classifications.[96] It was designed to appeal to the growing conservatism within society and the declining sympathy for minority rights which was marked by the election of Nixon a few months before the publication of the theory. The theory was a realistic

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[95] In this context, the definition of liberal and conservative derive from the degree of change required. Conservatism sought to preserve the current situation, whilst liberalism sought change. Thus, the conservatism of the Coons' theory stemmed from two main aspects. First, its aim to preserve local control, the fundamental element of the school finance system. Second, the desire to minimise judicial involvement in the search for a remedy. However, although the basic element of the system would remain intact, it contained enough degree of change to satisfy liberal demands. Further classifications of liberal and conservative, therefore, are categorised according to the degree of change required to the basic social and political structure.

[96] For example, in the postscript to the 1969 *California Law Review* article, the authors considered the significance of the recently rendered *Shapiro v. Thompson* 394 U.S. 618 (1969). Although they conceded that the decision was "encouraging to all who seek judicial aid for public education", it also "illustrates the need for confining an intelligible principle in the legislative and judicial development of these new rights to proceed in an orderly fashion." Coons *et al., loc.cit.,* p. 421.

approach to the elimination of the inequalities around which the litigation was centred.

On 15th October 1969, the District Court for the Western District of Texas entered its first ruling in *Rodriguez v. San Antonio Independent School District.* The court denied the defendants' motion to dismiss, but held the case in abeyance, pending legislative action. This was in recognition of the recommendations made by the Governor's Commission of Public School Finance, published in August 1968, which illustrated that the state legislature had, by "its own initiative", attempted to address the problems of the school finance.[97] According to the defendants, ample time remained for the problems to be explored and addressed by the state legislature. Thus, the court held that legislative action must be taken by the adjournment of the next sitting of the state legislature.[98] Until that time, the court decided not to rule.

The court's decision to stay its hand in *Rodriguez* pending legislative action reflected its reluctance to enter the school finance debate unless prompted by political inaction. Although not the outcome the plaintiffs desired, it was not a rejection of their case, merely an acknowledgement that judicial involvement constituted the final resort for redress. The court had expressed its willingness to hear the case, which was a major advance since *McInnis.* Similarly, the proceedings in *Serrano* reflected the recent developments in school finance. Collaboration between Sidney Wolinsky, Harold Horowitz and Derrick Bell had, until October 1970, failed to make headway in the California courts. Following the state trial court's dismissal of the case in January 1969, the lawyers appealed to the state's intermediate court, which affirmed the lower court's decision in September 1970.[99] However, in October 1970, the California Supreme Court agreed to hear the case, and oral arguments were set for May 1971.

The contribution to legal theory made by Coons *et al.,* enabled the lawyers in *Serrano* to distinguish the case sufficiently from *McInnis* to warrant separate consideration. The publication of the Coons theory marked the turning point in the fate

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[97] *Rodriguez v. San Antonio Independent School District* 337 F.Supp 280, p.285 fn.11 (1971). Governor's Commission of Public School Finance was entitled *The Challenge and the Chance.* For more details of this report, see Chapter One, p. 54.

[98] At this time, the Texas state legislature met every second year. The next sitting was scheduled for January - June 1971.

[99] The brief opinion issued by the court followed the *McInnis* precedent. The court stated that "even if we are not bound by the *McInnis* holding, it is certainly of persuasive character and entitled to great weight....and irrespective of its effect, as legally binding or not, its reasoning and logic are unquestioned". Quoted in David Kirp, *loc.cit.*, p. 98.

of the case: "In the winter of 1970-71, *Serrano*'s prospects looked bleak....What happened in the intervening months to reverse this gloomy prediction? *Public Wealth and Private Education*, published the previous year, was quickly recognised as a landmark work in constitutional law."[100] The individual participation of Coons, Clune and Sugarman in *Serrano* was evidence of the effect of their legal theory. In addition to filing an *amicus* brief on behalf of the Urban Coalition and the National Committee for the Support of the Public Schools in California, Coons followed Wolinsky in the presentation of the arguments to the California Supreme Court. The plaintiffs' case in *Serrano* was the first comprehensive presentation of the Coons theory, and the California Supreme Court's agreement to hear the case was the recognition of the change in plaintiffs' demands since *McInnis*. The court's opinion illustrated the profound influence of the Coons theory upon the direction of school finance litigation.

In a 6-1 decision, the California Supreme Court found in favour of the plaintiffs. The opinion, written by Justice William Sullivan, accepted almost all elements of the plaintiffs' arguments, finding that wealth was a suspect classification and education a fundamental interest under the Federal Constitution and California State Constitution. This finding shifted the burden of proof onto the defendants. They had to prove the finance system was constitutional. The Coons theory provided the basis for much of the court's reasoning. The financing system was invalidated because "it makes the quality of a child's education a function of the wealth of his parents and neighbors."[101] This was a direct reference to the wording of the plaintiffs' brief, which was based upon the Coons theory.[102] The opinion began with a detailed analysis of the mechanics of the system, in which the court faulted the system at all levels of finance.[103] The state contribution, supplied in two main forms, the basic aid and equalisation aid, was found to "widen the gap between rich and poor districts."[104] The interdistrict variation in expenditures verified

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[100] *Ibid.*, p. 100.
[101] *Serrano v. Priest* 5 Cal 3d (1971), p. 12.
[102] In their brief, the plaintiffs asserted that the financing scheme "makes the quality of education for school age children in California a function of wealth of the children's parents and neighbors." Plaintiffs' Brief 35017 LA 298. California State Library, Sacramento, California. Hereafter cited as C.S.L.
[103] According to the statistics submitted in the case, the educational revenues for the fiscal year 1968-1969 came from the following: 55.7% local property taxes, 35.5% state aid, 6.1% federal funds, and 2.7% miscellaneous sources.
[104] The court found the equalisation aid to "temper the disparities which result from vast variations in real property assessed value, wide differentials remain available to individual districts, and consequently, in the level of educational expenditure." Coons *et al., op.cit.*, p. 592.

this point:

> the Baldwin Part Unified School District expended only $577.49 to educate each of its pupils in 1968-69, during the same year Pasedena Unified School District spent $840.19 on every student, and the Beverly Hills Unified School District paid out $1,231.72 per child.....The source of these disparities is unmistakable: in Baldwin Park the assessed valuation per child totalled only $3,706, in Pasedena, assessed valuation was $13,706; while in Beverly Hills, the corresponding figure was $50, 885 --- a ratio of 1 to 4 to 13.[105]

After verifying the inequalities in the system, the court considered the plaintiffs' legal analysis. The plaintiffs had challenged the finance system on the basis of both federal and state constitutions. The court, however, rejected the argument that the school finance system violated Article IX, Section 5 of the California Constitution.[106] In its dismissal of this particular contention, the court also rejected the notion of uniform educational expenditure. This eliminated the possibility of interpreting *Serrano* as a move towards absolute equality in expenditures, and attempted to define the parameters of the decision.[107] After clarifying these points, the court then examined the plaintiffs' application of the Fourteenth Amendment in depth. The court stated, however, that "our analysis of plaintiffs' equal protection contention is also applicable to their claim under these state constitutional provisions."[108] Thus, *Serrano* invalidated the finance system on the basis of both the federal and state constitutions. This acquired particular significance

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[105] *Ibid.,* p. 607. These figures demonstrated that a similar degree of inequality existed in California as in Texas. Statistics for the previous academic year in Texas showed a per pupil expenditure of $231 per pupil in Edgewood compared to a $507 in Alamo Heights. Edgewood had an average property value of $5,429, compared to $45,095 in Alamo Heights. The difference between the racial composition of the two districts was not as great as in San Antonio, but remained significant. In Baldwin Park, 87% of the student population was "black, Hispanic or from another minority group." In Beverly Hills, this figure was 21%. In contrast, 96% of the Edgewood student population was from a minority group, whereas 19% of the students in Alamo Heights were from a minority.

[106] Article IX, Section 5 of the California Constitution stated: "The Legislature shall provide for a system of common schools by which a free school shall be kept up and supported in each district at least six months every year."

[107] The court stated, "Consequently, we must reject the plaintiffs' argument that the provision in Section 5 for a "system of common schools" requires uniform educational expenditure." *Serrano.,* p. 609.

[108] These state provisions were Article I, sections 11 and 21 of the California Constitution. Section 11 stated: "All laws of a general nature shall have a uniform operation." Section 21 stated: "No special privileges or immunities shall ever be granted which may not be altered, revoked, or repealed by the Legislature; nor shall any citizen, or class of citizens, be granted privileges or immunities which, upon the same terms, shall not be granted to all citizens." Thus, the court found that "we have construed these provisions as 'substantially the equivalent' of the equal protection clause of the Fourteenth Amendment to the Constitution." *Ibid.*, p. 609.

after the U.S. Supreme Court's decision in 1973: *Rodriguez* did not overturn *Serrano.*

The structure of the legal analysis provided the framework for many subsequent state court decisions, including *Rodriguez*. The detail in which *Serrano* was cited in other state decisions demonstrated its profound importance in the development of school finance litigation.[109] The analysis consisted of three parts; a consideration of the suspect nature of wealth classifications, the analysis of education as a constitutional, or fundamental, right, and the employment of the strict scrutiny measure. The bulk of the legal analysis dealt with the two primary assertions, which initially appeared in Horowitz's 1966 article. The court found "that the school financing system classifies in the basis of wealth."[110] The basis for this finding was not only the vast discrepancies in expenditure levels, but also the difference in taxing levels. The residents in Baldwin Park, for example, taxed themselves at a rate of $0.55 per $100 of assessed valuation for 1968-69, in comparison with a rate of $0.28 for Beverly Hills residents.[111] This inequality, the court concluded, demonstrated the local desire to spend more upon education, but the structure of the system rendered this impossible. Thus, the inequality of the system extended beyond the basic financial differences. Structural inequalities meant the poorer districts taxed themselves at a higher tax rate, at a lower return. As a result, the court found, "the affluent districts can have their cake and eat it too: they can provide a high quality education for their children while paying lower taxes. The poor districts, by contrast, have no cake at all."[112] The court then rejected elements of the defendants' claims that the case was non-justiciable. According to the defendants, the basis of the wealth classification related to district, not individual wealth. This consequently rendered the classification non-justiciable, and the legal precedents irrelevant. With the burden of proof having been shifted to the defendants under strict scrutiny, they attempted to

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[109] For example, the Minnesota decision, *Van Dusartz v. Hatfield* 334 F.Supp 870 (1971) found *Serrano* to be persuasive, and contained frequent reference.

[110] *Ibid.,* p. 615.

[111] Baldwin Park was considered to be an economically deprived area. For example, the average value of local property was $13,108 compared to $50,885 in Beverley Hills. A similar taxation difference existed in Texas, where Edgewood taxed themselves at a rate of $0.70 per $100 of assessed valuation, in comparison to $0.31 in Alamo Heights. The *Serrano* opinion does not, however, contain specific statistics regarding the racial composition of the schools and thus cannot be compared to *Rodriguez.* However, the connection between race and class was evident in the complaint, which stated: "A disproportionate number of school children who are black children, children with Spanish surnames, children belonging to other minority groups reside in school districts in which a relatively inferior educational opportunity is provided."

[112] *Ibid.,* p .620.

convince the court that the legal analysis was flawed.[113] The court found their argument unpersuasive; "we think that discrimination on the basis of district wealth is equally invalid."[114]

This aspect of the decision resulted in criticism from certain legal commentators who argued that the Supreme Court decisions used as precedent invalidated wealth classifications on the basis of individual wealth.[115] Thus, the extension of the legal analysis to include district classifications was without precedent and consequently unsound legal reasoning. The court also determined that absence of discriminatory motivation did not render the system valid. In order to reach this finding it employed the same legal analysis as *Hobson.* The state was accountable for the *de facto* discrimination that existed in the educational structure.[116] The court refused to make a distinction between *de facto* and *de jure* discrimination for the purposes of legal analysis and consequently ruled that

> We recently pointed out the difficulty of categorizing racial segregation as either *de facto* or *de jure*. We think the same reasoning applies to classifications based on wealth. Consequently, we decline to attach an oversimplified label to the complex configuration of public and private decisions which has resulted in the present allocations of educational funds.[117]

The legal reasoning applied to racial discrimination was extended to include wealth discrimination. The two forms of discrimination, in the opinion of the California Supreme Court, were found to be equally unconstitutional in the provision of education. The California Court determined that *de jure* discrimination was violative of the constitution and thereby extended Constitutional guarantees to a new area of judicial involvement.

The analysis of the fundamentality of education established the ideological

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[113] As the court found wealth to be a suspect classification, the strict scrutiny measure would now be employed. This meant that the finance system was presumptively invalid, unless the defendants could establish a "compelling interest" for the system. For further details of this, see Introduction, pp. 27-28.

[114] *Ibid.,* p. 612.

[115] The most comprehensive criticism of *Serrano*, published after the district court decision in *Rodriguez*, included this argument. See Stephen R. Goldstein, Member of Pennsylvania Bar, "Interdistrict Inequalities in Public School Financing: A Critical Analysis of *Serrano v. Priest* and its progeny," *University of Pennsylvania Law Review,* Volume 120 (1972), pp. 504-621. Another criticism of *Serrano* also included this argument. See Paul Carrington "Egalitarian Overzeal: Polemic Against the Local School Property Tax Cases", *University of Illinois Law Forum*, Volume 2, 1972 pp. 872-908.

[116] "Official activity has played a significant role in establishing the economic classifications challenged in this action", *Serrano v. Priest,* p. 614.

[117] *Ibid.,* p. 612.

parameters of the case. The court's legal reasoning affirmed the centrality of education to American society, thereby accepting the legal doctrine expounded by Horowitz, Wise and Coons.[118] The court agreed with the contention that recent Supreme Court decisions, including *Brown*, reapportionment cases, criminal procedure cases, supported the plaintiffs' claim that education was a fundamental interest.[119] The court found *Hobson* persuasive, citing its affirmation of the cultural importance of education in the eradication of socio-economic inequality.[120] In the light of these findings, the court employed strict scrutiny, and found the state's rational interest in the system unpersuasive.[121] Localism was insufficient justification for the vast discrepancies in the system. The special nature of education warranted the highest degree of judicial protection, and the court determined localism to be a weak reason for the existing inequalities. The court, therefore, denied that the case held broader ideological implications. It rejected the notion that this finding would result in the gradual equalisation of all governmental services. The holding applied only to school finance and would not start the gradual "destruction of local government." It also questioned the degree to which poor districts even possessed local choice when the difference in tax levels between rich and poor districts were considered. Therefore, "far from being necessary to promote local fiscal choice, the present financing system actually deprives the less wealthy districts of that option."[122] The concluding rhetoric confirmed the ideological premise of the plaintiffs' case:

> By our holding today we further the cherished idea of American education that in a democratic society free public schools shall make available to all children equally the abundant gifts of learning. This was the credo of Horace Mann, which has been the heritage and inspiration of this country. "I believe", he wrote, "in the existence of a great, immortal, immutable principle of natural law, or natural ethics- a principle antecedent to all human institutions and incapable of being abrogated by any ordinance of man.....which proves the absolute right to an education of every human being that comes into the world and which, of course, proves the correlative duty of every government to see that means of that

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[118]The Court stated, "education is the lifeline of both the individual and the society," *Ibid.,* p.615.
[119] "Education may have far greater social significance than a free transcript or a court appointed lawyer....the United States Supreme Court has repeatedly recognized the role of the public education as the basic tool for shaping democratic values." *Ibid.,* p. 617.
[120]*Ibid.,* p. 618, fn. 27.
[121] For further detail of the strict scrutiny measure, see Introduction, pp. 27-28.
[122] *Ibid.*, p. 622.

education are provided for all.[123]

Although *Serrano*'s legal analysis was extensively cited in other state cases, it contained certain weaknesses for future analysis. Its legal setting prevented a thorough examination into the factual assumptions of the plaintiffs' case. As the case was decided upon a demurrer, the court accepted certain factual contentions that were, at that time, hotly disputed. In particular, the court did not consider the "cost-quality" social science debate, which was becoming central to school finance litigation.[124] In addition, the court did not address the question of remedial options. In order to minimise disruption, the ruling did not require the immediate implementation of a substitute system. Instead, "such a system remains operable until an appropriate new system can be put into effect."[125] The decision did not establish any guidelines for the nature of the new constitutionally valid system; neither did it establish criteria for a constitutional finance system other than the Coons theory, nor did it fix a specific time period for the establishment of a new system. The final weakness in the legal analysis was that the opinion never mentioned race. Despite the advice of Coons, the plaintiffs' complaint retained explicit mention of discrimination on the basis of race.[126] The California Supreme Court, however, did not expand the analysis to include race. The court found sufficient basis for finding for finding the system unconstitutional without reference to race.

Serrano was handed down at a crucial juncture in the development of the *Rodriguez* suit. The Texas legislature, in session between January and June 1971, failed to make progress on the school finance issue. The nature of the Texas legislature contributed to the political inaction and the composition of the 1971 legislature further compounded the obstacles to reform. The Texas legislature met every second year for a five-month period. It was a part time law-making body with a reputation for inaction. For example, in a national report published in 1971, Texas ranked 38th for "its overall quality as a lawmaking body", receiving its lowest marks for staff competence and efficiency.[127] The

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[123] *Ibid.*, p. 626.
[124] The court ruled, "defendants contend that different levels of educational expenditure do not affect the quality of education. However, plaintiffs' complaint specifically alleges the contrary, and for purposes of testing the sufficiency of a complaint against a general demurrer, we must take its allegations to be true."
[125] *Ibid.*, p. 627.
[126] See above, p. 81.
[127] John Burns, *The Sometimes Governments: A Critical Study of the 50 American State Legislatures,* (1971), As quoted in Daniel Morgan, *op.cit.*, p. 23.

new legislature consisted of the highest number of first term legislators in the state's history, many of whom had campaigned upon a "no new taxes" platform.[128] The possibility of substantive reform in a politically controversial area, therefore, was slim.

Between June and October 1971, the lawyers in *Rodriguez* prepared their case for trial and it was during this period that *Serrano* was handed down.[129] In addition to *Serrano*, school finance had become an issue of mounting national political importance. The magnitude of the school finance litigation had become apparent; by the end of 1971 26 suits had been filed in 17 states.[130] The political profile of the issue had risen considerably. In January 1970, President Nixon had appointed the President's Commission on School Finance. Furthermore, between 1968 and September 1971, 25 states published the findings of state appointed school finance commissions.[131] Other state commission reports had yet to be filed.[132]

In part, the increased attention towards school finance was precipitated by the busing controversy, which increased its political volatility. The Supreme Court handed down *Swann v. Charlotte Mecklenburg Board of Education* in March 1971, two months

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[128] The reason for the popularity this campaign pledge can be attributed to the "tax payers revolt of the 1970s."This was the title given to the increasing level of dissatisfaction expressed by the voters in certain states regarding taxation levels. The property tax in particular was a cause of dissatisfaction. Although the more significant tax payers revolt occurred in the late 1970s, this revolt nevertheless characterised the growing dislike of the tax. Ohio, Michigan, New York and California were the primary locations of the revolt.

[129] 31st August 1971.

[130] The states were Arizona (*Hollins v. Shofstall* 110 Ariz. 88 1973), California (*Serrano v. Priest* 5 Cal 3d 1971), Colarado (*Allen v. Otero* Case no. 71-3021), Florida (*Hargrave v. Kirk* Case no. 72-1231), Illinois (*Sharbor v. Illinois* Case no: 71-032, *Blane v. Illinois*_Case no: 70-1102), Indiana (*Perry v. Whitcomb* Case no: 72 –2031, *Spilly v. State Board of Tax Commissioners* Case no: 71-8921), Kansas (*Hergenreter v. Kansas* Case no: 71-2331, *Caldwell v. Kansas* Case no. 72-1203), Maryland (*Parker v. Mandel* 78 Md 193 1973), Michigan (*Detroit v. Michigan* 104 P 2d 183 1971, *Milliken v. Green* Case no: 761203, *Montgomery v. Milliken* Case no 72964), Minnesota (*Van Dusartz v. Hatfield* 334 F.Supp 870 1971), Missouri (*Troeth v. Robinson)* , New Jersey (*Robinson v. Cahill* 62 N.J. 473 1973), New York (*Spano v. Board of Education* 20 N.Y. 2d 98 1972), Ohio (*Ohio Education Association v. Gilligan* 67 Ohio St. 2d 42), Texas (*Rodrigruez v. San Antonio* 337 F.Supp 280 1971, *Guerra v. Smith* 69-1402, *Fort Worth Independent School District v. Edgar* 70-13345), Virginia (*Burrus v. Wilkerson* 26 S.E. 2d 642 1974), Wisconsin (*Stovall v. Milwaukee* Case no. 72-2931, *Stallow v. Wisconsin* Case no 73-1001), Source: *The Lawyers' Committee for Civil Rights Under Law,* January 1972. Case numbers were used where specific citations were unavailable.

[131] These states were: Alaska (January 1970), Arkansas (October 1970), California (February 1970), Florida (January 1971), Hawaii (September 1971), Kansas (January 1971), Massachussetts (September 1970), Maine (December 1970), Michigan (1968), Minnesota (December 1970), Missouri (1968), New Jersey (December 1968), New Mexico (December 1970), North Carolina (December 1968), North Dakota (December 1970), Oklahoma (1969), Oregon (1970), Pennsylvania (1970), South Dakota (December 1968), Tennessee (1968), Texas (1969), Utah (July 1970), Virginia (1970), Washington (February 1971), Wisconsin (November 1970). Source, *The Presidents Commission for School Finance Report,* January 1972.

[132] *Fleischmann Commission,* New York, (1972).

before the rendering of *Serrano.*[133] This decision gave the federal courts the power to issue whatever measures deemed necessary to facilitate integration, including busing. It gave weight to *Alexander v. Holmes County Board of Education* in which the court abandoned the "deliberate speed" formula of *Brown.*[134] Busing raised pertinent questions regarding the true definition of equal educational opportunity, and the educational cost of forced integration. It facilitated the call for quality education, of which concern over school finance was part. School finance and busing worked towards the same ultimate objective: to equalise educational opportunity. The principles underlying both movements invoked different means to achieve equal educational opportunity, but the goal remained the same. It also, however, threatened localism by removing parental choice of school. Thus, busing increased awareness of the enlarged judicial and federal involvement in education, as well as raising ideological questions regarding the exact meaning of equal educational opportunity.

Further, the property tax was becoming a political issue in many states, with dissatisfaction mounting from the inequitable nature of the tax. This dissatisfaction was part of a broader rejection of higher taxes for government services. The rising rate of inflation, prompted by the cost of the Vietnam conflict and Great Society programmes, increased opposition to increased governmental spending, at all levels, not just federal. For example, the Investment Banking Associations reported that, on a national scale, voters in 1960 rejected 11% of school bond issues put before them. In 1965, the level of rejection had risen to 33%, and in 1970, this figure stood at 52%.[135] An inevitable result of bond issues is higher taxes in the long term, their declining popularity thereby demonstrated the increasing rejection of governmental spending at all levels. In addition, the burgeoning number of suits highlighted the increased prominence of the school finance issue, but was not the only manifestation of discontent. Broadening voter dissatisfaction with the property tax and concern over educational standards increased the political volatility of school finance litigation.

The statewide prominence of school finance had also substantially increased. Two other suits had been filed since July 1968 in different parts of Texas. The first case, *Fort Worth Independent School District v. Edgar,* differed significantly from

[133] 402 U.S. 1 (1971).
[134] 396 U.S. 19 (1969).
[135] Joel S. Berke, *op.cit.,* p. 9.

Rodriguez.[136] Plaintiffs, who were the school districts of Fort Worth, Dallas and Houston and students and parents from each of these districts, challenged a single aspect of the school finance system, the state Minimum Foundation Plan.[137] They asserted that "the State's foundation plan is illegally and unconstitutionally exacting the amount of local contribution from plaintiff school districts."[138] Thus, the plaintiffs asserted that the Minimum Foundation Plan discriminated against them. They sought a ruling in which the state would be compelled calculate local tax paying ability differently, in order to ensure uniform contributions, irrespective of the amount derived from other sources. At the time of the *Rodriguez* trial, the case was pending before a three-judge court. The second case, *Guerra et al. v. Smith*, was similar to *Rodriguez*.[139] Filed in January 1969 in the District Court for the Western District of Texas, Austin Division, *Guerra* was sponsored by the Mexican American Legal Defense and Educational Fund (MALDEF), and was filed against the Texas Governor, Preston Smith.

MALDEF's involvement in school finance dated from its foundation in the spring of 1968.[140] Arthur Gochman had applied to MALDEF for financial assistance in the formative stages of *Rodriguez*. The organisation declined his request, and Gochman consequently funded the case personally.[141] Since that time, *Rodriguez* had developed without the assistance of MALDEF. However, the organisation then sought to launch a suit of its own. In October 1968, MALDEF held a one day conference entitled "Unequal Education of Mexican American Children", which included lectures from Derrick Bell and John Coons. The expressed purpose of this conference was to enable the organisation to

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[136] The case was filed in the U.S. District Court, Northwestern District of Texas, Fort Worth Division. 70-13345. Defendant was J.W. Edgar, the Commissioner of Education for the State of Texas, who also testified for the state in *Rodriguez*. See below, p. 92.

[137] For a description of the structure of the school finance system, see previous chapter, pp. 50-52.

[138] Summary of School Finance Suits, published by The Lawyers' Committee for Civil Rights Under Law, January 1972.

[139] Plaintiffs claimed that the school financing scheme deprives them of equal educational opportunity in that "it makes the quality of education a function of wealth of the children's parents and neighbors, fails to provide children of substantially different age, aptitude, motivation and ability with substantially equal educational resources, it provides relatively inferior educational opportunity to a disproportionate number of Mexican Americans and Negro children." The Coons theory formed the basis for this claim, as it did for *Rodriguez*.

[140] For details of the foundation of MALDEF, see Chapter One, p.45.

[141] The reasons given for refusing Gochman's request were due to "too many cases", and given its youth, it could not "afford too many commitments." Quoted in Peter Irons, *The Courage of Their Convictions,* (New York, 1988). p. 285. Gochman's response to the rejection was simple "at that time, it was totally up to me.....and I decided to file suit." Interview with author, 10th December 1998.

sponsor litigation in its field.[142] *Guerra* was the result. However, unlike *Rodriguez,* the defendants' motion to dismiss in this case was successful. On 20th July 1971, the court ordered dismissal of the case for failure to state claim on which relief could be granted.[143] Despite the fact that they employed the same format as the plaintiffs in *Rodriguez* and *Serrano*, the court refused to consider the plaintiffs' case. The court for the Western District of Texas, Austin Division did not share the views of San Antonio Division. This outcome, three months before *Rodriguez* went to trial, illustrated the importance of the additional factors which may influence the Court's decision, namely the performance of the lawyers, the quality of arguments, and the jurisprudence of the court.

The *Rodriguez* trial commenced in October 1971, and the court handed down its decision on 23rd December 1971. In light of the outcome of *Guerra, Serrano* and the growing number of cases in other states, *Rodriguez* was the subject of increased attention from organisations and individuals alike. Mark Yudof, Professor of Law at the University of Texas at Austin, now assisted the plaintiffs' legal team.[144] In addition, the Lawyers' Committee for Civil Rights Under Law, a Washington-based organisation, performed a crucial role in establishing an interstate network of experts and lawyers. The plaintiffs' legal strategy combined the recent developments in legal doctrine with the distinguishing features of the Texan system. Their 36-page trial brief, filed in November, used the same format as the plaintiffs' brief in *Serrano.*[145] However, the plaintiffs' evidence provided a clear distinction between the California case and the case at bar. The primary task facing the plaintiffs was the collation of testimonies and statistics to support their case. Their strategy at this point was simple, "in order to prevail, the strongest factual showing possible must be made to convince the court of the magnitude of the discrimination against poor and minority children."[146] Therefore, although the legal context of the case was determined beforehand, the strength of the evidence provided the foundation for the plaintiffs' case. The Coons theory and *Serrano* had significantly strengthened the

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[142] Conference Invitation to Judge Albert Pena, Box 20 Folder 3, J.P.C.

[143] At the time of *Rodriguez,* the case was on appeal before the U.S. Court of Appeals, Fifth Circuit. However, the *Rodriguez* decision rendered this case moot.

[144] Yudof volunteered to help on the case. "He had begun teaching at the University of Texas law school and was interested in school finance. He showed up one day to volunteer." Arthur Gochman, Interview with author, 10th December 1998.

[145] Both briefs replied upon the same precedents and legal opinion as discussed earlier in this chapter.

[146] Mark G. Yudof and Daniel C. Morgan, "*Rodriguez v. San Antonio Independent School District:* Gathering the Ayes of Texas- the Politics of School Finance Reform", *Law and Contemporary Problems* Volume 38, No 3, (Winter-Spring 1974), p. 392.

plaintiffs' case, yet the task of constructing a factually convincing case, and arguing it well, remained.

Accordingly, the plaintiffs formed a team of expert witnesses to support each of the five central components of the legal challenge. These components were:

> Plaintiffs allege that the system established by the state to support free public education denies them equal educational opportunity in that a) it makes the quality of education received by the plaintiffs a function of the wealth of their parents and neighbors as measured by the property values of the school district in which they reside b) it provides students, living in school districts other than Edgewood, with material advantages for education, c) it provides plaintiffs, who are of substantially equal age, aptitude, motivation and ability, with substantially inferior educational resources than children in defendant school districts other than Edgewood, d) it perpetuates marked difference in the quality of educational services e) it discriminates against Mexican American children.[147]

With the assistance of the Lawyers' Committee for Civil Rights Under Law, the legal team formed a team of expert witnesses to support each claim.[148] The lawyers enlisted the assistance of Professor Joel S. Berke of the Policy Institute of Syracuse University and Professor Daniel C. Morgan of the University of Texas at Austin to assimilate the financial statistics relating to school finance inequity. Richard J. Avena of the U.S. Commission of Civil Rights testified upon the state of education in the poor districts and the inherent discrimination against Mexican Americans present in the school finance system. The testimony of Dr. José Cárdenas, former superintendent of Edgewood, supported claims of the educational and administrative effects of an unequal finance system.

The defendants' task, in contrast, was straightforward. The burden of proof was on the plaintiffs, and therefore Pat Bailey, Assistant Attorney General for the State of Texas, had to expose the weaknesses in the plaintiffs' legal analysis. Accordingly, during the course of the oral depositions and trial, Bailey endeavoured to prove the fragility of the plaintiffs' case. In order to achieve this aim, the defendants enlisted the expert assistance of Dr. John Stockton, an adviser in school finance reform, Dr. Leon Graham,

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[147] Plaintiffs' Trial Brief, *Rodriguez v. San Antonio,* Civil Action No. 68-175-S.A.

[148] The Lawyers' Committee for Civil Rights Under Law was a Washington based organisation, which performed a crucial role in the establishment of an inter-state school finance litigation network.

Director of the Texas Education Agency, and J. W. Edgar, the Commissioner of Education for the State of Texas. Each of the defendants' witnesses were instrumental in the administration of the school finance system under attack. The objective of their testimony was to illustrate the reasoning behind the present system and so refute the plaintiffs' claims of discrimination.

The first component of plaintiffs' case supported the claim that the state school finance system caused the high degree of educational inequalities. Professor Berke provided the factual evidence to support this claim.[149] In his affidavit, he highlighted the inequalities of the system by implicit reference to the Coons theory:

> As in California, the system of school finance in Texas makes the quality of education a direct function of the wealth of the local school districts, providing consistently higher schooling in districts with higher property values per pupil and consistently lower quality education in school districts with less local resources available for taxation.[150]

He also confirmed that "poorer districts tax themselves at consistently higher equalised tax rates yet realize far lower tax yields than is true in the richer districts."[151] These factors combined to offer the children of the poor districts a much lower quality of education, thereby affirming the relationship between cost of education and quality received. He confirmed this relationship, stating that "the more Negroes and Mexican Americans in the school population of a district, the lower its revenues for education."[152] This finding provided evidence for the most volatile element of the plaintiffs' case. Berke profiled racial minorities as residents of the poorest districts, thereby confirming the correlation between race and class. Finally, Berke concluded with a damning indictment of the finance system, stating "a system more effectively designed to assure inequality of educational opportunity would be more difficult to design."[153] Berke's testimony thereby

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[149] *Ibid.*, p. 392.
[150] Affadavit for Joel C. Berke in *Rodriguez v. San Antonio Independent School District et al.,* in the U.S. District Court, Western District of Texas, Civil Action No 68-175-A.
[151] *Ibid.*, p. 3.
[152] *Ibid.*, p. 4.
[153] Berke's professional credentials enhanced the strength of his testimony. In addition to his post as Director of the Educational Finance and Governance Program of the Policy Institute, he was executive director of a study for the Presidential Commission on School Finance, co-director of New York State Commission on New York State Commission on School Finance, and co-author for a study in school finance for the U.S. Senate.

supported the ideological premise of the plaintiffs' case; the correlation between race and class inherent within American society.

Morgan's testimony was intended to accompany Berke's. Morgan was an expert on the Texas school finance structure, and provided a more thorough analysis of the structural weaknesses of the system. He had also become personally involved in the legal team, advising Gochman and Yudof of the exact shortcomings of the system. Morgan's affidavit detailed in particular the weaknesses of the state equalisation plan which, although designed to reduce the disparities in educational expenditures, in actuality enhanced them. Morgan concluded that the impact of the finance system was clearly evident: "the state of Texas has created a class of children which it deems less deserving of education because they are poor or living in poor districts."[154] Thus, the combination of the testimonies of Berke and Morgan illustrated the extent of financial inequalities and the state's role in the financial variation.

Morgan was directly cross-examined at the pre-trial hearing on 5th October 1971. During the course of the cross-examination, the defendants' litigation tactic became apparent. Pat Bailey tried to convince the court of the extreme ideology in the plaintiffs' case, and that the claims were at odds with fundamental American principles:

> Q: Doctor Morgan, you say that you don't want a district to be able to afford a much greater educational opportunity than what may be afforded by some other districts. How are you ever going to do this unless you put some ceiling on it, Doctor Morgan?
>
> A: Well, one of the approaches that you can take is what- it has many many terms, political economy approach, equalising approach, Wisconsin approach, state aid formula approach and so on, whereby you enable a district by making an effort to have- by making the same kind of effort they can come to the same revenue. In other words, equalize fiscal power, fiscal potential, power equalizing, whatever you want to say
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> Q: Socialism?
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> A: (The witness laughs). Yes. Public schools are- if you want to say public schools are social, public social principle, I will be happy to say that. I will say

[154]Affidavit of Daniel C. Morgan, p. 4.

public school education, if you want to say socialism.[155]

Bailey sought to expose the weaknesses in the plaintiffs' suit by trying to limit the effectiveness of the witnesses' testimony. His cross-examinations of Avena and Morgan also illustrated this tactic.

Avena, the director of the Southwestern Field Office for United States Commission on Civil Rights, testified to the racial discrimination pervasive within the system, and the state of the education of the poor in Texas. The inherent racial discrimination had already been mentioned by Berke and Morgan. Avena, however, was called to provide a more detailed description of the correlation between race and class within the Texas school finance system. In his affidavit, Avena referred the court to the research conducted by USCCR on the condition of Mexican American education in Texas. During the 9th-14th December 1968, the USCCR held public hearings in San Antonio on the conditions confronting Mexican Americans, which were convened by Avena. The findings of the hearing, and others similar across the Southwest, were published in a report entitled *The Mexican American* in 1968.[156] The report documented the appalling living conditions endured by the majority of the Mexican American population in the Southwest. It found that "Mexican Americans have on average eight years of school, or four years less than Anglos, two years less than non-whites."[157] The Commission also reported upon the pervasive discrimination endured by the Mexican American children within many schools, including punishment for speaking Spanish, and the belief expressed by "many school administrators" that "because of their cultural value system....Mexican American youth do not aspire to educational success."[158] During the next five years, during the period between the filing of the initial suit and the Supreme Court decision, the USCCR continued its research and published a series of five detailed reports. The first of these reports, *Ethnic Isolation of Mexican Americans in the Public Schools of the South West*, was published in April 1971, six months before the trial. In this report, research showed Texas as the state in which "ethnic isolation is most marked."[159] Furthermore, the

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[155] Oral Deposition of Daniel C. Morgan, 20th October 1971, p. 20.
[156] For more detail of the previous activities of the USCCR, see Chapter One, p.48.
[157] *The Mexican American,* U.S. Commission on Civil Rights Publication, (Washington D.C., 1969), p. 24.
[158] *Ibid.,* p. 26.
[159] Report II: *Ethnic Isolation of Mexican Americans in the Public Schools of the South West*, U.S. Commission of Civil Rights, April 1971, p. 28.

report focused upon those cities with the worst degree of ethnic isolation, one of which was San Antonio.[160] These contemporary research findings enabled Avena to speak on the condition of Mexican American education in Texas supported by firm evidence. The research also indicated the growing awareness of the condition of Mexican American education which had been precipitated in part by the growth of Mexican American activism in the late 1960s.

In a brief affidavit, he confirmed the findings of the reports by describing the situation confronting Mexican Americans in Texas. Avena concluded that state *de jure* segregation resulted in "a generally poorer education, more substandard housing, more limited job opportunities, smaller incomes and more deprivation of civil and political rights for Mexican Americans (and more specifically for those Mexican Americans who reside within the Edgewood district) than any other white Americans in Texas."[161] The central purpose of Avena's testimony, however, was to show the existence of racial discrimination in the school finance system. Avena supported the plaintiffs' claim that the school finance system discriminated on the basis of race as well as class. This aspect of the plaintiffs' case, like the similar claim in *Serrano*, was difficult to prove. The plaintiffs' case benefited greatly from the USCCR's research, which provided independent evidence. However, according to the USCCR, the school finance system compounded, rather than caused, educational inequalities. Avena cited this finding in his deposition, asserting instead that state action, not the finance system, facilitated the contemporary situation. This claim provided Bailey with wide scope for argument in the cross-examination. In order to prove that the state was constitutionally blameless for the present state of discrimination, he emphasized the difference between *de jure* and *de facto* discrimination. According to Bailey, this difference was crucial when determining the extent of the state's responsibility for the discrimination described by Avena:

> Q: Let's take San Antonio. Here is a district that starts out thirty years ago in a particular section of town, with, a say, a fairly low percentage of Mexican Americans in it. But, over the next thirty years or forty years or fifty, or whatever period, the Mexican American population, or ratio within this area

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[160] The commission found the pattern of racial isolation in San Antonio to reflect the broader pattern in Texas. 85 percent of Mexican American were found to be in schools over 75 percent Mexican American.
[161] Affadavit of Richard Avena, *Rodriguez v. San Antonio Independent School District*. Civil Action 68-175-SA. p. 5.

> begins to rise, and it comes up to 75%. Then you wouldn't say that the state or the school district has, in effect, brought about this segregation of Mexican Americans in this district, would you?
>
> A: I would say in some cases there were acts by state or local entities, restrictive deeds or whatever, which caused a population pattern to exist.
>
> Q: In otherwords, you feel this might have been done intentionally?....Would you not say a part of this is a natural inclination of these people with the same interests, backgrounds, likes and dislikes and everything tend to want to be in an area where there are people that have the same interest in things?
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> A: It's my own personal opinion that a lot of people congregate in sections of a large city like San Antonio....primarily well, let's say, to a large degree because of racial discrimination that has existed in other parts of the state.[162]

During cross-examination, Bailey questioned Avena repeatedly upon whether specific instances of racial discrimination were evident in the school finance system. The inability by Avena to isolate specific discriminatory actions by the state, but to instead highlight "some examples of things which have resulted in discrimination against Mexican Americans" illustrated, according to the defendants, the tenuous nature of the plaintiffs' case.[163] However, the lack of conclusive proof regarding the state's action was not, in the plaintiffs' opinion, a weakness in Avena's testimony. It was illustrative of fundamental difference in the cases. The difference between *de jure* and *de facto* segregation raised fundamental legal questions pertaining to state responsibility. Thus, a legal attempt to eradicate any form of *de facto* segregation forced a consideration of the state role. The lawyers for the state believed the distinction had legal consequences, whereas the plaintiffs, employing the legal reasoning from *Hobson*, believed this distinction unimportant.

The different components of the legal analysis were synthesised with the expert testimonies in the plaintiffs' trial brief and submitted on 6th November 1971. The plaintiffs' trial brief re-emphasised the evidence submitted during the pre-trial hearings, contained a detailed analysis of the shortcomings of the finance system, and advanced the Coons' legal theory. In addition to the frequent quoting of *Serrano,* Gochman also cited

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[162] Affidavit of Richard Avena, *op.cit.,* p. 2.
[163] *Ibid.,* p. 5.

the most recent decision, *Van Dusartz v. Hatfield,* which was delivered on 12th October 1971 in the Federal District Court for Minnesota.[164] The analysis employed in *Van Dusartz* relied heavily upon *Serrano,* and did not, therefore, provide Gochman with any additional arguments for his brief.[165] However, favourable decisions in one state and one federal court strengthened the validity of the plaintiffs' arguments. Gochman also ensured that the limitations of the case were clear in order to prevent any misrepresentations of plaintiffs' claims:

> The present case emphatically is not a judicial attempt to redistribute wealth in this county; it does not hold that the pricing of all public and private goods, with the concurrent denials to those who cannot afford the price is unconstitutional. The court is not asked to redistribute Cadillacs and color televisions; rather it is asked to draw significant distinctions between public and private goods, finding that only in the former case does a constitutional issue arise. Further, and most significantly, this Court is asked to hold that the public school financing system can no longer perpetuate a class of school children deemed less deserving of education because they are poor, members of a minority, or living in poor districts.[166]

Despite the plaintiffs' attempt to define the limitations of the suit, the defendants focused upon its potentially broad ideological implications: "It would be nothing less than honest at this point to call what the plaintiffs seek by its real name - socialised education."[167] Throughout their brief, the defendants sought to place the plaintiffs' complaints into a wider ideological context to contrast with the plaintiffs' specific focus upon school finance. This tactic was designed to alter the emphasis and to illustrate the potentially disastrous consequences of a decision in favour of the plaintiffs. The second component of Bailey's brief was a critique of all aspects of the plaintiffs' suit. The critique, couched in subjective, almost aggressive terminology, dismissed the plaintiffs' legal analysis, with no consideration of its merits:

With the use of such 'magic words' as 'fundamental right', 'suspect

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[164] 334 F.Supp. 870 (1971).
[165] The opinion, written by District Judge Miles W. Lord, stated that "the principle announced in *Serrano v. Priest* is correct". Furthermore, in his analysis of *McInnis*, Judge Lord asserted that "The reasoning of the California court on this point is completely persuasive and the Court adopts it as its own."
[166] *Ibid.,* p. 21.
[167] Defendants' Trial Brief, p. 7.

> classification', racial minority and 'racial minority' and 'classification based on wealth' sprinkled liberally through its pleading and brief- with little else- the plaintiffs seek to shed their burden of proof and retire to the sidelines to see what the state can do about proving that the complex financing system of public schools in this state is valid and in no way offends any constitutional rights.[168]

Bailey dismissed the claim regarding racial discrimination as a litigants' tool to attract additional attention to its suit, and to avert attention from the weaknesses of its arguments: "Defendants submit that plaintiffs are guilty of a tactic which has become all too frequent in this type of litigation - the injecting of a racial issue or a classification of wealth into the proceeding, where none really exists, for the sole purpose of using this as a substitute for cold, hard facts."[170] The racial discrimination claim, according to the defendants, was evidence of the plaintiffs' questionable litigation strategies. The defendants challenged the motivations of the plaintiffs' legal tactics throughout their brief. At one stage, defendants implicitly accused the plaintiffs of attempting to weaken their case in an underhand manner:

> The lengthy cross examination is not yet ready for use in either preparing this brief, nor is it likely to be ready sufficiently in time for the court to give it ample consideration prior to the hearing of the merits in this case. Defendants cannot but wonder if such an occurrence was more by design than by accident. A clear and comprehensive understanding of the facts often exposes what confusion and an endless morass of useless and pointless data conceals- namely the continuing use of time worn slogans and rhetoric rather than sound legal and factual grounds to attempt to have the court allow the plaintiffs to embark upon a plan of social and educational experimentation without the idea of where we will end up or what wreck or shambles will be made of the educational programs of this state.[171]

The defendants rejected all elements, accusing the plaintiffs of seeking an "educational utopia", in which "the plaintiffs have not even attempted to set out in their pleadings how what they want (whatever that is) can be achieved or accomplished."[172] Proposition One was not mentioned at any point in the defendants' brief, nor the principles for which it stood. For Bailey, Proposition One was not central to the case. It was simply one of

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[168] *Ibid.*, p. 20.
[169] *Ibid.*, p. 20.
[170] *Ibid.*, p. 33.
[171] *Ibid.*, p. 4.
[172] *Ibid.*, p. 30.

many solutions. Instead, much of the defendants' analysis concentrated upon the persuasiveness of *McInnis* and the flaws of *Serrano.* The positive effects of localism in education were not mentioned in detail. According to the defendants, the current school finance system functioned adequately and lacked pervasive problems of any nature, constitutional or otherwise: "The plaintiffs feel that the current equalisation is not doing a good enough job, but this falls far short of making it unconstitutional.[173]

Defendants asserted, therefore, that the state provided a minimum standard of education and thereby fulfilled its obligation towards its citizens. The standard of that education was unimportant. The defendants, therefore, distinguished between absolute and relative deprivation of education. The plaintiffs' case pertained to the quality of education, which was, according to the defendants, constitutionally irrelevant. The language of the defendants' brief, its apparently casual dismissal of *Serrano*, its failure to consider Proposition One, or to mention *Van Dusartz*, all attempted to discredit the validity of the plaintiffs' claims and to thereby ensure the Court rejected their claims. The fundamental essence of the plaintiffs' strategy had now been victorious in two states, and the gathering momentum of school finance litigation was becoming increasingly evident.[174] The developments outside Texas, however, did not directly affect the case. The claims of the plaintiffs were novel and public attention and press coverage of *Rodriguez* and the other school finance cases remained minimal.[175] It was not until the federal district court rendered its decision on 23rd December 1971 that *Rodriguez* became the object of detailed press coverage.[176] *Rodriguez* was not a widely publicised case, and in light of the failure of *Guerra,* it was reasonable to assume the plaintiffs' chances of success were slim. Bailey, through his dismissive treatment of the plaintiffs' claims, intended to give this impression to the court.

In a unanimous decision, the three judge court ruled in favour of the plaintiffs. The composition of the court provided an important context of the case and illustrated the

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[173] *Ibid.,* p. 50.
[174] See above, p. 90, fn. 130.
[175] It is important to note, however, that the lack of extensive coverage outside San Antonio could merely be an outcome of the localised nature of the press. In addition, the size and demographic structure of Texas meant that San Antonio was not a city of major national importance. Despite these qualifications, the basic point remains: *San Antonio* was relatively unknown until the decision in December 1971.
[176] Much of the press coverage of the decision focused upon the shock with which many of received news of the ruling, and the magnitude of change to follow. See, for example, Ron White, "A Revolution's Ahead", *San Antonio Express,* Saturday December 25th 1971, p.1.A and "Nation Eyes Texas Tax Ruling", *San Antonio Light,* Sunday 26th December 1971, p. 2-C.

many factors that contributed to the plaintiffs' victory. The author of the brief opinion, Chief District Judge Adrian Spears, had been appointed to the federal bench by Johnson in 1965, and resided in Alamo Heights, the district which the plaintiffs found to possess the highest expenditure per-pupil in Bexar County.[177] Thus, one of the three judges had first hand knowledge of the inequalities of the educational system and had personally witnessed the effects of the inequitable system of funding. The other two judges, Circuit Judge Irving Goldberg and District Judge John Roberts, were also Johnson appointees.[178] The judges were of a liberal political stance on most issues. They had been appointed by a strongly pro-civil rights President, but they also met the approval of the liberal Democratic Senator, Ralph Yarborough.[179] This in turn suggested that their personal sympathies were more likely to be with the plaintiffs than the defendants.

Judge Spears accepted the persuasiveness of *Serrano* and *Van Dusartz*, and determined the case to be sufficiently different from *McInnis.*[180] The opinion followed the same basic format as *Serrano*, but lacked its depth of analysis. In the first part, Judge Spears considered the argument that the present finance system "makes education a function of the local property tax base."[181] The court accepted the plaintiffs' analysis of the system, as presented in the trial by Professors Berke and Morgan. It then briefly outlined the main flaws of the finance system, concluding: "those districts most rich in property also have the highest median family income and the lowest percentage of minority pupils, while the poor property districts are poor in income and predominately minority in composition."[182] The court based this aspect of the opinion upon the strength of the plaintiffs' evidence, thereby verifying their factual findings. The remainder of the opinion focused upon the two contentions central to the legal analysis: that education was a fundamental interest and wealth a suspect classification.

In this aspect of the decision, the court employed the same legal analysis as

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[177] *Rodriguez* was six pages long, compared to the twenty-six pages of *Serrano*.
[178] For more information on Irving Goldberg, see Harvey C. Couch, *A History of the Fifth Circuit, 1891-1981* (Washington, 1984), p. 134.
[179] Senators of the President's party have the privilege to suggest and veto nominees to the federal branch in their state. Couch, for example, commented that Goldberg "was of the liberal wing of the court." *Ibid.*, p. 134.
[180] "*Serrano* convincingly analyzes discussions regarding the suspect nature of classifications based on wealth, and *Van Dusartz* points out that in this type of case "the variations in wealth are State created." *Rodriguez v. San Antonio* 337 F.Supp.280 (1971).
[181] *Ibid.*, p. 281.
[182] *Ibid.*, p. 280.

Serrano. The *Serrano* court established the suspect nature of wealth classifications in an eight-page examination of the relevant cases and a consideration of the conflicting arguments. *Rodriguez*, however, established the suspect nature of wealth in one paragraph, referring the reader to *Serrano* which "convincingly analyzes discussions based on wealth."[183] In his brief analysis, Judge Spears relied upon the Supreme Court opinion in *Harper v. Virginia State Board of Elections*, which stated simply "lines drawn on the basis of wealth are suspect."[184] Additionally, Spears cited *McDonald v. Board of Election Commissioners of Chicago,* in which the Supreme Court ruled, "a careful examination on our part is especially warranted where lines are drawn on the basis of wealth.....which would independently render a classification highly suspect and thereby demand a more exacting judicial scrutiny."[185]

Similarly, the court's reasons for finding education to be a constitutional guarantee lacked detail. Judge Spears simply affirmed the "very great significance of education to the individual" and that "the crucial nature of education for the citizenry lies at the heart of almost twenty years of school desegregation litigation."[186] The primary basis for this finding derived from the famous *Brown* quotation, which the opinion cited in full.[187] The court thereby accepted the plaintiffs' contention that Supreme Court, through its *Brown* ruling, had recognised the distinctive constitutionality of education, and offered no further elaboration upon this claim.

Differences between *Rodriguez* and *Serrano* became evident in Judge Spears' consideration of appropriate remedial action. *Rodriguez* accepted the recommended principle of fiscal neutrality as constituting "judicially manageable standards."[188] It limited the degree of judicial involvement as it "does not involve the Court in the intricacies of affirmatively requiring that expenditures be made in certain manner or amount."[189] Thus, the court found the Coons principle established an acceptable level of judicial involvement in the process of determining remedial action. *Rodriguez* also fixed a specific time period of two years for the legislature to change the system: "the mandate in this cause shall be stayed for a period of two years in order to afford the defendants and

[183] *Ibid.*, p. 281.
[184] 383 U.S. 663 at p.153 (1965).
[185] 394 U.S. 802 (1969).
[186] *Rodriguez v. San Antonio.*, 337 F.Supp 280, at p. 283 (1971).
[187] *Ibid.*, p. 283. See above, p. 57.
[188] *Ibid.*, p. 283.
[189] *Ibid.*, p. 283.

the Legislature an opportunity to take all steps reasonably feasible to make the school system comply with the applicable law."[190] *Rodriguez* declined involvement for a further two years, to give the legislature that time to find a political solution to the problem. This continued the court's previously expressed desire for the problem to be solved through legislative rather than judicial action; an indication that a judicial solution was the last resort. To this extent, it ensured the decision was not predicated upon the over-extension of judicial authority, but necessitated by legislative gridlock. Accordingly, the court did not advocate a replacement system: "the selection may be made from a wide variety of financing plans so long as the program adopted does not make the quality of public education a function of wealth other than the wealth of the state as a whole."[191] This ensured that the legislature retained the freedom to select a finance system, which thereby limited the involvement of the judiciary. The espousal of Proposition One established the standard for legislative action.

The remaining element of the Judge Spears' decision considered the flaws in the defendants' arguments. The court had confirmed the strength of the plaintiffs' evidence through finding that the plaintiffs had "vividly demonstrated at trial through the testimony and exhibits" that education was a function of the local property tax base.[192] In contrast, the court was critical of the defendants' brief, determining that:

> not only are defendants' unable to demonstrate compelling state interests for their classifications based upon wealth, they fail to even establish a reasonable basis for these classifications.....They lose sight of the fact that the state has, in truth and in fact, limited the choice of financing by guaranteeing that "some districts will spend low (with high taxes) while others will spend high (with low taxes)".....Hence, the present system does not serve to promote one of the very interests which defendants assert.[193]

The court considered the defendants' accusation that the plaintiffs sought "socialised education." In response, the court asserted, "Education, like the postal service has been socialized, or publicly financed and operated almost from its origin. The type of socialised education, not the question of its existence, is the only matter currently in

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[190] *Ibid.*, p. 283.
[191] *Ibid.*, p. 283.
[192] *Ibid.*, p.284.
[193] *Ibid.*, p.283.

dispute."[194] This was a direct rebuke of one component of the defendants' arguments. Accusations of socialism failed to convince the court against the plaintiffs; instead Judge Spears and his colleagues confirmed this was a component of the plaintiffs' case, yet nonetheless ruled in their favour. The court did not, therefore, accept the argument that plaintiffs' case held momentous implications for the political structure of the U.S. and instead proved sympathetic to their claims.

Rodriguez accepted the central principles of the legal doctrine with little elaboration. One interpretation of the brevity of the opinion lay in the persuasiveness of the court's reasoning in *Serrano;* it implied that decision was adequate, and required no further analysis. The lack of detail, however, was later used against the plaintiffs to illustrate the weakness in their case.[195] The brief opinion did not include a thorough analysis of the complexities of the plaintiffs' case, and did not respond to certain components. This omission was subsequently interpreted as the court's inability to approve elements of the plaintiffs' case. The opinion accepted all aspects of Coons' legal analysis presented in the plaintiffs' brief. However, it did not accept the plaintiffs' brief in its entirety. Like *Serrano,* discrimination on the basis of race was not mentioned. The court neither denied nor affirmed this claim. The omission of race affected the application of *Rodriguez* in other state cases, and provided a focal point in the Supreme Court's consideration. Its exclusion from the legal analysis suggested the problems of obtaining a judicial ruling on the congruity between race and class. On one hand, the claim was not explicitly rejected. On the other, the defendants presented its omission as an inherent weakness in the plaintiffs' case.

The legal analysis applied in the *Rodriguez* district court decision was the product of recent trends in legal scholarship. The analysis proposed by Horowitz, Wise, and Coons *et al.,* established a legal strategy to tackle the increasingly politicised problem of school finance. The assertion of the suspect nature of wealth as a classification and the fundamental right of education, combined with Proposition One, created a novel yet attainable legal doctrine. However, to attribute the plaintiffs' victory in *Rodriguez* simply to academic developments would be to pay insufficient attention to the dynamics of the suit. The inherent complexity of school finance rendered any litigation suit unpredictable.

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[194] *Ibid.,* p.284.
[195] See below, p. 130.

Victory in California and Minnesota provided examples of success for the *Rodriguez* plaintiffs, but did not directly strengthen its chances of success in Texas, as the fate of *Guerra* illustrated.

As with most, if not all cases, the exact reasons for plaintiffs' victory were undeterminable. The effectiveness of counsel combined with the strength of evidence was the first determining factor in the success of *Rodriguez.* At one level, the plaintiffs' success derived from the persuasiveness of their evidence that verified their claims. At another, their success lay in convincing the court that their claims raised a judicial rather than legislative question. Thus, it was not simply enough to convince the court of the inequity of the school finance system. The plaintiffs also faced the task of convincing the court that the scope of judicial scrutiny extended to school finance. The composition of the court was, therefore, important, especially with the dismissal of *Guerra* three months earlier. The court, composed of three Johnson appointees, was unmoved by the defendants' exaggerated accusations of socialism and the over-extension of judicial authority. The three judges were ideologically aligned more to the plaintiffs than defendants, which also accounted for the unanimous victory. At least one of the three justices possessed personal knowledge of the school districts involved in the case, which increased the chances of success for the plaintiffs. The Coons principle established parameters of judicial activity that were acceptable to the *Rodriguez* court, but not to the *Guerra* court. The politics of the judges, therefore, was a vital factor in the outcome of the case.

In order to convince the court of the judiciary's role in school finance reform, Gochman needed a coherent legal strategy. It is to this degree that the emergence of the Coons principle altered the plaintiffs' chances of success. *McInnis* demonstrated the shortcomings of a legal strategy predicated upon the broad judicial principles advocated by Horowitz and Wise. *Hobson* marked a judicial acceptance of these principles despite their shortcomings, but this decision was not followed elsewhere. School finance litigation challenged a system which affected the life of every citizen to some degree. The use of the property tax to finance public school education was an issue that transcended regional and generational boundaries, and was becoming increasingly politicised. Consequently, the merits of judicial involvement were hotly debated. In order to justify involvement to any degree, an adequate framework had to exist. The Coons theory provided this framework

through the establishment of clearly defined terms for judicial involvement. The ultimate victory of the plaintiffs at this stage derived from a combination of factors. These were the weaknesses of the defence and the strengths of the plaintiffs, the jurisprudence of the court, the politics of the judges, the example of the *Serrano* court, the clearly denoted framework of judicial action, and the timing of the suit. All factors coalesced in order to convert legal theory into judicial reality.

During the two years in which the case was filed and the decision rendered, the issues raised by the case became increasingly complex. The developments in constitutional law, which enabled socio-economic discrimination to be challenged, reflected the new objectives of civil rights activists. However, the changing political mood necessitated a legal strategy which emphasised the conservative nature of the legal claims. Increased federal involvement in education coupled with the rising busing controversy, ensured that further threats to localism would be strongly resisted. Increased awareness of the inequities within educational funding and the problems with the property ensured that the issues raised by *Rodriguez* were subject to increased political scrutiny. By December 1971, therefore, the issues intertwined in *Rodriguez* had acquired additional political dimensions since July 1968. However, the declining emphasis upon racial discrimination also reflected the changed political environment. The failure to answer the charge of racial discrimination by both California and Texas courts showed that, despite finding in favour of the plaintiffs, the courts could not support their claims in their entirety. Despite overruling the school finance system, the Texas court did not support the contention that the system discriminated upon the basis of both race and class. Although the decision, by its very nature, would engender a great deal of controversy, the ideological implications of the plaintiffs' claims were slightly reduced by the Court's decision.

These changes reflected the alterations in the political context between July 1968 and December 1971. At the time of the Texas decision, Nixon was pursing his policy of "New Federalism", many state governments, as well as the federal government, had conducted examinations of school finance structure and the mass civil rights movement had mostly fragmented. Thus, the increased national focus upon school finance coupled with the declining significance of race was reflected in the developments in *Rodriguez.* However, the plaintiffs' victory demonstrated that the broader political context, although changed, was not transformed. Although the mood of the country was increasingly

conservative and less sympathetic to minority claims, the need for substantive change in some areas, particularly education, was still recognised by many. Furthermore, it also reflects one of the key elements of federalism; the ability of the states to act independently from the federal government in order to solve social problems. This ability has been one of the traditional strengths of federalism. The activities of the Nixon administration and the developments within the civil rights movement were not of direct concern for any of the parties in *Rodriguez.* Instead, their focus was much narrower, concentrating solely upon winning their case in their immediate environment. However, all of those involved in *Rodriguez* were a product of their time and were, therefore, influenced by contemporary trends. Furthermore, the issues intertwined within the arguments of both sides were reflective of the broader political environment. Thus, at this stage of the proceedings, *Rodriguez* reflected the broader political trends but was immediately affected by the state political environment. However, after this point, the national political environment, particularly the nature of the Supreme Court, would be of direct concern.

CHAPTER THREE:

January-October 1972

The Journey From The District Court To The Supreme Court: The Formation and Presentation of the Supreme Court Case

On 8th January 1972, the Texas State Board of Education voted unanimously to appeal the district court decision in *Rodriguez v. San Antonio Independent School District* to the United States Supreme Court.[1] The appeal was filed on 17th April, and the Supreme Court granted full review of the case on 7th June. The granting of review by the Court transformed the nature of *Rodriguez.* Until the granting of *certiorari, Rodriguez* was one of 28 school finance cases filed in 17 states. It then became the means by which the Supreme Court ruled upon the unresolved legal doctrine developed over the previous seven years. In the nine month period between the district court decision and the presentation of oral arguments in the Supreme Court, *Rodriguez* became the primary focus for all school finance litigants. The preparation of Supreme Court strategy for both parties reflected the nation-wide importance of the case. Lawyers on all sides of other school finance suits became involved in its preparation. Plaintiffs' counsel, in particular, received advice on strategy and recommended drafts from leading school finance lawyers, and from organisations such as the Lawyers' Committee for Civil Rights and MALDEF. The basic consideration in strategy development for both sides was the nature of their intended audience: namely the nature of the Supreme Court. An integral component in the development of the case was the attempt to isolate those factors which may influence the Court's decision. Consequently, the advice received, and tactical choices made, were moulded by the broader political environment, of which the Court was part. In addition, personalities also influenced the development of the case. The opinion of the lead counsel determined which suggestion was followed in accordance with their personal interpretation of its feasibility. Thus, the individual view of those involved, shaped by the external political environment, and influenced by their personal ideology, was the primary determinant of Supreme Court strategy in *Rodriguez.*

The political profile of *Rodriguez* increased significantly during the period between the district court decision and the oral arguments.[2] On 19th January 1972, the school finance litigants achieved another success in the lower courts in *Robinson v. Cahill.*[3] This decision, rendered by the New Jersey Supreme Court, highlighted the growing momentum of the litigation movement.[4] Reflecting this, President Nixon commented in his 1972 State of Union Address, "During 1972, I hope we will resolve one of the most critical questions: how best to finance schools."[5] In the same month,

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[1]Clyde Walter,"State Board of Education to Appeal", *San Antonio Express,* Sunday 9th January 1972, p. A1

[2] This period was the 23rd December 1971 to 12th October 1972.

[3]118 N.J. Sup.Ct. 223 (1972).

[4] This decision was based upon the "Thorough and Efficient" Clause of the New Jersey Constitution, the the Fourteenth Amendment of the Federal Constitution. The decision, by Justice Michael Botter, followed the reasoning of the *Serrano, Van Dusartz,* and *Rodriguez* decisions.

[5]Public Papers of the President, State of Union Address, 20th January 1972.

The New York Times devoted its Annual Education Report to the current financial crisis in education, and the potential impact of school finance litigation.[6] This served as a precursor to the New York State Commission Report delivered in February 1972.[7] In March, the President's Commission on School Finance delivered its findings. Its conclusions confirmed the declining educational standards which had provided the original impetus for the litigation movement: "The system which has served our people so long and so well is today in serious trouble, and if we fail to recognize it, our country's chance to survive will all but disappear."[8] In the period following the publication of the report, the federal government considered the different solutions to the school finance problem, all of which: "will be considered controversial.....Traditional preferences, embedded in the daily lives of our citizens, are being challenged by the pressures of changing demands."[9] These events illustrated the growing political recognition of the problem of school finance. This added an extra dimension to the preparation of the case for the Supreme Court.

In addition to the heightened political profile of school finance, the issue of busing was becoming increasingly controversial. Although this had no direct effect upon the preparation of the case, it raised issues that were relevant to its aims. Busing became a central issue in the presidential elections of 1972 and therefore considerations of localism and federal involvement in education became a central topic of political debate. Furthermore, Nixon's policy of New Federalism had achieved its first legislative victory and had therefore begun to attempt to reduce the role of the federal government. In March 1972, Congress approved Nixon's Revenue Sharing Plan in which each state would receive funds to distribute as they saw fit. Nixon also continued to cultivate support amongst the "Silent Majority" and consequently remained mostly unsympathetic to minority demands. Thus, increasing support for a reduction in federal government power, growing resentment of federal judicial involvement in education and declining sympathy for minority claims contributed to the political environment.

The external political environment established the framework in which the strategy developed. It provided the basis for tactical decisions. The Supreme Court was

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[6] Robert Reinhold, "A Challenge for Education: Making Ends Meet- Fairly", "John Serrano *et.al.*, and School Tax Equality", Fred Hechinger, "Fear and Necessity Spur Reform Drive," Martin Gansberg "Taxpayer Revolt Raises a Dilemma", Charles E. Benson "The Economic Squeeze in Education is Pervasive", Harold Howe "Wanted: A System of Finance", William E. Farrell, "New York State Awaits Reform Plan", Daniel P. Moynihan "Can Courts and Money Do it?", *The New York Times,* Monday 10th January 1972, pp. E-1-6.

[7] The New York State Commission on the Quality, Cost and Financing of Elementary and Secondary Education, known as the Fleischmann Commission Report.

[8] Neil McElroy, Submission Letter, *School, People and Money: The Need for Educational Reform,* The Presidential Commission on School Finance, p. 1.

[9] *Ibid.,* p. ix.

part of the wider political environment; the ideologies of the individual justices were moulded by broader political themes. The ultimate job of the lawyers was to convince a majority of Supreme Court justices of their arguments. Consequently, pinpointing potential votes on the Court, and tailoring their arguments accordingly, guided the litigation strategy. The judicial and political philosophy of each justice was a dominant factor in the shaping of the arguments. Litigants' interpretation of the justices' perception of recent political changes influenced their strategy. Consequently, the litigation process was, as Mark Tushnet said regarding the segregation suits, "a social process."[10] This concept "indicted the prominent role that internal, as well as external, elements play in the interpretation."[11] Internal factors are defined as those factors that affected strategy from within the parameters of the legal counsel. These included individual ideology, strategy decisions, group dynamics and available resources. External elements are those factors that shape the broader social, political and economic context, and thus, in turn, shape the case. The formation of the litigation strategy was moulded not only by impersonal forces such as the socio-political environment, but also the relationship between counsel, their personal opinions and available resources. External elements provided the framework for the strategy; internal elements crafted the design.

The nature of the Court was the dominant external factor in the formulation of the litigation strategy. President Nixon's four appointments - Warren Burger as Chief Justice, Harry Blackmun, Lewis Powell and William Rehnquist - heralded a new period in the Court's history, and marked the end of the liberal, Warren Court era.[12] The remaining five Warren Court justices William Douglas, Thurgood Marshall, Potter Stewart, William Brennan and Byron White ensured that the balance between the old and new remained close during the 1970s. The political and judicial profile of the justices influenced the tactical decisions made by counsel and the litigation strategy generally.

The appointment of Warren Burger as Chief Justice in May 1969 fulfilled Nixon's 1968 election campaign pledge to nominate "strict constructionists" to the bench, who were dedicated to law and order.[13] Born in Minnesota in 1907, Burger was a Republican, who had carved a successful law career from an impoverished background. Whilst

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[10]Mark V.Tushnet, *The NAACP's Legal Strategy Against Segregated Education*, (Chapel Hill, 1987).p. xii.

[11] *Ibid.*, p. xii.

[12] For a detailed analysis of the Burger Court, see Herman Schwartz, *The Burger Years: Rights and Wrongs in the Supreme Court, 1969-1986,* (New York, 1987), and Vincent Blasi, (ed.) *The Burger Court: The Counter Revolution That Wasn't,* (New York, 1983).

[13] Nixon's definition of strict constructionists were those who would "interpret the Constitution strictly and fairly and objectively, instead of those who have gone too far in assuming unto themselves a mandate which is not there, and that is, to put their social and economic ideas in their own decisions." Transcript of the President's Announcement on Two Nominees for the Supreme Court, *New York Times,* 22nd October 1971. p. A-1.

serving on the U.S. Court of Appeals for the District of Columbia, Burger had criticised the Warren Court's criminal procedure jurisprudence, thereby aligning his views with those of Nixon.[14] In the two years he had served, his opinions reflected his conservative political philosophy, his adherence to judicial restraint and strict constructionism of the Constitution. For example, in *New York Times Co. v. United States* (1971), the "Pentagon Papers" case, Burger's dissent illustrated his broad conception of executive powers and his narrow interpretation of judicial functions.[15] However, his early opinions also illustrated his adherence to the enforcement of previous court opinions, and demonstrated that his conservatism not simply reactionary. For example, the first major civil rights decision of his tenure, *Swann v. Charlotte-Mecklenburg Board of Education* upheld busing as a constitutionally viable method of desegregation.[16] In *Reed v. Reed*, Burger wrote the majority opinion which invalidated a state law for discriminating against women.[17] Thus, Burger's conservatism varied in accordance with the constitutional issue under scrutiny.

The next Nixon appointee was Harry Blackmun, also from Minnesota and an old friend of and the best man for Warren Burger at his marriage. Harvard educated, Blackmun was nominated on 15th April 1970, and he took his seat on 9th June.[18] His judicial philosophy "seemed to be exactly what Nixon was looking for: a judge, who believed in judicial restraint, was strong on law and order, and weak on civil liberties."[19] Consequently, he was expected to be a supportive vote for Burger, which resulted in the nickname of "Hip Pocket Harry."[20] This was evident in the Blackmun's dissent with Burger in *New York Times Co. v. U.S.* (the "Pentagon Papers" Case) (1971). After his first two years on the Court, there was very little evidence to the contrary.[21] His first separate opinion, issued in the obscenity case of *Hoyt v. Minnesota*, demonstrated his deference to the states, and in particular state courts.[22] He argued against a "national and uniform measure" for state regulation of obscenity, advocating instead "one capable of some flexibility and resting on concepts of reasonableness."[23] His attitude towards

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[14]The most controversial of these cases were *Miranda v. Arizona,* 384 U.S. 436 (1966).
[15] 403 U.S.713 (1971).
[16]402 U.S. 1 (1971).
[17]404 U.S. 71 (1971).
[18] Blackmun's nomination came after the failed nomination of Judges Clement Haynsworth and G. Harrold Carswell.
[19] Jeffrey Sharman, "Justice Harry A. Blackmun: The Evolution of a Realist", *American Bar Association Jounral,* Volume 72 (1986), p. 39. It is important to note, however, that Blackmun was Nixon's third choice for the appointment. The Senate had already rejected his nominations of Haynsworth and Carswell.
[20]Stephen L. Wasby, "Justice Harry A. Blackmun: Transformation from 'Minnesota Twin' to Independent Voice", Lamb and Halpern, *op.cit.,* pp. 63-99.
[21] Although Blackmun gradually became more liberal, this change was not yet evident in 1972.
[22]399 U.S. 524 (1970).
[23] 399 U.S. 524, p.529 (1970).

federalism was of particular relevance to the litigants in *Rodriguez.*

The last two Nixon appointees, William Rehnquist and Lewis Powell, were nominated simultaneously. Rehnquist, formerly Assistant Attorney General for the Office of Legal Counsel, had proven himself to be an extreme supporter of law and order measures.[24] His conservatism had been demonstrated during his Supreme Court clerkship for Justice Jackson in 1953 when he argued in favour of upholding *Plessy v. Ferguson.*[25] In his first year as Justice, he illustrated his desire to practice judicial restraint, in particular towards the states. He warned "over-reaching by the Legislative and Executive Branches may result in the sacrifice of individual protections that the Constitution was designed to secure against, but judicial over-reaching may result in the sacrifice of the equally important right of people to govern themselves."[26] Rehnquist proved to be the most consistently conservative of all the new appointees.

Lewis Powell, nominated at the same time, was considered to be a mild conservative.[27] A Virginian Democrat, Powell was in private practice and was former President of the American Bar Association (ABA).[28] His views on criminal justice, expressed whilst he was A.B.A. President were in accordance with Nixon's own, and indicated his subsequent judicial philosophy: "The immediate problem is one of balance and, in the current climate, the pendulum may have indeed swung too far in favor of defendants."[29] Powell's notion of balance was integral in his judicial reasoning, echoing the judicial style of Justice John Marshall Harlan.[30] Powell's early opinions illustrated his emerging balancing style. In *Weber v. Aetna Insurance Company*, the Court invalidated a Louisiana statute that gave priority to legitimate children in the receipt of compensation.[31] In the opinion, Powell illustrated his deference to the judgement of the

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[24]For example, he supported the notion that executive privilege permitted wiretapping and surveillance without a court order, and supported the tactics employed by the police in the 1971 May Day Celebrations, in which the police arrested 12,000 people and detained them until demonstration ended. For more detail of Rehnquist's actions before his appointment to the Court, see Sue Davis, "Justice Willian H. Rehnquist: Right-Wing Ideologue or Majoritarian Democrat", Lamb and Halpern (eds), *op. cit.*, p.316.

[25] 163 U.S. 537 (1896). This interpretation is based upon the existence of a memo written by Rehnquist to Jackson in which he urged upholding *Plessy.* Rehnquist disputed this interpretation. He asserted that Jackson asked for a memo in which outlined the case for upholding *Plessy.* See Richard Kluger, *Simple Justice*, (New York, 1975), pp. 605-609, for a lengthy discussion of this issue. In this discussion, Kluger disputes Rehnquist's interpretation of the memo, and argues that the content of the memo was an accurate reflection of Rehnquist's views on the case.

[26]*Furman v. Georgia*, 408 U.S. 238 (1972), at 470.

[27] Dallin H.Oaks "Tribute to Lewis F. Powell, Jr", *Virginia Law Review,* Volume 68 (1982).

[28]For more biographical information on Powell, see John Jeffries Jnr, *Justice Lewis F. Powell, Jnr,* (New York, 1994).

[29] Lewis Powell, "An Urgent Need: More Effective Criminal Justice", *American Bar Association Journal* 51 (1965).

[30] It has been suggested that Justice Powell deliberately attempted to emulate Harlan: "No previous justice was cited so frequently in his opinions and none more reverently", Jacob W. Landynski, "Justice Lewis F. Powell Jr: Balance Wheel of the Court", Lamb and Halpern, *op.cit.,* p. 278.

[31] 406 U.S. 164 (1972). For more detail, see below, p. 184.

state "Our decision fully respects Louisiana's choice in this matter", whilst simultaneously demonstrating his regard for fair legal treatment; "[l]egal burdens should bear some relationship to individual responsibility or wrongdoing."[32] This line of reasoning illustrated Powell's continuing tactic to balance competing interests, and weigh them accordingly. The questions raised by *Weber* were, according to Powell: "What legitimate state interest does the classification promote? What fundamental personal rights might the classification endanger?"[33] Consequently, Powell had demonstrated his ability to respond to new ideas, thereby establishing himself at the new ideological centre of the Court.

Of the five remaining Warren Court justices, William O. Douglas had served the longest. Appointed by Franklin Roosevelt in 1939, Douglas had proven himself to be strong defender of individual liberties and advocated an active judicial role: "There has been a school of thought that the less the judiciary does the better. The late Edmund Cahn, who opposed that view, stated my philosophy. He emphasized the importance of the role that the federal judiciary was designed to play in guarding basic rights against majoritarian control."[34] Douglas also championed the notion of liberty, at the heart of which, in his opinion, lay the First Amendment. Consequently, Douglas held an absolutist interpretation of First Amendment rights, and did not support any interference with freedom of speech or press. Another strand to his definition of liberty was the idea of minimum government intervention in the daily lives of citizens, which resulted in the notion of privacy. He affirmed the constitutional importance of privacy in *Griswold v. Connecticut.*[35] Douglas' political and judicial philosophy thereby emphasised the dynamic nature of the law, and its potential scope as an instrument of positive social change.

Justice Thurgood Marshall shared Douglas' view of the possibilities of law to facilitate social change. Lyndon Johnson appointed Marshall, the first black Justice, to the Court in 1967. Born in Maryland in 1909, Marshall was the great grandson of a slave, and had obtained his legal training from Howard Law School, after his application was rejected from the University of Maryland on the basis of race.[36] Marshall was the Director-Counsel of the NAACP for 11 years, and had argued before the Supreme Court on 32 occasions, winning 29, including *Brown v. Board of Education.*[37] Marshall's judicial

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[32] 406 U.S., 178, 189.
[33] 406 U.S., 179.
[34] *Flast v. Cohen,* 392 U.S. 83 (1968). Quoted in "Justice William O. Douglas: Conscience of the Court", Phillip J. Cooper, Lamb and Halpern, *op.cit.*, p.175.
[35] 381 U.S. 479 (1965).
[36] For more biographical information, see Roger Goldman and David Gallen, *Thurgood Marshall,* (New York, 1992).
[37] 347 U.S. 483 (1954).

philosophy reflected his background of legal activism, which derived from a fundamental belief in the potential to correct social injustices through judicial rulings. Marshall consistently ruled in favour of those seeking legal redress from social or political ills, emphasising the constitutional rights of the individual rather than the states.[38] Consequently, Marshall focused upon the practical consequences of decisions.[39]

Justice William Brennan, an Eisenhower appointee, similarly followed the "results oriented" approach to law.[40] Before his Court appointment, Brennan had served on the New Jersey Supreme Court which had "developed an activist tradition and a penchant for public policy making."[41] Once on the Court, Brennan continued in this tradition, which reflected his liberal political belief in the affirmative role of the state. His opinion in the reapportionment decision, *Baker v. Carr*, reflected his personal adherence to egalitarian principles.[42] His profound belief in egalitarianism was in accordance with the broader direction of the Warren Court decisions. In this context, he developed his abilities as a coalition builder, and became the "leader of the liberal faction" during the Warren Court era.[43] He supported the notion that the interpretation of the Constitution was a dynamic process. He commented for example in 1965 that the meaning of the equal protection clause was "equal protection today."[44]

The judicial philosophies of the other remaining Warren Court justices, Bryon White and Potter Stewart, had a more complex legal perspective. White, described as a "pragmatic liberal", was appointed to the Court by President Kennedy in 1962.[45] Unlike Douglas, Brennan and Marshall, White did not believe the judiciary had the duty to promote broad social change, but Kennedy had appointed White to the Court on the basis of his sympathy towards the claims of racial minorities, which continued when on the Court. For example, in *Palmer v. Thompson*, White wrote the dissent which protested against the Court's upholding of the decision by Jackson, Mississippi to close

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[38] For example, Marshall dissented in *Dandridge v. Williams* 397 U.S. 471 (1970), in which the majority upheld a limitation on Aid to Families with Dependent Children (AFDC), regardless of need or family size.

[39] William J. Daniels, "Justice Thurgood Marshall: The Race for Equal Justice", Lamb and Halpern (eds.), *op.cit.*, p. 214.

[40] Stanley F. Friedelbaum, "Justice William J. Brennan Jnr: Policy-Making in the Judicial Thicket", Lamb and Halpern (eds.), *op.cit.*, p.104. The definition of "results oriented" approach to law is "employing the law as a means to attain the political and economic ends" favoured by the justice. It is the act of "treating the law as instrument to foster personal societal vision." Bernard Schwartz, *A History of the Supreme Court,* (New York, 1993). Thus, the results-oriented justice focused upon the consequences of the decision, rather than the means by which the decision is reached.

[41] *Ibid.*, p. 102.

[42] 369 U.S. 186 (1962).

[43] Stanley Friedelbaum, *loc.cit.*, p. 106.

[44] William J. Brennan Jr, "Constitutional Adjudication", *Notre Dame Lawyer,* Volume 40, (1965).

[45] Daniel C. Kramer, "Justice Byron R. White: Good Friend to Polity and Solon," Lamb and Halpern, (eds.) *op.cit.*, p. 408.

all public swimming pools.[46] Similarly, White was consistently opposed to sex discrimination, illustrated in his majority opinion in *Stanley v. Illinois*.[47] However, in other areas, White proved less sympathetic to claims of less powerful groups. In *Lindsey v. Normet*, White supported the right of landlords to evict tenants for non-payment, even if the landlord had breached his contract.[48] This ruling demonstrated White's limited view of the guarantees of the equal protection, and the private nature of contractual agreements; other avenues of redress existed for the tenant to pursue his claims. This decision also illustrated White's limited view of the judicial role. Thus, White's judicial philosophy was a mixture of different elements: he held a liberal attitude on the rights of the minorities, yet demonstrated a keen awareness of the limitations of the Court's political role.

The pragmatic judicial philosophy of Justice Stewart made it difficult to define. Potter Stewart, appointed by Eisenhower in 1958, applied a "lawyer-like approach" to his decision making. During the Senate hearings on his nomination, he asserted "For me there is only possible way to judge cases, and that is to judge each case on its own facts of record, under the law and the United States Constitution, conscientiously, independently, and with complete personal detachment."[49] He did not share the opinion that the Supreme Court should be the primary instrument of political change, "that function is the function of the people's elected representatives, to be carried out by the executive branch of government."[50] Thus, Stewart's judicial philosophy incorporated a high regard for elected institutions, and for the role of the states within the federal system.[51] During the Warren Court era, Stewart had also demonstrated a narrower construction of equal protection guarantees than some of his colleagues. For example, his dissent in *Harper v. Virginia Board of Elections*, demonstrated his opposition to broadening equal protection guarantees beyond race.[52]

Thus, a broad ideological spectrum existed on the Supreme Court. The Court was not consistently liberal or conservative; the issue under consideration determined the

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[46] 403 U.S. 217 (1971).

[47] 405 U.S. 645 (1972). This opinion struck down an Illinois law that declared unwed fathers unfit for parenthood, with no hearing. Unwed mothers were permitted a hearing. White asserted "Under the Due Process Clause, the administrative advantage is insufficient to justify refusing a father hearing when the issue at stake is the dismembership of his family."

[48] 405 U.S. 56 (1972).

[49] Potter Stewart, "Reflections on the Supreme Court", *Litigation 8* (1982). This type of statement was customary for Congressional nomination hearings and cannot necessarily be interpreted as an accurate reflection of his philosophy. It does, however, give some indication of his approach towards each case.

[50] Potter Stewart, "Address to New Hampshire Bar Association", *New Hampshire Bar Journal* 18 (1977), p. 165.

[51] For example, see *Katzenbach v. Morgan* 384 U.S. 641 (1966) and *Younger v. Harris* 401 U.S. 37 (1971).

[52] 383 U.S. 663 (1966).

ideological slant of the Court's decision. Although the new Nixon appointees were chosen for their political conservatism, the first years of the Burger Court cannot be characterised as conservative. Instead, during the period in which *Rodriguez* was filed and the presentation of oral arguments in October 1972, the Court had become involved in more controversial issues. In May 1971, through its decision *Reed v. Reed,* the Court struck down gender based legislation under the equal protection clause.[53] A few months before oral arguments were heard in *Rodriguez,* the Court declared the current practice of the death penalty to be unconstitutional. The Court had become further involved in social issues since the original filing of the suit. Gender discrimination and death penalty had now become areas of Court concern. Although this demonstrated the Court's continuing potential for liberal decisions, it also marked its involvement in new areas of controversy. With the ideologically mixed nature of the Court, the presentation and content of the arguments in *Rodriguez* had to be carefully balanced. In order to afford themselves the best chance of victory, the plaintiffs needed to emphasise the conservative features of their argument. Similarly, the defendants could not appear reactionary, which would have risked alienating those justices thought to be moderate.[54] Therefore, the content of the argument and their subsequent presentational style derived in large part from the counsels' attempt to win the majority of votes.

Both sides underwent significant changes in the period before the case reached the Supreme Court. Once the decision to appeal had been filed, the State of Texas knew a complete tactical restructuring was necessary. The first significant change made by the appellants was the hiring of Charles Alan Wright, an eminent professor at the University of Texas, and a leading expert on the federal judicial system.[55] Wright, a Republican, had argued before the Supreme Court on previous occasions, the most recent of which was for the state in the death penalty case, *Furman v. Georgia.*[56] He was personally acquainted with some of the justices, which illustrated Wright's high standing within the legal community.[57] Crawford Martin, the Attorney General of Texas, telephoned Wright on 2nd January 1972 to request if he would be willing to argue the case in the Supreme Court. Wright agreed immediately. Wright's professional experience was an influencing factor in the development and presentation of the Supreme Court case; his decisions were

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[53] 404 U.S. 71 (1971).

[54] These assertions are based upon ideological nature of the justices targeted by both Gochman and Wright. These justices were Stewart, White and Powell. See below, p. 128.

[55] Professor Wright had written a number of texts on the federal judicial system, the most famous of which is Wright's *Federal Pleadings and Practice* (Chicago, 1969).

[56] 408 U.S. 238 (1972). The decision was rendered in June 1972. Thus, Wright had appeared before exactly the same Court, a matter of months before the oral arguments.

[57] For example, he first met Powell during his period as president of the A.B.A during the 1960s. However, his acquaintance with the justices did not affect the result. As Wright pointed out "I knew Potter Stewart the best, and he often voted against me." Interview with author, 16th September 1997.

shaped by previous experiences before the Court.

Alterations in the plaintiffs' legal team similarly reflected the different nature of the case. In the aftermath of the district court decision, the possibility of a Supreme Court appeal prompted the direct involvement of MALDEF, John Coons and Sidney Wolinsky. The first significant alteration in plaintiffs' counsel was the inclusion of Mario Obledo, Executive General of MALDEF, as co-counsel in the case. Obledo, based in San Francisco, was previously involved in *Serrano v. Priest*, and was in close contact with the lawyers of that case.[58] Consequently, through the inclusion of Obledo, the plaintiffs' legal team in *Serrano* became directly involved in the preparation of *Rodriguez*. Furthermore, three years after its original refusal to assist Gochman, MALDEF was now actively involved in the *Rodriguez* suit.[59] Stephen Browning, of the Lawyers' Committee for Civil Rights, who had provided assistance at the district court level, also remained closely involved in the development of the case. Browning and Obledo were the primary source of external assistance to the original legal team. The rest of the legal team remained unchanged from the district court case. Arthur Gochman was assisted by Rose Spector, and Mark Yudof and Daniel Morgan remained "of counsel". Once the Notice of Appeal was filed, Yudof, Gochman and Morgan held meetings in Gochman's San Antonio office to discuss strategy.

The Notice of Appeal was officially filed in the Supreme Court on February 14th.[60] The Notice of Appeal was an indication of defendants' objections to the district court decision, and the points to be addressed in their Jurisdictional Statement. No response was required from the plaintiffs. It was almost two months later, on the 17th April, when the defendants filed the appeal. During that time, Wright had become fully involved in the case, and was primarily responsible for the preparation of the Jurisdictional Statement. He had first heard of the case "on December 24th 1971, when I was sitting eating breakfast and read about the decision in the morning's papers."[61] Four months later, he orchestrated the defendants' movements.[62]

In the statement Wright established the primary elements of the defendants'

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[58] 5 Cal 3d (1971). See previous chapter, pp. 84-90.
[59] See Chapter Two, p. 92.
[60] The state challenged the district court opinion on five counts, based upon the central argument of "whether the court has applied the proper test in passing upon the validity of public school finance in the state of Texas." Notice of Appeal to the Supreme Court of the United States, *Rodriguez v. San Antonio Independent School District*, Civil Action No. 68-175-SA, p. 4.
[61] Interview with author, 14th September 1997.
[62] This was illustrated by a letter from Charles Alan Wright to Pat Bailey, 4th April 1972, in which he said: "I think our Jurisdictional Statement is in the form in which I would like to see it. I think it is well to get it to the printer on Thursday." Box 10, Private Papers of Charles Alan Wright (hereafter cited as C.W.P)

arguments, (hereafter "appellants"), which would later be elaborated on in the brief. [63] The first question focused upon the broader implications of affirming the district court decision, stating simply that "if it is upheld, it would require striking down the systems of school financing used in 49 of the 50 states."[64] The second argument introduced one of the primary contentions against school finance reform, "The decision below would adversely affect the quality of public education in the state.....Equalizing amounts spent on education on a statewide basis would almost certainly be done at a level that would not significantly increase the overall expenditure for education. ...Quality education would be sacrificed in the name of equality.....The result would be homogenized education."[65] This was the "leveling down" argument, upon which Philip Kurland originally wrote, which aligned equalisation with mediocrity.[66] The third argument placed *Rodriguez* in context with other recent Supreme Court decision regarding education, in particular busing.[67] The appellants referred to the present disruption to education caused by the enforcement of the desegregation decision, and the potential problems of the enforcement with *Rodriguez.* Thus, the appellants placed the case into the broader political context, relating school finance to desegregation. The fourth theme introduced was a central component of their subsequent brief: the appropriate spheres of judicial activity. Appellants asserted that school finance reform was a legislative, rather than a judicial question: "a policy judgement of this kind is more appropriately made by a legislative body rather than a court."[68] In the final section, the appellants requested that oral arguments be heard, instead of obtaining a summary reversal. In response to the growing number of state and district court decisions, "it seems appropriate that this Court hear oral argument in the matter and resolve the issue in a way that cannot be misunderstood by lower state and federal courts."[69] It was therefore imperative that the Supreme Court heard the arguments in full and rendered a detailed opinion. These arguments provided the basis for the appellants' case throughout the rest of the proceedings.

The plaintiffs, (hereafter "appellees"), began to prepare the Motion to Affirm after the Jurisdictional Statement had been filed. Before counsel prepared the motion, a

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[63] Appellants are the party that files an appeal and appellees are the party that defends the lower court decision. From this point, the defendants will be called appellants and the plaintiffs will be called appellees.

[64] Jurisdictional Statement, *San Antonio Independent School District, et al. v. Rodriguez, et al.* No 71, p.8.

[65] *Ibid.,* p. 8.

[66] See previous chapter, p. 66.

[67] The appellants argued "This would be a crippling blow to education at a time when it is already under heavy pressure from those who resist desegregation". Jurisdictional Statement, p. 8.

[68] *Ibid.,* p. 9.

[69] *Ibid.*, p.10.

disagreement over strategy required resolution. A difference of opinions existed regarding the timing of *Rodriguez* in the Supreme Court. In a memo from Stephen Browning to Obledo and Gochman, dated 9th April, Browning suggested an action to ask the Supreme Court to hold the case in abeyance, in order for more lower court decisions to be rendered.[70] This, it was hoped, would present a stronger case to the Court. Gochman, however, did not believe that more lower court decision would substantially alter appellees' chances in the Supreme Court.[71] This difference of opinion related to a fundamental tactical question regarding school finance litigation: whether victory was more probable in federal courts with more lower court backing.

At the Lawyers' Committee for Civil Rights Conference in October 1971, Sidney Wolinksy urged school finance litigants to adopt a national strategy aimed at avoiding federal courts whenever possible, in order to build a favourable wealth of legal opinion at the state court level.[72] This opinion was shared by Michael A. Wolff, counsel for the appellees in the Minnesota school finance case *Van Dusartz v. Hatfield*, who circulated a memorandum expressing this view.[73] The memorandum, distributed mid-April 1972, reflected concern with the strategy of heading directly to the Supreme Court. In Wolff's opinion, the previous Supreme Court school finance decision, *McInnis v. Shapiro*, constituted a dangerous precedent and offered a simple "get out clause" to the Court.[74] Consequently, Wolff recommended, "If a case had to be brought in federal court, it should not be pleaded in a way that would not result in direct review in the Supreme Court."[75]

Gochman's initial decision to file in the federal district court and to push for an immediate Supreme Court hearing was, therefore, contrary to the opinion of some prominent school finance lawyers. According to one report: "one evolving sophistication of social reform lawyers is to shield an issue from the Supreme Court while building up a series of favourable lower court decisions and moulding a favourable political climate nationally."[76] In light of this increasingly popular point of view among litigants, Gochman's motives were questioned. According to a report in *The Washington Post*: "Gochman, who some Washington and New York lawyers consider a "gunner" for a dramatic, nation-wide legal breakthrough, denies that he put his case on a fast track to

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[70] Memo from Stephen Browning to Mario Obledo and Arthur Gochman, 9th April 1972. M.A.
[71] Interview with Author, 10th December 1998.
[72] Gerald Lubnow, "The Action lawyer", *Saturday Review Magazine,* 26th August 1972, p. 42. Sidney Wolinsky was lawyer for the plaintiffs in *Serrano v. Priest.* For further detail, see previous chapter, p. 74.
[73] 334 F.Supp 870.
[74] John P. Mackenzie, "Jockeying in the Texas Case: School Financing", *Austin-American Statesman,* 31st April 1972, p. 4.
[75] *Ibid.,* p. 4.
[76] Gerald Lubnow, *loc.cit.*, p. 39.

Washington to gain fame. 'I filed this suit long before I ever heard of any of these committees and foundations, he said."[77] Gochman showed his desire to pursue his own course of actions based upon his personal judgement, thus earning him the description of an "independently minded liberal."[78] He was unwilling to alter his intended action on the advice of organisations which had only recently become involved in the case. Gochman's reluctance to delay the case, however, did not derive from a lack of consideration of alternative strategies. Instead, he thought the number of favourable lower court decision would not significantly affect appellees' chances of success in the Supreme Court. The tailoring of arguments to appeal to key members of the Court would be, according to Gochman, the persuasive factor, not the number of lower court precedents.[79]

Obledo also disagreed with Browning's suggestion of a delay. This was made clear by Obledo's response to Browning's memo, dated 12th April: "I stand opposed to such action. The record in *Rodriguez* weighs heavily for the Appellees and the climate seems ideal for a favorable ruling. I believe it would be wise to have the Court entertain the matter at this time."[80] The number of lower court cases, in Obledo's opinion, indicated that momentum remained with the appellees. This was an opinion that Wright privately shared, "Many of my friends thought I had no chance at all in this case. The number of district court and lower court opinions suggested that this was a notion whose time had come."[81] Wright's decision to treat plaintiffs' claims respectfully, rather than dismissively as Bailey had done, reflected this view. Differences of opinion, however, between named counsel in *Rodriguez* and other school finance litigants persisted throughout the Supreme Court proceedings and illustrated how internal factors influenced the development of the case.

Before the appellees had filed the Motion to Affirm, two *amici* briefs were filed in support of the appellants' Jurisdictional Statement. The first, filed the next day, was on behalf of thirty states. George Liebmann, Attorney for Montgomery County, Maryland, co-ordinated the large state effort and drafted the brief. Liebmann, counsel for the State in the Maryland school finance case, *Parker et al. v. Mandel et al.* had approached counsel with the idea of a joint state brief soon after they filed the Notice of Appeal.[82] On 23rd February, he wrote to Wright:

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[77] John Mackenzie, *loc.cit.*, p. 4.
[78] *Ibid.*, p. 4.
[79] Interview with Author, 10th December 1998.
[80] Memorandum, from Mario Obledo to Stephen Browing, 12th April 1972. Folder M 673 R G5, Box 15, Folder 20. M.A.
[81] Interview with Author, 16th September 1997.
[82] Liebmann had also been counsel for the State of Maryland in *Dandridge v. Williams* 397 U.S. 471 (1970).

> A sufficiently emphatic statement by the Supreme Court would do much to stop the *Serrano-Rodriguez* movement in the lower courts.....We believe that a clear and emphatic statement of the concern of numerous states and school districts at this time, in the form of an *amicus curiae* memorandum, in support of jurisdictional statement, will almost inevitably receive the attention of the press and that such an emphatic statement may operate to slow or reverse the movement of cases in the district courts.[83]

Liebmann believed such a brief would emphasise the nation-wide political implications of *Rodriguez* and he subsequently began to co-ordinate the interstate *amici* brief, and, in the process, created a network for defence lawyers, similar to the network established by the Lawyers Committee for Civil Rights for the plaintiffs. His motivation derived, in part, from Liebmann's views on the litigation, which he expressed in his closing: "We believe that the *Serrano- Rodriguez* cases pose one of the gravest threats in our time to the control by states of their fiscal affairs and their rights of self-government."[84] *Rodriguez*, according to *amici* brief, concerned the state right of taxing and spending, which have "traditionally immunized such determinations, state and federal, from intensive judicial review."[85] The arguments advanced by Liebmann concerned the financial expense of school finance reform, its implications for local government and the federal balance. The erosion of local government would be an inevitable consequence of an affirmance of the district court decision:

> The present case, more than any other case before the Court in the last decade, constitutes a threat to the autonomy and independent existence of state and local governments and indeed to the power of the purse of legislatures that is the enduring and perhaps the most important legacy of seven centuries of Anglo-American constitutional history.[86]

This dramatic, possibly over-dramatic, statement encapsulated the perceived threat school finance posed to federalism. Despite the carefully framed arguments of Coons, in which localism was not only preserved but also championed, the fear remained that school finance threatened the entire federal structure. Liebmann, therefore, was strongly defensive of localism, which he believed was already threatened through busing.

Before he filed the brief, Liebmann sent a draft copy to Wright for approval. Wright wrote to Bailey: "It is not the kind of brief I would ever write. I prefer, in a brief, to give the tone of calm reasonableness, rather than very shrill tone of this brief. That

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[83] Letter from George Liebmann to Charles Alan Wright, 23rd February 1972. C.W.P.
[84] *Ibid.*, p. 2.
[85] *Ibid.*, p. 3.
[86] *Ibid.*, p. 2.

doesn't bother me, however, since patently, we are not being asked to join in it, and the tone of the *amici* suggests, by contrast, what sober and reasonable people we are."[87] Through this comment, Wright revealed an important strategic objective: to maintain a tone of reasonableness that would present the arguments in the same light. This objective remained an integral component of Wright's strategy throughout the Supreme Court proceedings. Wright's view of the joint state brief was echoed by the Commonwealth of Pennsylvania two weeks later, when its Attorney General, J. Shane Craemer, filed a separate motion on the grounds that "its views are not represented by the brief filed in support of appellants."[88] Its brief supported the appellees' case and criticised the arguments advanced by Liebmann: "We do not share this gloomy, cataclysmic view."[89] Therefore, although the appellants' motion had the support of thirty states, the solitary support of Pennsylvania for the appellees showed the complexity of the case. However, only one state supported the district court decision, whilst thirty states opposed it.

On 17th May the appellees filed the Motion to Affirm. Written by Gochman and his assistant, Rose Spector, it responded to each question raised by the appellants in the Jurisdictional Statement. The Motion laid out the principal points of the legal analysis, and briefly outlined the facts of the case.[90] The appellees also distinguished the case at bar from the previous school finance decision, in order to ensure the Supreme Court did not render a summary dismissal, the outcome that Wolff feared might occur in his April memorandum.[91] The preparation of the Motion to Affirm signaled the change that had occurred in the appellees' legal team. Obledo, through his close contact with the counsel from *Serrano*, ensured Gochman knew their recommendations during the preparation of the document. On 2nd May, Gochman received documents, forwarded from Obledo, which included an initial draft of the motion to affirm. Ellen Cummings, Assistant Director of the Los Angeles Poverty Lawyers Association and former clerk to Judge William Sullivan of the California Supreme Court who wrote the *Serrano* opinion, sent a detailed draft of the Motion to Affirm.[92] Gochman did not, however, use this in his final version, thereby resisting external attempts to alter the presentation of his argument.

Gochman, whose strategy had already been questioned by the Lawyers' Committee for Civil Rights, preferred to remain consistent with his original district court

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[87] Letter from Charles Alan Wright to Pat Bailey, 4th April 1972, p.1 C.W.P.
[88] Amicus brief for the Commonwealth of Pennsylvania, *San Antonio Independent School District v. Rodriguez,* p. 2.
[89] *Amicus* Brief for Commonwealth of Pennsylvania, p. 10.
[90] The legal analysis remained unchanged from the district court case, that wealth was a suspect classification and education a fundamental interest.
[91] See above, p. 121.
[92] Memo from Ellen Cummings to Mario Obledo, 3rd May 1972. M.A.

brief and pursued the strategy he deemed best. Although differences existed, the overall strategy remained the same. Cummings suggested stressing the limitations of the district court decision, which was already a feature of Gochman's strategy. The virtual absence of the Coons theory also reflected its marginal importance to the case. The absence of the more specific suggestions from Cummings demonstrated that Gochman, as lawyer for Demetrio Rodriguez, remained the primary orchestrator of the plaintiffs' case despite the recommendations of the organisations. His refusal to delay the Supreme Court hearing, which had the support of Obledo, further demonstrated this. His personal judgement remained the dominant factor in the shaping of the case.

The Supreme Court granted the appeal for a full hearing on 7th June 1972, three weeks before its ruling in *Furman v. Georgia* was delivered.[93] In the period between the granting of a new hearing and oral arguments, the Court had become involved in another controversial issue during a presidential election year, thereby further altering the political context of the litigation. The debate over capital punishment and the continuing controversy over busing, showed the Court's involvement in an increasing number of social issues. The *certiorari* memoranda, written by the Supreme Court clerks to the justices, recommended full review of the case. They summarised the main elements of the Jurisdictional Statements, the Appeal and Motion to Affirm and stated their recommendations after summarising the case. The memo to Justice Powell, for example, simply outlined the facts of the case, and the lower court decision, and then concluded, "because of the importance of this issue, I would note probable jurisdiction. In the alternative, affirm."[94] Similarly, the memo to Justice Douglas, which was labeled "discuss", recommended an affirmance. No mention was made of the content of the argument of either side, simply the facts of the case.[95]

However, the *certiorari* memo to Justice Marshall contained a more detailed analysis. Marshall's clerk wrote, "It is critical to understand what the D.C. did not decide. It did not decide that there must be equal expenditure for every school district in a state."[96] Then, following a description of power-equalization, he asserted "this has the advantage of equality at the cost of diversity."[97] Thus, the ultimate question, according to the clerk, was "the merits or demerits of the lower court's decision." The clerk's conclusion was much more detailed, and identified certain problem areas of the appellees'

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[93] *Furman v. Georgia,* the death penalty case, was delivered on June 29th 1972.
[94] Memo from Larry Hammond, clerk to Justice Powell, 2nd May 1972, Box 71-1332 Working Papers, Justice Powell Archives, Washington and Lee University. (Hereafter cited as P.P.).
[95] Memo from clerk to Justice Douglas, 31st May 1972, *Certoirari* Memos, File 1581, William O. Douglas Papers, Library of Congress, Manuscript Division, Washington D.C. (Hereafter cited as D.P.).
[96] Memo from clerk to Justice Marshall, 27th May 1972, *Certoirari* Memo, Box 75, Thurgood Marshall Papers, Library of Congress, Manuscript Division, Washington D.C. (Hereafter cited as M.P.).
[97] *Ibid.*, p. 2.

case:

> I think that eventually you will vote to affirm the lower court, and that this is the correct vote, although there are many problems that do not appear on the surface..... The Court will eventually have to face up to the fact that there is just not enough evidence to show that the poor always have less money spent on their schools than the rich. I know you will reject this assertion out of hand, but I only include it to demonstrate that there is going to be a problem.....While I think you should eventually vote to affirm, the truth of the case is that an affirmance strikes down the method of financing schools in every state except Hawaii. This justifies plenary consideration, at least in my opinion.[98]

Although the *certiorari* memos were designed merely to identify the facts of *Rodriguez*, and any potential problem areas, they began to familiarise the justices with the issues under contention. Justice Powell showed a desire to familiarise himself even further with the case during the summer recess. In June, he wrote to his clerks for the next term, Larry Hammond and J. Harvie Wilkinson III, stating "Let's put this one on our summer list for study."[99] This reflected Powell's particular interest *Rodriguez* which stemmed from his educational background. Powell, chairman of the Richmond School Board from 1951-1961 and then the Virginia State Board of Education from 1961- 1968, possessed a profound personal and professional interest in education, which became of central importance in the case.[100] The Court scheduled oral arguments for the October term, and in order to meet this date, the brief of appellants was to reach the Court by 22nd July, and the appellees brief was due 30 days later, on 21st August.[101]

Once the Supreme Court had decided to hear the case, the next stage of the proceedings was the preparation of the appellants' brief. Wright was its sole author, involving no one else in its preparation: "I preferred to work alone. I wrote the brief with my own typewriter, I took it to the printer, and did not show it to the Attorney General before it was finished."[102] Wright was solely responsible for devising the Supreme Court strategy: "The main problem I had was thinking of a strategy. I had done all the research, I knew everything I needed to know, but I could not think how to formulate the strategy."[103] Whereas the appellees had a number of different lawyers offering advice, the appellants' brief was produced by Wright alone. In reflection of this, Wright regarded

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[98] *Ibid.*, p. 3.
[99] Memo from Lewis Powell to Larry Hammond and J.Harvie Wilkinson III, 12th June 1972. P.P.
[100] For more detail of Powell's background, see below, p. 178.
[101] Letter from Michael Rodak Jnr, Clerk of Supreme Court to Arthur Gochman, 7th June 1972. Box 1666, American Civil Liberties Union Papers, Seely Mudd Library, Princeton University. (Hereafter cited as ACLUP)
[102] Interview with author, 14th September 1997.
[103] *Ibid.*

the structuring of the *Rodriguez* brief the most difficult organisational experience of his career. In a 1993 account of his *Rodriguez* experience, Wright recalled:

> I could not see how to organize the argument in defense of the Texas system. The days went by and I wrote nothing. One day in July, I was in Washington for a meeting of a committee dealing with the Federal Rules of Civil Procedure. School finance was the furthest thing from my thoughts. On the plane home I was reading yet again Josephine Tey's famous crime novel, *The Daughter of Time.* I had a couple of drinks and, as often happens at the end of a long day, I was finding it hard to concentrate on even so excellent a book. In this unfocused state there suddenly came to my mind an idea about the organization of my brief. ...I took out my pen and wrote it in the back of my book..... I took the Tey book to the office the next day and, with the organization now safely in mind, was able in a long day's work to write the 48 page brief. [104]

The reason for Wright's difficulty lay primarily with the "unusual background of the case, and the constitutional principle it announces."[105] According to Wright, the unusual nature of the case derived from its emergence from the minds of scholars, not legal precedent. In his opinion, the Coons theory was the issue under examination. Wright's focus upon the Coons theory, instead of the inequities of the finance system, was significant in the development of the appellants' case. This emphasis was designed to maximise chances of success, as it diverted attention from the primary aspects of the original suit: the constitutionality of the financial inequities. Instead, the appellants focused upon one proposed solution. Wright, therefore, brought the problematic consequences of an affirmative ruling to the forefront of the suit.

After considering the Court's composition, Wright decided his best tactic was to treat the Coons theory respectfully. This decision stemmed from Wright's recognition of his basic objective: "My job, quite simply, was to win five votes on the Supreme Court. That was the reason the State of Texas employed me."[106] If this was "a notion whose time had come", which was the view expressed by some of Wright's friends, it was necessary for him to treat the theory appropriately.[107] Following an examination of the district court trial, Wright concluded that Bailey's tactics were wrong: "I was not going to do the same foolish thing that the state lawyer did at the District Court and call the appellees' plea socialist....That would be a sure way to lose."[108] If this was "a notion whose time had come", treating the claims dismissively as Bailey had done would, in

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[104]Charles Alan Wright, "How I Write", *The Scribes Journal of Legal Writing*, 1993, pp. 89-90.
[105] Brief for Appellants, p. 2.
[106] Interview with author, 14th September 1997.
[107] See above, p. 122.
[108] Interview with author, 14th September 1997. For a detailed account of Bailey's tactics, see previous chapter.

Wright's opinion, alienate the centrist, moderate justices. Accordingly, he pinpointed the crucial votes on the Court, and devised his strategy with those justices primarily in mind: "I thought Lewis Powell was terribly important because of his moderate, somewhat liberal views. Justice Stewart of course I was worried about....And Justice White also....."[109] In order to attract their votes, he decided against dismissing the appellees' claims, and concentrated instead upon questioning their appropriateness for constitutional law. This tactic was designed to appeal to the principle of judicial restraint, invoking a limited judicial role and arguing instead for more affirmative legislative action. Wright treated the proposed constitutional principle respectfully:

> So many people, including so many courts, had found the argument of Coons to be persuasive, I thought I would get into trouble if I scoffed at it. If serious people thought this was something that should be taken seriously then we had better take this seriously. So, my argument to the Supreme Court was about why you should not take this so seriously as to adopt this as a principle of constitutional law, but it was instead something the legislatures should read and take seriously.[110]

This tactic was evident from the start of Wright's brief. His focus upon the Coons theory was apparent from the first sentence: "In a book published two years ago three scholars announced what they called Proposition One."[111] Wright then established his central tactic:

> *Private Wealth* is a splendidly scholarly achievement. It has been the catalyst for widescale rethinking of the problems of financing public education. Its analysis of what its authors perceive as the flaws in existing financing schemes and its presentation of the remedy they propose might well prove persuasive to the legislators. The issue here, however, is whether these ideas, and those of similar contemporary critics, must be accepted by constitutional mandate.[112]

This statement was the heart of Wright's defence. The Coons theory was a valuable contribution to school finance reform, but untenable as a new chapter of constitutional law. Thus, the primary thrust of his brief focused upon the weaknesses of the Coons theory, not the constitutionality of the inequities in educational funding. This tactic ensured that the Court was made immediately aware of the implications of upholding the district court ruling. The brief then showed Wright's difficulties in preparation: "it does

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[109] *Ibid.* Wright's view of Powell's political philosophy illustrated his own political beliefs. His description of Powell as "moderate, somewhat liberal" demonstrates his own conservative views.
[110] *Ibid.*
[111] Brief for Appellants, *San Antonio Independent School District v. Rodriguez,* No 71-1332, p. 5.
[112] *Ibid.*, p. 8.

not lend itself readily to the usual form of appellate brief."[113] Instead, Wright established the nature of the problem, the critics' arguments, the unsound factual assumptions, the weakness of the legal analysis, and the consequences of an affirmative decision. Wright methodically disputed each element of the appellees' case, from the legal analysis to the potential effects of the decision.

Wright conceded school finance was a "vexing problem," and one which Texas dedicated much time and effort to resolving: "No one familiar with the Texas system would contend that it has yet achieved perfection."[114] This admission, coupled with the detailing of Texas's efforts of improvements, demonstrated the efforts to resolve the problem without judicial pressure. This implied that judicial involvement was unnecessary to prompt legislative action. Wright then challenged the appellees' notion that the flexibility of Proposition One enabled the legislature to decide from a host of remedial alternatives. Instead, he asserted, there were primarily two kinds of possible solutions. The first would be state allocation of school funds, assessed upon criteria such as varying costs of locations, demand for special programmes and transportation needs. This would restrict local control; "Only the amount allocated by the state, by whatever formula, could be spent and that no district would be permitted to supplement this subvention from its own resources."[115] The second solution, "District Power Equalizing", was the theory advanced by Coons.[116] He disputed the main elements of the theory later in the brief. Thus, Wright denied that the legislature would have a variety of alternatives available to improve the system of financing. At this point, Wright noted instead the difference of opinion which existed between the primary proponents of school finance litigation: "there is a sharp division among the prophets, seers, revelators of the new dispensation about these competing solutions."[117] Essentially, then, Wright illustrated that the solutions to the problem were complicated. Court involvement would further increase the complexity of the situation.

The next element of the appellees' case to be challenged was its unsound factual assumptions regarding the correlation between financial expenditure and educational quality.[118] Wright admitted a marginal correlation between the two factors: "It is

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[113] *Ibid.*, p. 2.
[114] *Ibid.*, p. 2.
[115] *Ibid.*, p. 15.
[116] For a detailed definition of District Power Equalizing, see previous chapter, pp. 76-80. In brief, this was the idea that the local districts would select their own tax rates. If the yield of a certain area was lower than that of another with the same tax rate, the state would impose an additional tax to rectify the imbalance. Thus, this system would preserve local choice, whilst simultaneously eliminating the ability of rich tax districts to impose a lower tax but obtain a higher revenue.
[117] Brief for Appellants, p. 16.
[118] This was the debate, precipitated by the Coleman Report in 1965, that educational expenditure had only a limited effect upon educational quality. For further detail, see previous chapter, p. 70.

reasonable to suppose that there is some minimum of dollars beneath which a sound education cannot be had."[119] He then continued: "Beyond that minimum it cannot be assumed that more dollars means better education- and relation between the two."[120] Thus, through disputing this correlation, Wright consequently challenged the initial motivation for appellees' action. Demitrio Rodriguez's complaint stemmed from the educational effect of the inadequate school funds in Edgewood school district. Implicit in Wright's challenge was the notion that the inadequate school funds did not contribute to the poor standard of education received in Edgewood beyond a minimum provision. He did not, however, attempt to define the minimum provision. Wright then briefly considered the charge of racial discrimination. The brevity implied that it was not worthy of more detailed mention: "the court did not rely at all on racial considerations in its determination of unconstitutionality and it was wise not to do so."[121] The marginalisation of race within Wright's brief illustrated its decreasing importance to the case. Implicit within the appellees' suit was the correlation between racial composition and educational funding. Areas with the highest racial composition received the lowest educational funding. However, as the litigation progressed, charges of racial discrimination become increasingly peripheral. The lack of mention of race by the district court had showed that claims of class discrimination, not race, had become the prime focus. Wright's short consideration of racial discrimination underlined this development.

The majority of the brief illustrated the flaws in the legal argument. The underlying impetus for Proposition One, Wright conceded, lay rooted in "a great American tradition", which was "to find in the Constitution a mandate for the majority of the Court to substitute their judgement of wise policy for that of legislative bodies."[122] Thus, "the favorite vehicle for efforts of this kind is the recently- developed doctrine that if a 'suspect' classification affects 'fundamental' rights, a 'compelling state interest' is required to justify the legislation."[123] Wright then proceeded to dissect the legal analysis, arguing that education was not a fundamental interest, nor was wealth a suspect classification. Education, he conceded, was of great significance to the individual, yet "that does not mean that it is fundamental in the sense that makes it applicable to the 'compelling state interest' or 'rigid scrutiny' test."[124] To support this assertion, Wright quoted the Maryland school finance decision, *Parker v. Mandel*:

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[119] *Ibid.*, p. 18.
[120] *Ibid.*, p. 18.
[121] *Ibid.*, p. 23.
[122] *Ibid.*, p. 25.
[123] *Ibid.*, p. 26.
[124] *Ibid.*, p. 26.

> That education is important and a vital concern of state and local government cannot be denied. But this is far from saying that education is so vital as to be called a 'fundamental' interest from a constitutional point of view and thus made subject to a much more rigorous constitutional test than applied in other areas of state concern. Can it reasonably be said that education is a more fundamental interest than health or welfare? Millions of young people in the United States are, of course, immediately and vitally affected by educational policies and expenditures. Millions of the aged on the other hand are more immediately and vitally affected by state expenditures for health care.[125]

Wright used *Parker* to establish the arguments against the fundamentality of education. He did not expand in greater depth, but reiterated the importance of other governmental services in order to deny the constitutional particularity of education. In contrast, his consideration of the suspect nature of wealth was significantly more detailed, and heavily reliant upon Supreme Court opinions. Recent Court decisions, according to Wright, rendered appellees' claims obsolete: "In its eagerness to write Proposition I into the Fourteenth Amendment, the District Court did not see fit to discuss recent decisions of this Court...that are contrary to the legal positions it took. Such cases as *Dandridge v. Williams,*[126] *James v. Valtierra,*[127] and *Gordon v. Lance,*[128] were not given so much as a passing mention."[129] In Wright's view, this was an essential weakness in the district court opinion. Six pages of his brief dealt exclusively with the suspect nature of wealth, focusing primarily upon the district court's omission of recent poverty cases. Two pages, of which the majority was a quotation, dealt with the fundamentality of education. The difference in analysis reflected Wright's personal perceptions of the appellees' claims:

> The claim that education was fundamental was far more difficult than wealth being suspect. What made education difficult was the statement in *Brown* stating that there was no more important activity for the state and local government than education. When the Court said how important this is, it becomes very easy then to say that it is fundamental....I disagreed with that, but I thought there was more chance I could lose on that than I could lose on wealth. I thought the Supreme

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[125] Civil No. 71-1089 H (D.Md, June 14th 1972). George Liebmann was defence counsel in this case.
[126] 397 U.S. 471 (1970). In this decision, the Court upheld a state regulation payment that put an absolute limit on welfare payments for dependent children, regardless of the size of family or its actual need. The Court stated "In the area of economics or social welfare, a State does not violate the Equal Protection Clause merely because the classifications made by its laws are imperfect" (397 U.S. at 485).
[127] 402 U.S. 137 (1971). This decision upheld the constitutionality of a state provision which required approval by referendum for low rent housing projects. According to Wright, the state provision under consideration "was a *de jure* classification in terms of wealth, rather than a *de facto* classification in terms of ability to pay, which is the most that is even arguably involved here." (Brief for Appellants, p. 34).
[128] 403 U.S. 1 (1971). In this decision, the Court upheld a West Virginian law which required 60% of a referendum vote to raise taxes or incur public indebtedness. This law, the Court concluded, was not violative of the Equal Protection Clause.
[129] Brief for Appellants, p. 31.

> Court had already made it clear, through *James v. Valtierra,* that they weren't going to buy the claim that wealth was suspect.[130]

Consequently, Wright's argument against the suspect nature of wealth was significantly more detailed than that against the fundamentality of education. Regardless of the detail of the analysis, the combination of these assertions resulted in the contention: "The applicable standard is the 'rational basis' test. It would be doctrinaire in the extreme to hold that there is no rational basis for continuing a system that has worked well and been widely hailed for 50 years in preference to immediate adoption of some new scheme, on which the reformers themselves cannot agree."[131]

He then arrived at the primary argument in favour of the existing school finance system: the importance of localism in a federal system. This argument, which Bailey had failed to emphasise in the district court, was designed to appeal to justices' concern of the consequences of the extension of judicial authority. Wright disputed the assurances from Coons regarding the compatibility of Proposition One with localism: "The Coons plan does not in fact provide equality without sacrificing freedom. Districts with relatively low property values would be under great pressure tax themselves at a high rate in order to receive the maximum state aid. Communities that wish to emphasize services other than education, and that have property values lower than the state average, would be inhibited from doing so."[132] According to Wright, the Coons theory, which would enable districts to set their taxation rate in accordance with local desire, would be detrimental to communities. In Wright's opinion, districts would feel pressured to set a taxation rate beyond their means, and districts that decided to spend local revenue on alternative services would be frowned upon. The notion of local districts deciding taxation rates, designed by Coons to preserve localism, was thereby criticised by Wright. The element that was intended by Coons to preserve local control was, according to Wright, detrimental to the local community. After Wright had illustrated the flaws in Coons remedy, he then considered other alternatives. The alternatives, which conservative legal scholars had criticised before *Rodriguez*, posed a threat to educational quality: "The alternative, centralized decisions on a state-wide basis would destroy local autonomy, with all the values it brings to the system. It would discourage experimentation and promote uniform mediocrity. It would be a crippling blow to education at a time when it is already under heavy pressure from those who resist desegregation."[133] The final

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[130] Letter to Mary H. Sandoval from Charles Alan Wright, 2nd May 1977. Box 10, C.W.P.
[131] Brief for Appellants, pp. 38-39.
[132] *Ibid.*, p. 45.
[133] *Ibid.*, p. 46.

impression obtained from the brief highlighted the educational implications of an affirmance: "The decision below would encourage flight away from the public schools at a time when those schools are the principal hope of achieving a society that is not divided by artificial barriers of race or class or wealth."[134] Flight from public schools was already a feared consequence of busing, and this reference assured that the connection between busing and school finance factored in the Court's decision-making process.

The organisation of the brief ensured the effective communication of the different elements of the appellants' brief. The logical progression of argument, combined with Wright's lucid writing style, clearly established each issue and advanced each point accordingly. The brief also contained reference to the plethora of recent legal scholarship which challenged school finance litigation.[135] The inclusion of this material emphasised Wright's basic arguments, whilst simultaneously revealing the broader opinion of *Rodriguez* within the legal community. Reference to newspaper articles and government reports illustrated the coverage of the case beyond legal academia.[136] The use of non-legal and recent legal scholarship stressed the diverse interests affected by the case, and confirmed its contentious nature.

Whilst Wright prepared the appellants' trial brief, George Liebmann planned the brief for the thirty states. On 14th June, Liebmann circulated a memo that discussed the desirability of maintaining the collaboration of states which had filed the Motion to Appeal: "Whilst some independent briefs upon different aspects of the case may be welcome, we believe that the attention drawn to the case on behalf of thirty odd states and local government will be an influencing factor in the Supreme Court decision."[137] No state filed an independent brief, reflecting their agreement with the perceived value of a collaborative brief. On 21st July, the appellants and the thirty states filed their briefs. The *amici* brief was lengthy: 107 pages in total, in comparison to the 48 pages of the appellants' brief. In the brief, Liebmann elaborated upon the arguments previously

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[134] *Ibid.*, p. 47.

[135] The main articles referred to were Ferdinand P. Schoettle, "The Equal Protection Clause in Public Education" *Columbia Law Review,* Volume 71, (December 1971), pp.1355-1410, Stephen Goldstein, "Interdistrict Inequalities in School Financing: A Critical Analysis of *Serrano v. Priest* and its Progeny" *University of Pennsylvania Law Review*, Volume 120, pp. 504-621 (1972). Both of these articles had been mentioned in correspondence between George Liebmann and lawyers involved in school finance litigation, including Wright. In a memo dated 14th June, Liebmann wrote of the Goldstein article, "I urge you all engaged in the defense of these cases to secure a copy of this publication." In reference to the Scheottle article, he wrote: "The article contains a considerable number of helpful points." Box 10, C.W.P.

[136] The government reports mentioned were the President's Commission for School Finance (see above, p. 101) and the Select Committee on Equal Educational Opportunity, United States Senate 92nd Congress, Second Session, "The Financial Aspects of Equality of Educational Opportunity and Inequities in School Finance", 66.

[137] Memo from George Liebmann to "Counsel interested in defense of school finance litigation", 14th June 1972, p. 1. C.W.P.

established in the Motion to Appeal.[138] The brief focused upon "the impact of the issues at stake in the present litigation upon the educational, social revenue and expenditure policies of the signatory governments."[139] Thus, this line of argument was intended to emphasise both the broader statewide implications of the case, and its subsequent implications for federalism. According to Liebmann an affirmance would permanently enfeeble local governments: "Admitting a judicial role in this sphere will result in the crippling of essential government programs by a welter of conflicting legal demands."[140] He extended his analysis beyond that of the conservative school of thought in his assessment of the potential effects of this decision. The litigation, according to Liebmann, threatened private property, was wholly undemocratic, endangered individual freedoms, would destroy the fiscal powers of the legislatures, and compel changes in the tax system.[141] He then proceeded to raise more customary criticisms of the case, namely the consequences of full state funding, the dangerous threat posed to local control, the mediocrity from reduction of education expenditures, the lack of relationship between property and income and the high cost of the relief sought.

Liebmann failed to note any merit in the appellees' argument, portraying their case as dangerous and without any legal foundation. His strategy was the antithesis to that of Wright. Whereas Wright treated the appellees' claims respectfully, Liebmann failed to acknowledge any positive elements. The contrast between the two briefs was apparent in the concluding tone of the *amici* brief: "Nor is there any reason to believe that the principles of *Rodriguez* will be limited in their impact to state programs. Rather it is clear that every federal matching program will be potentially jeopardized by the decision."[142] Liebmann thereby implied that *Rodriguez* could profoundly alter every government-funded programme, at both federal and state level. However, the influence of Liebmann's brief upon the Supreme Court proceedings was questionable. The effect of *amici* brief in litigation was unclear. According to Wright, the influence of the thirty states *amici* was extremely limited, a conclusion based upon his broader opinions of the value of *amici* brief; "I don't think that brief had much bearing on the case at all. I don't think that *amici* briefs ever have much relevance.....particularly if the average case has

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[138] See above, p. 114-115.
[139] Brief of Amici Curiae in Support of Appellants, *San Antonio Independent School District et.al. v. Rodriguez et.al.*, p. 4.
[140] *Ibid.*, p. 10.
[141] "One consequence of the *Rodriguez* rule may be to promote a shift away from property taxation toward other forms of taxation whether of a regressive or a progressive nature," *Ibid.*, p.23. He also stated that "This is a nation whose Constitution, included the Fourteenth Amendment to it, expressly recognizes and protects private property....The state is not constitutionally obligated to eliminate the effects of differences in private means of individuals, let alone differences in average private means of the subdivisions in which individuals reside." pp. 13-14.
[142] *Ibid.*, p. 104.

been adequately briefed by the parties, the Court is likely to pay very little attention to the *amici* briefs."[143] The significance of the brief, therefore, derives not from its impact upon the litigation, but from its content. Liebmann's basic argument emphasised the potential impact of *Rodriguez* upon local and state governments. His argument was dramatically presented but it nevertheless echoed the widespread belief that school finance reform would extend federal control of education at the cost of localism, with potentially disastrous consequences. Although Wright had also advanced this argument, Liebmann's style emphasised the high degree of emotion surrounding this issue. This indicated the potential reaction that a positive ruling would elicit from state governments.

Once the appellants had filed their brief, appellees had thirty days to respond. Arthur Gochman was the primary author of the brief, with Rose Spector assisting him in editing and research. Regular meetings with Mark Yudof and Daniel Morgan shaped the content of the brief, but the end product was, according to Morgan "wholly attributable to Gochman."[144] Of more marginal importance was the advice offered by the Californian counsel. The involvement of Obledo ensured that the opinion of the *Serrano* team was made known to Gochman. In May, after sending Cummings' suggestions, Obledo forwarded a letter from Wolinsky with his suggestions for Supreme Court strategy, for Gochman's consideration.[145] Wolinsky's suggestions focused primarily upon placing *Rodriguez* in its broader judicial context, through the isolation of particular features of the case and relating them to broader events. He offered three main suggestions. First, the appellees should emphasise the freedom of remedial action states would obtain from an affirmative decision.[146] Second, the positive effects of an affirmative decision upon to the broader economic environment should be stressed, and third, that the decision would help to diffuse the current busing controvery.[147] Wolinsky acknowledged that the substantive arguments derived from their essential conservatism. They were in accordance with recent decisions and the broader political environment, and consequently minimised possible changes resulting from an affirmance. For example, his first suggestion regarding the increased freedom the decision would give to states was in accordance with Nixon's "New Federalism" philosophy, which was the belief that Washington should have less power and federal government should be smaller. This would enable individualism and localism to flourish, and thus more power should be returned to the states and localities.

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[143] Interview with author, 15th September 1997.
[144] Interview with author, 16th September 1997.
[145] Letter from Sidney Wolinsky to Mario Obledo, 3rd May 1972. M.A.
[146] "The State-Federal relationship should be stressed. States, such as Texas, should be left free to work out their own financing scheme....That freedom to act will never come about unless the Supreme Court affirms the Texas court." *Ibid.*, p. 1.
[147] "Taxpayers are in revolt, school districts are going bankrupt, urban school systems are falling apart, and the property taxes will not support additional funds." *Ibid.*, p. 1.

This philosophy had, one month before, gained legislative approval in the form of Nixon's Revenue Sharing Plan, in which $30.1 billion were allocated to the states for them to spend as they, not the federal government, saw fit. Wolinsky then suggested a possible procedural argument:

> I think it should be stressed that it is procedurally too early and too premature to do anything other than affirm the Texas case. To reverse or even to grant a hearing without a full evidentiary record below, without a case in which a Circuit Court of Appeals has had an opportunity to write a decision, without allowing enough time for the Legislature to actually put some alternative system into operation, would be for the Court to act prematurely and precipitously.[148]

Thus, his view was the opposite of appellants. For them, the political profile of school finance was an additional reason against Court involvement: it was already the subject of political discussion, which removed the necessity for a judicial solution. For Wolinsky, however, a Supreme Court decision would provide the necessary impetus for political reform; a necessary instrument to ensure comprehensive change. In sum, Wolinsky's suggestions urged the appellees to answer each political, as well as legal, objection to an affirmance and to broaden the scope of the analysis. Instead of adding to the political volatility of school finance, judicially engineered reform would assist in its resolution.

When the brief was filed on 21st August, Gochman had included only some of Wolinsky's suggestions, in the broadest terms. The substance of the brief remained unchanged from the district court, except for the necessary refinements, and inclusion of recent Supreme Court opinions.[149] The first section of the brief detailed the school finance system, and its problematic effects.[150] Gochman highlighted the discrepancies between the appellants' actions in the district court, and the arguments expressed in Wright's brief. The existence of this discrepancy, according to Gochman, rendered Wright's argument irrelevant: "Defendants, with income and wealth data available at all times, did not produce evidence that called into question the evidence of the appellees. Now appellants indicate that these statistics may possibly point out some "state peculiarity" that results in the poor and minorities being in rural districts."[151] Gochman

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[148] *Ibid.*, p. 2.
[149] For example, *Palmer v. Thompson* 403 U.S. 217 (1971), *Wisconsin v. Yoder* 406 U.S. 205 (1972) and *Weber v. Aetna Casualty & Surety Company* 406 U.S. 162 (1972).
[150] Gochman highlighted the regressive nature of the property tax, "the districts with the least revenue are making the greatest tax effort." He also stressed the inability of the poor districts to raise the funds at the same level as the affluent districts, "The poor districts would have to tax at several times that rate to make available the revenues available in wealthy districts." Brief for Appellees, *San Antonio Independent School District v. Rodriguez.* p. 12.
[151] *Ibid.*, p. 13.

hoped to reveal the inconsistencies in the appellants' case through highlighting the areas in which their argument had changed since the district court decision.

The primary point of contention during the preparation of the brief was the question of race. The district court decision omitted to answer the plea of racial discrimination and Wright had only briefly mentioned it. It was questionable, therefore, whether the appellees should include race within its legal analysis. Obledo advised for the claim against racial discrimination to be extended, and become more prominent within the brief. His reasons for this were straightforward:

> The allegation of racial discrimination is significant for several reasons:
> 1. Racial classifications are more consistently held suspect than wealth classifications.
> 2. The Court is used to dealing with issues of racial discrimination in education.
> 3. This would sufficiently distinguish this instant case from *McInnis*.[152]

Thus, Obledo recommended this tactical change in part because of the nature of the Court. The majority of the Court had proven to be wholly opposed to racial discrimination, but their record on socio-economic discrimination was more mixed. Obledo thereby concluded that a stronger emphasis upon racial discrimination might be more successful. In order to emphasise this point, Obledo sent Gochman a draft by Ellen Cummings on a suggested racial analysis which relied upon recent Court decisions. In this draft, Cummings combined the *Hobson*[153] analysis with the recent employment discrimination decision *Griggs v. Duke Power Co.*[154] The combination of these cases, according to Cummings, "can leave little question that the Texas scheme is unconstitutional" because "since the financing system discriminates, albeit unintentionally on the basis of race, without a constitutionally valid justification, it violates equal protection."[155] Thus, the Court's commitment to eradicating racial discrimination as indicated by its busing decisions would, Obledo hoped, translate into an affirmative ruling in *Rodriguez.*

However, Gochman resisted Obledo's, and consequently MALDEF's attempt to make *Rodriguez* more of a civil rights minority case. The claim against minority group discrimination remained, but it did not feature prominently in the brief: it occupied only one page. Gochman outlined the central arguments regarding racial discrimination: "It is

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[152] Letter from Mario Obledo to Arthur Gochman, 3rd May 1972. M.A.
[153] 269 F.Supp.401 (1967). See Chapter Two, pp. 57-61, for an analysis of *Hobson.*
[154] 401 U.S. 424 (1971) *Griggs* invalidated employment practises which unintentionally discriminated against minorities, except when that practice is job related. Consequently, the burden of proof was shifted to the employer to show that the rational basis for the discrimination.
[155] Ellen Cummings, Draft version of the race component of the brief. p. 3. M.A.

no historical accident that 90% of the school children in Edgewood are Mexican-Americans and Edgewood is the poorest district within San Antonio."[156] In order to explain the high percentage of minority pupils in Edgewood, Gochman referred to Richard Avena's deposition, in which the segregation in housing, and consequently in education, was "the result of state-enforced deed restrictions."[157] Gochman's decision not to emphasise racial discrimination was based upon appellees' victory in the district court. His success at the district court level was an adequate reason not to alter substantially the strategy for the Court. This decision contrasted against Wright's deliberate tailoring of his case to appeal to those justices he believed crucial. However, it also demonstrated Gochman's desire to keep the focus of the plaintiffs' claims narrow and not to broaden the claims unnecessarily. Thus, Gochman's strategy reflected the broader developments within the litigation. Although the claim of racial discrimination was evident within the brief, it was not prominent and therefore demonstrated the increased emphasis upon class.

After his brief mention of racial discrimination, Gochman considered at length the correlation between financial expenditure and educational quality, in response to appellants' assertion that the correlation was unproven.[158] Instead, one of the appellants' arguments proved the existence of the correlation:

> The defendants' counsel claims that money makes a difference. Defendants urged the Supreme Court to note probable jurisdiction because it is unlikely that those whose children now enjoy high quality education would sit happily by as the quality of education is reduced. In the Trial Court, the defendants argued a decision in favour of appellees' could cause a reduction of funds in some districts thereby reducing the quality of education provided in those districts.[159]

Thus, according to Gochman, there was an inherent contradiction at the heart of the appellants' case. Kurland's original claim, that equalised spending would subsequently result in educational mediocrity, implicitly acknowledged a connection between expenditure and quality.[160] Without this correlation, any reduction in funding would have no bearing upon the quality of education received. Gochman concluded "The evidence is clear, unequivocal, and uncontroverted that the quality of education a school is able to provide relates to the amount of funds that the school has available for

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[156] Brief for Appellees, p. 17.
[157] *Ibid.*, p. 17. See previous chapter, pp. 97-99.
[158] Six pages were devoted to this section: pp. 17-23.
[159] Brief for Appellees, p. 20.
[160] See previous chapter, p. 66.

educating the school children."[161] However, although this point had been clearly made, he continued to illustrate it for another three pages. There was no additional material introduced to support his claim, instead this section became somewhat repetitive.

The majority of the brief dealt with the legal analysis. Gochman first established the egalitarian themes of the litigation: "The system is capricious and irrational. More than that, it is backwards; it favors the affluent and discriminates against those whose need is the greatest. The state denies to its children even the semblance of an equal start in life."[162] He then analysed the claim that education was fundamental in substantial detail, commencing with the famous quotation from *Brown v. Board of Education.*[163] In the twelve pages spent upon this claim, Gochman focused upon five central elements:

1. Education is essential to the maintenance of the free enterprise system....The public schools are the great hope for the poor and minority groups; they represent their greatest opportunity to achieve security and social status
2. Education is vital to the development of the individual
3. Education is universally relevant and it is compulsory
4. Education is a vital element in the molding of personality: it shapes attitudes and values
5. Education is vital to the economic and political survival of the state.[164]

To support these arguments, Gochman referred to recent Supreme Court decision that, he argued, affirmed the unique status of education. In *Palmer v. Thompson* Justice Blackmun asserted that education is a great deal more than "a nice to have public service."[165] Further, in *Wisconsin v. Yoder,* Justice White asserted that the education system attempts to "nurture and develop human potential of children....to expand their knowledge, broaden their responsibilities, kindle their imagination, foster a spirit of free enquiry, and increase their human understanding and tolerance."[166] These Burger Court decisions, according to the appellees, illustrated the Court's continued commitment to the constitutional protection of education. Thus, the legal analysis was not based solely upon Warren Court precedents. Instead, the present Court had confirmed the constitutional uniqueness of education.

The distinction between education and socio-economic rights became more acute, argued Gochman, when the political implications of education were considered: "Education is distinctly related to the right to vote; for often the uneducated citizen

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[161] *Ibid.*,p. 22.
[162] *Ibid.*, p. 24.
[163] See previous chapter, p. 57.
[164] Brief for the Appellees; *San Antonio Independent School District v. Rodriguez,* p. 3.
[165] 403 U.S. 217 (1971).
[166] 92 S.Ct. 1526, 1545 (1972).

cannot assimilate the battery of conflicting political opinions and cast his vote wisely."[167] To support this claim, he alluded to Thomas Jefferson's concept of the educated citizenry and included a quotation from Horace Mann, thus placing *Rodriguez* within the American political tradition.[168] An affirmance would not, plaintiffs argued, deviate from American tradition; on the contrary, it would advocate principles inherent within the American political culture. *Rodriguez* did not, therefore, represent a new chapter in American legal history, but was the fruition of the old. It asked the court to confirm its dedication to education.

One of the most critical points relating to the fundamentality of education concerned the question of complete or relative deprivation. According to the appellees, "complete deprival of all educational opportunity is not necessary to demonstrate an unconstitutional deprivation."[169] It was irrelevant whether poor children had access to education, instead the constitutional question was the nature of the education on offer. The Civil Rights cases of the 1950s provided the legal premise for this claim: black children had not been completely deprived of education, yet segregation was rendered unconstitutional.[170] Therefore, the extension of this reasoning raised the essential question: "Can the State of Texas open its doors to the poor, compel their attendance, and then effectively deprive them of an equal educational opportunity because of their economic status?"[171] This statement, therefore, indicated the way in which plaintiffs were attempting to extend constitutional guarantees to include socio-economic status. The plaintiffs in *Brown* had not been deprived of education completely, yet the Court ruled in their favour. Plaintiffs in *Rodriguez* wished for the same recognition.

The next section of the brief focused upon the claim that wealth was a suspect classification. The supporting case material focused upon the recent series of "poverty cases," the most recent of which was *Shapiro v. Thompson.*[172] The combination of these rulings illustrated that the poor were entitled to belong to the category of "discrete

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[167] *Ibid.,* p. 34.
[168] Gochman cited an extract from Jefferson's First Inaugural Address to illustrate his concept of the educated citizenry: "If there be any among us who would wish to dissolve this union or to change its republican form, let them stand undisturbed as monuments of the safety with which error of opinion may be tolerated, where reason is left free to combat it." *Ibid.,* p. 32. The quotation from Mann further supported the social importance of education: "Education, then, beyond all other devices of human origin is the great equalizer of the condition of men-the balance wheel of the social machinery.....[It] gives each man the independence and the means by which he can resist the selfishness of other men. It does better than to disarm the poor of their hostility towards the rich: it prevents them becoming poor." *Ibid.,*p.27.
[169] Brief for Appellees, p. 38.
[170] *Brown v. Board of Education,* 347 U.S. 483 (1954), *Sweatt v. Painter,* 339 U.S. 629 (1950) and *McLaurin v. Oklahoma State Regents,* 339 U.S. 637 (1950).
[171] Brief for Appellees, p. 39.
[172] 394 US 618 (1969). The others were *Griffin v. Illinois,* 351 U.S. 12 (1956), *Douglas v. California,* 372 U.S. 353 (1963), *Harper v. Virginia,* 383 U.S. 663 (1969). See previous chapter for further details.

and insular minorities", which the Court protected.[173] After making this assertion, Gochman then proceeded to distinguish *Rodriguez* from *James v. Valtierra*, in direct response to the appellants' claim that *James* invalidated a crucial aspect of the appellees' legal analysis.[174] Gochman asserted "*James* involved no systematic discrimination based upon wealth." [175] Instead, the case challenged the method of popular referendum, which, the appellees' asserted, discriminated against the poor. Thus, the poor had not been singled out for discriminatory treatment. The second distinguishing feature of *James* was the nature of the right affected: "Housing is a purely economic interest, and, most often is a private and not a governmental concern. Education, by contrast, is a fundamental interest with both economic and First Amendment significance."[176] Thus, according to the appellees, the nature of the right, and the manner in which it was affected, rendered *James* inapplicable to *Rodriguez.*

As a result of the nature of the discrimination, and the importance of the right at stake, appellees argued for the application of the strict scrutiny test: "It serves no purpose except to make wealth the basis for determining the allocation of educational dollars."[177] According to appellees, local control was insufficient justification for the continuance of the finance system. Gochman then asserted that the appellants had "missed the point of the present litigation" in their contention that the finance system, as it then stood, gave districts the opportunity to enrich its educational offering through the Minimum Foundation Program. He stated simply "The point of this lawsuit is that the poor district *do not have the choice*.....Poor districts spend less on education because they are financially incapable of doing otherwise."[178] After illustrating the appellees' support of localism in education, Gochman then introduced the concept of fiscal neutrality, in order to show it was possible to reconcile local control of education with school finance reform.[179]

The final section of the brief considered possibilities for remedial action. Gochman illustrated the advantages of school finance reform, referring to arguments originally made in the district court. First, that reform "leaves state legislatures free to choose among a host of alternatives for raising and distributing education dollars."[180] This point was also among the suggestions from Wolinsky. This assured the Court that an

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[173] *United States v. Carolene Products,* 304 U.S. 144, 153 n.4. (1938).
[174] 402 U.S. 137 (1971).
[175] Brief for Appellees, p. 40. *James* challenged a California law that stated that no low-rent housing project can be constructed without a local referendum. The Court found that the law did not violate the Equal Protection Clause.
[176] *Ibid.,* p. 41.
[177] *Ibid.,* p. 46.
[178] *Ibid.,* p. 47 (Emphasis in original).
[179] *Ibid.,* pp. 50-51.
[180] *Ibid.,* p. 51.

affirmance would not require a judicially imposed solution, but each state would be free to select their own solution. This was an attempt to assuage fears regarding the potential political implications of judicial involvement. Gochman did not, however, emphasise this point in any depth; instead, he had, in his previous section, introduced the notion of fiscal neutrality, and then proceeded to assert that numerous options were available to the legislature. Thus, he presented an alternative before he stressed the limitations of the ruling, which ensured that the nature of the remedial action remained an important focus. The final argument introduced regarded the status of children: "Children have no influence on the complex process whereby the state offers them an education. A child born and raised in a poor school district is penalized, not for any errors or decisions of his own making, but for his misfortune in being born into a poor family."[181] In this section, Gochman asserted that the recent decision in *Weber v. Aetna Casualty & Surety Company,* written by Justice Powell, established the peculiar constitutional nature of children by recognising the inheritance right of illegitimate children.[182] The Court stated in this decision that "no child is responsible for his birth" and Gochman extended this analysis to include impoverished children. Gochman added this after the district court opinion to apply recent Court decisions to the case at bar, in order to demonstrate the continuity with established precedent and to distance himself from over-reliance upon Warren Court precedent.

The brief did not reflect Wolinsky's suggestions. It did not place *Rodriguez* explicitly within the broader political environment, or emphasise the limitiations of the case in sufficient depth. Instead, it focused purely upon school finance, following substantially the same format at the district court brief.[183] This derived from Gochman's basic strategy; to keep the focus upon the school finance inequalities in Texas, not to extend its analysis to include additional controversial issues such as busing. With issues such as busing and capital punishment featuring prominently in the presidential election campaign, Gochman attempted to keep the Court's focus solely upon the constitutionality of school finance in Texas, not any broader controversial issues. Despite Gochman's exclusion of Wolinsky's suggestions, Obledo appeared satisfied with the brief. In September, Obledo sent Gochman a congratulatory note "I commend you on a well written brief for Appellees... After reading the same I feel confident that Appellees

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[181] *Ibid.,* p. 52.
[182] 406 U.S. 164 (1972).
[183] Morgan was unimpressed with Gochman's brief. He believed that Gochman reiterated points unnecessarily and did not express his points clearly or succinctly: "Wright beat us hollow on the brief. His was great- a straightforward, organized list of arguments against our case. Ours wasn't like that. It was much more rambling." Interview with author, 16th September 1997. However, Morgan's opinion expressed after the plaintiffs had lost, and thus their defeat could have affected his opinion of the brief.

will prevail."[184] Gochman had illustrated his continual desire to develop his strategy, as far as possible, independently from others. Neither Yudof nor Obledo viewed the brief before it was filed. Thus, although the content of the brief was discussed in the meeting between Gochman and Yudof, the actual wording of the brief was not. The content and format of the brief, therefore, can be attributed solely to Gochman.

The *amici* briefs for the appellees provided interested parties with the opportunity to apply a varied legal analysis. Consequently, the emphasis upon racial discrimination claims and the contextualisation of *Rodriguez* within the broader political environment appeared in the *amici* briefs. The organisation of the briefs, by Stephen Browning of the Lawyers' Committee for Civil Rights, was conducted in close correspondence with Obledo. Arthur Gochman sent any request for information regarding *amici* briefs directly to Browning, thereby remaining uninvolved with their formation.[185] During the period in which Wright prepared the appellants' brief, Browning began to group together potential *amici* in order to formulate a more ordered collection of interests.[186] He feared that without a coherent organisation, any tactical advantage of the briefs would be lost:

> There are scores, perhaps hundreds of people interested in school finance reform who would like to file an *amicus curiae* brief supporting the appellees. Were that to happen, the effect, I fear would be adverse: either the Court will reject all amicus briefs (as it did in *James v. Valtierra*), or it will give them very little, if any, consideration.[187]

The early date of this correspondence demonstrated the necessity for coherent organisation in order to ensure their effectiveness. In order to balance the diverse interests, Browning attempted to divide the interests into six briefs. These were: "an educational brief, a governor's brief, an urban brief, an LDF brief, a narrow affirmance brief, and a fiscal neutrality brief."[188] Only one change occurred in this original list: instead of an urban brief, the sixth brief was filed by San Antonio Independent School District, the original defendants in the case.

The short brief from San Antonio Independent School District (ISD) in support

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[184] Letter from Mario Obledo to Arthur Gochman, 13th September 1972. M.A.

[185] For example, on 5th July 1972, Gochman sent an inquiry from Stanford Rosen, of the ACLU to Stephen Browning. In his reply to Rosen, Gochman wrote, "Stephen Browning is attempting to co-ordinate the amicus briefs filed in the *Rodriguez* case. I am therefore sending your request to him. In future all correspondance should be directed to him." ACLUP

[186] Browning allowed himself a two month period in which to accomplish this task: "Since the timetable is very short (at the outside we have only two months to prepare *amicus* briefs)." Letter from Stephen Browning to Ed Idar at MALDEF, 16th June 1972, ACLUP.

[187] Letter from Stephen Browning to Mario Obledo, 16th June 1972. M.A.

[188] Letter from Stephen Browning to Stanford Rosen of ACLU, 24th July 1972. ACLUP.

of the appellees illustrated the complexity of the case.[189] The dismissal of San Antonio ISD as defendant in August 1969 enabled it to file its support of the appellees' claims. Its brief verified the appellees' claims regarding the difference in facilities and quality of environment was the result of the inadequate educational funding system.[190] It also demonstrated the inability of the school district to rectify the problem. Comprehensive change was the only solution to the present problem. Thus, this brief provided a specific perspective of the issues at stake; it was not designed to discuss the broader issues, but to examine the specific problems the state finance system created for individual districts. That the district was the named defendant in the case increased its significance.[191]

The education brief supported the specific claims of San Antonio ISD and placed them in a broader educational context. The *amici* were the National Education Association, the American Association of School Administrators, the National Congress of Parents and Teachers and the Council of Chief State School Officers. The central focus of this brief was relationship between educational quality and financial expenditure. In answer to the appellants' contention that "there is no significant relationship between cost and quality of education, we believe it would be useful to bring the Court's attention to the numerous studies demonstrating a positive relationship between the expenditures for education and the quality of education enjoyed by the child."[192] *Amici* Appellees proceeded to detail the "substantial and respectable" educational research that demonstrated a correlation between funding and achievement.[193] Finally, the brief focused upon the educational consequences of low funding:

> the heart of the matter is that the funding level is important because it is a major determinant in the options available. The level of funding determines not only the type of physical plant and the salary level, degrees and experience of teachers,

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[189] The status of the school board as *amici* created a similar situation that existed in the earlier case, *Fort Worth ISD v. Edgar,* which was dismissed as a result of the district court ruling in *Rodriguez.* See previous chapter, p. 92.

[190] "Differences in school funds result in visible differences in physical facilities, teachers' salaries, the available scope and variety of programs and funds with which districts may innovate and adapt themselves to changing demands for education." *Amicus Curiae* Brief for San Antonio Independent School District in *San Antonio Independent School District v. Rodriguez,* p. 3.

[191] The involvement of San Antonio ISD as *amicus* did not, however, meet with the approval of the original appellees in the case. On 20th May 1972, Demetrio Rodriguez sent an angry letter to the San Antonio ISD Board of Trustees. Rodriguez expressed upset at the "ill-concealed disguise of wanting to help the poor. Your positions with regard to the *Rodriguez* case now places you in the role of the Trojan horse and further jeapordizes the future of the children in this state....You have had many years in which to take some action to alleviate the discriminations. We have long cried for your help. You have continually denied it." M.A.

[192] *Ibid.*, p. 3.

[193] Much of the evidentiary material in support of the correlation came from The Urban Coalition, *Schools and Inequality*, Hearing before the Senate Select Committee on Equal Educational Opportunity, 92d. Congress. 1st Sess. 7068 (1971), and Henry Levin's report of the same hearing; *The Costs in the Nation of Inadequate Education.* Additional evidence was from Staff of the Advisory Commission in Intergovernmental Relations, *School Spending and Pupil Achievement: A Working Paper,* 30th May 1972.

> but also whether the school district can implement new programs for teaching, reading and mathematics....[194]

Thus, the purpose of the educational brief was to illustrate the practical implications of the appellees' case. Their arguments derived from practical experience, not legal theory. Similarly, the governors' brief was intended to contrast with the appellants brief for thirty states. The five Governors named as *amici* were: Wendell Anderson of Minnesota, Kenneth M. Curtis of Maine, Richard F. Kneip of South Dakota, Patrick J. Lucey of Wisconsin and William Milliken of Michigan.[195] The short brief focused primarily upon appellants' contention that an affirmance would result in the eventual equalisation of all governmental services. The Governors disputed this, supporting the appellees' argument regarding the "constitutional importance of education, which would prevent the extension of *Rodriguez* to all governmental services."[196] They also expressed their support for the district power equalising solution, which, in their view "met all the necessary reform requirements, whilst simultaneously preserving local control of education."[197] Thus, the primary purpose of this brief was to illustrate the compatibility of school finance reform with local government. Of the five states, appellees in school finance suits had been successful in only Minnesota.[198] In both Michigan and Wisconsin, federal suits had been filed, and awaited the outcome of *Rodriguez.*[199] No suit had been filed in Maine or South Dakota. Governor Wendell Anderson of Minnesota had begun a comprehensive reform of the school financing system after the Minnesota decision.[200] This enabled him, and the other governors supporting his actions, to confirm the appellees' claims regarding the political feasibility of school finance reform.

The legal defense brief was filed solely on behalf of NAACP. MALDEF had decided not to file a separate *amicus* brief:

> We have no plans to submit an *amicus curiae* brief for this reason that Arthur Gochman, the lead counsel in the said case, has agreed to accept the co-operation

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[194] *Ibid.,* p. 33.
[195] Four of the five governors were Democrats. The only exception was William Milliken of Michigan.
[196] Brief for Governors, p. 3.
[197] *Ibid.,* p. 7.
[198] *Van Dusartz v. Hatfield,* 334 F.Supp. 870 (1971).
[199] *Milliken v. Green.* (Michigan). The Governor was the plaintiff in this case. *Stovall v. Milwaukee* (Wisconsin).
[200] This plan established a minimum per-pupil unit cost of $600 per year and then puts a tax-rate ceiling of 90 mills (one mills equals one-tenth of a cent) per $100 of assessed valuation of the amount each district may raise from property taxes for school financing. For further details of Governor Anderson's reform initiatives, see "Minnesota Plan Cutting School Taxes" by Francis Ward, *San Antonio News,* Friday 19th May 1972, p.3-E.

> of MALDEF in his appeal of the case. The name of Mario Obledo has been added as counsel in connection with the appeal, and he and our San Francisco office staff are the ones collaborating with Gochman.[201]

Obledo adequately represented MALDEF's interest, which negated any need for a separate *amicus* brief. However, the brief filed on behalf of NAACP reflected the views MALDEF expressed during the writing of the appellees' brief. NAACP focused primarily upon the existence of racial discrimination within the school finance system, which distinguished *Rodriguez* from other school finance cases: "But this is not a case such as *Serrano v. Priest* where the racial factor was either absent or subordinated. *Appellees are all Mexican-Americans.* They claimed relief as and for Mexican-Americans."[202] To support their claim, the NAACP then proceeded to narrow the issues under consideration. According to their brief, the Court should not attempt to answer all the questions raised by the defendants, but instead should concentrate upon its specific context. This argument intended to answer the primary criticism against a racial discrimination ruling: the high percentage of minority children in Edgewood was clear, but this was insufficient evidence to extend the ruling further. Thus, the NAACP's tactic intended to focus the Court's attention upon the specific complaint, rather than the broader issues of school finance inequality. The extension of the racial discrimination claim coupled with the narrowing of the focus of the case created a strategy that enabled the Court to rule upon racial discrimination in the specific geographical area under examination. The NAACP did not seek a general ruling upon the correlation between race and class within American society. Instead, this ruling would recognise the correlation in one state. This brief, therefore, highlighted the racial discrimination claim which had been marginalised by Wright and, to a lesser extent, Gochman. For NAACP, the narrow claim of racial discrimination afforded appellees the best chance of success, but Gochman did not share this view.

The narrow affirmance brief also focused upon the specific issues under examination. Nine parties joined this brief, making it the largest collaborative effort of the *amici* supporting the appellees.[203] Sidney Wolinsky and Ellen Cummings wrote the brief, and consequently, race remained a prime focus: "the districts which are best able to finance themselves have the lowest proportion of minority group pupils and vice

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[201] Letter from Ed Idar, Associate Counsel for MALDEF to Stephen Browning, 23rd June 1972, ACLUP.
[202] *Ibid.*, p. 7.(emphasis in original).
[203] These parties were the American Civil Liberties Union (ACLU), the American Jewish Congress, Anti-Defamation League of B'Nai B'Rith, National Coalition of American Nuns, National Catholic Conference for Interracial Justice, National Council of the Churches of Christ in the USA, Scholarship, Education and Defense Fund for Racial Equality INC, Southwest Council of *La Raza* and United Ministries in Public Education.

versa.....This constitutes a plain case of racial discrimination in violation of the Equal Protection Clause."[204] The brief applied the *Hobson* analysis, and then considered the practical differences between the Mexican-American and white school districts.[205] This led the authors to conclude: "In large part, this case is for the Mexican-American community what *Sweatt* and *Brown* were for our Black citizens. It is an attempt by a substantial and disadvantaged minority to resort to a court of law for the orderly redress of discrimination visited upon them by the State."[206]

The second argument advanced by the narrow affirmance brief was similar to that of the NAACP. It attempted to return the Court to the specific issues under consideration: "This case need not be treated as a vehicle in which all of problems associated with that issue must be resolved by the Court."[207] The authors then criticised the appellants' brief for its emphasis upon the legality of the remedy, rather than the substantive issues at stake. Wolinsky's suggestion to Gochman to emphasise the conservatism of the case was also evident: "Affirmance of the decision below would not break new ground. It would allow the slow and orderly development of legal doctrine and legislative reform in Texas as well as in other states facing the same problems."[208] Wolinsky also included another of his recommendations; that *Rodriguez* was in keeping with the appropriate judicial role: "By staying its decree for two years, the court below accorded due respect for the legislative process."[209]

The *amici* for the appellees also included Coons, Clunes and Sugarman, who filed a detailed "fiscal neutrality" brief.[210] Coons had been kept abreast of developments in *Rodriguez* through correspondence with Obledo.[211] Their decision to file a separate *amici* brief stemmed from the centrality of their theory to the proceedings: "the emphasis by appellants and appellants' *amici* upon the published work of counsel herein. Misrepresentations of this work by appellants' advocates are understandable and unresented. Yet their number and magnitude entail patient clarification of what is, underneath it all, a fairly simple lawsuit."[212] Given this objective, the authors first dispelled common misconceptions about fiscal neutrality, which then enabled them to present it in a positive light: "Fiscal neutrality is a constitutional standard of

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[204] Amicus Curi Brief, *San Antonio Independent School District v. Rodriguez*, p. 11.
[205] For analysis of *Hobson*, see previous chapter, pp. 57-61.
[206] Narrow Affirmance Brief, p. 22.
[207] *Ibid.*, p. 12.
[208] *Ibid.*, p. 13.
[209] *Ibid.*, p. 34.
[210] For details of Coons' involvement in school finance thus far, see previous chapter.
[211] For example, on 20th May 1972, Obledo sent Coons a copy of the Motion to Affirm. M.A.
[212] For details of their theory of District Power Equalizing and Fiscal Neutrality, see previous chapter, pp. 62-66. *Amici Curiae* Brief for John Serrano in *San Antonio Independent School District v. Rodriguez*, p. 5.

extraordinary restraint. Far from confining the legislature it liberates a political system long deadlocked by the very structure of educational finance. This prospect is fearful only to those who would shun the democratic process."[213]

Coons *et al.,* then advanced arguments that were substantively the same as the appellees. They examined the reasons for the fundamentality of education, the suspect nature of wealth, and the positive features of fiscal neutrality. The authors expressed their strong support for local control, and subsequently challenged the appellants' arguments to the contrary: "It is difficult in the face of all this to grasp the point of endless remonstrations of defendants and their *amici* in favor of keeping local choice constitutional. Apparently everyone on both sides is in agreement with this point."[214] The purpose of the brief was, therefore, to provide additional support for the original arguments advanced by the appellees, and to present them in a more authoritative manner. Coons *et al.,* were the most qualified to present their theory to the Court, and the brief reflected this.

The involvement of Coons *et al.,* was not confined to an *amici* brief. Given their expertise on the issues, there was increasing support for Coons to argue the case in the Supreme Court instead of Gochman. Once the briefs were filed, this was the next question to occupy appellees. Morgan recalled "Mark [Yudof] kept on trying to persuade Arthur to step aside. Coons was ready on the sidelines to jump in, but Arthur refused."[215] Gochman's refusal to allow Coons take over the preparation resulted in increased disharmony on the appellees' side. Obledo also supported the idea of Coons presenting oral argument, simply due to his "in depth knowledge of the subject, which makes him ideally suited to respond to Justices' questions."[216] However, Gochman proved resolute. He was Demetrio Rodriguez' lawyer, and it was his job, not the outside organisations' job, to represent the interests of his client. He had personally funded it since the original meeting with CPA and had remained the prime orchestrator of the suit until this point. Thus, he was effectively being asked to stand aside at the final stage, which he was unwilling to do. Furthermore, the constitutionality of the Coons theory was not the issue under consideration. This resulted in an alternative course of action. On 7th September, a Motion for Leave to Argue as *amici curiae* was filed by Coons, on behalf of John Serrano, that "counsel be allowed one half hour in which to argue on behalf of movants."[217] The reasons for this were:

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[213] *Ibid.,* p. 10.
[214] *Ibid.,* p. 49.
[215] Daniel Morgan, Interview with author, 16th September 1997.
[216] Letter from Mario Obledo to Mark Yudof, 25th August 1972, M.A.
[217] Motion for Leave to Argue as *Amici Curiae, San Antonio Independent School District v. Rodriguez,* p. 1.

> Appellants and their *amici* have repeatedly characterized the result below as grounded principally in the published works of movants' counsel. Indeed, Appellants' arguments in important respects rest upon disputed interpretations of such books and articles. Movants counsel has devoted years of study to the difficult issues here presented. Oral presentation by such counsel would be unusually helpful to the Court in the appropriate resolution of those issues.[218]

A difference of opinion thereby existed amongst appellees' counsel. Gochman considered himself to be sufficiently familiar with Coons' theory and the legal arguments to continue to offer the best representation to the appellees. The theory was only of peripheral importance to the case and thus Coons' expertise was not directly relevant. Demetrio Rodriguez fully supported Gochman's decision to continue: "Arthur had made the case what it was. He had got it this far. He wanted to go all the way."[219] This ultimately, was the key issue. Rodriguez wanted Gochman to argue the case. However, the widespread support for Coons to argue the case illustrated the broader context of the case. Through *Rodriguez,* the Supreme Court would examine the legal doctrine which had been developing over the previous seven years, and had involved a vast number of legal scholars and lawyers in its development. This larger context was the motivation for Coons' desired involvement. However, Gochman considered the case in a narrower perspective. He attempted to keep the case focused upon the inequalities of the Texas school finance system. His reluctance to include alternative drafts into documents, his differences with Yudof, combined to suggest that Gochman attempted, as much as possible, to develop this case independently from the expanding network of school finance litigants. He resisted Wolinsky's suggestions to relate *Rodriguez* to busing. As the lawyer hired by the named plaintiffs, Gochman resisted attempts of the other lawyers to present their interests to the Supreme Court and preferred to follow the own course of action he devised as the best way of winning five centrist or liberal Supreme Court views. A narrow affirmance was Gochman's best chance of success. He sought a "negative" decision, in which the Court invalidated one system without suggesting a remedy. This would leave the states to choose their own alternative, thereby avoiding excessive federal control.

The Reply Brief for Appellants was the final document to be filed before the Supreme Court oral arguments. The short response to the appellees' brief and the *amici* briefs focused primarily upon the argument advanced by the Narrow Affirmance Brief of

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[218] *Ibid.,* p. 2.
[219] Interview with author, 11th September 1997.

the NAACP; that the focus of the case should remain clear, and not be broadened unnecessarily. Thus, in answering the charge that they included material that pertained to "states other than Texas", they "cheerfully plead guilty."[220] Their reason for this was "As the list of *amici* on both sides indicates, this case is of nationwide significance."[221] Whereas Gochman wished to keep the focus of the case narrow, the appellants wished to emphasise its nationwide significance. This suggested that the appellants were aware of the strength of Gochman's tactic. Relating *Rodriguez* to its broader context emphasised its connection to many of the controversial issues of the period and would underline the numerous implications of an affirmative ruling.

The reply brief also attempted to define a fundamental right more precisely. However, in attempting this, Wright wandered from the basic issue of whether education was inherent within the Constitution: "A basic education may well be necessary in order to enjoy First Amendment rights and thus be "fundamental" but the issue here is whether there is a "fundamental" interest in a more expansive education than the basic education Texas already provides."[222] This statement implicitly acknowledged the necessity of education to exercise political rights, which, according to the appellees, rendered education fundamental. However, in Wright's opinion, this was not the issue under consideration. This statement revealed the essential difference in arguments. The question of the fundamentality of education lay at the heart of the appellees' challenge; it provided the legal means by which the finance system could be found unconstitutional. For the appellants, however, the fundamentality of education was not the central issue. Its analysis was dependent upon the distinction between complete and relative deprivation of education, rather than simply whether the right to education, to whatever level, was implicit in the Constitution. This distinction enabled appellants to focus upon their primary defense: the importance of localism: "The state program is far from perfect, but it does guarantee an adequate education for every child.....Each district is left free to spend more money as its resources and its desires indicate. This, we submit, meets the test of the Fourteenth Amendment."[223]

Wright used a "more sweeping approach" in his reply brief, which would establish the themes to be pursued during the oral arguments.[224] This, he believed, would ensure that consideration of the case in a limited focus, as recommended by the narrow affirmance and NAACP briefs, would not be possible. He used his reply brief to

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[220] Reply Brief for Appellants, No. 71-1332, p. 4.
[221] *Ibid.*, p. 4. For description of Professor Berke's involvement, see previous chapter, p.95
[222] *Ibid.*, p. 11.
[223] *Ibid.*, p. 17.
[224] Letter from Charles Alan Wright to George Liebmann, 7th September 1972. C.W.P.

emphasise the numerous political and economic implications of an affirmance in order to appeal to the Court's conservatism. Thus, the Reply Brief, the final document filed before oral arguments, ensured the appellants had replied to the appellees' central contentions regarding its own defense. As his reasoning regarding the fundamentality of education illustrated, however, Wright did not respond directly to each element of the appellees' case.

The final stage of the proceedings were the oral arguments. These were the culmination of months of preparation, and the opportunity for counsel to reaffirm the content of their brief, and receive questions from the justices. Wright illustrated his personal conviction in his argument and his determination to win in a letter to Coons: "I am going to do my best to beat you in *Rodriguez*, but regardless of the outcome of the case, I have nothing except admiration for the thoughtful and incisive attention you and your associates have brought to this very important question."[225] Coons occupied no further role in the proceedings, however, as on the 10th October, the Court denied his motion to argue the case.[226] No reason was given for this ruling, but privately, the Court noted the implications of the motion upon the ability of Gochman to argue the case persuasively. Justice Douglas's clerk wrote in a memo:

> The attorney for the Appellees, according to my information, is <u>not</u> a very able oral advocate. My personal recommendation would be that Serrano's motion be granted for two major reasons. First.....counsel arguing for Serrano will be Prof. John Coons of Berkeley, who by now is widely known for his theories, and which, no doubt, will be of central interest to the Court. Second, although I have never heard Prof. Coons argue, I have heard from both Boalt Law Review Editors and clerks at the California Supreme Court.....that he is extremely able.[227]

Douglas's clerk echoed the view, as expressed by Yudof, Morgan and Obledo, that Gochman did not possess the necessary qualities or expertise to argue the case persuasively. He also, however, stated that the Coons theory was of "central interest to the case". This statement showed that the clerk believed the Coons theory to be an integral component of the case. This misrepresented the plaintiffs' case, but demonstrated Wright's central tactic; to bring the Coons theory to the forefront of the litigation. The clerk to Justice Douglas had gleaned this information from an unknown source, but it demonstrated the prevalence of this opinion amongst those interested in

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[225] Letter from Charles Alan Wright to John Coons, 5th September 1972. C.W.P.
[226] Letter from Michael Rodak Hr, Clerk to U.S. Supreme Court to Arthur Gochman, 10th October 1972. M.A.
[227] Memo from clerk to Justice Douglas, 5th October 1972, D.P. (emphasis in original).

Rodriguez.[228]

On 12th October the Court heard oral arguments. Justice Marshall was ill and absent from the Court. Later that same day, the oral arguments for *Keyes v. School District No. 1*, the school busing case, were also heard.[229] The broader context of *Rodriguez* was immediately evident: the education process was already being disrupted by the Court in order to achieve racial desegregation. *Rodriguez* effectively questioned whether the Court was willing to extend its involvement in education in order to achieve further equalisation. However, the broader context provided only the backdrop for the litigants; other, more pressing concerns, influenced oral arguments. According to Wright, attempts were still being made to persuade Gochman to allow Coons to argue the case: "I knew he was under pressure.... even as late as the morning of oral argument there were people trying to persuade him to stand aside."[230] Nonetheless, Gochman remained unmoved. The contrasting presentational styles of Wright and Gochman highlighted their different levels of experience. Wright remained in control of his argument throughout, answered questions directly, and spoke at a clear, deliberate speed. Gochman, however, was more rushed and his responses were indirect. He was also unable to clarify the details of District Power Equalizing sufficiently, a reflection of its lack of importance to his argument. The oral arguments, therefore, vividly highlighted the influence of internal factors on the case, and the pivotal importance of the individual counsel on the case.

Wright opened with a statement indicated the high quality of his strategy. He began with a quotation from Coons, which, according to Wright, supported the position of the state of Texas:

> I would like to take as the text for my argument this morning a sentence from an article that Professor Coons and his collaborators, Messrs Sugarman and Clunes, wrote last year.....They said 'Of all public functions, education in its goals and methods is least understood and most in need of local variety, experimentation and independence.' That, I think is wise counsel, and I believe, that is the argument for reversal in this case.[231]

Wright followed the same tactic as in his brief. His immediate mention of Coons brought

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[228] It was possible that the unknown source was close to Yudolf, Obledo, Morgan or Coons, and thus presented a biased view.

[229] 413 U.S. 189 (1973). This decision, handed down after the *Rodriguez* decision on 21st June 1973, established the principle that *de facto* racial discrimination that leads to school segregation will be treated like *de jure* segregation and may be remedied through busing.

[230] Interview with author, 15th September 1997.

[231] Transcript of Oral Argument, *San Antonio Independent School District v. Rodriguez*, Docket Number 71- 1332. Transcribed by the author in consultation with supervisor. Oral recording purchased from *National Archives and Records Administration* (NARA). The transcript is available upon request. Copy is also in possession of supervisor. All page numbers refer to this transcript.

the theory to the forefront of the oral arguments, and thereby suggested that the Coons theory was the issue under constitutional scrutiny. This established the primary focus of the oral arguments. The emphasis upon Coons reflected the content of Spears' lower court opinion, which contained Proposition One.[232] The opinion did not, however, contain mention of District Power Equalizing, yet both elements of the theory were considered during oral argument.

Wright then proceeded to concede the imperfections of the Texas school finance system, thereby reiterating the point previously made in his brief.[233] He pointed to the constitutional implications of finding for the appellees: "it would impose a constitutional straitjacket on the public schools of fifty states."[234] This was particularly dangerous, argued Wright, when the shaky doctrinal foundations were considered: this decision would continue "at least until a new book is written and the Constitution changes again." Thus, in the first few minutes, Wright had successfully established his central argument and indicated, in his opinion, the inherent weaknesses what he said was the appellees' case. The emphasis upon the flaws in the proposed remedial action moulded the subsequent line of questioning, which demonstrated the success of the Wright's strategy.

Justice White asked the first question, in which he sought to clarify the notion that inequalities would persist under district power equalising. Wright's response, of "the whole reason for having District Power Equalizing would be to make unequal input possible", immediately changed the emphasis from the inequalities in the present system to the inequalities in the proposed remedy. This enabled Wright to compare District Power Equalizing with the present system. He asserted that appellees currently had the same level of inequality that they would be afforded under District Power Equalizing: "I don't see how the unequal input of power equalizing can be defended if the Constitution says you can't have unequal input."[235] Wright thereby questioned the appellees' objectives. However, Justice White continued to question Wright on the level of education guaranteed by the Minimum Foundation Program: "To sustain you, we must agree with you that the foundation program brings up to a minimum level?"[236] In responding to White's challenge, Wright conceded that "there is a constitutional minimum [of education] that could be required." This concession, which, according to appellees'

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[232] The lower court stated: "the selection may be made from a wide variety of financing plans so long as the program adopted does not make the quality of public education a function of wealth other than the wealth of the state as a whole." *Rodriguez v. San Antonio Independent School District* (1971), p.283. See previous chapter, p.105.

[233] "The Texas system of school finance, imperfect as it is, and we've conceded its imperfections in our brief..." p. 1

[234] *Ibid.*, p. 1.

[235] *Ibid.*, p. 2.

[236] *Ibid.*, p. 3.

brief, implied that education was indeed fundamental was, for Wright, not the issue under consideration: "I can understand that there is a viable constitutional argument that a minimal education is required, but it is not the issue between the parties *in this case*, on whether or not Texas is providing a minimum education."[237]

The discrimination suffered by the appellees was, simply, that the foundation program did not "give Edgewood as much as Alamo Heights."[238] This implied that the nature of inequality endured was simply one of materialistic difference, inevitable in a free enterprise system. The next issue raised challenged Wright's proposition of equality even further. Justice Rehnquist asked "Are you willing to concede that maybe a minimum education may be Constitutional requirement if the state could get out of it entirely?"[239] This question was intended to discover whether the nature of the defence, and the fundamentality of education, might alter if a complete deprivation of education had occurred. Wright agreed that a minimum standard of education must exist within each state, and Texas had fulfilled this requirement. One of the most significant challenges came from Justice Douglas, who raised the issue of race. Wright agreed that the majority of students in Edgewood were Mexican-American, yet this was "a happenstance", a view which the appellees did not accept.[240] As a broader principle, "poor school districts are not congruent with racial distributions."[241] Thus, Wright continued to deny the relevance of the racial discrimination claim. The high percentage of minority students in the district was, quite simply, coincidence and held no broader relevance to the litigation.

The contrast between Gochman and Wright was apparent from the start of Gochman's argument. However, the pace with which he delivered his arguments illustrated the difference between the counsel. Gochman rushed many of his points, and on occasion, loss his train of thought and ground to a halt, whereas Wright maintained a steady speed throughout. Chief Justice Burger's first challenge pertained to the relevance of the issues to other states, namely that "Can you carry your general theory across state lines?"[242] Burger had attempted to broaden the scope of plaintiffs' claims beyond that of the state and to assess its nationwide significance. Gochman, however, wished to emphasise the limitations of the case, and attempted to keep the Court's line of questioning narrow. This, Gochman believed, was his best opportunity for obtaining the votes of the moderate, centrist justices. Burger then changed to a different line of questioning: the relation between education and other governmental functions. Gochman

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[237] *Ibid.*, p. 3 (emphasis in original).
[238] *Ibid.*, p. 3.
[239] *Ibid.*, p. 4.
[240] *Ibid.*, p. 7.
[241] *Ibid.*, p. 7.
[242] *Ibid.*, p. 8.

spoke confidently on the constitutional uniqueness of education, clearly establishing the varying reasons which distinguished education from other governmental functions.[243]

Justice Brennan then sought a response to Wright's suggestion that the present finance system provided an adequate level of education. In order to support his points, Gochman cited *Sweatt* and *McLaurin*, in order to illustrate the similarity between the issues raised by *Rodriguez* and those raised by segregation. At this point, Gochman may have benefited from explicit connection between school finance and segregation, in the manner suggested by Wolinsky.[244] However, Gochman switched his focus to the concept of a minimum standard of education. He indicated the ambiguity with the concept and the subsequent problems of attempting to adhere to it. Although Gochman did not wish to emphasise the claim of racial discrimination, his use of precedents implicitly highlighted the connection between segregation and school finance.

The challenge from White posed the most problems for Gochman. White's questions attempted to identify exactly the nature of inequality Gochman did believe to be constitutional and the way in which that inequality could be established. This line of questioning raised one of the ideological flaws of the appellees' case. The appellees' careful emphasis of the value of localism and flexibility ensured differences in financial expenditure would remain if the Court ruled in their favour. However, White wished to know the degree of inequalities that would be constitutionally permissible in the new system. [245]

> **White**: Let's assume that one district decided that and they wanted to spend eight hundred dollars a student, and another district said, well, we just don't believe in education...we're just going to five hundred. Now that would be alright?
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> **Gochman**: The compelling basis for that, if it is to be sustained, and I am not preaching for power equalization, because that is not what Texas is looking at, Texas is looking at a new program.
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> **White**: So you would say that the state may provide unequal inputs?
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> **Gochman**: On some basis, yes, where there is a compelling interest.
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> **White**: But that's only if the state could guarantee a minimum
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> **Gochman**: No, I can't say there is such a thing as a minimum.

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[243] "Public health, food, lodging, those things are great economic importance. They are not matters that are related to those things guaranteed by the Bill of Rights. And in importance, education lies at the apex up and down the ladder." *Ibid.*, p.9

[244] See above, pp. 129-130.

[245] *Ibid.*, p. 11.

Thus, although Gochman stated that he was not advocating power equalising, the inequalities that would persist under the system remained the focus of White's questioning. However, Gochman's failure to respond to the questions satisfactorily resulted in White commenting: "I don't really understand your position, but go ahead with your argument." Rehnquist then picked up the same line of questioning, but Gochman's responses prompted the comment: "But there has got to be some consistent principle that governs the decision, rather than just saying this is really bad and the other wouldn't be quite so bad."[246] Gochman, therefore, received detailed questions upon one possible solution to the problem, rather than the problem itself. White and Rehnquist, therefore, both illustrate the weakness with the appellee's case and pursue the same line of questioning, yet they eventually vote on opposing sides.

Gochman appeared unprepared for the continual questioning on district power equalizing. Instead he clumsily attempted to refocus discussion upon the current system when questioned upon the degree of state responsibility for the current inequalities: "I contend that Texas did what it did, and it could have done something else, and what it did discriminates against minorities."[247] Thus, the majority of Gochman's oral presentation had focused upon the constitutionality of the Coons theory, questions for which Gochman was unprepared. His attempts to refocus questions were mostly unsuccessful. Wright then concluded his argument, using final six minutes to respond to some of Gochman's arguments, using Coons as his primary focus. In his conclusion, Wright reiterated the two enduring points of his strategy: that the Texas school finance system was far from perfect, and that although Wright admired Coons' scholarship, it was not tenable as a Constitutional principle. Thus, Wright concluded as he had begun: treating the Coons theory respectfully.

The two counsel differed greatly in presentational style and ability. Wright responded to questions confidently, he used the justices' names in a natural, easy style, and maintained an air of confidence. Gochman, however, rushed his responses, provided rambling answers, and appeared hesitant at times. As Robert Dixon of the National Law Center wrote to Wright: "your presentation was superb, and the opposition so inept as to be embarrassing."[248] Daniel Morgan echoed this view: "Gochman did not belong in the Supreme Court. It was marvelous to do what he did, to bring the case that far, but he

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[246] *Ibid.*, p.12.
[247] *Ibid.*, p. 13.
[248] Letter from Robert G. Dixon of the National Law Center to Charles Alan Wright, 15th October 1972. C.W.P.

should have stepped aside. Wright beat the daylight out of us."[249] In Morgan's view, Gochman's performance was a primary factor in the outcome. However, he does not suggest that Gochman's performance was responsible for losing the vote of one of the justices. Thus, his presentation alone does not adequately explain the outcome. Wright's assessment of both his and Gochman's performance differed. Although he was pleased with his personal performance, he thought it far from superb "every lawyer, once he gets back to the hotel, wishes he answered some a bit better.....but I didn't have any [answers] I felt embarrassed by."[250] His assessment of Gochman's performance was also far kinder than others. Wright wrote to Gochman on 17th October, congratulating him on his performance:

> Whatever the outcome of the *Rodriguez* case you are entitled to take great pride in the ability with which you represented your client before the Supreme Court. I have heard a great many oral arguments before that court and you did a much better job that many famous leaders of the Bar have done at that lectern. I congratulate you very sincerely.[251]

Gochman's reply indicated both his respect for Wright, and his awareness of the limitations of his performance: "Your very kind remarks, considering the source, mean a great deal to me. It will make me more capable to live with the results. I was honored to have heard you argue in two cases, and needless to say, I was greatly impressed."[252] Wright's favourable opinion of Gochman's performance continued after the decision had been rendered. In a letter to Maury Maverick Jnr, in December 1976, Wright stated "I thought Arthur Gochman did an excellent job representing the views of the appellees and that he was quite right not to let one of the national organizations take the case over as they wanted to."[253] Wright, therefore, agreed with Gochman's basic tactic; to keep the focus of the case upon the Texas school finance system and to not extend its analysis further. He was, however, an experienced Supreme Court litigator, and was cognizant of the etiquette surrounding the court, including treatment of opposing counsel. Thus, Wright's praise of Gochman was consistent with his professionalism and cannot be interpreted as an accurate reflection of his feelings. He remained consistent in his support, " I thought he did a very credible job. I meant what I said in my letter to him after the arguments."[254] Gochman's own view of his performance was, quite simply,

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[249] Interview with author, 16th September 1997.
[250] *Ibid.*
[251] Letter from Charles Alan Wright to Arthur Gochman, 17th October 1972, C.W.P. The exact sentiment of this statement, however, is difficult to ascertain.
[252] Letter from Arthur Gochman to Charles Alan Wright, 19th October 1972, C.W.P.
[253] Letter from Charles Alan Wright to Maury Maverick Jnr, 23rd December 1976, C.W.P.
[254] Interview with Author, 15th September 1997.

"good. Most of the questioning was good and on target. The justices caught our weaknesses."[255] Gochman did not regret his decision to argue the case personally, and attributed his shaky performance to well-formulated questioning.

Despite Wright's praise and Gochman's personal satisfaction, the basic fact remained: Gochman's oral performance did not match that of Wright. However, the overall impact of the presentations of the oral arguments should not be over-estimated. To attribute the appellees' defeat to Gochman's performance before the Court would distort the factors that contributed to the Supreme Court decision. The issues raised by *Rodriguez* and the politics of the justices were more important than the performance of the counsel. Gochman's refusal to step aside was one of many factors, both internal and external, which influenced the development of the case, and affected the manner in which it was presented to the Court. Further, in order to judge Gochman's performance, the quality of his opposition must also be remembered. His weakness in oral argument was made even more apparent by Wright's strength. The decision by the State of Texas to hire Wright was based upon his excellent national reputation. It was unsurprising, therefore, that Gochman did not equal his performance.

However, Gochman committed errors in his oral argument presentation. He did not steer the case away from District Power Equalizing and onto the primary issue: the constitutionality of the Texas school finance system. Wright exposed the weaknesses in District Power Equalizing, which were then interpreted as weaknesses in the plaintiffs' suit. Gochman's failure to stress its peripheral importance fuelled this assumption. Wright, through his emphasis upon the Coons theory, successfully managed to alter the primary focus of the case. This strategy was Wright's best defence. The justices' questions in oral argument were primarily concerned with the nature of the remedial actions, thereby demonstrating the success of Wright's strategy. This was not the issue Gochman was trying to argue. The Court had to decide whether the inequalities in the Texas school finance system were constitutional, not whether there was an effective solution to the problem. It simply had to decide whether to strike down the existing system. However, this was not emphasised adequately, and as a result, the focus of the Gochman's oral presentation changed to the potential of effectiveness of the replacement system. A more forceful presentation of the issues under constitutional scrutiny would have detracted attention from the problematic consequences of affirming the district court.

The oral arguments were one stage, albeit important, in the development of

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[255] Interview with Author, 10th December 1998.

Rodriguez. The absence of Justice Marshall from oral arguments, who then voted on the case and wrote a lengthy dissent, illustrated their limited importance in *Rodriguez.* It was, however, the stage in which all factors coalesced. The opposing counsel had prepared their arguments, which had been influenced by internal factors such as group dynamics, personal judgement, and available resources. The oral arguments were the final stage in the case for the counsel. For Gochman, the oral presentation of *Rodriguez* to the Supreme Court was the culmination of four years work, at immense personal financial cost. The legal context of the suit had been created by others, but its application was Gochman's own. His desire to work independently from the network of school finance lawyers and to pursue an independent course of action affected the development of the case. For example, Gochman resisted Wolinsky's suggestions to argue that an affirmative decision would help diffuse the busing controversy. The connection between busing and school finance was not explicitly addressed within the brief. This left the Court to draw its own conclusions regarding its potential effects. Gochman did not address the political implications of the decision, and thereby ignored the broader context. He wished to keep the focus of the case firmly upon the inequalities of the Texas system, instead of extending its scope to include broader structural inequalities. He considered this to be his best chance of obtaining the votes of the centrist, moderate justices. With four Nixon appointees on the Court, Gochman considered that the narrower the claims, the better chances of success for the appellees. Thus, unlike the legal organisations, Gochman sought a victory for his clients, rather than a ruling to further a political cause. His principal mistake derived from his insufficient emphasis upon the limitations of the Supreme Court ruling. Instead of emphasising the freedom of action each state would have, his presentation of the case focused too heavily upon the practicality of District Power Equalizing. The plaintiffs were simply asking the Court to strike down one system of financing, not rule upon the effectiveness of the proposed alternative.

Thus, throughout the case, Gochman had followed the course of action he deemed best. He, not MALDEF or Coons, was the lawyer hired to represent Demetrio Rodriguez. He had joined forces with MALDEF in order to cultivate their expertise, not to allow them to control the case. His decision to argue the case personally, therefore, was a reflection of the primary focus of the plaintiffs' complaints. He was acquainted with the plaintiffs, the schools, and the state finance system. However, Gochman did not address some of the Court's primary concerns and did not respond to the political implications of the case. The Court's involvement in busing, the growing political profile of the property tax and the recent judicial activism were relevant concerns of the Court. Gochman's strategy, therefore, was to concentrate upon the inequalities of the system

and the reasons for its unconstitutionality. However, his oral presentation did not communicate the case effectively.

For Wright, *Rodriguez* represented a dangerous new wave of litigation, with the potential to "constitutionally compel communities to provide an equal amount of services for every person."[256] Alternative arguments against the suit had been developed elsewhere, but the nature of the defence in *Rodriguez* was Wright's own. His emphasis upon the Coons theory, which Bailey had barely mentioned in the district court case, constituted the primary change. This changed emphasis proved successful, as the justices' questions at oral arguments demonstrated. Wright, like Gochman, worked independently, but Wright's experience was an important difference between the two counsel. It was Gochman's first occasion before the Court, whereas Wright was an eminent appellate advocate, whose next appearance before the Court would be in *United States. v. Nixon*, on brief, supporting James St. Clair defending Nixon.[257] His brief and oral presentation reflected his experience. He tailored his argument to respond to the primary concerns of the justices, arguing for example that the "educational process is already disrupted," and ensuring that the justices were fully aware of the potential consequences of affirming the district court ruling.[258] He acknowledged the inequalities of the system, but questioned their relevance to constitutional law. Thus, he was sympathetic to the plaintiffs' demands, but distinguished between sympathy and constitutionality. The development of the strategy for both parties was primarily dependent upon the perceptions and character of the two lead counsel: they each interpreted the nature of the Court, and used their professional judgement regarding the usefulness of advice. The two counsel, therefore, provided the design for the litigation strategy.

However, the social and political environment provided the context and shaped the development of the case. The changing political context influenced both the nature of the litigation and the attitudes of those involved. Although no explicit connection can be made between the litigation strategy and the political environment beyond that of the issues involving the Supreme Court, those involved in the case were influenced by the broader political and ideological trends of the time. A pertinent illustration of external factors, which provided the broader context of the case, was the scheduling of oral arguments for *Rodriguez* and *Keyes* on the same day. This served as a vivid example of the increased judicial involvement in education since *Brown*. Furthermore, the oral

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[256] Interview with author, 16th September 1997.
[257] 418 U.S. 683 (1974).
[258] Brief for Appellants.

arguments were presented at the height of the 1972 election campaign, in which busing was a prominent issue. Its decision three months earlier to overturn the practise of capital punishment meant that Court was also involved in the campaign issue of Law and Order and the desire to reestablish social stability. The Court was involved in two of the most contentious domestic political issues of the election campaign.

Both busing and capital punishment also affected the federal balance. The Court had invalidated state legislation on capital punishment throughout the country, whilst also mandating busing. Thus, despite Nixon's attempts to reduce the power of the federal government and his appointment of political conservatives to the Court, the federal judiciary became involved in new areas of controversy. Burger's line of questioning during oral arguments, in which he questioned the nationwide significance of appellee's claims, demonstrated his awareness of the broader implications.[259] Furthermore, the declining significance of race within the litigation also reflected the broader environment. Nixon's election campaign focused upon revitalising his support amongst the "Silent Majority" which necessitated a lack of sympathy for minority concerns. The lack of governmental commitment to furthering racial equality affected the litigation strategy. The claim that school finance system discriminated on the basis of race and as well class sought an implicit recognition of the connection between socio-economic status and racial descent inherent within American society. The immense implications of this claim, in light of the growing conservative political mood, had become increasingly untenable. The district court, despite ruling for the plaintiffs, had not supported this claim. Thus, in the presentation of the case to the Supreme Court, the racial discrimination claim was only mentioned in detail in the *amici* brief of the NAACP. Socio-economic discrimination within the finance system was the primary focus for both lead counsel.

The litigation strategy, therefore, both reflected and was influenced by the broader political environment. Those involved in the case shaped the content of the litigation, but their decisions and presentation of the case cannot be separated from the external context. The political prominence of busing, capital punishment and the presentation of *Keyes* and *Rodriguez* on the same day, demonstrated that external political and social factors provided an important component in the development of *Rodriguez*. The case was presented within this context, and the decisions of the counsel were shaped by these factors.

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[259] See above, p 154.

CHAPTER FOUR:

October 1972-March 1973

The Development of the Supreme Court Opinion in *San Antonio v. Rodriguez*

Five days after Oral Arguments, the Supreme Court justices held the weekly conference to discuss the merits of *Rodriguez.* This conference, on 17th October, marked the second stage of the passage of *Rodriguez* through the Supreme Court.[1] The opinion writing process took five months, at the end of which, in addition to the Opinion of the Court, four other opinions were filed. Lewis Powell wrote the opinion for the five justice majority, with Potter Stewart joining the majority opinion but also filing a concurrence. Thurgood Marshall, joined by William Douglas, wrote the dissenting opinion, and William Brennan and Byron White filed separate dissents. The Court voted to reverse the district court decision and to uphold the appellants' arguments by a majority of only 5-4. Each opinion reflected a difference in judicial philosophy and thereby illustrated the broad ideological spectrum that existed among the justices. The final decision also reflected the complexity of both the legal analysis and ideological tenets of the appellees' case. The four dissenting justices, for example, agreed with the appellees' claims to differing degrees; only two justices voted to uphold the district court decision in its entirety.

The majority opinion was a landmark in constitutional law. The decision marked the Court's refusal to extend the list of fundamental rights further and halted any future litigation attempts that sought to apply the equal protection clause to new areas. As a result, the opinion defined the still current limits of constitutional equality. The final opinion, handed down on 21st March 1973, was the result of five months of work by Powell and his clerks, during which time four drafts were written. The essence of the opinion adhered to the doctrine of judicial restraint and upheld the principles of federalism, both of which were central to Powell's judicial philosophy. The questions raised by the case were of great personal significance to Powell, as his period of public education had been largely dedicated to finding the solution to many problems raised by the appellees' case. During his period of service on the Richmond and Virginia State boards of education which had spanned nineteen years, Powell attempted to improve the school finance system in order to ensure all citizens obtained an adequate standard of education. This idea lay at the heart of the appellees' case in *Rodriguez.* Although personally committed to this notion, however, it was in direct conflict with Powell's judicial philosophy of judicial restraint. He possessed a superior understanding of the issues raised by the appellees' case: he had first hand knowledge of the role and

[1] The first stage was the presentation of oral arguments, which had occurred on 12th October 1972.

limitations of the local school board, and the problems faced by the state in attempting to improve the overall standard of education. In *Rodriguez*, therefore, Powell's judicial philosophy coalesced with his personal commitment to the improvement of educational quality. This conflict was reflected in his consideration of the case in which he acknowledged that, to a layman, the fundamentality of education was apparent. For a justice, however, the fundamentality of education was far from obvious. This difference accounted for Powell's vote and formed an important component of his opinion. He sought to establish the Court's reasons for finding against the fundamentality of education with clarity. His opinion also emphasised the importance of local control of education, Powell's commitment to which had been evident throughout his involvement in education.

The primary essence of the opinion, therefore, was to prevent further federal government involvement in education and to avoid further expansion of judicial activity. To this extent, *Rodriguez* reflected the dominant political attitudes of the time, which Nixon's "New Federalism", in particular, encapsulated. However, the opinion was not simply reflective of the growing political conservatism of the Court. Although the opinion contained conservative principles, the broader context of the decision illustrated the Court's ideological complexity. The decision was handed down two months after the controversial abortion decision *Roe v. Wade.* This decision held profound social and political implications. *Roe* was widely criticised by legal scholars for its overexpansion of the right to privacy. It also further affected the federal balance. Similar to the capital punishment ruling of June 1972, the Court had deprived states of the authority to decide abortion legislation and nationalised abortion policy. Thus, the decision extended the power of the federal government into a new area of controversy. In addition to its scholarly and political significance, the decision also precipitated an immense moral outcry. During the period in which the Court was deliberating upon *Rodriguez*, therefore, the political context surrounding the Court had altered significantly. The Court was also considering the busing case *Keyes v. School District No.1, Denver Colorado,* which was handed down three months after *Rodriguez.*[2] This decision increased the Court's commitment to busing established in *Swann v. Charlotte-Mecklenburg Board of Education.* Thus, *Rodriguez,* handed down in March 1973, occurred mid-way between

[2] 413 U.S. 189 (1973). In this case, the Court upheld the busing of children in areas where *de jure* segregation had not existed.

these two controversial decisions, amidst a time of growing resentment at recent Court decisions. Thus, the deliberations of all the justicies were made within this broader context. Although these considerations did not directly influence the Court's decision, they nonetheless shaped the surrounding environment of which the Court was part.

At the time in which *Rodriguez* was rendered, therefore, the Court was at the centre of three controversial political issues; abortion, capital punishment and busing. The rendering of *Rodriguez* came at a key moment in the Court's institutional history. The very essence of the Court's legitimacy is dependent upon the support of the other governmental branches and, ultimately, the people. The controversy precipitated by its recent decisions, particularly *Roe*, endangered political compliance with Court decisions. The Court's authority rests, in part, upon public approval. It was essential for the Court not to be perceived as a "super-legislature" and usurping the powers of the other governmental branches. Since *Brown,* the Court had become involved in a growing number of socially divisive issues. Thus, it was necessary for the Court to reconcile its increasingly controversial agenda with its judicial role in order to maintain public approval. As the early decisions of the Burger Court illustrated, the appointment of four politically conservative justices had not halted Court involvement in controversial issues. Thus, the institutional necessity to stay within the broad parameters of public approval provided an additional element to the political context.

However, internal, as well external factors, influenced the content of the opinion. The process of negotiation and compromise between Powell, as the justice assigned to write the Court's opinion, and the other justices provided some of the detail of the opinion, in particular regarding its wording and analysis. In order to present a clear, coherent statement of judicial doctrine, it was desirable for as many justices as possible to join the Court's opinion. Powell, therefore, sought to obtain a majority coalition whilst simultaneously producing a well-written opinion, reflective of his writing style and judicial philosophy. The opinion writing process was influenced by internal factors, but it was conducted in the context of broader political and institutional considerations.

The conference on 17th October 1972 was the first occasion for the justices to voice their opinion as a group and to indicate their thoughts about the case.[3] The questions posed during oral arguments provided an insight into their primary concerns

[3] Votes cast at conference are tentative. Votes are not final until the day the Court hands down its decision.

and understanding of the elements of the case, but the conference was the first opportunity to voice their opinion. In accordance with Court tradition, justices spoke in order of seniority.[4] Chief Justice Burger began the proceedings:

> The local property tax varies from district to district. The 3 judge court held that Texas system violates equal protection- no elaboration as to why this is true. They follow the Coons theory that education must not be a function of wealth, and confirm equal advantage with equal protection. But whatever state of education may be, it does not alter other duties. The 3 judge court would overhaul school systems everywhere. This course of action, with the disruption it would cause, would not match the result. I agree with Professor Wright's submission. Holding would result in a restructuring of our system of state and local government- reverse.[5]

Burger's comments were also in accordance with his questions during oral arguments, in which Burger demonstrated his concern for the inter-state implications of *Rodriguez* and its subsequent effect on the federal balance.[6] Burger remained convinced that to affirm the lower court decision would profoundly alter the federal balance, and he wished to avoid further court involvement in education. Burger's thoughts in *Rodriguez* reflected his conservative judicial philosophy and his preference for judicial restraint.[7]

William O. Douglas, as the Senior Associate Justice, expressed his views next. His view was recorded as: "the problem of equality is not solved by money alone, but money is an element- Affirm."[8] This view illustrated Douglas's concern for minorities and his desire to enhance the level of equality within society, which was a prominent feature of

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[4] The following material is obtained from the Court notes of William Douglas and Lewis Powell. They are not, therefore, an exact recording of the thoughts of the justices.

[5] Conference Notes of William O. Douglas, Case File 71-1332, #1575, D.P. and Conference notes of Lewis Powell, Case File 71-1332, OT 72, P.P. (All the following detail of the conference is from *both* sources, unless otherwise indicated.)

[6] See above, p. 154. Burger's question: "the logic of it, laying aside the Fourteenth Amendment emphasis on state, the logic of it however would apply across state lines" encapsulated his attitude. The question pertained to the inter-state implications; whether a discrepancy in educational expenditure between Rhode Island and Texas, for example, that also would be unconstitutional.

[7] According to one commentator, "No one has ever seriously asserted that Warren Burger was an egalitarian. That was not the nature of this Midwestern Republican, a judge who was more concerned with the rights of society writ large and who only occasionally came to the defense of political dissidents, small religious groups, racial minorities, or women." Charles M. Lamb, "A Conservative Chief for Conservative Times", Charles M. Lamb and Stephen C. Halpern (eds.), *The Burger Court*, p. 143. For more detail of Burger's judicial philosophy, see previous chapter, p. 113..

[8] Conference notes of Douglas and Powell, Case File (C.F.)71-1332, D.P., P.P.

his judicial philosophy.[9] His questions during oral arguments had demonstrated his adherence to the principle of equality, raising the question of race.[10] This was not an issue, however, that Douglas raised during the conference. His comment simply demonstrated his belief that a more equitable system of finance would contribute to a more equitable society. William Brennan followed Douglas. He began by expressing his conflicting thoughts regarding *Rodriguez*, commenting that "few cases have troubled me more." His question during oral arguments had illustrated his dissatisfaction with elements of the appellees' case.[11] However, after balancing the conflicting interests, Brennan decided that "Money is important and if a state provides education, the allocation of money must be substantially equal. There is disparate, unequal treatment. Presence of a compelling interest is not necessary as there is no rational interest- Affirm."[12] The absence of a rational interest in the Texas school finance system was, according to Brennan, sufficient justification for affirming the three-judge decision. This approach was in accordance with the "strict scrutiny" measure for the equal protection clause. The concern expressed by Brennan at the beginning of his comments acknowledged the complexity of the case, but his vote was in accordance with his liberal judicial philosophy, and thereby advocated a more active judicial role than some of his brethren.[13]

At this point in the proceedings, the votes had been cast in the manner predicted by Gochman and Wright. Gochman believed that he had "no problems with the votes of Douglas, Marshall and Brennan and absolutely no chance with Burger, Blackmun and Rehnquist." Thus, the three critical justices for Gochman were White, Powell and Stewart. Wright also agreed with this view.[14] The next justice to voice his opinion was one of the critical justices, Potter Stewart. A discrepancy existed between the conference notes of Powell and Douglas regarding Stewart's final vote at this conference. According

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[9] For more details of Douglas's judicial philosophy, see previous chapter, p. 115.
[10] Douglas asked Wright: "As U read in this record, Mr Wright, it seems to me that the testimony- and I am not sure about the findings- pretty clearly demonstrate that there is unequal treatment of these respondents who are Americans of Spanish ancestry at education levels. Is this any part of this litigation."? Oral Arguments, 12th October 1972, Docket no. 71-1332.
[11] See above, p. 155. During Oral Arguments, Brennan expressed his concern with District Power Equalizing: "And yet your answer to Justice White a few moments ago leaves me with the impression that district power equalization could produce precisely the picture of which you complain today." *Ibid.*
[12] Conference notes of Douglas and Powell, C.F. 71-1332, D.P., P.P.
[13] For more detail of Brennan's judicial philosophy, see previous chapter, p. 116.
[14] Wright commented: "I thought Lewis Powell was terribly important because of his moderate, somewhat liberal views. Justice Stewart of course I worried about.... And Justice White also...I had some hope of getting his vote." Interview with author, 15th September 1997.

to the Douglas' notes, Stewart was undecided. Powell, however, recorded Stewart's vote as a reversal. According to Powell, Stewart commented "money is some index, but the equal protection clause does not require egalitarianism. Unless there is a specific, identifiable class of people which is discriminated against, the equal protection clause does not apply. Rich and poor are not discrete, specific and identifiable classes- Reverse."[15] Douglas, although recording the same comments, marked a query alongside Stewart's name in the final count. This confirmed Gochman's and Wright's view of Stewart as a crucial vote.[16] His questions during oral arguments related to the structure of the education system and the district court decision.[17] They did not, therefore, make Stewart's primary concerns clear. However, the discrepancy suggested that Stewart's conference vote was extremely tentative and could be subject to alteration.

The comments of Justice White, another key vote, showed an attempt to strike a middle ground. He agreed with aspects of the lower court's findings, but not with the decision in its entirety. White had taken an active role in oral arguments, in which he posed challenging questions to both Gochman and Wright. White seemed particularly concerned with the constitutional principle sought by the appellees, and found Gochman's arguments unsatisfactory. He "agreed with the District Court with regard to the school district being locked in to a certain financial expenditure and cannot raise itself higher. Where the state provides no way to equalise this discrepancy, there is a denial of equal protection." Thus, White wished to "affirm, but with a narrower opinion than the District Court."[18] This view illustrated White's desire to prevent the Court extending its influence into a new area unnecessarily, whilst simultaneously protecting the interests of minorities.[19] Thus, the first aspect of his philosophy prompted Wright's hope for his vote, whilst the second part made him a target for Gochman. White's moderate response incorporated both strands of his judicial philosophy, and enabled him to vote for a narrower affirmance.

Thurgood Marshall's comments were unsurprisingly forceful: "We can equalize the money even if can't equalise education- we will never have an equal system. The

[15] Conference notes of Powell, C.F. 71-1332, P.P.
[16] See previous chapter, p. 128.
[17] He asked Gochman: "The school districts are created solely by the state legislature are they? That is, their meets and bounds." He later asked Wright: "Was it any part of the District Court's rationale in this Constitutional decision that this was racially discriminatory?"
[18] Conference notes of Powell and Douglas, C.F. 71-1332, D.P., P.P.
[19] For more detail of White's judicial philosophy, see previous chapter, p. 117.

[finance] scheme does violate the 14th Amendment. This is property line discrimination- affirm." Although Marshall was absent from oral arguments, his background and judicial philosophy meant it was extremely unlikely he would vote against the appellees.[20] Marshall and Douglas were the only justices who unhesitatingly affirmed all aspects of the lower court decision. At this point in the proceedings, the overall vote stood at 4-2 to affirm the district court decision.[21]

Harry Blackmun, the first of the new Nixon Appointees, spoke next. He emphasised the importance of preserving the federal balance: "Much prefer to let the states struggle with this." Blackmun believed that this was an inappropriate area for Supreme Court involvement, and would result in the over-extension of judicial authority: "The Texas system provides a basic education for all children- if we affirm, federal courts will destroy the state systems. We cannot legislate equality- this would be another step towards big government and there would be a general lowering of educational standards." Thus, he expressed the desire not to alter the federal balance, a prominent feature of his judicial philosophy.[22] A further expansion of governmental authority into the provision of education might destroy the quality of education offered and would further extend federal government involvement in education, then under threat by busing. The federal balance was, therefore, a primary concern of Blackmun. According to Blackmun, Texas had met the requirements of the equal protection clause by providing each child with the opportunity to receive an education.

Lewis Powell expressed his thoughts next. He had not questioned counsel during the oral arguments, but he had prepared well for the conference, filling four pages of a legal pad with his thoughts on *Rodriguez.* [23] His long-standing involvement in education accounted for his detailed preparation, and was of central importance in Burger's decision to assign the majority opinion to Powell. Powell's eleven year tenure as Chairman of Richmond School Board spanned the period of desegregation and he therefore confronted the policy of massive resistance.[24] He then moved to the Virginia Board of Education,

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[20] For more detail of Marshall's judicial philosophy, see previous chapter, p. 116.
[21] This included the vote of Justice Stewart.
[22] For further details of Blackmun's judicial philosophy, see previous chapter, p. 113.
[23] His lack of questioning during *Rodriguez* was indicative of Powell's customary role during oral arguments. He was, in general, one of the least vocal members of the Burger Court during oral arguments.
[24] Massive Resistance was the policy of resisting integration, which existed in Virginia. The phrase originated in a speech by Senator Byrd on February 26th 1956. Byrd commented that "If we can organize

where he served until 1969. Powell was also a member of the education sub-committee of the 1968 Virginia Constitutional Committee that drafted a new version of the Constitution.[25]

On 30th August and 31st August 1972, approximately six weeks before the court heard arguments, Powell sent a memorandum to each of his law clerks, J. Harvie Wilkinson III and Larry Hammond. Wilkinson received the first memo, in which Powell outlined the Coons theory and expressed his thoughts on Stephen Goldstein's critique of this theory.[26] Powell called the Goldstein article "rather convincing". His own experience supported Goldstein's view:

> My own experience in public education in Virginia if my recollection is correct- tends to corroborate Prof. Goldstein's critical view. The taxable wealth of a school district does not necessarily reflect the wealth of the citizens who reside in it. A classic example is Sussex County, Virginia, in which VEPCO has recently constructed an atomic power plant costing- as I recall- several hundred million dollars. This has resulted in the taxable wealth of that previously poor county "going through the roof", without affecting- except in a few marginal cases of persons employed – the actual wealth of residents of the County..... My guess is that, in terms of wealth, the City of Richmond is one of Virginia's wealthiest school districts- largely because of industrial and commercial development within the City. Yet the wealth per individual or family may be relatively low in view of the large black population.[27]

Powell expressed concern for the apparent discrepancy between those areas with a poor income but wealthy industrial assests which altered the tax yield and therefore distorted the plaintiffs' claims. In order to verify these suspicions, Powell had his clerk research statistical information relating to school finance in Virginia. This desire for additional information was further reflected in his second memo, in which he commented again upon the Coons theory in addition to other sociological evidence within the case. Powell requested additional information to further investigate appellees' contentions: "The

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the Southern States for massive resistance to this order, I think that in time the rest of the country will realise that racial integration is not going to be accepted in the South."

[25] Powell had expressed his interest before summer recess in 1972.

[26] See Chapter One for detail of the Coons theory and Stephen Goldstein's article. Powell wrote "The Court in *Rodriguez* followed almost slavishly the California case of *Serrano v. Priest*, which in turn adopted the almost literally the "activist scholarship" theory of Professors Coons and Sugarman in their book, *Private Wealth and Public Education.*" Memo from Lewis Powell to J. Harvie Wilkinson III, 30th August 1972. C.F. 71-1332, P.P.

[27] Memo from Lewis Powell to Larry Hammond, 31st August 1972, p.1, C.F. 71-1332, P.P.

Coons and Sugarman thesis (that the quality of education varies directly with the money spent on it) has been assumed by many to be true, but proved by no one. Before I accept it, I would like to see more documentation than I've found so far in the briefs or the shallow opinions of *Serrano* or *Rodriguez.*"[28] Powell was convinced that the Coons theory was central to the case, which showed the success of Wright's strategy. These memos also showed Powell's extensive interest and his desire to conduct his independent research in order to acquaint himself fully with the issues perceived to be in the case.

Two weeks before oral arguments, Powell further demonstrated his interest *Rodriguez* by sending a memo to Hammond. On the 28th September, Powell outlined his thoughts on the case at this stage. Powell began with the suggestion that "carried to its ultimate extreme, *San Antonio* would require rationalisation of all public schools."[29] At the heart of the case lay the conflict between two competing interests: "the country highly values the notion that everyone gets an equal educational opportunity. But at the same time, we also value highly the goal of best education available for children. Any system that cannot provide the former without sacrificing the latter is destined to meet public opposition."[30] Powell also asked: "If spending less in the wealthy schools means that they will become mediocre, how is it that spending more will not improve the quality of education?"[31] The contention that reduced expenditure would result in mediocrity had originally been advanced by Philip Kurland in 1967.[32] However, Wright did not incorporate it into his defence, which was a further demonstration of the strength of his strategy. Powell also considered, therefore, some of the wider questions, beyond those raised by the briefing and argument of the case. Powell observed that appellees distinguished education from other governmental services in order to prevent claims seeking their equalisation.[33] However, the implicit danger remained that "children in schools with lesser expenditure could claim that they do not receive as great expenditure, this is a denial of equal educational opportunity."[34] Thus, even if the decision did prevent claims relating to other governmental services, the possibility remained that it could still precipitate numerous claims relating only to education. As a result, Powell concluded:

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[28] Memo from Lewis Powell to Larry Hammond, 31st August 1972. p.1,C.F. 71-1332, P.P.
[29] Memo from Lewis Powell to Larry Hammond, 28th September 1972, p.1. C.F. 71-1332,P.P.
[30] Memo from Lewis Powell to Larry Hammond, 28th September 1972, p. 1. C.F.71-1332, P.P.
[31] *Ibid.*, p. 3.
[32] See above, p. 66.
[33] He commented that "the thesis of this claim would not compel similar action." *Ibid.*
[34] *Ibid.*, p. 3.

> I am still undecided in this case. Despite the basic simplicity of the constitutional argument, and despite the apparent unfairness of the present system, I cannot yet be sure that every consideration has accurately been disposed of. I am leaning towards an affirmance, but will make no recommendation of the merits at this stage. I suggest this case should be treated somewhat differently than usual.[35]

This memo, therefore, demonstrated his conflicting ideas towards the case. On one hand Powell was aware that an affirmance would have far-reaching implications for the education in forty-nine states and upon equal protection claims. On the other, he was aware that profound inequalities existed, and they must be rectified. Of greatest importance, however, was his statement "I am leaning towards an affirmance." His desire to fully comprehend all aspects of the case, and his concern for the broader implications of the decision were clearly evident and illustrated that his thoughts on the case were not yet fully developed.

On the day of oral arguments, 12th October, Powell sent Hammond another memo. The timing and length of this memo illustrate its importance: it was sixteen pages and sent just prior to oral arguments. Powell outlined the troubling areas of the case, and indicated the reasons for his personal interest:

> This case is more troublesome for me than it otherwise would be because of my long association with public education. Next to the law, education was my primary intellectual interest for many years. As a member of the Richmond School Board for eleven years, as it Chairman for nine, and as a member of the State Board of Education for eight years, including serving as its President, I lived fairly intimately with the immense problems, frustrations and occasional successes of public education.[36]

He then proceeded to give his opinion of the school finance system in Virginia, which gave an important insight into his understanding of the issues in *Rodriguez.* He commented:

> I am in agreement that the traditional system of funding and control is not designed to produce- and does not produce- identical expenditures among the school districts of a state, or indeed, within certain districts. I have advocated for

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[35] *Ibid.,* p. 3.
[36] Memo from Lewis Powell to Larry Hammond, 12th October 1972, p.2. C.F. 71-1332, P.P.

> years a larger participation by the state in financial education, and the trend-certainly in Virginia- has been in this direction. The difficulty with school financing in Virginia was twofold: i) The property wealth of districts does vary and ii) the willingness of people to tax themselves for public schools may vary even more widely.....The answer to the problem is not as simple as having the state take over all funding of public education.[37]

During his period of service on the Richmond and Virginia school boards, Powell had campaigned for increased state involvement in education finance. His desire for an increased state role in the financing of public schools stemmed from his recognition of the inadequacies of the current system. In an address to the Mayor of Richmond in 1958, Powell commented that "the question is whether we are willing to provide the funds necessary to continue quality education in our public schools. Money alone is certainly not the hallmark of a superior education system, but adequacy of funds is a necessary element."[38] In an address to the Virginia Commission of Public Education in 1959, Powell commented: "It is not necessary for Virginia to recognise that localities cannot be expected to provide adequate funds for education without either local sales tax or a statewide tax? How long is Virginia going to continue to avoid this inevitable issue?"[39]

Throughout his tenure on the Richmond School Board, Powell campaigned for increased education funding. He objected to cuts in the school budget in 1959 with the statement: "The budget has been gradually been tightened to the point that quality is being threatened... The excellence of the Richmond Public School System cannot be maintained indefinitely in face of serious budgetary limitations."[40] In light of the increasing fiscal restraints, Powell advocated a statewide sales tax to meet the growing costs of education. Powell appeared before the finance committee of the state senate in 1960 with his proposal, and expressed the belief that:

> we are doing too little in Virginia for public education. Real estate taxes are the principal source of educational revenue in Virginia....Those of you who are homeowners will agree, I believe, that there is a limit beyond which the real estate taxes simply cannot be increased; many think we have already reached that limit.

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[37] *Ibid.,* p. 2.
[38] Address to the Honorable Mayor and Members of the Council, City of Richmond, 30th June 1959, Box 001 94, P.P.
[39] Address to Virginia Commission on Public Education, July 15th 1959. Box 001 94, P.P.
[40] School Budget Message, 12th February 1959.Box 001 94, P.P.

> The solution, I believe, is a sales tax, the majority of which should be earmarked for education. It should be either administered by the state board or allocated to the localities on a basis which will assure that the revenues be used to improve education and not merely to reduce local tax levies. [41]

Powell's proposal of a new tax, therefore, acknowledged the importance of financial expenditure to education quality. It also recognised the shortcomings of the finance structure, and its failure to meet the rising costs of education.

During his attempt to obtain new sources of education funding, Powell also revealed his desire to prevent further federal government involvement in public education. This belief was central to his subsequent vote in *Rodriguez.* Despite his desire to increase teachers' salaries, Powell warned against taking a federal subsidy to combat this problem:

> No one believes more firmly than I do in the essentiality of retaining control of education at the state and local level.... Once the national government assumes responsibility in this area, it will never redraw....and through gradual intervention and control, local school boards would be reduced to inconsequential satellites of a federal bureaucracy...A free public school system, financed and operated by state and local boards, is the single greatest bulwark of our democracy....Besides weakening the crucial power of local school boards, growing federal intervention would make states and localities less and less inclined to meet their own responsibilities. [42].

This opinion was critical during his deliberations in *Rodriguez.* His recognition of the inadequacy of the finance system and of the connection between financial expenditure and educational quality were elements of his educational philosophy. His concern for localism in education and lack of federal government involvement were also essential components. By the time *Rodriguez* was before the Court, the involvement of the federal government, in particular the Supreme Court, had substantially increased as a result of the Great Society programs and the desegregation decisions. Thus, local control was already perceived to be under threat. Although the plaintiffs did not seek increased government involvement in school finance, the rational basis for the system was localism. An attempt to change the system was thereby presented as a further threat to localism. This aspect of

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[41] Address to Finance Committee of the state Senate. Box 001 94, P.P.
[42] "Powell Warns Against Taking Federal Subsidy", *Richmond Times-Dispatch,* Saturday 8th October 1960.

the case had not been emphasised sufficiently by Gochman in oral arguments, and Powell's concern for federalism was evident throughout his consideration of *Rodriguez.*

Powell's experience in education affected his consideration of the case. His previous attempts to obtain increased state involvement in education acknowledged the inadequacies of the system. However, his desire to improve the financing of public education did not include increased federal involvement in education. He sought changes at the state level, and did not call upon the federal government for increased assistance. This attitude was reflected in his consideration of *Rodriguez.* In the memo he sent to Hammond on the day of oral arguments, he celebrated the structure and rationale of the federal system and confirmed the importance of local governments:

> The tax structure of a state, involving the interrelationship of federal, state and local taxes of all kinds, is a complex mix which cannot be restructured without created immense problems- political, economic and legal. Moreover, the genius of our federal system- *certainly until recently*- has rested not merely upon the relationship and balance between state and federal governments. Local government has played a fundamental role in making our system work, in preventing the bigness even of state government from overwhelming the citizen, in keeping control of local municipal services- including education; largely in the hands of the localities where the politicians are far more responsive to the needs of the communities and the will of the people than at any other level....[43] [author's italics].

These issues were, according to Powell, intertwined in *Rodriguez* and thereby provided an important context to the case.

At the heart of his attitude towards *Rodriguez* lay a fundamental conflict: "Thus, as you can see, I approach this case with mixed emotions when I think only as a citizen and a former public educator. As a lawyer and a judge, however, I have to apply constitutional principles in the resolutions. Yet they must not be applied in a vacuum or in a way which may weaken or destroy substantial values in the existing system."[44] The different considerations of a private citizen and a Supreme Court justice were profound and of critical importance to Powell's vote in the case. His involvement in education derived from his acknowledgement of its critical importance both to the individual and to

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[43] Memo from Lewis Powell to Larry Hammond, 12th October 1972. C.F.71-1332, P.P.
[44] *Ibid.,* p. 6.

society. This importance also provided the premise for the appellees' arguments regarding its fundamentality. Powell, however, now approached the question of fundamentality as a justice, not an educator. This difference provided the key to Powell's vote and his subsequent opinion. In his conclusion, Powell acknowledged the competing interests and the inadequacies of the current system, yet wondered "whether this complex problem of how best to finance public education should not be left to the democratic process."[45] Although his views were not yet fully clarified, he was leaning towards a reversal immediately prior to oral arguments. Powell's personal conflict also related to the factors that are involved in the decision making process. As Powell acknowledged, he attempted to lay aside his personal preferences and approach the case from purely a legal standpoint. He was, therefore, attempting to strike the balance between legal and political considerations that influence the Court's decisions.

It was with this background that Justice Powell went into conference on 17th October. Powell spoke for the longest of all the justices, a reflection of his detailed preparation. His comments demonstrated both his expertise and his attempt to balance the competing interests within the case:

> The district court opinion would regulate the entire financial system of the states. The result would be regressive especially for urbanised areas. Education is not fundamental in the constitutional sense – the rights are in the Constitution itself – we have also never held that wealth is a badge of discrimination – is there a "natural" basis for this kind of inequality? If not, this would mean full state funding of education- the state would battle over most local functions. For example, Richmond Virginia has the largest black population and they have a larger tax base than most parts of Virginia. If there was statewide funding, Richmond would drop from first to 6th for the state of Virginia. Arlington County spends $1300 per pupil and it too would drop. This would hurt those they were meant to help. Only the legislative branch can solve this problem- reverse. [46]

After careful deliberations, Powell had decided to reverse the district court decision. His conflicting emotions towards the case illustrated the reasons for both Gochman and Wright viewing Powell as a key vote.[47] Powell's decision brought the overall count to 4-4, with one Justice remaining. William Rehnquist cast his vote last, and

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[45] *Ibid.*, p. 16.
[46] Conference notes of Justice Douglas. p. 3. D.P., P.P.
[47] For further details regarding the judicial philosophy of Lewis Powell, see p. 114-115.

voted to reverse the lower court decision. His comments highlighted Rehnquist's political and judicial conservatism, in which he sought to minimise government interference in society and reduce the scope of judicial activity. He employed "strict constructionist" or "original intention" interpretation of the Constitution: "this type of financing of school districts existed at the time of the adoption of the 14th Amendment; and there is no lack of motivation. Thus, there is a rational basis, and I vote to reverse."[48]

The Court had decided to reverse the district court decision. Each justice approached the case slightly differently which reflected their broader ideological differences. The five justices who voted to reverse demonstrated different priorities of concern. Chief Justice Burger expressed his adherence to the doctrine of judicial restraint, Justice Stewart disagreed with the argument that wealth was a suspect classification and Blackmun expressed concern about the governmental and educational consequences of the further expansion of federal government power. Powell, in conference, objected to the validity of the legal analysis and disputed the viability of the appellees' aims and Rehnquist disputed whether school finance reform was encapsulated within the wording of the Fourteenth Amendment. Of the three justices that both Wright and Gochman pinpointed, two voted for the appellant and one for the appellees at conference. This gave the defence the majority of one.

The next stage in the proceedings was the assignment of the opinion by the Chief Justice. On 28th October, Powell notified his clerks that he had been assigned to write for the majority. Burger's decision to assign the majority opinion to Powell stemmed from his recognition of Powell's vast experience in public education. The assignment of the majority opinion to Powell added a different dimension to the opinion and enhanced the legitimacy of its conclusions regarding education. This was a point with which Wright agreed: "It did strengthen the weight of the opinion, more so than if Warren Burger or Harry Blackmun had written it."[49]

Powell's first hand experience of the consequences of *Brown* during the period of massive resistance and interposition meant he fully comprehended the implications of a far reaching Court decision on local communities. His attitude and actions during this period, which were raised during the Senate Committee hearings on his nomination in

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[48] Conference notes of William O. Douglas, p. 2. For further detail regarding the judicial philosophy of William Rehnquist, see p. 114.
[49] Interview with author, 15th September 1997.

1971, provided an important insight into his deliberations and reasoning in *Rodriguez.* Powell's attitude to segregation before 1954 was one of acceptance, in which "it never occurred to me to question it."[50] His relationship with blacks was indicative of his social background:

> Growing up, he lived with black servants and played with black children; relations were friendly and familiar, but unself-consciously unequal. He attended all white schools and churches and never met a black as an equal. Neither had has background been changed in the military; the Army in World War II was as segregated as civilian society. Elsewhere in post-war America, civil rights became an issue, but there was little change in Richmond Virginia. Where Powell lived and worked, the institution of segregation- not only in schools, but in churches, restaurants, movie theaters, and public buildings- was alive and well. [51]

Powell's heritage and upbringing ensured his acceptance of segregation. The rendering of *Brown,* therefore, marked a turning point in both the history of the South and Powell's ideological development. At the time of the decision, Powell believed "the school decisions to be wrongly decided" and commented that "I am not in favor of, and will never favor compulsory integration."[52] Powell's law partners at his firm Hunton & Williams, Justin Moore and Archibald Robertson, were counsel for the defendants in the Virginia school desegregation case which was also decided in *Brown.*[53] Segregation was an accepted and, until *Brown*, constitutional practise, which shaped Virginian society. Powell was directly involved in the desegregation process. Richmond did not admit black children to white schools until 1960, at the end of Powell's period of service on the School Board. His silence on desegregation and lack of action to achieve it later interpreted as his acquiescence in segregation. Powell's reluctance to desegregate cannot be questioned, yet Powell worked behind the scenes to fight the policies of massive resistance and interposition. He did not, therefore, seek to obstruct the desegregation process.

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[50] John Jeffries, *Justice Lewis Powell Jnr,* New York, 1994, p. 139.
[51] *Ibid.,* p. 139.
[52] *Ibid.,* p. 140.
[53] *Brown* was the lead case in four segregation cases. The Virginia case was *Davis v. County School Board of Prince Edward County, Virginia.* The other cases were *Briggs v. Elliott* from South Carolina and *Gebhart v. Belton* from Delaware.

In his "behind the scene" struggle against the staunch supporters of segregation, Powell revealed important aspects to his personal philosophy that would later influence his opinion in *Rodriguez.* The first target of attack was the policy of interposition. This policy resurrected the doctrine of Nullification from the 1830s and advocated the right of individual states to declare Supreme Court decisions void. Powell was wholly opposed to this policy: "This is no less than a proposal of insurrection against the Federal Government. It is an attitude of lawlessness." Powell's particular objection, however, was the detrimental effect of interposition on the authority of the Supreme Court:

> The attack on the Court has, I think, assumed disquieting if not positively dangerous proportions. I hardly need say that I personally do not agree with the decision of the Court. Indeed, I personally think that we now have an exceptionally weak Supreme Court, with many members possessing few qualifications other than "political" ones. Nor do I consider that the Supreme Court should be protected from fair criticism. But the Supreme Court, as an institution, is one of the great bulwarks of our cherished American form of government. During most of our history it has well protected the personal liberties of the people, and it has been conservative and steadying influence in times of violent emotion and political passion.[54]

This statement demonstrated Powell's belief that the *Brown* decision had been rendered on political, rather than legal, grounds. For Powell, this was an essential distinction in Supreme Court decision making and influenced his vote in *Rodriguez.*

His lack of concerted action to enact integration can be attributed to his personal beliefs and the broader political context. Powell, respectful of traditions, did not wish to disrupt Richmond society more than was absolutely necessary. Powell's respect of law, however, defined the parameters of his actions. The highest court of the land had ruled segregation to be unconstitutional, and, in Powell's view, that ruling must be obeyed. His profound belief in education compelled him to ensure that public schools stayed open at all costs. Thus, his dislike of massive resistance and interposition stemmed from this belief. At the Senate Committee hearings on his nomination, Representative John Conyers, Jr, on behalf of the Congressional Black Caucus, commented that Powell had followed "his own segregationist policies....He consistently voted to resist or ignore the

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[54] Letter from Lewis Powell to Governor Stanley, 19th January 1956, quoted in Jeffries, *op.cit.,* p. 148.

decisions of the Supreme Court requiring racial integration of public schools."[55] Thus, although Powell did not openly resist integration, he did little or nothing to facilitate it.

The record of the State Board of Education on integration during Powell's service was equally unimpressive. Powell moved to the State Board in 1961, and "the problem [of integration] was not on the board's agenda."[56] It is unsurprising therefore that "desegregation proceeded at a snail's pace."[57] However, Powell's "behind the scenes" actions had more lasting value than public statements which would have politically isolated him and reduced his effectiveness. In the period after the Civil Rights Act of 1964, the pace of integration increased, but progress remained marginal. The inaction of the board resulted in two suits during the 1960s, in both of which named Powell as a defendant. The first, *Griffin v. County School Board of Prince Edward County* was a continuation of the original suit decided with *Brown*.[58] Plaintiffs challenged the closure of schools in Prince Edward County in order to avoid segregation. The Court ruled the closure unconstitutional, and determined that the closure had occurred with "the acquiesce of the State Board."[59] The Court ordered the state to find a "quick and effective" solution to desegregation. In the second suit, *Green v. Board of Education New Kent County,* the Court invalidated "freedom of choice" plans in which parents, instead of the school board, chose the public school for their children.[60] Under this system, no white child had opted to attend the predominately black school. The Court ruled that the board of education had an affirmative duty to devise realistic and quick plans for desegregation: "It is incumbent upon the school board to establish that its proposed plan promises meaningful and immediate progress towards disestablishing state imposed segregation."[61] Thus, both of these cases, which increased the involvement of the Supreme Court in the process of desegregation, also illustrated the slow speed of desegregation in Virginia. The cases reflected the inaction of the Virginia State Board of Education on desegregation, of which Powell was a member. The poor record of the state board of education, however, cannot be too closely associated with Powell. He was one member of a board which was not inclined to address the problem of integration. If Powell had been a champion of

[55] Quoted in John Jeffries, *op.cit.,* p. 160.
[56] *Ibid.,* p. 157.
[57] *Ibid.,* p. 157.
[58] 377 U.S. 218 (1964). See Introduction, p. 20.
[59] John Jeffries, *op.cit.,* p. 219.
[60] 391 U.S. 430 (1968).
[61] 391 U.S. 430, 432.

integration, his appointment would not have occurred. His record on integration was acceptable for further political advancement in a segregationist state. Thus, Powell was able to continue in the same vein as on the Richmond school board, in which he neither obstructed nor aided segregation. To be a firm supporter of desegregation would have rendered Powell ineffective.

Powell's educational expertise was only one factor, however, which influenced his opinion writing. His judicial philosophy provided the essence of the legal reasoning in *Rodriguez*. His wish to maintain the federal balance, frequently expressed during his previous involvement in public education, became an integral component of his judicial philosophy. His desire to prevent the continuing expansion of federal government in any way, coupled with his faith in the legislative process, formed the other central component of his judicial philosophy: judicial restraint. Powell had also developed a detailed, thorough approach to each case. In an assessment of Powell after six months on the Supreme Court, Gerald Gunther of Stanford Law School commented that Powell's performance thus far was "enormously encouraging. He already possesses the single most important trait: a Justice committed to a balancing approach. He has a capacity to identify and evaluate separately each analytically distinct ingredient of the contending interests."[62] The balancing approach of Powell was, therefore, the most noteworthy characteristic of his jurisprudence.

At the time of *Rodriguez* increasing focus was placed upon the manner in which the equal protection clause had recently been applied, and its implications for Constitutional law.[63] The two-tiered test, consisting of the strict and intermediate scrutiny, had become increasingly criticised as an "all or nothing approach."[64] The selection process of which test to apply provided the basis for the legal reasoning; as soon as the test was selected, the outcome was determined. Further, application of the

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[62] Gerald Gunther, "In Search of Judicial Quality on a Changing Court: The Case of Justice Powell", *Stanford Law Review*, Volume 24, (1971-72), p. 1035.

[63] See, for example, Gerald Gunther, "In Search of an Evolving Doctrine in a Changing Court: A Model for a Newer Equal Protection Clause" *Harvard Law Review*, Volume 86, (November 1972), No.1. pp. 1-35.

[64] Briefly, the first of these tests was the "strict scrutiny test". In this test, the Court determined whether a fundamental right had been affected or a suspect classification existed. If this was the case, a "compelling interest" must exist in order to justify the infringement. At this point, the Court had never found a compelling interest to exist. If the first of the criteria was met it would, in all probability, result in the overturning of the law. The second test, the "rational basis" was used if no suspect classification existed or fundamental right had been affected. If this was the case, a "rational basis" for the current law challenged must exist. If this test was used, the law challenged was sustained.

strict scrutiny test into new areas would extend the list of fundamental rights and suspect classifications further.[65] The Burger Court confronted the doctrinal and ideological consequences of the Warren Court's use of the equal protection clause: "the Warren Court left a legacy of anticipation as well as accomplishments. Its new equal protection clause is a dynamic concept, and has encouraged hopes of further steps towards egalitarianism."[66] The Burger Court, therefore, confronted the implications of the equal protection clause. The appellees wished for the Burger Court to extend the guarantees the Warren Court further. They were not seeking the enforcement of precedents, but new guarantees. This was an essential distinction and of central importance to the Court opinion. In the equal protection decisions rendered prior to *Rodriguez,* the Court had demonstrated its reluctance to extend the line of fundamental rights or suspect classifications further. In *Lindsey v. Normet,* for example, the Court ruled that housing was not a fundamental interest and in *Jefferson v. Hackney*, the Court determined that the distribution of welfare benefits were not subject to strict scrutiny.[67]

At the time of *Rodriguez,* the Court had expressed increased dissatisfaction with the two-tiered approach to equal protection claims. In 1970, Marshall and Harlan had expressed its inadequacy as a constitutional standard in their dissents in *Dandridge v. Williams*.[68] Harlan voiced his concerns clearly and succinctly: "I find no solid basis for the doctrine there expounded that certain statutory classifications will be held to deny equal protection unless justified by a "compelling" governmental interest, while others will pass muster if they meet traditional equal protection standards."[69] Marshall, however, was more detailed and forthright in his objection:

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[65] For details of the rights declared fundamental during the Warren Court, see Introduction, p. 28.
[66] Gerald Gunther, *loc.cit.,* p. 9.
[67] 495 U.S. 56 (1972) and 496 U.S. 535 (1972). These decisions also account for the appellees' desire to distinguish education from other governmental services.
[68] 397 U.S. 471 (1970). In this decision, the Court upheld the constitutionality of a $250 per month limitation upon Aid to Families with Dependent Children (AFDC) grant, regardless of actual need or family size. Harlan had already expressed his concern with the developing doctrine. In *Shapiro v. Thompson* (394 U.S. 618 1969), he commented with reference to fundamental rights: "I think this branch of the "compelling interest" doctrine particularly unfortunate and unnecessary. It is unfortunate because it creates an exception which threatens to swallow the standard equal protection rule. Virtually every state statute affects important rights....To extend the "compelling interest" rule to all cases in which such rights are affected would go far towards making this Court a "super-legislature". .....When a statute affects only matters not mentioned in the Federal Constitution and is not arbitary or irrational, I must reiterate that I know of nothing which entitles this Court to pick out particular human activities, characterise them as fundamental, and give them added protection under an unusually stringent equal protection test." 394 U.S. 618, p. 662.
[69] 397 U.S. 471 (1970), p. 490.

> This case simply defies easy characterization in terms of one or the other of these 'tests'. The cases relied upon by the Court, in which a 'mere rationality' test was actually used e.g. *Williamson v. Lee Optical of Oklahoma, Inc.*, are most accurately described as involving the application of equal protection reasoning to the regulation of business interests. The extremes to which the Court has gone in dreaming up rational bases for state regulation in that area may in many instances be ascribed to a healthy revulsion from the Court's earlier excesses in using the Constitution to protect interests that have more than enough power to protect themselves in the legislative halls. This case...is far removed from the area of business regulation....Why, then is the standard used in those cases used here?[70]

Marshall then suggested an alternative equal protection measure: "Equal protection analysis of this case is not appreciably advanced by the definition of a 'right', fundamental or otherwise. Rather, concentration must be placed upon the character of the classification in question and the relative importance to individuals in the class discriminated against."[71] This suggestion recommended a more medium standard in which a right was assessed in relation to its importance for those concerned. This became known as the "sliding scale" analysis or "means scrutiny", in which a middle level of analysis would be employed. According to Gunther: "The intensified means scrutiny would, in short, close the wide gap between the strict scrutiny of the new equal protection and the minimal scrutiny of the old by not abandoning the strict but by raising the level of minimal from virtual abdication to genuine judicial inquiry."[72] The "sliding scale analysis" would eliminate the "all or nothing" approach of the two-tier test. Each right or classification would be assessed independently, in the specific context of the case. This would also avoid the rigidity of the existing analysis; rights deemed "fundamental" would be done so in the context of a specific case, and the same reasoning would not necessarily apply in future circumstances. This approach had been employed in the sex discrimination case of *Reed v. Reed*[73] and would be employed two months after *Rodriguez* in *Frontiero v. Richardson.*[74] Thus, the Court decided to use the sliding scale analysis in a different case during the period in which *Rodriguez* was under consideration.

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[70] *Ibid.*, p. 521.
[71] *Ibid.*, p. 522.
[72] Gerald Gunther, *loc.cit.*, p. 24.
[73] 404 U.S. 71 (1971). The Court stated that sex classifications were "subject to scrutiny" and must "bear a fair and substantial relation to the object of legislation."
[74] 411 U.S. 677 (1973).

During his first year on the Court, Powell had demonstrated a preference for the sliding scale analysis. In April 1972, Powell wrote the majority opinion in *Weber v. Aetna Casualty & Surety Co.*[75] This case challenged a Louisiana workmen's compensation law which did not acknowledge illegitimate children to be in the class of "children" for the purpose of benefits. The Court determined the law to be violative of the equal protection clause as "the inferior classification of these dependent children bears no significant relationship to the purpose of the compensation statute."[76] In this opinion, which six justices, including Marshall, joined, Powell purposefully avoided reference to the two-tier test. Instead he posed two key questions: "What legitimate state interest does the classification promote? What fundamental personal rights might the classification endanger?"[77] These questions evaluated the classification in relation to its effect upon the individual. This approach was in accordance with the sliding scale analysis, as demonstrated by Powell's conclusionary remarks: "The equal protection clause does enable us to strike down discriminatory laws relating to status of birth where, as in this case, the classification is justified by no legitimate state interest, compelling or otherwise."[78] Thus, Powell's legal reasoning in *Weber* followed the sliding scale approach, in which the rights and classifications were assessed in the context of the issues at hand. Powell continued this approach in June 1972, in his majority opinion in *James v. Strange.*[79] The opinion was not a broad ruling, instead it kept the focus of the case to the specific statute at hand: "We turn therefore to the Kansas statute, aware that our reviewing function is a limited one. We do not inquire whether this statute is wise or desirable...Our task is not to weigh this statute's effectiveness, but its constitutionality."[80] The narrow focus of the opinion avoided the use of the two-tier analysis. The legal challenge was predicated upon the equal protection clause, but the opinion did not seek to employ the customary analysis. The combination of these opinions, therefore, demonstrated the existence of, and Powell's apparent preference for, a potential middle ground in equal protection analysis.

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[75] 406 U.S. 164 (1972). See previous chapter, p. 115.
[76] *Ibid.*, p. 165.
[77] *Ibid.*, p. 173.
[78] *Ibid.*, p. 176.
[79] 407 U.S. 128 (1972). This case challenged the Kansas statute which enabled the state to recover legal defence fees for indigent appellants. The Court affirmed the lower court decision which overturned the statute.
[80] *Ibid.*, p. 134.

Rodriguez, therefore, occurred at a moment when the development of the application of the equal protection clause was unsettled. Powell had to decide whether to follow the two-tiered analysis or continue in his apparent attempt to strike a middle ground. Before oral arguments had been heard, Powell sent a memo to Hammond stating they should attempt to find: "A sliding scale analysis in which we assess the relative importance of the right weighed against the relative suspectness of the classification. I believe this is the manner we will- and should- approach this case."[81] This approach would enable the Court to reaffirm the importance of education, but question the notion that wealth was a suspect classification: "wealth based discrimination is insufficient to warrant closer scrutiny."[82] On the day of oral arguments, however, Powell expressed reservations about using strict scrutiny:

> The sliding scale analysis is difficult to visualise as being a solution. There is, no doubt, a grey area between the two conventional standards. But would it not be as difficult to identify and define a position within this grey area as it had been for various members of the Court in the past to define – and distinguish rationally – the two standards now customarily invoked.[83]

In this statement, Powell observed that the sliding scale analysis would not solve the problems of the two-tier analysis. In addition, it may also create additional problems: "If we use the sliding scale, where does that leave us on future cases?"[84] Use of the sliding scale analysis in *Rodriguez* "leaves the judgement in the realm of subjectivity and does not necessarily lead to a legal conclusion- at least as I presently view it."[85] Thus, despite Powell's previous use of the sliding scale analysis, he did not deem it appropriate for *Rodriguez*. In a memo to Hammond on 28th October 1972, four days after the assignment of the opinion, Powell outlined his priorities for the opinion. In so doing, Powell showed that the two-tier analysis would be employed in *Rodriguez*: "it would be best, I believe, to decide the case in the manner which it has been presented to us- and decided in the district court."[86] However, Powell hoped to eliminate some of the confusion surrounding the two-tier analysis. He suggested that the present confusion derived in part, from the

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[81] Memo from Lewis Powell to Larry Hammond, 28th September 1972. C.F. 71-1332, P.P.
[82] *Ibid.*
[83] Memo from Lewis Powell to Larry Hammond, 12th October 1972. C.F. 71-1332, P.P.
[84] Memo from Justice Powell to Larry Hammond, 20th October 1972. C.F. 71-1332, P.P.
[85] *Ibid.*, p. 1.
[86] Memo from Justice Powell to Larry Hammond, 28th October 1972. C.F. 71-1332, P.P..

Court's failure to accurately define the criteria for the two-tier analysis. As a result, "a grey area" existed, which Powell would attempt to define in his *Rodriguez* opinion.

On the same day, Powell sent Hammond a second memo which provided guidance for the first draft, and was the first indication of the format of the opinion. The lengthy memo covered all aspects of the forthcoming opinion. Powell began by establishing the material to be used in the legal analysis: "It should only touch upon secondary sources- I do not wish to rely upon them. The meat of the opinion would turn on the discussion and interpretation of the Supreme Court cases. However, depending upon the nature of the dissent, we may have to resort to a sociological discussion."[87] According to Powell, the opinion must contain a clear explanation of its reasons for not finding education to be a fundamental right. This, he believed, was particularly important in light of the social and political significance of education:

> If a layman stopped me on the street and inquired whether I thought education is fundamental to our democracy, there could only be one answer. But if the same layman asked whether public housing and welfare are fundamental where indigents are concerned, I would unhesitatingly give the same answer. Thus, it is vital to show that the legal concept of fundamentality is different from the lay concept.[88]

This statement again revealed the conflicting emotions Powell had towards the contention that education was fundamental.[89] Powell's previous involvement in public education in Virginia added an important dimension to considerations of its fundamentality. On one hand, Powell, the citizen, acknowledged the social and political fundamentality of education. On the other, Powell, the justice, could not acknowledge its constitutional fundamentality. This distinction was also particular important in light of Powell's previous involvement in the Virginia Constitutional Convention of 1968. Powell, with Colgate Darden, comprised the sub-committee for education.[90] It submitted a recommendation in which "it believes the time is right for carrying the principle underlying the educational clause of the Constitution to its logical conclusion, and

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[87] *Ibid.*, p. 1.
[88] *Ibid.*, p. 3.
[89] See previous chapter, p. 171.
[90] Colgate Darden was "one of the most remarkable and engaging persons ever to hold public office in Virginia. He had been Governor from 1942-1946 and thereafter served twelve years as the third president of the University of Virginia." Jeffries, *op.cit.* p. 168.

recognising the explicitly the Constitutional right to education."[91] The recommendation was accepted, and Powell and Darden added education to the Virginia Bill of Rights. This provision stated: "Free government rests, as does all progress, upon the broadest possible diffusion of knowledge, and that the Commonwealth should avail itself of those talents which nature has sown so liberally among its people by assuring the opportunity for their fullest development by an effective system of education throughout the Commonwealth."[92] Thus, Powell had been instrumental in making education a fundamental right in Virginia. However, there was a significant, and for Powell essential, distinction between a federal and state constitutional guarantee. This distinction lay at the heart of federal ideology and was a distinction which Powell sought to preserve. It was also a distinction which needed a clear explanation, in case his thoughts on the Virginia Constitutional Convention appeared incongruous with those in *Rodriguez.*

It was essential, therefore, that the opinion contained a clear definition of a fundamental interest. Powell defined it as "one rooted in the Constitution itself. If we depart from this definition, there are no bench marks- only subjective judgements."[93] This, Powell believed, was the essence of the Court's judgement in *Rodriguez*. The Court did not wish to belittle the importance of education, but instead distinguish between its constitutional status and social importance.

His desire to produce a clear explanation regarding the fundamentality of education provided a second reason for his decision to use the two-tier analysis. The remainder of the memo established the basic structure of the opinion, and contained responses to specific questions raised by the case. For example, Powell recommended that "you analyze the district court decision and show its two major flaws: first, no convincing proof that money is quality education, and wealth classification is based upon property wealth, not individual."[94] Powell also wished to provide a clear rationale for the Court's judgement: "The second half of the opinion must focus upon the importance of local

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[91] Proposal from the Subcommittee of Education to General Constitutional Commission, 22nd June 1968. Box 001 99 1, P.P. The General Committee decided not to put explicit recognition of the right to education in the Bill of Rights. The final version of Article VIII, Section I read: "The General Assembly shall provide for a system of free public elementary and secondary schools for all children of school age throughout the Commonwealth, and shall seek to ensure that an educational program of high quality is established and continually maintained."

[92] As quoted in Jeffries, *op.cit.,* p. 178.

[93] *Ibid.,* p. 4.

[94] *Ibid.,* p. 4.

control. It must also be made clear that the system need not work perfectly to be rational."[95] Finally, Powell wanted the opinion to include a "disclaimer." In this section, the opinion should pre-empt some of the arguments against the decision, in particular the argument that "nine old friends of the children rejected the chance to assure public education to all children equally."[96] This memo provided the basic structure for the first draft and the subsequent opinion.

Hammond was given the task of writing the first rough draft of the opinion. The draft kept primarily to Powell's outline memo, circulated on 28th October, but was kept "deliberately brief."[97] The first rough draft did, however, provide the fundamental structure for the subsequent opinion. Hammond began by outlining the nature of the Texas system of school finance, its problems and attempted solutions. This was in accord with Powell's proposed outline, in which he said "in the first section we will candidly address the existing statistical disparities, but also emphasize the extent to which Texas has increased state participation in recent years."[98] The next section dealt with the weaknesses of the District Court decision which "does not reflect the novelty of the Constitutional question posed by the appellees' challenge," and lacked "sufficient justification for the decision reached."[99] This also reflected Powell's opinion that the decisions in both *Rodriguez* and *Serrano* were "shallow."[100] The third part of the opinion examined the finding that wealth was a suspect classification and acknowledged that "wealth classification challenged here is quite distinct from of the forms of wealth discrimination reviewed by this Court."[101] The fourth section considered the fundamentality of education. In accordance with Powell's wishes, Hammond first emphasised the importance of education, citing the *Brown* quotation.[102] He then established one of the key elements of the decision: "Education is not a right explicitly protected within the Constitution. We also do not find any basis for finding that it is implicitly so protected." Hammond asserted that "its social importance is not

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[95] *Ibid.*, p. 4.
[96] *Ibid.*, p. 4. The term "nine old friends of the children" was a reference to the Coons theory (see Chapter Two, p. 77). The book *Private Wealth and Public Education* was dedicated to "Nine old Friends of the Children."
[97] Memo from Larry Hammond to Lewis Powell, 10th November 1972. C.F. 71-1332, P.P.
[98] Memo from Lewis Powell to Larry Hammond, 28th October 1972. C.F. 71-1332, P.P.
[99] First Rough Draft, 10th November 1972. C.F. 71-1332, P.P.
[100] Memo from Lewis Powell to Larry Hammond, 31st August 1972. C.F. 71-1332, P.P.
[101] First Rough Draft, 10th November 1972. C.F. 71-1332, P.P.
[102] See Chapter Two, p. 57.

synonymous with its fundamentality." He then examined the question of relative deprivation of education: "There is no absolute deprival of education. The appellees do not assert that Texas deprive children in property-poor areas of education completely. Instead, their challenge is predicated upon a relative deprivation. All children in Texas are provided with the opportunity to attend school and thereby become part of the "educated citizenry.'"[103]

The final two sections of the brief dealt with the rationality of the present system and Powell's notion of a "disclaimer". Local control provided the rational basis for the flawed finance system. This principle ensured that communities were "free to tailor local programmes to local needs." As a result, "it also affords some opportunity for experimentation, innovation and a healthy competition for educational excellence."[104] Hammond did, however, acknowledge the appellees "say they do not wish to subvert local control, and also recognise its numerous merits." On the other hand, "the notion that 'some' inequality exists is insufficient reason to strike down a system which operates, albeit imperfectly, in 49 states."[105] The rough draft concluded with a "cautionary postscript", based upon Powell's notion of a "disclaimer." In this section, Hammond warned against the consequences of "unprecedented upheaval in public education." This warning was particularly relevant in light of the growing busing controversy that surrounded the Court, which was already proving disruptive to education. Upheaval in school finance was particularly dangerous in light of the "conflicting and contradictory material that surrounds this issue.....Although these practical considerations play no role in constitutional issues here, they serve to highlight the wisdom of the limitations of the Court's function."[106] Thus, the conflicting material, which of itself was insufficient justification for lack of Court action, underlined the reasons for judicial restraint. The final remarks served as a reminder that the Court was not, and did not wish to become, a super-legislature.

Powell responded to the first rough draft on 13th November. His main focus was upon the fundamentality of education, thereby illustrating his desire to ensure the Court's reasoning was clear:

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[103] First Rough Draft, p.5. C.F. 71-1332, P.P.
[104] *Ibid.*, p. 8.
[105] *Ibid.*, p. 9.
[106] *Ibid.*, p. 15.

> Your draft is already fairly strong on this point, but obviously needs to be tightened in areas. One question which puzzles me is whether there is a difference between a "fundamental right" and "fundamental interest". The terms seem to be used interchangeably. Yet, it is easier for me to think of education as being a fundamental interest than as being any sort of 'right' in a constitutional sense. Whatever the terminology may be, the compelling state interest test is applicable only with respect to a right rooted in or derived from the Constitution. It is here that our opinion should be strong and clear. I do not have the briefs with me, but I recall that Charlie Wright was fairly good on this.
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> In terms of pure analysis, it is difficult to see that education could possibly be a fundamental constitutional right. It is virtually conceded that the state has no constitutional obligation to provide free public education.[107]

His initial comments reflected the importance of wording and the necessity for attention to detail. It was essential that the opinion contained clear legal reasoning and included a lucid explanation of the Court's application of the equal protection clause, in particular its reasons for finding against the fundamentality of education. Powell also illustrated his high opinion of Wright's brief.

His next points dealt with the state tax structure, in which he indicated a desire for Hammond to expand upon certain areas:

> Your second point relates to the "delicate and significant state interest in gathering money within its borders". I consider this a point of major dimensions. In terms of finding a "rational basis" for the Texas system, you have properly emphasized two grounds: a) the legitimate state interest in local control b) the state interest in allocating sources of tax revenue as between the state itself and the localities. Both of these can be developed further in the opinion. I believe you can derive some help from Charlie Wright's brief as well as from the brief filed on behalf of 30 states.[108]

Powell attached a great deal of significance to local control of taxation and education. It was imperative, therefore, that the rationale for the finance system was explained fully in order to provide the justification for the Court's decision. He then agreed that more precedents should be included:

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[107] *Ibid.*, p. 1.
[108] *Ibid.*, p. 1.

> I also wonder whether there are not some decisions which emphasize the right of a state to determine the types of local taxes and the allocation of revenue sources between state and localities. The importance of this point- as we have discussed- goes in the final analysis to the heart of federalism. If the federal judiciary can order the states to conform to taxing systems prescribed by it, we will indeed have rewritten the Constitution.[109]

Powell's concern for preserving the federal balance lay at the heart of the Court's finding. This element of the opinion was in accordance with the political philosophy he demonstrated when on the Richmond and Virginia Boards of Education. He sought precedents that confirmed the Court's commitment to the financial, as well as political, features of federalism in order to adequately account for the Court's decision not to become further involved in the local provision of education. Powell wanted to ensure that the implications of the appellees' challenge were fully explained:

> The draft opinion has not addressed specifically the almost certain outcome of appellees' position: namely, that equal spending on education will inevitably require full state funding of education so that expenditures per pupil will be the same on a statewide basis. It is hard to see that anything short of this would be constitutional. Texas is now providing 50% of the school funds and appellees say this is not enough. Would 75% be enough? Would 95%? If the localities are still allowed to "ice the cake" there will be disparity regardless of the state's contribution. In short, full state funding would be inevitable, and this would surely destroy or severely weaken local government....If the "function of wealth" theory is sound as a matter of constitutional law with respect to education, why would it not apply to virtually all municipal services: health, welfare, safety, public works, roads and the like? [110]

Powell's concern for the balance of federalism up and down the American system of government remained the prominent feature of his comments. Full state funding of education was, to Powell, an unthinkable option as "whoever exclusively controls the purse strings, in the end will control all programs and policy."[111] He was unconvinced by the plaintiffs' attempt to emphasise the myriad of alternatives available to the states. Powell also showed that he was unpersuaded by appellees' argument that the

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[109] *Ibid.*, p. 3.
[110] *Ibid.*, p. 4.
[111] Memo from Lewis Powell to Larry Hammond 12th October 1972. C.F. 71-1332, P.P.

distinctiveness of education would preclude challenges to the level of equality in other governmental services. Powell was unable to accept this distinction, and thus his fears for the consequences of the decision on federalism remained unabated.

Powell's final remarks indicated his personal view of the case: "I suggest that you give this case your first priority attention. We will probably have no equally important case this term. And the way this opinion is written could have profound influence on constitutional doctrine."[112] In reflection of the importance Powell attributed to the case, he sent another memo to Hammond three days later on 15th December. The reason for the second memo derived from "the unusual importance of the case." As a result, "I have spent a considerable amount of time reviewing it and also have re-examined – to some extent- the briefs."[113] The second memo confirmed the paramount importance Powell attached to the case and his desire to obtain a strong familiarity with case material. It also established Powell's objectives for the style of the opinion: "I naturally want the opinion to reflect something of my own style, but I am far more concerned with substance and soundness. Also, matters of taste, relevancy and restraint are also important to me, but I value your judgement on these."[114]

The first draft was circulated on 21st December. Once this had occurred, the process of negotiation and compromise began. Between the circulation of the first draft and Powell's declaration on the 27th February that they "had a Court", Powell compromised and altered the opinion in accordance with the wishes of the other justices.[115] The circulation of the first draft also prompted the dissenting justices to write their dissenting opinions. On 27th December 1972, Powell met with Potter Stewart to discuss the opinion. It was in accord with Stewart's tentative conference vote that meant that he was the critical fifth vote.[116] Wealth as a suspect classification provided the primary focus of the meeting. Stewart expressed reservations regarding the two-tier test. It was a brief meeting, and Stewart's comments were of a general, rather than a particular, nature. Stewart did not dispute the exact phrasing of the opinion, but some of its general

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[112] Memo from Lewis Powell to Larry Hammond 13th November 1972. C.F. 71-1332, P.P.
[113] Memo from Lewis Powell to Larry Hammond, 15th December 1972. C.F. 71-1332, P.P.
[114] *Ibid.*, p. 1.
[115] Memo from Lewis Powell to Larry Hammond, 27th February 1973. C.F. 71-1332, P.P.
[116] See above, p. 168.

findings.[117] From this meeting, Powell gleaned an important indication of the changes that were needed in order to secure Stewart's vote. The next justice from whom Powell heard joined the opinion with no recommended changes. On 8th January 1973, William Rehnquist sent Powell a memo which stated simply, "Please join me."[118] The brevity of this statement gave no indication of Rehnquist's exact views on the opinion, but he clearly found it sufficiently acceptable to have his name joined as he requested. The next day, 9th January, Thurgood Marshall sent Powell a memo which declared: "In due time I will circulate a dissent in this case."[119] The circulation of the first opinion enabled Marshall to begin writing his dissenting opinion.

Powell, in the meantime, continued to amend the opinion.[120] The next list of recommended changes stemmed from his reconsideration of case material, in particular the Liebmann brief.[121] Powell wrote: "in re-examining the powerful brief filed on behalf of thirty state governments and political sub-divisions, I have noted several things that might be added to our opinion." One example was "the quotation from *Madden v. Kentucky*, which is a stronger one than the one we are currently using from *Wisconsin v. Penny*."[122] This quotation appeared on page two of the *Madden v. Kentucky* which appeared on page two of the *amicus* brief, appeared on page 41 of the final opinion.[123] Powell, therefore, used the *amici* briefs as a source of material. Although he had read them closely, he used

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[117] According to Powell's notes, Stewart commented that "it is not even an equal protection claim. Not only a *sui generis* claim, but does not create a valid equal protection controversy." Notes on meeting with Potter Stewart, 27th December 1972, C.F.71-1332, P.P.

[118] Rehnquist requested to be joined up to the opinion, which was not immediately identifiable by the original statement. This is Court shorthand for "Please join me to the opinion." Memo from William Rehnquist to Lewis Powell, 8th January 1973. C.F. 71-1332, P.P.

[119] Memo from Thurgood Marshall to Lewis Powell, 9th January 1973, Box 0071-1332, Marshall Papers. Marshall had been assigned the dissent on 25th October 1972. Douglas, as senior dissenting justice, had assigned the opinion. In a memo to William Brennan, Douglas stated, "I've talked with Thurgood about the dissents in the October list. If you agree, Thurgood would like to try his hand as *Rodriguez*....". Memo from William Douglas to William Brennan, 25th October 1972, Case File 71-1332, D.P.

[120] On 25th January, Powell illustrated his overall satisfaction with the opinion: "I have re-read *Rodriguez* and find virtually nothing I want to change. It is an opinion I am happy to stand on." Memo from Lewis Powell to Larry Hammond, 25th January 1973. C.F. 71-1332, P.P.

[121] See Chapter Three, pp. 123-124.

[122] Memo from Lewis Powell to Larry Hammond, 25th January 1973, C.F. 71-1332, P.P.

[123] This quotation was "the broad discretion as to classification possessed by a legislature in the field of taxation has long been recognized....The passage of time has only served to underscore the wisdom of that recognition in the large area of discretion which is needed by a legislature in formulating sound tax policies....It has...been pointed out that in taxation, even more than in other fields, legislatures possess the greatest freedom in classification. Since the members of a legislature necessarily enjoy a familiarity with local conditions which this Court cannot have, the presumption of constitutionality can be overcome only by the most explicit demonstration that a classification is hostile and oppressive discrimination against particular persons and classes." *Madden v. Kentucky* 309 U.S. 83, 87-88 (1940).

their cited sources, rather than their analysis, in the final opinion. Although their actual influence cannot be accurately gauged, Powell's limited use of the *amici* briefs supported Wright's previously expressed opinion of the Liebmann *amicus* brief and the role of *amici* briefs in general.[124]

The contrasting views of the justices and the subsequent difficulties in achieving agreement were illustrated by the separate opinions filed in the case. Justice White, as suggested by his comments during conference, voted for an affirmance, but with a narrowing of the district court opinion. This view resulted in White writing a separate dissent, the first draft of which was circulated on 30th January. White agreed with the appellees' contention that the current structure of the school finance system did not provide poorer districts with sufficient means to raise the level of financial expenditure, even if they so desired. This resulted in the poorer districts being "locked in" to low levels of expenditure: "The difficulty with the Texas system, however, is that it provides a meaningful option to Alamo Heights...but almost none to Edgewood."[125] White had demonstrated this same concern during oral arguments, in which he, along with Rehnquist, questioned Gochman on the difference between the current inequities and those under the proposed system of District Power Equalising. Although White was concerned about the same problem existing under a new finance system, its current structural inequities were, in his view, sufficient reason for the narrow affirmance. In White's view, the shortcomings of District Power Equalizing did not alter the unconstitutionality of the existing system. White agreed with the proposition that "local control and local decision making play an important part in our democratic system of government." He also stressed that "this does not mean that the State must guarantee each district an equal per-pupil revenue from the financing system." He simply sought "a financing scheme which provides a rational basis for the maximization of local control."[126] Hammond thought the opinion unpersuasive: "The dissent is thin, as you suggest. His reasoning that there is no rational basis is unpersuasive on traditional e.p. analysis under the rational basis test. It also provides little real guidance to what system would be constitutional except to indicate that any such system should 'extend a meaningful option to all local districts to

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[124] See Chapter Three, p. 124.
[125] Byron White, First draft of dissent, *San Antonio v. Rodriguez,* 71-1332, at p. 8. C.F. 71-1332, P.P.
[126] *Ibid.,* p. 9.

increase their per pupil expenditures.' [127] Thus, White's dissent did not prompt Hammond and Powell to make any substantial changes and did not shape the opinion to any significant degree.

The next response Powell received was the longest and most detailed reply from any justice. On 8th February, Stewart sent Powell a memo in which he outlined his primary objections to the opinion. He began by complimenting Powell: "I think you have done a magnificent job with this extremely important and factually complex case. I agree with the result you reach."[128] Stewart then proceeded to state his objections: "I have decided I cannot subscribe to an opinion that accepts the "doctrine" that there are two separate alternative tests under the Equal Protection Clause, and that the necessary first step in any equal protection case is to decide which test to apply.[129] He did not find sufficient merit in the application of the two-tier analysis and believed it to be without ample foundation in Constitutional law. He felt unable to join Powell's opinion on the basis of the legal reasoning employed.[130]

Powell responded to Stewart's memo on 14th February, the day after the second draft went into circulation. At the outset Powell asserted: "unless I misread the essence of your views, I see little of substance that separates us."[131] The primary difference, according to Powell, was "in the area of Equal Protection analysis which has come to be known as the "fundamental" rights doctrine."[132] Powell sought to assure Stewart that the fundamental rights category could be applied strictly, without subjectivity: "I do not regard as 'fundamental' any rights that are not 'explicitly or implicitly' guaranteed by the Constitution, I doubt that you and I would arrive at different results in very many cases."[133] In light of Stewart's concerns, Powell confined the legal analysis to addressing

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[127] Hammond pointed out three particular areas of weakness: "1. He equates local control with local fiscal autonomy, 2. He relies on the state law which imposes a $1.50 barrier against excess spending. That law was not before the court below. 3. He suggests that we have held that there is no ground for invocation of the e.p.cl. here." Memo from Larry Hammond to Lewis Powell, 2nd February 1973. C.F. 71-1332, P.P.
[128] Memo from Potter Stewart to Lewis Powell, 8th February 1973. C.F. 71-1332, P.P.
[129] *Ibid.*, p. 1. Stewart understood, however, Powell's reasons for following this analysis: "I do not for a moment criticize you for embracing this analysis. It is the analysis adopted by the district court, the analysis briefed and argued before us, and the analysis finds support in many of our recent cases." Memo from Potter Stewart to Lewis Powell, 8th February 1973, C.F. 71-1332, P.P.
[130] On the same day as Stewart's memo, Powell received a memo from Rehnquist which stated: "I share much of the concern expressed by Potter." Memo from William Rehnquist to Lewis Powell, 8th February 1973. C.F.71-1332, P.P.
[131] Memo from Lewis Powell to Potter Stewart, 14th February 1973. C.F. 71-1332, P.P.
[132] *Ibid.*, p. 1.
[133] *Ibid.*, p. 2.

the fundamentality of education, the suspect nature of wealth classifications, and the presence of a rational interest. In a further attempt to secure Stewart, Powell also included a quotation from his concurrence in *Shapiro v. Thompson.*[134] In the original draft, Powell had only included a quotation from Harlan in *Shapiro.* However, the inclusion of the quotation illustrated Powell's desire to ensure *Rodriguez* was consistent with Stewart's judicial philosophy.[135] His response was designed to assuage Stewart's concern in order to win his support for his opinion, which proved successful. On 26th February, Stewart declared: "my suggestions, the modifications in the draft recirculated on 23rd February are such that I am able to join your opinion and gladly do so."[136]

The second draft then in circulation prompted responses from Harry Blackmun and Warren Burger. Blackmun expressed his high regard of the opinion: "Your careful and detailed opinion reveals that you have devoted a vast amount of work and thought to this case. I am pleased to join your opinion, for I feel that it reaches a sound result and is consistent with past decisions of the Court."[137] Burger's response was not as straightforward. Although he congratulated Powell on a "well-written and thoughtful opinion" he also included a list of desired changes. Burger's recommended changes dealt mostly with wording of the opinion, rather than substantive points. He asked for the statement to be added: "It has simply never been within the constitutional prerogative of this Court to nullify statewide schemes for financing public services merely because of the burdens and benefits thereof fall unevenly depending upon the relative wealth of political subdivisions in which citizens live."[138] Burger wished to emphasise the arbitrary nature of the claim, and to illustrate the limited function of the Court. All of Burger's recommended changes appeared in the final opinion. The decision by Burger, Blackmun and Stewart to join the opinion resulted in Burger informally telling Powell on 27th February that "this gives us a court."[139] Powell's opinion had the agreement of four other justices, which enabled the majority to appear united on the finding of the Court. It did

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[134] 394 U.S. 618 (1969).
[135] The quotation was: "The Court today does not pick out particular human activities, characterize them as 'fundamental' and give them added protection.....To the contrary, the Court simply recognizes, as it must, an established constitutional right, and gives to that right no less protection than the Constitution itself demands." *Shapiro v. Thompson,* 394 U.S. 655, p. 642.
[136] Memo from Potter Stewart to Lewis Powell, 26th February 1973. C.F. 71-1332, P.P.
[137] Memo from Harry Blackmun to Lewis Powell, 13th February 1973. C.F. 71-1332, P.P.
[138] This statement appeared on page 54 of the final opinion.
[139] Note from Warren Burger to Lewis Powell, 27th February 1973. C.F.71-1332, P.P. This note was written despite Burger not having yet formally joined the opinion.

not, however, prevent Stewart from filing a separate concurrence. However, the changes made ensured that no other justices joined this concurrence.

The writing of the dissent occurred simultaneously with the negotiation of the majority opinion. Marshall circulated the first draft of his dissent on 14th February, the same day of Powell's response to Stewart. Marshall's dissent was long, nearly six pages longer than Powell's opinion.[140] In his dissent, Marshall agreed with all elements of the appellees' claims, and thereby responded to certain points of the majority opinion. He began by disputing the notion that no substantial discrimination against individuals existed. The children in property poor districts constituted the class at the heart of the case, and with this in mind, substantial discrimination existed "against individuals, not just districts."[141] Marshall also accepted the appellees' contention that education was a fundamental interest, accepting the contention that previous Court opinions established sufficient precedent. However, the legal reasoning employed by Marshall distinguished his dissent from the brief and the lower court decision. Instead of relying upon the "two-tiered analysis", Marshall relied upon the "sliding scale" analysis to arrive at his conclusion:

> The Court apparently seeks to establish today that equal protection cases fall into one of two neat categories which dictate the appropriate standard of review. But this Court's decisions in the field of equal protection defy such easy categorization.....As the nexus between the specific constitutional guaranteed rights and the nonconstitutional interest draws closer, the nonconstitutional interest becomes more fundamental and the degree of judicial scrutiny applied when the interest is infringed on in a discriminatory basis must grow accordingly.[142]

According to Marshall, the constitutionality of the finance system should be assessed in accordance with the importance of the rights under consideration. The greater importance of a right towards the individual, the stricter the examination. Thus, in Marshall's view, education was of paramount importance to the individual, and the school finance system should, as a result, be strictly examined. Although he acknowledged that "no previous

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[140] Powell's opinion was 57 pages in length, whereas Marshall's dissent was 63 pages (both figures include footnotes).
[141] First draft of Justice Marshall's dissent, p. 23. C.F. 71-1332, P.P.
[142] *Ibid.*, p. 30.

decision has deemed the presence of just a wealth classification to be sufficient basis to call forth 'rigorous judicial scrutiny'", when combined with the fundamentality of education and discrimination against children, "it calls for careful judicial scrutiny".[143] As a result of the sliding scale analysis, Marshall found "the wide disparities in taxable district property wealth inherent in the local property tax element of the Texas financing scheme render that scheme violative of the Equal Protection Clause."[144]

Powell's reaction to Marshall's dissent was a combination of amazement, concern and indignation. When reading Marshall's dissent, Powell made comments and observations on the draft. Marshall's justification for employing the sliding scale analysis prompted a reaction of concern. He stated:

> A principled reading of what this Court has done reveals that it has applied a spectrum of standards in reviewing discrimination allegedly violative of the Equal Protection Clause. This spectrum clearly comprehends variations in the degree of each case with which the Court will scrutinize particular classifications, depending, I believe on the constitutional and societal importance of the interest adversely affected and the recognised invidiousness of the basis upon which the particular classifications is drawn.[145]

Alongside this statement, Powell had simply written, and underlined, "Wow!"[146] He then noted that this statement suggested the equal protection clause was an "open-end review", with a subjective judgement system based upon "societal importance and recognized invidiousness" rather than constitutionality. Marshall's point was in direct conflict with Powell's and Stewart's concern regarding the Court "picking out human interests and characterizing them as fundamental."[147] Marshall's approach was precisely opposite to Powell and, to him, symbolised the inherent dangers of deciding fundamentality in accordance with personal value judgements. For Powell and Stewart, such subjective assessments had no place in constitutional law.

Marshall's discussion of local control of education precipitated an immediate response from Powell. Marshall stated: "local control is offered primarily as an excuse

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[143] *Ibid.*, pp. 51-52.
[144] *Ibid.*, p. 62.
[145] *Ibid.*, p. 29.
[146] *Ibid.*, p. 29.
[147] See above, p. 137.

rather than as a justification for interdistrict inequality."[148] He then suggested that local control was simply a façade behind which discrimination could be perpetuated. Powell's immediate response, after placing an exclamation mark beside the statement, was to list some functions of a local school board: "hire and promote teachers, attendance zones, location of schools, extra curricular activities, elective council, submit books for approval."[149] All parts of the dissent to which Powell responded, however, remained its final version.

Marshall's argument, therefore, contained most elements that Powell opposed and sought to avoid. Of particular concern to Powell was Marshall's dismissive attitude towards local school boards:

> I know, from personal experience, that the local school boards in Virginia have more operational responsibility than the State Board of Education. In Virginia, the local board- among other things- employs, promotes, and fires all personnel, subject to general teacher qualifications prescribed by the State Board; the local board assigns teachers and supervisory personnel to the various schools, just as it assigns pupils....community relations are, of course, in the hands of the local board (we would rarely have a school board meeting without having various groups of parents, PTAs and the like appear before us).[150]

Powell did not, therefore, react to Marshall's legal analysis. The memo to Hammond contained no mention of Marshall's legal reasoning. Instead, Powell reacted most strongly to what he considered to be Marshall's misrepresentation of the role of the local school board. However, Marshall did not deny the role of local school boards, merely that the state boards of education determined the scope of their action. The state board set vital limits on the local school boards and could compel or restrict action. His reaction reflected his personal experience. The only recommendation to Hammond was to provide more supporting evidence for the importance of the local school board: "If we add a footnote on this point- as we may very well do, take a look at *Kramer v. Union School District*, which emphasizes the authority of the local school boards under New York law."[151] As a result of these recommendations, Hammond added footnote 108 to the opinion, which

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[148] First Draft of Marshall's dissent., p. 56.
[149] *Ibid.*, p. 56.
[150] Memo from Lewis Powell to Larry Hammond, 20th February 1973. C.F.71-1332, P.P.
[151] *Ibid.*, p. 2.

established both the different functions of the local school board, and the court precedents, confirming this importance.[152] This change was, therefore, largely a result of Powell's first hand experience of local school boards.[153]

Only one justice, William Douglas, joined Marshall's dissent.[154] William Brennan wrote a separate dissent, the first draft of which was circulated on 27th February. Douglas and Brennan also joined White's dissent. Brennan's dissent was predicated on one basic point, in which he objected to Powell's definition of a fundamental right: "As my Brother Marshall convincingly demonstrates, our prior cases stand for the proposition that 'fundamentality' is, in large measure, a function of the right's importance of the effectuation of those rights which are in fact constitutionally guaranteed." Brennan also used the "sliding scale analysis" in his dissent. As a result of this reasoning: "there can be no doubt that education is inextricably linked to the right to participate in the electoral process and the rights of free speech and association guaranteed by the First Amendment." In light of this important relationship, Brennan concluded that the school financing scheme was constitutionally invalid.

On the morning of Wednesday 21st March, Powell delivered the opinion of the Court. The first section, the description of the structure of the Texas school finance system, recognised its problems, but also acknowledged the recent improvements:

> Although the 1967-1968 school year figures provide the only complete statistical breakdown for each category of aid, more recent partial statistics indicate that the previously noted trend of increasing state aid has been significant. For the 1970-1971 school year, the Foundation School Program allotment for Edgewood was $356 per pupil, a 62% increase over the 1967-1968 school year. Indeed, state aid alone in 1970-1971 equalled Edgewood's entire 1967-1968 school budget from local, state and federal sources.[155]

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[152] 411 U.S. 1, p.52, footnote 108: "The 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....the day to day authority over the management and control of all public and elementary and secondary schools is squarely placed upon the local school boards.". Hammond then proceeded to state the different responsibilities of the local school board.

[153] Marshall's dissent prompted Stewart into filing a separate concurrence. In his concurrence, Stewart confirmed his objection to the application of the equal protection analysis. Marshall's use of the equal protection clause was unacceptable for Stewart.

[154] He joined on 4th February 1973, before the first draft had been circulated, and then restated this position on 15th March 1973.

[155] 411 U.S. 1, p. 14.

Despite the numerous faults of the system, increases in expenditure could occur without the interference of the federal courts. Although the increases were only marginal, and the difference in expenditure between rich and poor districts remained intact, the system did allow for growth. After ascertaining the structure of the finance system, Powell then turned to the legal analysis: "We must decide, first, whether the Texas system...operates to the disadvantage of some suspect class or impinges upon a right explicitly or implicitly protected by the Constitution, thereby requiring strict judicial scrutiny. If not, the Texas scheme must still be examined to determine whether it rationally furthers some legitimate, articulated state purpose." This provided the framework for the opinion, and enabled Powell to respond to each element of the appellees' claims.

In the first section of the legal analysis, the plurality responded to appellees' claim that wealth was a suspect classification. It first considered the Court precedents upon which the appellees' claims relied. Powell distinguished these cases from the case at bar by focusing upon the distinction between relative and absolute deprivation of a right:

> In *Douglas v. California* the Court dealt only with appellants who could not pay for counsel from their own resources and who had no other way of gaining representation. *Douglas* provided no relief for those on whom the burdens of paying for a criminal defense are, relatively speaking, great but not insurmountable. Nor does it deal with relative differences in the quality of counsel acquired by the less wealthy.[156]

Appellees' challenge in *Rodriguez* was significantly different to the precedents upon which its claim relied. The difference between relative and absolute deprivation was, to Powell, insurmountable. The Texas school finance system did not deprive poor children of education entirely. Indeed, as Powell observed, there was not even an immediately identifiable class present: "there is no basis on the record in this case for assuming that the poorest people....live in the poorest districts."[157] Given this discrepancy, it was not possible for the plurality to conclude unequivocally that children living in property poor areas and poor children were mutually exclusive. Thus, the "poor" in the case were not an identifiable class of people, but were instead those people residing in property poor areas. In light of this ambiguity, the application of Court precedents to the case at bar was

[156] 372 U.S. 352 (1963), *ibid.*, p. 21.
[157] *Ibid.*, p. 23.

unacceptable. The difference between relative and absolute deprivation confirmed this: "The argument here is not that the children in districts having relatively low assessable property values are receiving no public education, rather, it is that they are receiving a poorer quality education than that available to children in districts having more assessable wealth."[158] This was an area into which the Court was unwilling and unable to venture.

Powell then proceeded to refute the contention that comparative discrimination existed within the system. The appellees contended, and the district court found, that the poorer the wealth of the family, the less educational expenditure it received, and vice versa. However, Powell dismissed this claim due to the unreliability of the evidence presented: "Professor Berke's affidavit is based upon 10% of the school districts in Texas....for the remainder of the sample, almost 90% of the school districts, the correlation is inverted." As a result of these inconclusive findings: "even if the conceptual questions were answered favourably to appellees, no factual basis exists upon which to found a claim of comparative wealth discrimination."[159] Thus, the majority found neither the claims of wealth discrimination, nor the factual basis persuasive. Powell summarised that:

> It is clear that appellees' suit asks this Court to extend its most exacting scrutiny to review a system that allegedly discriminates against a large, diverse and amorphous class, unified only by the common factor of residence in districts that happen to have less taxable wealth than other districts. The system of alleged discrimination and the class it defines have none of the traditional indicia of suspectness: the class is not saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process.[160]

As a result of this finding, the plurality determined that the term "poor" did not warrant constitutional protection, and thereby prevented further claims predicated upon the effects of relative levels of wealth. This effectively concluded the attempt to extend the fourteenth amendment guarantees to socio-economic inequalities in education.

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[158] *Ibid.*, p. 25.
[159] *Ibid.*, p. 27.
[160] *Ibid.*, p. 28.

In the next section, Powell addressed appellees' claims that education was a fundamental interest. As noted above, Powell emphasised the profound importance of education to the individual: "Nothing this Court holds today in anyway detracts from our historic dedication to public education." However, Powell then proceeded to analyse the fundamentality of education through a comparison with other social and economic rights: "the undisputed importance of education will not alone cause this Court to depart from the usual standard for reviewing a state's social and economic legislation."[161] The plurality, therefore, did not accept appellees' contention that education was distinct from other social and economic legislation for the purposes of constitutional analysis. It accepted the connection between education and effective exercise of First Amendment rights, but did not accept that the notion that the constitution guaranteed each citizen the right to achieve a quality level of education: "we have never presumed to possess either the ability or the authority to guarantee to the citizenry the most effective speech or the most informed electoral choice."[162] The Court found that Constitutional guarantees did not include ensuring the desired educational level to each citizen in order to facilitate reasoned political choices. Despite the worthiness of these objectives, it was not a matter for judicial concern.[163] Instead, for the purposes of constitutional analysis, the right to education was comparable with other governmental services:

> How, for instance, is education to be distinguished from the significant personal interests in the basics of decent food and shelter? Empirical examination might well buttress an assumption that the ill-fed, ill-clothed and ill-housed are among the most ineffective participants in the political process, and that they would derive the least enjoyment from the benefits of the First Amendments.[164]

Following the dismissal of appellees' legal analysis, and the consequential finding that the case was not subject to strict scrutiny, Powell then considered the rational basis for the finance system. Localism was the key component of the finance system. Powell upheld the constitutionality of the state's decision to use localism as the basis of the

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[161] *Ibid.*, p. 35.
[162] *Ibid.*, p. 37.
[163] Powell stated: "These are indeed goals to be pursued by a people whose thoughts and beliefs are freed from governmental interference. But they are not values to be pursued by judicial intrusion into otherwise legitimate state activities." *Ibid.*, p. 37.
[164] *Ibid.*, p. 38.

educational structure. The implications of the appellees' challenge on the federal structure were, in Powell's view, enormous: "We are asked to condemn the State's judgement in conferring on political subdivisions the power to tax local property to supply revenues for local interests."[165] The Court upheld the state's judgement to use local revenues for local education. It lacked both the expertise and knowledge of the local area to "make wise decisions with respect to the raising and distribution of local revenues."[166] Thus, local decisions relating to education were best left to the local communities. Powell then continued to underline the potential importance of *Rodriguez* to federalism: "It would be difficult to imagine a case having a greater impact on our federal system than the one now before us, in which we are urged to abrogate systems of financing public education presently in existence in virtually every state."[167] Local control of education was an important and appropriate aspect of the federal system; the Court upheld the right of the state to chose localism as the basis for its educational system. He also acknowledged the recent trend towards centralisation, and thereby reflected the broader political environment: "In an era that has witnessed a consistent trend toward centralization of the functions of government, local sharing of responsibility for public education has survived."[168]

Powell did, however, acknowledge that appellees "do not question the propriety of local control of education." Powell never specifically addressed the concept of "Proposition One" and was therefore aware of the peripheral importance of the Coons theory to the plaintiffs' case. He did not specifically consider the appellees' emphasis upon the preservation of localism and the variety of remedial solutions available to the legislature. Despite the awareness of the limitations of the appellees' claims, Powell continued to outline the advantages of localism in education, which suggested that the appellees did indeed challenge it, even if this was not their intention. He commented "the people of Texas may believe that along with increased control of the purse strings at the state level will go increased control over local policies." He believed, therefore, that, despite the appellees' arguments to the contrary, an affirmative ruling in *Rodriguez* would inevitably result in greater state control of education.

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[165] *Ibid.*, p. 42.
[166] *Ibid.*, p. 42.
[167] *Ibid.*, p. 43.
[168] *Ibid.*, p. 51.

Powell then noted the recent efforts by Texas to improve the finance system. This aspect of the opinion sought to illustrate that judicial interference in this matter was unnecessary: the democratic political process was working to ensure improvements were made.[169] Powell's concluding remarks emphasised the Court's position of judicial restraint, yet also urged the legislatures to act upon this pressing issue:

> The consideration and initiation of fundamental reforms with respect to state taxation and education are matters reserved for the legislative process of the various States....We hardly need add that this Court's action today is not to be viewed as placing its judicial imprimatur on the status quo. The need is apparent for reform in tax systems which may well have relied too long and too heavily on the local property tax. And certainly innovative thinking as to public education, its methods, and its funding is necessary to assure both a higher level of equality and greater uniformity of opportunity.....These matters merit the continued attention of the scholars who already have contributed much by their challenges. But the ultimate solutions must come from the lawmakers and the democratic pressures of those who elect them.[170]

Neither the appellants nor the Court sought to defend the inequality inherent within the system, with the Court stating that the decision "is not be viewed as placing its judicial imprimatur on the status quo." This comment, however, was somewhat disingenuous as Powell would have been aware of the way in which legislatures would interpret the decision. However, the appellants argued, and the Court agreed, that it was not within the province of the Court or within the wording of the Constitution to improve the system. Thus, it acknowledged the need for reform, but refused to become directly involved. The rejection of the appellees' challenge and district court decision was premised upon the legal analysis, rather than the ideological validity of their claims. Powell wanted the opinion to reflect the conflict between constitutional guarantees and considerations of social desirability rather than appear as a victory for the affluent or the status quo. His opinion reflected Powell's primary concerns: the preservation of state control in

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[169] "Texas has acknowledged its shortcomings and has persistently endeavoured – not without some success- to ameliorate the differences in levels of expenditures without sacrificing the benefits of local participation. The Texas plan is not the result of hurried, ill-conceived legislation. It certainly is not the product of purposeful discrimination against any group or class. On the contrary, it is rooted in decades of experience in Texas and elsewhere, and in major part is the product of responsible studies by qualified people." *Ibid.*, p. 56.

[170] *Ibid.*, p. 59.

education and the distinction between legislative and judicial matters. He supported school finance reform, but it was not in the remit of the Court to enact this reform.

The immediate reaction to the opinion from those around Powell was extremely positive. After the opinion had been delivered, Blackmun passed Powell a note which stated "a fine opinion and a correct result."[171] Hammond echoed this opinion in a note he wrote to Powell later the same day. Hammond stated:

> For me, this was an especially hard case because what I regard as sound Constitutional doctrine occasions a result that will not be happily received by those who are presently disadvantaged by finance systems. The proof of this vitality and propriety of this decision will be found, I think, in the course of future equal protection litigation. If the justices of this Court stand behind the two-tier level doctrine of this case, our case can be defended fairly as respect for "laws". If the Court departs from this approach in the near future, this case will look like a result-orientated political judgment by 5 men. I have great confidence in the future of course of your judgment in this area, but less in the course others may pursue.[172]

Hammond identified the different ways in which the opinion could potentially be received. There were two main areas of reaction, first among the public and the press, and second among the legal community. The public domain considered the decision from an entirely different perspective than that of the legal community. The legal community focused upon its legal analysis and the implications of the opinion on constitutional law, whereas the public reaction considered the decision more from an ideological or political perspective.

The reaction of the appellees and defence typified the two spectrums of opinion that existed within the country at large. Arthur Gochman was, predictably, desolated. He described his feelings as being comparable to "the guy who lost *Plessy*."[173] Demetrio Rodriguez expressed his reaction as one of "surprise. I was sure the Supremes (my nickname for the Supreme Court justices) were fair and would vote in favour of the case, because they could see there were discrepancies in the school financing in Texas."[174] He

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[171] Note from Harry Blackmun to Lewis Powell, 21st March 1973. C.F.71-1332, P.P.
[172] Letter from Larry Hammond to Lewis Powell, 21st March 1973. C.F. 71-1332, P.P.
[173] *Plessy v. Ferguson* 163 U.S. 537 (1896). This case confirmed the constitutionality of segregation, establishing the principle of all facilities must be "separate but equal."
[174] Peter Irons, *The Courage of their Convictions,* (New York, 1988), p. 300.

later commented, "I used to think that that the Supreme Court was there for people like me. But this case showed me they weren't. This was another example of the rich people coming out on top and the poor people losing again."[175] This response from Rodriguez confirmed the point Hammond made in his letter; the decision was not well received by those presently disadvantaged. According to Rodriguez, the decision reflected a broader rejection by the Court to assist the poor and minorities. Wright's opinion was predictably one of pleasure: "Any win is a good win, but a win in this case, given its implications, is especially welcome."[176] He also thought highly of the opinion: "I thought it was a very good opinion. There were some who said that Justice Powell used my brief in his opinion, which is a nice compliment but not true."[177] One month later, Wright expressed his high regard for the opinion to Powell. In a letter regarding a separate matter, Wright concluded by saying: "...it is no longer inappropriate for me to say what a splendid opinion I thought you wrote in *Rodriguez*. Clearly I am not without bias in the matter, but I thought the opinion was exceptionally clear and forceful statement for precisely the right reasons for the decision the Court reached."[178] Thus, in Wright's personal and professional view, the opinion was a sound statement of constitutional law and was a fitting response to the appellees' claims.

Legal commentators, however, expressed mixed views toward the decision. Most case comments focused upon Powell's application of the two-tiered analysis. Laurence H. Tribe, an eminent Harvard law professor, commented in the *Harvard Law Review*: "*San Antonio* was the antithesis to *Roe v. Wade*."[179] In the same term, the Court had ruled that "the right of procreation was constitutionally guaranteed but education was not."[180] Tribe argued that "both education and procreation are surely fundamental" and suggested that Powell should have applied a more flexible constitutional standard, which "could allow strictness of review to vary with degree of relative deprivation."[181] Although Tribe acknowledged that the Court should not "assess a fundamental right by its social

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[175] Interview with author, 12th September 1997. Rodriguez also described how he saw Gochman cry after the decision: "We even saw our lawyer, Arthur, cry about [the case]. I guess it showed how much he cared. He told us that maybe, in ten years, the case would be reversed." Irons, *op.cit.*, p. 300.
[176] "Wright was Right", *Austin Statesman*, 26th March 1973.
[177] Interview with author, 15th September 1997.
[178] Letter from Charles Alan Wright to Lewis Powell, 25th April 1973. Wright signed the letter "Charlie", thus indicating a degree of familiarity with Powell. C.F.71-1332, P.P.
[179] Lawrence H. Tribe, "Forward: Supreme Court 1973 Term", *Harvard Law Review*, Volume 87, p. 18.
[180] *Ibid.*, p. 21.
[181] *Ibid.*, p. 22.

importance", it should, however, recognise that there is "some distinction. Then, the severity of the review should vary with the importance of the interest affected."[182] This was a view which other legal commentators shared: "The Court failed to come to grips with the possibility of an intermediate standard of Equal Protection.....The two-tier analysis enables it to make explicit policy choices under the 'rationality and strict scrutiny' standards."[183] Thus, Powell's continued use of the two-tiered analysis precipitated criticisms from those in favour of developing a less polarised standard of analysis. The nature of the opinion, with a specific definition of fundamental rights, ensured that future litigation could no longer seek to extend the list further and seek new fundamental rights. The decision closed a particular chapter of constitutional law, and future litigants had to apply a different legal analysis to further their claims.[184] Powell rejected the sliding scale analysis, and in so doing, confirmed the two-tiered analysis as the test by which equal protection claims could be judged.[185]

The letters Powell received from the public encompassed both views. The majority of letters, however, expressed disapproval at the opinion. All of the letters against the decision contained a high level of emotion and sense of injustice, yet their reasoning differed greatly. In the view of one correspondent: "the *Rodriguez* decision is exceeded in meanness of spirit only by the *Dred Scott* decision....A bright child residing in a poor school district will view you in the same light as bright Blacks viewed Roger Taney."[186] He concluded by stating "I'm sorry now that I felt relief and reassurance when your name quieted the furor over those of Haynesworth and Carswell. Had any of them written the property tax opinion, it may not have been so polished and meticulously erudite, but it would have been the same. I had expected that you were a larger man than

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[182] *Ibid.*, p. 22.
[183] Case note; *Michigan Law Review,* Volume 72, (1973-1974), p. 536.
[184] In addition to the specific case comments, *Rodriguez* also prompted a number of articles based upon both its ideological implications and its legal analysis. For those in favour of the decision, see Paul Carrington, "Financing the American Dream: Equality and School Taxes", *Columbia Law Review*, Volume 73, 1973, pp. 1227-1260, Howard Glickstein, "Inequality in School Financing: The Role of Law", *Stanford Law Review,* Volume 25, 1972-1973, pp. 335-402. For those against the decision, see David A. Richards, "Equal Opportunity and School Financing: Toward a Moral Theory of Constitutional Adjudication", *University of Chicago Law Review*, Volume 41, 1973-1974, pp. 855-947, and Mark Yudof, "Equal Educational Opportunity and the Courts", *Texas Law Review*, March 1973, pp. 411-504.
[185] For further elaboration of this point, see Larry W. Yackle, "Thoughts on *Rodriguez*: Mr Justice Powell and the Demise of the Equal Protection Analysis in the Supreme Court", *University of Richmond Law Review*, Winter 1975, Volume 9, Number 2, pp. 181-247.
[186] Letter from Wm. J. Haney from Omaha, Nebraska to Lewis Powell, 22nd March 1973. C.F. 71-1332, P.P.

that and you were a larger man than you are."[187] Similar accusations appeared in another letter: "Once again this country has shown that is for the rich people.....This ruling is quite similar to a long line of rulings in the 19th Century. Are you again trying to make the white upper class absolute in this country?"[188] Other comments included "The decision in the *Rodriguez* case I find completely incomprehensible"[189] and "I sadly read your opinion."[190] One letter questioned specifically the aspect of the opinion in which Powell acknowledged the Court's limited knowledge.[191] If this was the case, he asked, "how was it possible for you to render an opinion?.....Those who are poor, disadvantaged, Black, Mexican or Indian are penalised by people like you who fail to acquaint themselves and "acquire expertise" with their problems."[192] A letter from the recruiter of students for Rice University in Texas further illustrated the differences between judicial and social considerations. The author of this letter had visited schools in both Edgewood and Alamo Heights, and described the conditions in both areas.[193] After viewing the contrasting conditions, it was difficult for the person to comprehend the Court's decision. As a result, he stated, "Having this firsthand knowledge of the bones and sinew on which your façade of legalism was based, I found it very difficult to use the *pro forma* title of justice in my salutation. I am glad that I will not be held accountable for the future generations of students that will remain trapped by the continuing reality of unequal opportunity that was sustained by your decision."[194]

Thus, despite Powell's efforts to explain the reasons for the decision in great detail and to ensure the Court's continued commitment to education was evident, members of the public, without significant knowledge of constitutional law, saw the legal reasoning as simply an excuse for the end result. The basic view was clear: the Court had decided to perpetuate a system in which the condition of the schools depended upon the property wealth of the local districts. This point was emphasised through the newspaper

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[187] *Ibid.*, p. 1.
[188] Letter from M. Peters to Lewis Powell, 26th March 1973. C.F. 71-1332, P.P.
[189] Letter from Efrem B. Neisuler to Lewis Powell, 26th March 1973. C.F. 71-1332, P.P.
[190] Letter from William P. Rutledge to Lewis Powell, 30th March 1973. C.F. 71-1332, P.P.
[191] "The justices lack both the familiarity and expertise with the local problems." 411 U.S. 1, p. 35.
[192] Letter from Herbert Weiner MD to Lewis Powell, 23rd March 1973. C.F. 71-1332, P.P.
[193] "Edgewood High School has offices and rooms lighted by one bare bulb hanging from the ceiling, while Alamo Heights has the most commodious of physical plants. The affluent district has a large staff of counselors, all specialists at getting their students into college. This counselling staff has more receptionists than Edgewood school have counsellors." Letter from M.L. Rudee to Lewis Powell, 26th March 1973. C.F. 71-1332, P.P.
[194] *Ibid.*

coverage that summarised the decision and contained only key parts. The local San Antonio press, with headlines such as "Local School Tax OK" and subheadings of "Education is not a constitutional right" led with the notion that education was not implicitly found in the Constitution.[195] The article only later mentioned the Court's acknowledgement of the imperfections of the current system and its emphasis that the finding was not an endorsement of the status quo. Thus, despite Powell's assurances that the decision was not "placing its judicial imprimatur on the status quo", the headlines announced otherwise. The necessity for reform, emphasised by the Court, was marginalised in the newspaper reports. Press reports noted the essential elements of the decision, not all aspects of the opinion. *Rodriguez* did not require the reform of the school finance system; it merely recommended it. The Court's declaration of the constitutionality of the system was interpreted as approval, and thus reduced the urgency for reform. Local press coverage also contained quotations from Demitrio Rodriguez and Arthur Gochman, both of whom expressed their "bitterness" and "deep resentment" of the Court.[196]

Coverage in the major regional newspapers focused upon the implications of the decision for that state. *The Los Angeles Times* considered the implications for the *Serrano* decision. They included a quotation from John Coons, who said that the "finding would not affect the *Serrano* decision because it had been decided upon state law which was not in conflict with federal law."[197] The newspaper also contained an editorial that stated "We regret that the U.S. Supreme Court ignored how essential equality of education is among rights guaranteed by the 14th Amendment."[198] *The Boston Globe* also expressed "disappointment" that the Court had decided to "uphold the status quo and remove the pressure for immediate legislative action."[199] *The Washington Post,* however, expressed agreement with the Court's decision in light of the complex material surrounding the case: "The Supreme Court would have been wanton to overlook the consequences of a doctrine of equal contribution and, quite properly, it drew back from the lower court's far too easy assumptions."[200]

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[195] "Local School Tax OK", *San Antonio News*, Wednesday 21st March 1973, p. 1. See also "School Financing System Okayed", *San Antonio Light,* Wednesday 21st March 1973, p. 1.
[196] "School Fund Equality Strictly Up to Austin", *San Antonio News,* Wednesday 21st March, p. 2.
[197] "Property Tax Use for Schools Upheld", *Los Angeles Times*, Thursday 22nd March, p. 1.
[198] "A Letdown in School Finance", *Los Angeles Times,* 22nd March 1973, p. 6 - Part II.
[199] "Mass., Texas disappointed over ruling," *The Boston Globe,* 22nd March 1973, p. 1.
[200] "The Schools and Equality", *Washington Post*, 22nd March 1973, p. A-26.

Press coverage of the decision emphasised the fact that it was the four Nixon appointees, along with Potter Stewart, who constituted the majority. This fuelled the notion that the recent personnel changes accounted for the appellees' defeat. Arthur Gochman shared this view: "We would have won against the Warren Court. Fortas, Thornberry, Douglas, Brennan and Marshall would have been the five votes."[201] For Gochman, therefore, the composition of the Court was critical in accounting for the outcome. Consideration of the composition of the lower court increased the validity of this view. The district court panel was composed of three Johnson appointees, in contrast with the four Nixon appointees of the Supreme Court. The decision, therefore, symbolised a retreat from the egalitarianism of the Warren Court era and highlighted the new conservative direction of the Court. Wright, however, disputed this view:

> With different personnel, the appellees might have had a better chance....but I am no means sure that I would have lost if the case had gone up against the Warren Court. I would have expected, for example, to get the vote of Abe Fortas, and perhaps even Chief Justice Warren.....In some ways it would have been more difficult, but I am not willing to concede that I would have lost the case against the Warren Court.[202]

Wright's view reflected the novel nature of the appellees' claims. Although Warren Court precedents were integral to the appellees' claims, the appellees were, nevertheless, seeking an extension, not a simple continuation of Warren Court ideals. It was a departure into a new area, seeking recognition of new constitutional guarantees and seeking further disruption to the educational process. The Burger Court, in the same term, had found abortion to be constitutional in *Roe v. Wade.* Further, three months after *Rodriguez*, the Court handed down its decision in *Keyes v. School District No.1 Denver Colorado,* in which the Court upheld busing in area in which *de jure* segregation never existed. Both of these decisions demonstrated that the Burger court had the capacity for "liberal" decisions, in the sense that these decisions precipitated a significant degree of change in order to extend or enforce constitutional guarantees. The dominant ideology of

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[201] Interview with author, 10th December 1998. This view derived Johnson's plan to appoint, after the retirement of Warren, the liberal, Associate Justice Abe Fortas as Chief Justice, and Fifth Circuit Court of Appeals Judge Homer Thornberry as Fortas's successor. If this had occurred, this would have perpetuated the liberal majority, which, according to Gochman, may have given plaintiffs the vital fifth vote.
[202] Interview with author, 15th September 1997.

the Court was not simply reactionary conservatism, resistant to change. Thus, to argue that Gochman's loss can be attributed to the composition of the Court overlooks the complexity of *Rodriguez.* It was a factor in the outcome, but it cannot be determined, whether the Warren Court would have upheld *Rodriguez.* It is important, however, to remember the unprecedented nature of the appellees' claims, and that they were seeking to apply Warren Court rhetoric, not actual guarantees. At no point did the Warren Court declare education to be a fundamental right or wealth a suspect classification. *Brown* confirmed the social and political importance of education without rendering it a constitutional guarantee. Racial discrimination, not the fundamentality of education, provided the legal basis for *Brown.* Thus, appellees in *Rodriguez* wished for the Court to extend the constitutional notion of equality to include economic discrimination in education, and to thereby indirectly acknowledge the constitutional existence of class. The Court's refusal to extend constitutional equality cannot, therefore, simply be interpreted as a typical example of the new conservatism of the Court. This was only one element of an ideologically and legally complex case.

The complexity of the decision was illustrated three years later when Powell's clerk, J. Harvie Wilkinson III criticised the Court's finding in *Rodriguez.*[203] Wilkinson disagreed with the ideological implications of the decision, precipitating a response from Powell. He argued that there were three standards of constitutional equality: political, economic and equality of opportunity. The Court, according to Wilkinson, should, and did, protect the right to political equality, but should refrain from becoming involved in the sphere of economic rights. Equality of opportunity, argued Wilkinson, was a more complicated area. If the area of equality of opportunity related to a political right, the Court should intervene. In this category, the Court should assess the claims on their individual merits rather than adhere to a general rule. According to Wilkinson, *Rodriguez* fell into this category, and the Court should have intervened; "a system which allegedly operated to deny, on a basis unrelated to ability, vast numbers of persons the basic opportunity to an equal education- the right most intimately related to personal potential and development. This, as we have seen, is precisely the kind of political discrimination

[203] "The Supreme Court, the Equal Protection Clause and the three faces of Constitutional Equality", J. Harvie Wilkinson III, *University of Virginia Law Review,* Volume 61, Number 5, June 1975, pp. 945-1030.

against the individual that the Court must be alert to protect."[204] For Wilkinson, the right to equality of educational opportunity was the essence of *Rodriguez* and was worthy of constitutional recognition. Wilkinson also expressed the notion that the Court had rejected constitutional promises made during the Warren Court era: "Almost 20 years after *Brown*, the Court was asked to clothe the rhetoric with Constitutional significance. It declined. Recognition of the Constitutional fundamentality of education would be the boldest step towards equality of opportunity the Court may now take."[205] He ignored the distinction Powell drew between *Brown* and *Rodriguez* and suggested that the Court rejected previous promises. Wilkinson also proceeded to fault the legal reasoning in *Rodriguez*. The two-tiered approach was not the most appropriate measure: a more flexible, sliding scale analysis should have been employed.[206]

Powell responded to Wilkinson by assuring him that "I certainly do not object to you entertaining differing views about *Rodriguez*...Almost the essence of being a lawyer is to be independent minded."[207] Instead, his letter was concerned with "the recollection of 'Powell Chambers History'" on *Rodriguez*, and proceeded to describe the opinion-writing process:

> I devoted considerable time during the summer to *Rodriguez*, and made extensive notes myself. ....It was "Larry's case", so he and I worked on it for many weeks. Revisions were made to accommodate the thinking of another justice....We had a discussion in my Chambers in which you and Larry participated. The discussion focused specifically on whether I should adhere to the two-tier analysis or to what one of you then called a "sliding scale" type of analysis. My recollection is clear that the three of us agreed that the two-tier analysis, with all of its flaws, was the established law of the Court at this time. There also was a general feeling, in which I think you concurred that the "sliding scale" equal protection analysis enabled a Justice in every case to apply a wholly subjective test. In the fall of 1972, I elected to stay with the two-tier analysis for two reasons: 1) the precedents seemed to require it, and 2) the case had been

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[204] *Ibid.*, p. 240.
[205] *Ibid.*, p. 243.
[206] Wilkinson commented: "The Burger Court's approach to Equal Protection may represent an admirably cautious and sober enlargement of the principle of constitutional equality. But the meaning of the evolution is not to be found in identifying tiers or standards of review or by measuring the Court's performance against some hopefully neutral model of adjudication. Coherence in Equal Protection law must be found rather in the meaning of equality itself and by assessing the legitimacy of the Court's efforts against the kind of equality it is attempting to achieve." *Ibid.*, p. 954.
[207] Letter from Lewis Powell to J. Harvie Wilkinson III, 11th March 1976. C.F. 71-1332, P.P.

> presented and decided by a majority of the Court within this framework. I also thought, and still think that you agreed.[208]

In Powell's view, Wilkinson had significantly altered his position on the case. Powell then expressed his personal views regarding the case:

> I consider the case one of the most, if not the most, important I have ever written. Had it been decided otherwise, it is difficult to visualize the ultimate impact on local and state government. This is no place to reargue *Rodriguez*. I merely ask you to contemplate, as you address your classes, how one could have distinguished education from some of the other governmental services provided primarily by local governments. [209]

Powell, therefore, maintained his original arguments and believed *Rodriguez* significantly challenged the federal structure. His concluding phrase illustrated both the pride and attachment he felt towards the case: "As *Rodriguez* is one of my favourite "children", I am not entirely disinterested when one of the "midwives" casts doubts upon its legitimacy."[210] Wilkinson, however, clearly indicated that, for him, *Rodriguez* was a retreat from the ideology, if not the precedents, of the Warren Court. The Court had missed an opportunity to rectify some of the inequalities which existed within society and thereby rejected the Warren Court's commitment to equality. However, his apparent changed view illustrated the complexity of *Rodriguez*. It also illustrated changes within the broader social context. By 1975, it was apparent that the advances blacks has made during the Civil Rights Era were insufficient to rectify persistent inequalities. Support for Affirmative Action measures, which was becoming increasingly controversial during this period, derived from this recognition. However, the dominant political mood had also become more conservative, and the possibility of further political reform appeared increasingly unlikely. With the benefit of hindsight, *Rodriguez* represented a missed opportunity. The significance of the opportunity *Rodriguez* presented was only identifiable in retrospect. There was no record of Wilkinson opposing to the finding in the formative stages of the case, before the opinion writing process had been assigned to a

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[208] *Ibid.*, p. 2.
[209] *Ibid.*, p. 2.
[210] *Ibid.*, p. 3. Wilkinson was contacted and asked to comment upon his apparent change of view. He declined to comment, and instead decided "to let the record speak for itself". Letter from J. Harvie Wilkinson III to author, 11th December 1999.

particular clerk. Thus his apparently altered view resulted from the multitude of issues encompassed within the case, and their increasing significance in light of the changed social and political context.

Rodriguez, therefore, was a landmark decision in Constitutional law, establishing parameters of fundamental rights and limitations of Constitutional equality, which still stand. It stemmed the tide of federal equal protection claims, and marked the end to the appellees' five year fight for a favourable ruling. The Court rejected the notion of Proposition One as an enforceable judicial standard. Wright had successfully convinced the Court of the limitations of District Power Equalizing and the practical difficulties of affirming the district court decision, and Gochman did not adequately emphasise the limitations of the plaintiffs case. Powell's long standing involvement in education contributed to his significant interest in the case, and provided an important context for his opinion. His knowledge of the role and difficulties of school boards and of the finance system in Virginia influenced his thoughts in *Rodriguez.* The appellees sought further Court involvement in education, at a time in which the educational process was already disrupted. The broader environment, therefore, was an essential component in accounting for the Court's decision in *Rodriguez.* On one hand, the Court's abortion decision and its busing decisions demonstrated that it was not wedded to the doctrine of judicial restraint. On the other hand, however, the controversies precipitated by these decisions provided a clear limitation to the scope of judicial decisions. The Court was considering *Rodriguez* at the same time as *Keyes.*[211] Yet, whereas it refused to become involved in a different area of educational inequality in *Rodriguez*, it increased its involvement in the eradication of racial inequality in *Keyes*. The public outcry that surrounded the abortion decision two months earlier increased the desirablity of avoiding new controversy by overturning the education finance system in forty-nine of the fifty states.[212] The Court was also aware of the public outcry which followed *Brown*, almost twenty years earlier. That decision affected the educational system in seventeen states, whereas *Rodriguez* had the potential to affect forty nine states. Furthermore, the Court was dealing with the legacy of *Brown* twenty years after the original decision. An affirmative *Rodriguez* ruling could result in a

[211] For detail of *Keyes,* see above, p. 152, fn. 229.
[212] For detail of the public reaction to *Roe v. Wade,* see Woodward and Armstrong, *The Brethren*, (New York), pp. 282-284. Whilst this information is unsubstantiated, it does give an impression of the public reaction.

similar, if not worse, long term involvement. It was handed down at the mid-way point between *Roe* and *Keyes*, and, although being a landmark decision, did not precipitate widespread change.

Thus, the decision marked a refusal by the Court to get involved in any other area of educational inequality except racial inequality arising from segregation. Its commitment to the eradication of racial inequality in education was clearly evident, but this commitment did not transcend into all areas of educational inequality. Instead, the opinion defended the importance of local control, and signalled a refusal to extend the powers of the federal government further. The opinion, by referring the appellees' to the democratic political process, acknowledged the limitations to judicial activity. Internal factors, such as the preferences of individual justices, shaped the content of the opinion. External factors, such as Powell's experience, influenced the opinion and the broader political environment provided the context for the decision.

CHAPTER FIVE:

The Effects of *San Antonio v. Rodriguez* Upon the School Finance Reform Movement in Texas

On the afternoon of the 21st March, the day of the Supreme Court decision, Demitrio Rodriguez and Dr. José Cárdenas held a press conference to give their opinion of *Rodriguez* and discuss its implications for the future of school finance reform in Texas.[1] During the conference, Rodriguez vowed to continue the fight for school finance reform and to use the avenue suggested by the Court: "The Supreme Court has told us to approach the state, and that is what we will continue to do...I would like to say to the Governor and State legislature that they still have a problem, and I hope they will do something about it in this session."[2] As indicated by Rodriguez, hopes of reform now rested with the governor and state legislature. The plaintiffs had failed to convince the Supreme Court of the legitimacy of their claim under the federal constitution. Instead, immediate hopes of reform in Texas now rested with the democratic political process.

For the ten years following *Rodriguez*, school finance reform activists petitioned the state for radical restructuring of the finance system. Although legislation was passed, it failed to address the inequalities of the system in sufficient depth. Litigation was once again employed as a reform strategy and fifteen years after *Rodriguez* was decided, the Texas Supreme Court declared the school finance system violative of the state constitution.[3] The decision by the activists to continue to use litigation to achieve their objectives illustrated the central effects of *Rodriguez.* First, the litigants had to base their legal arguments upon the Texas State constitution. *Rodriguez* appeared to preclude further litigation attempts based upon the federal constitution, so state constitutions had to provide the basis for post-*Rodriguez* school finance litigation. The development of the alternative litigation strategy based upon state constitutions, which occurred primarily outside of Texas, influenced the decision to file suit in the Texas state courts. The use of state constitutions created a wide national diversity in the degree of reform, but ensured that the balance of federalism in school finance remained intact.

The second effect of *Rodriguez*, as illustrated by the return to litigation in Texas ten years after the decision, was the importance of a constitutional ruling upon the reform movement. The failure of the legislature to enact substantive reform cannot be solely attributed to the Supreme Court's ruling in *Rodriguez.* The political volatility of school

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[1] Dr. José Cárdenas was the Edgewood District Superintendent and an expert witness in the district court case. See Chapter Two, p. 94.
[2] "Rodriguez Won't Give Up on Tax Fight", *San Antonio Light,* Thursday 22nd March 1973.
[3] *Edgewood v. Kirby*, 777 S.W. 2d 381 (Tx.1989).

finance ensured its difficult passage through the legislature. In an article written before *Rodriguez*, Yudof argued that the symbolic consequences of judicial activism were of equal importance to the immediate practical effects.[4] The Supreme Court had a vital role as an "educational body" or as the "ultimate interpreter of the American code of social ideals and morality."[5] Yudof asserted: "A Court decision often represents an enormous appeal to the public conscience or to public idealism that may be accorded enormous weight in the legislative and political processes."[6] Conversely, therefore, upholding the finance system reduced the need for substantial change. According to Cárdenas: "the legislature breathed a collective sigh of relief upon learning that the *Rodriguez* decision had been overturned...The tremendous pressure exerted by the lower court's ruling disappeared immediately."[7]

Thus, the Texas Supreme Court 1989 ruling that declared the state finance system unconstitutional was a key moment in the state school finance reform movement. It increased the pressure upon the legislature to provide an equitable solution. It provided activists with the constitutional backing for their cause, which they had failed to achieve in *Rodriguez.* However, it did not mark the end of the legal struggle. Plaintiffs used the court on three separate occasions to challenge the constitutionality of the new legislation. Finally, in 1995, the Texas Supreme Court upheld the most recent legislation, which had been passed in 1993. Thus, ultimately, reformers did not achieve their original objectives. Even with a constitutional ruling, the Texas state legislature would not enact reform with significant equalisation measures. Thus, a declaration of the unconstitutionality of the finance system was only one, albeit essential, in the establishment of a truly equitable finance system. The outcome of *Rodriguez*, therefore, was not the only reason for the Texas state legislature's failure to enact substantial reform. As the later case illustrated, the establishment of truly equitable system required more than a Court mandate. Nevertheless, however, the later victory provided activists with the weapon they needed to push for comprehensive reform, the weapon denied to them in *Rodriguez*.

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[4] "Equal Educational Opportunity and the Courts", Mark G. Yudof, *Texas Law Review,* Volume 51, No. 3 (1973) pp. 411-504.
[5] *Ibid.,* p. 415.
[6] *Ibid.,* p. 415.
[7] José Cárdenas, *Texas School Finance Reform: An IDRA Perspective,* Intercultural Development Research Association (San Antonio), 1997.

The effects of *Rodriguez* upon the school finance reform movement in Texas also serves to highlight its broader historical significance. The Supreme Court's refusal to become embroiled in the issue of school finance ensured that the issue became a political matter within each state. State governments would now deal with the issue of school finance, rather than the federal judiciary. Thus, the political environment of each state would now determine the nature and extent of school finance reform. The Court's ruling that school finance was essentially a political question, best solved by the democratic political process, altered the nature of the reform movement. Although litigation remained an important component in some states, activists now had to win support amongst legislators. As a result, new interest groups were formed in order to represent activists' interests effectively. However, the failure of the legislative process to enact substantial reform underlined the broader historical significance of *Rodriguez*. Although the school finance system was improved, the degree of equalisation remained minimal. The legislation ultimately raised the expenditures of the poor districts whilst simultaneously raising the level of the expenditure in the richer districts. Thus, the degree of equalisation required remained elusive. This demonstrated the broader conflict between equality and individual choice that lay at the heart of American ideology. The degree of equalisation sought by the plaintiffs in *Rodriguez* and the activists proved politically, as well as judicially, untenable.

The changes in the school finance reform movement in the post-*Rodriguez* era continued to reflect broader political changes. During the 1970s and 1980s, the movement for equality transcended race and encompassed other minorities, such as women, gays and disabled. Furthermore, as illustrated by the *Rodriguez* suit, issues of race and ethnicity continued to become more complex and included Hispanics-Americans, Asian-Ameircan as well as African-Americans. This was, in part due to the changes in immigration policy that had occurred in 1965. The Immigration Act of 1965 stopped the use of national quotas in determining immigration rates, thereby precipitating a growth in immigration from Asia and Latin American during the following decades. There was also an increase in the rise of illegal immigration, which was particularly significant in Texas. The rising number of Mexican Americans in Texas, therefore, increased the political prominence of their concerns. In addition, the quest for improved equality of educational opportunity continued, but began to encompass different

minorities with varied concerns. The federal government first responded to these changes by passing the Equal Educational Opportunity Act of 1974 and the Education for All Handicapped Children of 1975. In the first act, the government legislated that "no state could deny equal educational opportunity to any student because of language barriers."[8] This act, therefore, had a direct effect upon the Mexican American movement for educational equality in Texas and illustrated the government's increased awareness of Hispanic concerns. However, this act did not increase the federal role in education. It did not appropriate funds for bilingual education, thus was a statement of a principle rather than an affirmative attempt at change. It did not, therefore, enlarge the federal role in the provision of education and was in accordance with broader political trends. The second act appropriated federal funding for instructional programs for children with disabilities and reflected the heightened political awareness of disabled issues. Thus, broader concern with minority education, coupled with a specific attention to Mexican American problems, further moulded the post-*Rodriguez* era.

Despite the alterations in the reform movement, certain issues involved in school finance reform remained unchanged. Although the involvement of the federal government had not been extended as a result of *Rodriguez*, the issue of localism remained. The expansion of state involvement in education still detracted from local control of education, and thus many of the arguments in favour of local control still lay at the heart of school finance reform. This argument continued to reflect broader political trends, in particular the growth of political conservatism which was marked by the election of Ronald Reagan in 1980. His subsequent attempt to redefine federal-state relations derived from a desire to retrench the size and role of the federal government, similar to Nixon's "New Federalism."[9] This policy emphasised the importance of state autonomy and local control, which thereby remained at the forefront of federal and state political discourse. Therefore, issues of federalism in a sense persisted, with the balance of power between state and local government the new area of conflict. The issues of race and class continued to decrease in prominence, although this did vary from state to state. As school finance was now a state matter, the racial composition of each state determined the emphasis upon race. In Texas, for example, the high percentage of Mexican

[8] As quoted in George McKenna; *The Drama of Democracy,* (New York 1997), p.121.
[9] For further detail, see below, p.245.

Americans in poor school districts ensured that race and school finance remained intertwined.

The state political environment determined the both the nature and degree of reform. Activists used tactics and arguments appropriate to their immediate political context. After *Rodriguez*, therefore, school finance becomes less connected to the national political environment and instead was moulded more by the state political context. The vast complexity of school finance reform between the states illustrated this. An examination of school finance reform in Texas after *Rodriguez* does, therefore, illustrate a great deal about the broader state political environment but can only indirectly be connected to the national context. The traditionally conservative state politics of Texas was, therefore, particularly significant in the decades following *Rodriguez.* In every state, school finance was, for the legislators, an educational policy issue. Reform was no longer constitutionally compelled, so it became another educational concern and was also limited by budgetary concerns. School finance in Texas was, however, was also connected to the broader issue of Mexican American advancement and the improvement of Mexican American education. Thus, school finance became intertwined with the issue of bilingual education, which was an additional educational concern for Mexican American activists. In light of the failure of *Rodriguez* to achieve substantive change, bilingual education became the primary concern of Mexican American activists in Texas.

Research conducted by the USCCR verified that that current Texas public school curriculum was "racially bias and did not consider the language needs of Mexican Americans."[10] Since the filing of *Rodriguez*, the emphasis upon bilingual education had increased. The particular educational needs of Mexican Americans had become increasingly significant after the Supreme Court's *Swann* decision, in which the Court upheld busing.[11] After this decision, MALDEF lawyers argued that desegregation must take into account the educational needs of all groups. In its 1972 annual report, MALDEF reported "Equal educational opportunity means both desegregation and bilingual-bicultural educational programs. MALDEF seeks thereby to guarantee Chicano children an education suited to their special linguistic and cultural needs."[12] The movement for

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[10] United States Commission for Civil Rights, Report IV: *Mexican American Education in Texas,* August 1972.
[11] *Swann v. Charlotte Mecklenburg Board of Education,* 402 U.S. 1 (1971).
[12] MALDEF Annual Report, 1972, as quoted in Guadalupe San Miguel, *Let All of Them Take Heed* (Austin 1987).

equal educational opportunity was given a boost two months after *Rodriguez* in *Keyes*. The Supreme Court ruled that Mexican Americans were an identifiable minority and therefore had to be considered in the desegregation process. This ruling marked MALDEF's increased attempt to establish a bilingual educational curriculum in Mexican American areas. Thus, the fight for equal educational opportunity encompassed two primary areas: school finance and bilingual education. The interconnection between the two movements was illustrated before the Supreme Court's rendering of *Rodriguez*. In 1971, two Mexican American legislators- State Senator Joe Bernal and State Representative Carlos Truan introduced HB495 advocated mandatory bilingual programs for all school districts with more than 40% students with Limited English Speaking Ability (LESA). A second bill, HB1024 advocated increased state funds for the provision of bilingual education, including teacher training and educational resources. Neither bill, however, was passed. Both bilingual education and school finance reform required increased state expenditure and thereby raised the question of the source of the increased funding, which was a primary concern of the state legislators. The two issues, therefore, were integrally connected, both ideologically and politically. However, whereas bilingual education was an issue that affected only Mexican Americans, school finance was relevant to school children everywhere. Despite this critical difference, the developments in bilingual education must be considered in conjunction with Texas school finance reform.

Immediately after *Rodriguez*, the attention of school finance activists turned immediately to the 63rd Texas State Legislature, which had been in session since January 1973.[13] Between January and 21st March, the legislature took little concerted action, awaiting the Court's decision. In the state House of Representatives, four bills had been introduced in the period before *Rodriguez*, which were subsequently merged into one, House Bill 946.[14] The bill proposed to guarantee each district a $300 per student basic expenditure, to create a further provision which enabled districts to fix per pupil expenditure up to $300 above the basic level and to set a uniform tax rate. The state would also set a recommended per pupil expenditure each academic year. For those districts unable to raise this amount, the state would make up the difference. Thus, this bill would significantly reduce the existing disparities in the per pupil expenditure, and

[13] The Texas State Legislature met every second year, between January and June.
[14] These bills were House Bills 1255, 1256 and 1257, which were merged into House Bill 946.

would ensure that each district had a reasonable amount of funds per pupil, thereby help to improve the equality of the finance system. However the chances of the bill passing were "50-50 at best."[15] The estimated financial cost of the bill prevented widespread political support. In light of the dubious chance for reform, continued pressure upon the legislators was deemed essential. The CPA, along with other community leaders, organised a march to Austin.[16] The march was organised to express the continued discontent with the educational system and to demonstrate to the politicians the public desire for reform. It was intended to assist the passage of HB946 by indicating public dissatisfaction with recent political inaction. If no action had occurred before the close of the 63rd legislature, demonstrators wanted the Governor to call a special session of Congress to deal with school finance.

The People's Lobby for Equal Education (PLEE) sponsored the march. The organisation was primarily a coalition of Edgewood teachers, parents and students with community activists from beyond the Edgewood area. On 2nd May, approximately 2,000 demonstrators left Edgewood, including Rodriguez and Gochman.[17] Another 2,000 demonstrators joined them at Austin. The majority of protestors were Mexican Americans, and included representatives from *La Raza Unida* and The Brown Berets.[18] The 4,000 protestors marched to the State Capitol, chanting "Equality now", whereupon speakers then addressed the crowd. The first was Rodriguez, who told the demonstrators: "Our people have suffered enough. The time is now for people in public office to fulfil the wishes of the people, which is nothing more than fair, equitable financing of schools."[19]

The crowd's feelings towards the state government were expressed when Governor Dolph Briscoe addressed the crowd. The Governor was greeted with boos and

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[15] "State Efforts Towards Equalisation", Anonymous, *TEE Newsletter,* San Antonio, May 1973, Box 5, File 7, J.P.C.

[16] For more detail of the CPA, see Chapter One, p. 35.

[17] This was Gochman's last main involvement in the school finance struggle in Texas. He never joined the lobbying attempts, and relocated from San Antonio to Katy, Texas.

[18] For details of *La Raza Unida,* see Chapter One, p. 35, fn. 5. *The Brown Berets* were a radical organisation, inspired by the Black Berets. The Brown Berets originated in California and spearheaded the separatist "Brown Power" philosophy. This philosophy, like Black Power, championed the superiority of the Mexican Americans and pronounced that all of white society was corrupt. For further information, see Carlos Munoz, *Youth, Identity, Power: The Chicano Movement* (London, 1989).

[19] "Edgewood marchers in Austin", Aziz Shihar, *San Antonio News,* Wednesday 2nd May 1973, p. 2-A.

as a result, his comments were barely audible.[20] In his address, Briscoe acknowledged the importance of *Rodriguez* and described his view of the message it sent to the legislature:

> The *Rodriguez* case clearly pointed up inequities among school districts, and we must move to correct those inequities. It is obvious that these inequities do exist. They were not planned. They were not intended. Today we face the fact that our system of public school financing must undergo new changes, so that the children of Edgewood School District, as well as the other districts with the least resources per student, have quality educational opportunities.[21]

In order to demonstrate this stated commitment for reform, he announced legislation that would provide enrichment grants of $100 per pupil to the 113 of the state's poorest school districts. Further legislation "will set into action a process of altering our entire funding system so that state funds will be allocated to all school districts on the basis of the ability of the school district to fund their own program based upon the financial resources of each."[22] The estimated cost of the bill was $39.7 million, but Briscoe failed to convince many of the demonstrators of its merits. Rodriguez, for example, commented: "As a parent of children in Edgewood Independent School District, I find the bill unacceptable because Briscoe is just trying to bribe us."[23] José Cárdenas echoed this opinion, describing the bill as "trivial."[24]

At the time of the PLEE march, 25 days of the legislative session remained before the two year adjournment.[25] The march demonstrated the public concern surrounding school finance and, as a result, the House resolved to vote upon HB946. The bill contained a greater degree of equalisation than the legislation proposed by Briscoe, who opposed the bill on the basis of its estimated cost.[26] For the activists, however, HB946 represented their best hope of increased equalisation of the finance system during the 63rd Legislature.[27] The bill passed the House by a margin of one, but failed in the

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[20] "Emergency school aid plan told by Briscoe", *San Antonio News,* Wednesday 2nd May 1973, p. 2-A. The booing was attributed to the *Brown Berets*, and the demonstration organisers later apologised to Briscoe.
[21] "People's Lobby March Left Emotions Mixed", Pat Flores, *San Antonio Express,* Thursday 3rd May, p. 3-A.
[22] "Stopgap School Aid Plan Announced", Jon Ford, *San Antonio Express*, Thursday 3rd May, p. 3-A.
[23] "People's Lobby March Left Emotions Mixed", *San Antonio Express,* Thursday 3rd May 1973, p. 3-A.
[24] José Cárdenas, *op.cit.,* p. 65.
[25] The 63rd Legislature was due to adjourn on the 28th May. The Texas State Legislature met every second year. The next session was due to commence in January 1975.
[26] Daniel C. Morgan, *School Finance Reform in Texas,* TEE Publication, (San Antonio, 1974).
[27] According to Daniel Morgan, "it was by no means a 'no wealth discrimination' measure, but it had some heavy equalisation features, as well as some genuine increases for poor districts." *Ibid.,* p. 34.

Senate. Before the adjournment of the legislature, some house leaders expressed a desire for a special legislative session to be called. Representative Daniel Kubiak, the main sponsor of HB946, commented: "We cannot wait two more years. I do not relish a special session any more than the governor, but a special session is exactly what the crisis demands."[28] Governor Briscoe, however, opposed the prospect of a special session, and instead favoured further research, which would result in more effective legislation during the 1975 legislature. Thus, the 63rd Legislature adjourned without the passage of school finance legislation and the resolution for a special session also failed to achieve sufficient votes. It did, however, pass a new bilingual education bill. This bill, which established a bilingual education program for districts which had twenty or more LESA students per grade, attempted to improve the quality of educational provision for Mexican Americans. Thus, even though school finance legislation had failed, the passage of bilingual education legislation sought to advance the quality of Mexican American education. The cost of the programme precipitated a great deal of opposition and thereby engendered further debate about the cost of educational reform.

The political problems inherent in school finance reform were illustrated by the failure of the 63rd Legislature to pass any legislation. One of the prime concerns for legislators was the cost of new legislation. Briscoe, for example, promised there would be no tax increase during the 63rd Legislature, and thus, the finances for any reform measures must be located within the state budget. This added an additional constraint to the formulation of appropriate legislation. Without the pressure of a constitutional ruling, the financial restraints of the state budget provided a considerable obstacle to reform. The unsuccessful legislative attempts of the 63rd Legislature convinced activists of the importance of effective, coherent organisation. In order to maintain continued pressure upon the legislators, organisations were formed to provide a forum for strategy, discussion and research. The most notable of these new organisations was Texans for Educational Excellence (TEE).[29] José Cárdenas became Chief Executive and Daniel Morgan headed the research programme. The central functions of TEE were to co-ordinate the reform effort between organisations involved in school finance and to

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[28] *Ibid.*, p. 37.

[29] Other organisations included Texas Association for School Finance Reform, Communities Organised for Public Service (COPS) and the continuation of PLEE. TEE, however, soon became the most important of these organisations and before long, had incorporated the smaller organisations into its ranks. On 1st September 1974, TEE was reorganised as the Intercultural Development Research Association (IDRA).

continue to research and examine material surrounding school finance.[30] TEE headed the post-Rodriguez school finance struggle, and provided both leadership and structure to the development of strategy. For example, on 30th August 1973, TEE organised a conference in San Antonio on school finance reform. The conference reported upon the financial crisis within education, possibilities for future action, the recent responses of other states to school finance and the responses within Texas thus far.[31] Speakers at the conference included Daniel Morgan, Mark Yudof, Joel Berke, Stephen Browning of the Lawyers' Committee for Civil Rights, Representative Daniel Kubiak and former state Senator Joe Bernal. Following the conference, TEE sponsored a series of regional conferences throughout Texas.[32] These conferences were designed to inform as many "educators, politicians, community leaders, civic and grass roots organizations, business people and the general public" of the different aspects of school finance and the possibilities of remedial action.[33] A more educated public would, they hoped, prevent any misrepresentation of aims and effects of school finance reform.

The first long-term strategy discussion considered the possibilities of future litigation. The performance of the 63rd Legislature illustrated the problems of relying solely upon it for remedial action. Although the majority of legislators acknowledged the necessity for reform, it was now an issue that could be tackled gradually. Additional litigation was a potential method by which activists could restore the pressure upon the legislators to find a solution. This possibility was considered by Stephen Browning two days after *Rodriguez* had been handed down.[34] On March 23rd, Browning wrote a memo to "Friends of the School Finance Movement", entitled "Where do we go from here?", in which he was optimistic about the future of school finance litigation:

> It does not spell the end for school finance reform. Much progress has been made since August 30, 1971, when the California Supreme Court offered its historic pronouncements in the *Serrano* decision. Numerous state legislatures are in advanced stages of deliberation over revisions to inequitable school finance laws. Additionally, numerous state courts are continuing their close scrutiny of such

[30] According to its mission statement, TEE's primary functions were "to act as co-ordinating agency for organizations interested in school finance,....to be a voice for groups with limited access to the normal channels of education communication....to serve as a research organization", José Cardenas, *op.cit.*, p. 47.
[31] *Ibid.*, p. 60.
[32] Conferences were held at San Antonio, McAllen, Dallas, El Paso, Austin, Lubbock, Texakana, Houston and Fort Worth.
[33] José Cárdenas, *op.cit.*, p. 50.
[34] For detail of Browning's involvement thus far, see Chapter Three, pp. 143-144.

> laws as possible violations of state constitutional provisions. In short, we can not and should not allow a single defeat to stop our efforts in pursuit of educational opportunity. [35]

This memo illustrated the alternative possibility for litigation open to the activists. *Rodriguez* did not prevent suits predicated upon the new legal basis: state constitutions.

The New Jersey case, *Robinson v. Cahill* provided the primary impetus for the litigation strategy.[36] The New Jersey Supreme Court decision was handed down two weeks after *Rodriguez.* According to one commentator: "the timing and form of the opinion suggested that the New Jersey court was well aware of the psychological, as well as the doctrinal, impact of its opinion on the movement to reform school finance laws through litigation."[37] Thus, *Robinson* demonstrated that *Rodriguez* had not ended school finance litigation. The unanimous opinion by Chief Justice Jerry Weintraub was based solely upon the state constitution, and therefore provided an alternative litigation strategy.

Instead of the state equal protection clause providing the basis for the legal analysis, the court considered the constitutionality of the finance system in relation to the "thorough and efficient" clause of the New Jersey Constitution, which stated: "a thorough and efficient system of free public schools."[38] The plaintiffs asserted that the education clause required the state "to provide the minimum education to all children....so that they may be able to read, write, and function in a political environment."[39] The court ruled that the state failed to provide the standard of education required by the "thorough and efficient" clause: "the obligation being the State's to maintain and support a thorough and efficient system of free public schools, the State must meet that obligation itself or if it chooses to enlist local government it must do so in terms which will fulfil that obligation."[40] The court left the legislature with the task of providing a detailed definition of "thorough and efficient", thereby refraining from imposing a judicially engineered standard upon the education system.[41] The court then gave the legislature until 31st

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[35] Memo from Stephen Browning to Friends of the School Finance Movement, 23rd March 1973, ACLUP.
[36] 118 N.J. Sup.Ct. 223 (1972) *modified and affir'd on other grounds,* 62, N.J. 473, 303 A.2d 273 (1973).
[37] Paul Trachtenberg, "*Robinson v. Cahill*: The "Thorough and Efficient" Clause", *Law and Contemporary Problems*, Volume 38, No.3 (Winter-Spring 1974), pp. 540-562.
[38] New Jersey Constitution, Article VIII, Section 4.
[39] Plaintiffs' Complaint at Second Count, Paragraph 3 and 5, p.18. As quoted in Paul L. Tractenberg, *loc.cit.,* p. 203.
[40] 62 N.J, p.509.
[41] The Court did, however, provide certain guidelines for the legislature. It suggested that the meaning of thorough and efficient was relative, a dynamic concept that altered in accordance with current needs. It then suggested that the needs of a citizen after completing school must be considered. The Court also established

December 1974 to enact constitutionally acceptable legislation, which would be implemented by 1st July 1975.

The rendering of *Robinson,* so soon after *Rodriguez,* prompted Court commentators to examine the possibility of litigation attempts based upon state constitutions. As a result, over the course of the ensuing few months, numerous articles were written which considered the effect of *Rodriguez* and the possibility of litigation based upon state constitutions.[42] The combination of *Rodriguez* and *Robinson* led commentators to conclude: "It appears that while *Rodriguez* may have seriously hampered attempts by federal courts to restructure school finance systems, there is considerable potential for judicial reform of school financing systems through the use of a variety of state constitutional provisions."[43] The legal analysis in *Robinson* indicated two possible courses of action for litigants. The first strategy based litigation solely upon the education clause of state constitutions. The second strategy used the state equal protection clause, which the *Robinson* court decided against, but had demonstrated its feasibility. The choice of strategy rested upon the judicial character and political situation within each state: "no single legal theory or principle is likely to be able to deal with the many facets of school finance- problems differ from state to state as do state constitutions, statutes and regulations."[44] *Robinson* had illustrated the existence of alternate legal strategies, but each state had to be examined independently in order to determine the feasibility of litigation. The varied content of state constitutions required close examination.

The clauses of the state constitution relevant to the school finance litigation were education clauses and the equal protection provisions.[45] *Robinson* demonstrated that both

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that the decision, and its use of thorough and efficient did not demand the highest degree of education for all its citizens.

[42] See, for example, Gail Hefner Goheen, "Reform in Financing Public Education: An Examination of the Movement and its Implications", *Tulane Law Review,* Volume 47 (1973) pp. 235-280, Peter Roos, "The Potential Impact of *Rodriguez* on other School Finance Litigation", *Law and Contemporary Problems,* Volume 38 No.3 (Winter 1973) pp.455-505, Larry G. Simon, "The School Finance Decisions: Collective Bargaining and Future Finance Decisions", *Yale Law Journal*, Volume 82, (1973) pp. 409-460, Mark Yudof, "Equal Educational Opportunity and the Courts", *Texas Law Review*, Volume 51, No.3, (March 1973) pp.411-501, David Richards, "Equal Opportunity and School Financing: Towards a Moral Theory of Constitutional Adjudication," *University of Chicago Law Review*, Volume 41 (1973-74), pp. 305-398.

[43] Stephen Michaelson, "Reform through the State Courts", *Law and Contemporary Problems,* Volume 38, No.3, (Winter-Spring 1974), p. 309.

[44] *Ibid.,* p. 309.

[45] Each state constitution has a state equal protection clause. The detail contained within the clause varies, but the equal protection clause in the Illinois Constitution is typical: "No person shall be deprived of life,

provisions could be applied in order to render a school finance system unconstitutional. However, the wording of the education clause of state constitutions fell into two primary categories.[46] The first category was those which required that the state provide an educational system, but gave no indication of standard, such as "the state must establish a system of common schools." Fourteen state constitutions were contained in this category.[47] The second category provided a more detailed qualification of the nature of the educational system. Seven states required the educational system to be "thorough and efficient", and nineteen others contained such wording as "suitable", "adequate", or "uniform."[48] The wording of the education clause held implications for the nature of any future litigation.

These different education clauses provided the foundation for litigation attempts in all states in the post-*Rodriguez* era. As the Court had forced plaintiffs to seek redress from the legislation, organisations had to transfer their pressure to the state government in the period immediately after *Rodriguez*. During this period, however, school finance litigation continued in other states and consequently provided an important context to the gains and considerations of the Texas activists. *Rodriguez* had not stopped litigation attempts, but encouraged a different strategy. The possibility of future litigation depended upon the state political environment and the content of the particular state constitution. In Texas, however, discussions regarding the possibility of litigation were postponed until after the Constitutional Convention of 1974. The wording of the state constitution was crucial to the litigation attempt, and any changes could profoundly affect the chances of success, or choice of litigation strategy. A new educational clause was proposed which, according to Morgan and Yudof was: "more progressive than that of any existing state constitution."[49] The proposed article was:

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liberty or property without due process of law nor be denied the equal protection of the law." Article I, Section 2, Illinois State Constitution.

[46] This is a categorisation used by Tamar L. Sobel in "Strategies for School Finance Reform Litigation in the Post-*Rodriguez* Era", *New England Law Review,* Volume 21:4, 1985-1986, pp. 817-846.

[47] See Appendix, Table 1.

[48] The seven state constitutions with "thorough and efficient clauses" were Maryland, Minnesota, New Jersey, Ohio, Oregon, Pennsylvania and West Virginia. The nineteen with similar phraseology were Arizona, Arkansas, Colorado, Delaware, Florida, Georgia, Idaho, Illinois, Indiana, Kentucky, Montana, Nevada, North Carolina, North Dakota, South Dakota, Texas, Utah, Washington, Wisconsin, Wyoming.

[49] Mark G. Yudof and Daniel C. Morgan, "*Rodriguez v. San Antonio Independent School District:* Gathering the Ayes of Texas- The Politics of School Finance Reform", *Law and Contemporary Problems,* Volume 38, No.3, Winter-Spring 1974, p. 547.

> *Article VII- Education*
> *Section I. Equitable Support of Free Public Schools*
>
> a). A general diffusion of knowledge being essential to the preservation of the liberties and rights of the people, it shall be the duty of the Legislature to establish and make suitable provision for the equitable support and maintenance of an efficient system of free public schools and to provide equal educational opportunity for each person in this State.
> b) In distributing State resources in support of the free public schools, the Legislature shall ensure that the quality of education made available shall not be based upon wealth other than the wealth of the state as a whole and that the State supported educational programs shall recognize variations in the backgrounds, needs, and abilities of all students. In distributing State resources, the Legislature may take into account the variations in local tax burden to support other local government services.[50]

The specific detail of this provision precipitated widespread political opposition. Both the Governor and the State Board of Education opposed the adoption of this provision.[51] TEE and its allies, however, supported the provision wholeheartedly: "Had the legislature, acting as the Constitutional Convention, accepted the education article as recommended by the Revision Commission, TEE's goals would have been met within one year of its organisation."[52] However, the final version of the clause was modified to:

> A general diffusion of knowledge being essential to the preservation of the liberties and rights of the people, it shall be the duty of the legislature to establish and make suitable provision for the equitable support and maintenance of an efficient system of free public schools below the college level that will furnish each individual an equal educational opportunity.[53]

The final version indicated the state's commitment to provide an "equitable" and "efficient" system of education. It no longer, however, retained mention of the no wealth principle of education funding nor the guarantee to equalise tax burdens. It did retain mention of "equal educational opportunity", which although vague, was an important inclusion.

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[50] Texas Constitutional Revision Commission, *A New Constitution for Texas,* (1973). As quoted in *Ibid.,* p. 405.
[51] *Ibid.,* p. 407.
[52] José Cárdenas, *op.cit.,* p. 70.
[53] *Ibid.,* p. 407.

However, the new provision failed to pass the Convention by three votes.[54] Thus, hopes of a new constitutional provision to strengthen the impetus for reform were dashed, and the old constitutional provision remained. Article Seven, Section One of the Texas Constitution stated: "A general diffusion of knowledge being essential to the preservation of liberties and rights of the people, it shall be the duty of the legislature to establish and make suitable provision for the support and maintenance of an efficient system of free public schools." The primary difference between the existing constitutional provision and the new provision lay with the promise of individual equal educational opportunity. The existing clause simply provided for an efficient system, with no provisions for individual quality of education. The Constitutional Convention, therefore, illustrated the difficulties of achieving substantial change through the legislative process when the political atmosphere was heavily charged.

On 24-25th June 1974, TEE organised a conference on school finance litigation in San Antonio. Possibilities for future litigation were considered, and as a result of the conference, MALDEF and the Lawyers' Committee for Civil Rights conferred with TEE to decide the feasibility of litigation. Sanford Jay Rosen, legal director for MALDEF, wrote to TEE on 12th July 1974 to express his thoughts on the matter. In the letter he stated "the prospects for re-litigation of public school finance are not promising at this time."[55] His reasons were based upon certain comments by Justice Powell in *Rodriguez* which, according to Rosen, indicated the need for further research.[56] Thus, he identified areas for future research, such as finding a convincing answer to the question: "Where are the poor?....Are they in fact clustered around commercial and industrial areas as the Court surmised from the Connecticut study?"[57] Rosen, therefore, identified the apparent weaknesses in the plaintiffs' case as indicated by the *Rodriguez* opinion and recommended further research before any litigation was begun. Despite his recommendations, Rosen did not believe that if these questions had been answered, the Court would have ruled in the plaintiffs' favour: "Careful reading of Justice Powell's opinion in *Rodriguez* strongly suggests to me that he is only holding out false promise to

[54] The final vote was 118-62. The required number was 121.
[55] Letter from Stanford Jay Rosen to TEE, 12th July 1974, M.A.
[56] See Chapter Three, p. 201.
[57] Letter from Stanford Jay Rosen to TEE, 12th July 1974. Additional recommended areas of research included the adequacy of the minimum foundation program, the exact correlation between education and political rights, exact identification of the poor, demonstrate the effect of substantive reform on Texas political structure.

us."[58] Despite this, Rosen nonetheless believed this research to be the first stage in any future litigation attempt. He urged caution and careful planning of future litigation:

> Once you collect this data, we could then consider whether new public school financing litigation should be undertaken in Texas. It might well be better for us to wait until some of the law suits that are pending, or are being planned for states other than Texas, are completed. If we can then develop a series of precedents contrary to the *Rodriguez* decision, we may well be able to move again in Texas.[59]

Thus, Rosen was concerned with building a solid base of legal precedent before filing a suit. Stephen Browning shared Rosen's cautionary tone. In a letter to TEE on 27th July, Browning stated:

> Prior to filing new education reform suits, extreme care must be taken, not only with respect to developing viable legal theories, but also with respect to developing and presenting evidence of the inequalities complained of.....I am delighted that you are focusing first on the need to develop both a sound factual basis and a solid legal theory....rather than rushing into state court and filing a law suit.[60]

The advice of Rosen and Browning was heeded. TEE decided against filing a suit until more legal precedents had been established and "the political climate would be conducive for a successful decision."[61] This decision meant that immediate hopes for reform in Texas still rested with the legislature. Litigation was, however, employed in other states, and the development of an alternative litigation strategy occurred concurrently with the legislation passed in Texas.

During the 63rd and the 64th Legislatures (1973 and 1975), the research groups appointed by the governor studied and drafted legislative recommendations for the next session. At the start of the next legislative session, a high degree of expectation existed regarding the possibility for substantive reform.[62] The recommendations of Governor's Office of Educational Research and Planning (OERP), the group appointed at the end of the last legislative session, were long and detailed and dealt with all aspects of

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[58] *Ibid.*
[59] *Ibid.*, p. 3.
[60] Letter from Stephen Browning to TEE, 27th July 1974. M.A.
[61] *Ibid.*, p. 89.
[62] José Cárdenas, *op.cit.*,p. 101. This was particularly in light of the narrow failure of the 63rd Legislature to enact legislation.

educational finance. TEE, which had subsequently changed its name to the Intercultural Development Research Association (IDRA), was, however, unimpressed with the report: "Although OERP recommendations would increase the minimum level of education in the state, they do not promote equality of educational opportunity."[63] As a result of the high degree of interest in school finance, by April 1975, five major bills had been proposed.[64] The bill eventually passed did not contain the greatest degree of equalisation, but encompassed many areas of educational reform.

The bill contained provisions for admission procedure, provisions for bilingual education and student-teacher ratios. The provisions for educational finance provided greater flexibility and enhanced equalisation.[65] In addition to the enhanced financial support for districts with below state average taxable wealth, every school district would receive $40 for each educationally disadvantaged pupil. Thus the legislation contained equitable elements which improved upon the current system. It did not, however, provide a fundamental restructuring of the school finance system, and contained certain elements that detracted from its equalising features. For example, the bill contained a maximum of $50 million for equalization aid that subsequently allocated $70 per pupil. This amount was insufficient to address the problem of inequality in depth. Furthermore, the scope of the legislation was broad.[66] In order to obtain sufficient political support to ensure the passage of HB1715, the criteria of those eligible for assistance was increased. As a result, the funds appropriated proved inadequate to make substantial change. Thus, although the 64th Legislature passed school finance legislation, which was an achievement, it contained too many weak elements to produce substantive change.

Furthermore, the provision for bilingual education reduced the scope of the previously enacted bill. The 1973 bill created a bilingual program for grades 1-6, but this bill reduced the mandatory program to grades 1-3. Bilingual programs for the fourth and fifth grades were optional, but state assistance was offered if districts decided to establish programs. However, no state assistance was provided for bilingual programs in any other

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[63] José Cárdenas, *op.cit.*, p. 110.

[64] These bills were based upon the recommendations by Texas State Teachers Association, State Board of Education, Representative Daniel Kubiak and Texas State Advisory Committee respectively.

[65] The equalization aid formula was altered to allow districts with below average local fund assignment would be eligible for additional equalisation aid. In order to qualify for the maximum amount, the district must raise the difference between the amount of state equalisation aid and $70. If the district chooses to raise an amount below this, state funds would be reduced proportionally. This provision thereby accounted for local choice whilst provided increased state support for districts.

[66] José Cárdenas, *op.cit.*, p. 124.

grades. Thus, for Mexican American activists, the bill contained an inherent paradox. On one hand, the bill attempted to improve the funding in poor districts, although not to the degree activists required. On the otherhand, however, the bill also reduced the state funds for bilingual education. Thus, a small gain in school finance reform occurred simultaneously with a retrenchment in bilingual funding. The bill, therefore, illustrated the problematic nature of achieving equal educational opportunity. Concerns about the financial cost of reform restricted the degree of political support. The establishment of equal educational opportunity required significant financial commitment by the state. The economic atmosphere of the 1970s, with the rising rate of inflation and subsequent rising prices increased the opposition to costly reform programmes. The economic environment, therefore, shaped the political context which affected the degree of reform possible. The financial cost of achieving equal educational opportunity presented an additional obstacle for activists.

The next two legislatures, the 65th and 66th (1977 and 1979), followed a similar pattern. During the 65th Legislature, six school finance bills were proposed.[67] The process of negotiation and compromise occurred, which meant the remaining bills were modified to be less far-reaching and less expensive. Despite these modifications, neither the House nor the Senate achieved the required two-thirds majority necessary for implementation. The 65th Legislature therefore adjourned in June 1977 without passing any school finance legislation. It also failed to pass the bilingual education bill, which sought to extend the current program. During the interim, particularly in 1978, the Governor established additional research groups. The 66th Legislature opened with reports and recommendations regarding current changes and future courses of action.[68] During this session, the legislature was successful in enacting legislation and passed SB350. This act "provided for the infusion of approximately $1.174 billion into state elementary and secondary public school programs, with the majority of funds being distributed in

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[67] These bills were HB1113, proposed by the State Board of Education, HB750, proposed by the Governor's Office, HB147, proposed by the House Alternatives Committee, HB980, proposed by the Texas School Administrator's Council, HB613, proposed by the Texas State Teachers Association, and SB777, proposed by Senator Oscar Mauzy.

[68] The most important of these reports came from the National Council of State Legislators and the Education Commission, which reported upon the current state of Texas education and the effects of the recent changes. The report found that the basic educational programme had been upgraded, but in all other aspects, the school funding situation had remained unchanged. Even the 44% increase in district expenditures was only relative to increased educational costs and had done little to rectify the interdistrict disparities.

proportion to district property wealth."[69] The act appeared to provide a much-needed boost to educational funds in property poor districts. However, it also provided increased assistance for property rich districts, which reduced its effectiveness of the equalisation elements.[70] It illustrated the broader concerns of the legislature. The adequate provision of education, not equalisation, was the prime legislative concern. Legislation such as SB350 and the earlier bill HB1146 both increased the state expenditure on education. Property poor districts did receive increased financial assistance under both bills. The legislature, however, did not only identify the poor districts for additional assistance, but attempted to raise the educational standards throughout the state, in rich and poor areas alike. As a result, both bills also contained elements that detracted from the potential equalisation of funds by also assisting richer areas.

During the next two legislatures, no further legislation was enacted.[71] This was, in part, a reflection of the increased conservatism at both the state and national level. The election of William Clements as the first Republican governor of Texas and the continued conservatism of the state legislature ensured that the state commitment to education reform remained minimal. Furthermore, the election of Reagan to the Presidency and the subsequent cuts in social welfare expenditures coupled with the increasing rate of inflation further curtailed governmental expenditure. The movement for bilingual education, however, was significantly strengthened by a 1981 Federal Court of Appeals ruling. This decision, *U.S. v. State of Texas*, held that the bilingual educational programs were "wholly inadequate".[72] The Court stated that discrimination against Mexican Americans was "particularly acute in the Texas public schools and the state had not taken adequate measures to remove the disabling vestiges of past *de jure* discrimination." The state was ordered to give immediate relief by improving the standard of the bilingual program, finding that the current system was "seriously deficient". In order to remedy this situation, the Court ordered the state to submit a plan which contained bilingual education for all Mexican American children of limited English and devise a strategy for training bilingual teachers. This decision, amid an increasingly conservative state

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[69] Report by Albert Cortez for IDRA, as quoted in *ibid.*, p. 137.
[70] According to José Cárdenas, "The poorest school districts received an average of $132.70 in increased state aid, but the wealthiest districts in the state received $44 in additional state aid, thereby eliminating one third of the effect of the disparities." *Ibid.*, p. 138.
[71] The 67th and 68th Legislatures (1981 and 1983) both produced some educational legislation, but no further equalisation of school funding.
[72] 321 F.Supp.91 (1981), as quoted in Guadalupe San Miguel, *op.cit.*, p.201.

political environment, was widely condemned. Governor William Clements, for example, vowed "to fight the decision in a higher court."[73] *The Dallas News* commented that "the education of Chicanos was not a high priority of most Texans."[74]

However, MALDEF activists were understandably delighted with the decision. Vilma Martinez, General Counsel, stated "with this decision, we can break the cycle and give Mexican American children a fair chance to learn."[75] This decision prompted the legislature into eventually passing a much stronger bilingual educational bill, SB477 in June 1981, six months after the federal courts ruling. Thus, despite the political opposition to the Court ruling, the legislature passed a bill that was generally applauded by Mexican American leaders. Although this bill fell short of all the specific court requirements, it contained many of them, and thus received the support of Mexican American organisations. According to one reporter "the federal court decision was undoubtedly responsible for drastically changing the nature of political opposition to bilingual educational programs. Without this crucial decision, it is unlikely that Mexican Americans would have been able to get a much stronger bilingual law enacted."[76] *U.S v. Texas* was, therefore, the primary reason for the eventual establishment of effective and more comprehensive bilingual education. These events emphasised the importance of litigation in the achievement of substantive legislation on a politically contentious issue. It also illustrated that bilingual educational reform was easier to achieve than school finance reform. Although both issues were politically contentious and required increased state expenditure, bilingual education targeted a specific political group and did not challenge local control of education to the same degree. School finance, in contrast affected all Texas citizens, which heightened its political volatility.

The continued failure of the state government to enact substantive reform meant that litigation was once again considered as a possible course of action in school finance reform. The disillusionment of IDRA and the poor school districts with the legislature was complete. The absence of a constitutional ruling coupled with the political difficulties of school finance reform meant recent legislation addressed only the worst symptoms of finance inequality. The ten-year period after *Rodriguez* had not produced

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[73] *San Antonio Express,* February 15th 1981. As quoted in Guadalupe San Miguel, *op.cit.*,p.203.
[74] *Ibid.*
[75] *Ibid.*
[76] *Ibid.*

sufficient change in the school finance system. In 1984-85, per pupil expenditure in Edgewood was $2,202 in comparison to $3,750 in Alamo Heights.[77] This statistic illustrated the financial developments since *Rodriguez.* In 1968-1969, per pupil expenditure in Edgewood was $356, compared to $594 in Alamo Heights. Thus, despite the reform attempts, the difference between per pupil expenditure had remained approximately the same since *Rodriguez.* In 1968-1969, a difference of $238 existed between the richest and poorest district. In 1985-1986, the difference was $1548. Thus, in 1968-1969, Alamo Heights spent 1.6 times more per pupil, whereas in 1985-1986, it spent 1.7 times more per pupil. Inequalities persisted therefore, and the actions of the state government illustrated the immense problems of leaving school finance reform to the majoritarian political process. Thus, on 13th May 1983, IDRA, joined by MALDEF, resolved to begin litigation proceedings.

The decision to resume litigation attempts was also boosted by a Supreme Court decision of the preceding year. In *Plyler v. Doe*, handed down in June 1982, the Court struck down a Texas statute which forbade illegal immigrants from receiving a public education. This case was, in part, a response to the rising rate of illegal immigration from Mexico that occurred during this period and created further demands on the Texas educational system. The State banned illegal immigrants from receiving an education, yet in so doing facilitated the increase of uneducated people within Texas. The case, therefore, involved the larger issue of the consequences of illegal immigration, particularly on public services, which was of particular importance in Texas. In this decision, the Court reaffirmed its commitment to education and distinguished it between other economic rights. This was a distinction that it had refused to make in *Rodriguez.* Whilst the Court sustained *Rodriguez* by not declaring education to be a fundamental right, it ruled that education warranted special constitutional consideration. Thus, it narrowed the implications of *Rodriguez* and enabled litigants to use the federal constitution to support arguments regarding the legal distinctiveness of education. The case concerned the rights of illegal immigrants to an education.[78] The Court, by a 5-4 majority, upheld an U.S. Fifth Circuit court ruling that overturned a statute that withheld school funds for immigrants "not legally admitted into the U.S."[79] Furthermore: "using

[77] *Edgewood v. Kirby,* 777 S.W.2d (1989), p. 100.
[78] 457 U.S.202 (1982).
[79] *Ibid.,* p. 202.

carefully tailored language to avoid the *Rodriguez* conflict, the *Plyler* Court recognized that some instances of educational deprivation may not be tolerated under the fourteenth amendment."[80] Although *Plyler* did not consider school finance litigation, it nonetheless assisted litigants by confirming the constitutional distinctiveness of education. It was a symbolic ruling; *Plyler* did not overturn *Rodriguez*, but it did define the certain parameters of the decision.

The personnel of the Court had altered since *Rodriguez*. William Douglas had been replaced by John Paul Stevens and Potter Stewart had been replaced by Sandra Day O'Connor. Stevens, a Ford appointee, was described as "a moderate civil libertarian who was not always ideologically predictable and who was often a loner in civil liberties opinion writing."[81] O'Connor, the first woman appointee, had been active in Republican politics before her appointment, and had been a law student in the same class as William Rehnquist at Stanford University.[82] Her appointment by Reagan was not only because of her sex, but also of her ideological acceptability to his administration.[83] Thus, the departure of Douglas and Stewart had paved the way for an increasingly conservative court. O'Connor possessed a more conservative judicial philosophy than Stevens, but the ideological spectrum that existed at the time of the *Rodriguez*, with Rehnquist at one end and Douglas at the other, had narrowed.[84]

The five majority justices in *Plyler* were Brennan, Marshall, Blackmun, Powell and Stevens. Thus, two dissenters in *Rodriguez,* Marshall and Brennan, joined with two of the majority, Powell and Blackmun, and a recent appointee, to constitute the Court majority. Justice White, a dissenter in *Rodriguez*, also dissented in *Plyler*, the only justice to do so. William Brennan wrote the majority opinion, which confirmed the Court's findings in *Rodriguez*, but narrowly interpreted its implications. Brennan confirmed that "education is not a fundamental right", but then declared:

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[80] Tamar L.Sobel, *loc.cit.,* p. 843.
[81] Bradley C. Canon: "Justice John Paul Stevens: The Lone Ranger in a Black Robe", Charles Lamb and Stephen Halpern (eds), *The Burger Court: Political and Judicial Profiles,* (Chicago, 1991), pp.345-374.
[82] She was appointed to the Arizona state senate in 1969 to fill a vacancy, and then won election to that position in 1970 and 1972.
[83] For further detail of O'Connor's judicial philosophy, see Beverly B. Cook, "Sandra Day O'Connor: Transition to a Republican Court Agenda", Lamb and Halpern (eds), *op.cit.,* pp. 238-275.
[84] For further detail of the ideological composition of the Court at the time of *Rodriguez*, see previous chapter, p. 112-117.

> The deprivation of public education is not like the deprivation of some other governmental benefit. Public education has a pivotal role in maintaining the fabric of our society and in sustaining our political and cultural heritage; the deprivation of education takes an inestimable toll on the social, economic, intellectual and psychological well-being of the individual, and poses an obstacle to individual achievement.[85]

This assertion confirmed the importance of education in the life of the individual, which was in keeping with the *Rodriguez* opinion. The quotation from *Brown v. Board of Education*, cited in both the plaintiffs' brief in *Rodriguez* and in the majority opinion, was once again cited in *Plyler*.[86] Brennan used this quotation in the same sense as Powell in *Rodriguez*: to confirm the Court's long-standing commitment to education. However, the contention that deprivation of education could not be compared to other governmental benefits suggested that education could be distinguished from other state and local services. This was the essence of the plaintiffs' arguments in *Rodriguez*, but one that the Court had disputed: "How, for instance is education to be distinguished from the significant personal interests in the basics of decent food and shelter?"[87] The Court in *Plyler,* however, asserted: "But neither is [education] some governmental "benefit" indistinguishable from other forms of social welfare legislation."[88]

The concurring opinion of Justice Marshall indicated the discrepancy between the majority finding in *Plyler* and that of *Rodriguez*: "While I join the Court's opinion, I do so without in any way retreating from my opinion in *San Antonio Independent School District v. Rodriguez*. I continue to believe that an individual's interest in education is fundamental."[89] Thus, Marshall was able to reconcile his dissent in *Rodriguez* with his concurrence in *Plyler,* thereby demonstrating, in his view, a discrepancy between the two

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[85] 457 U.S., p. 203.
[86] *Brown v. Board of Education* 347 U.S. 483 (1954). The quotation appears at Chapter Two, p. 57.
[87] *San Antonio Independent School District v. Rodriguez,* 411 U.S.1, p. 37.
[88] 457 U.S.202, p.221. The legal analysis of the majority opinion followed the sliding scale equal protection analysis, also a departure from *Rodriguez.* Brennan wrote: "In applying the Equal Protection Clause to most forms of state action, we thus seek only the assurance that the classification at issue bears some fair relationship to a legitimate public purpose……We seek the assurance that the classification reflects a reasoned judgement, consistent with the idea of equal protection by inquiring whether it may fairly be viewed as furthering a substantial interest of the State." *Ibid.*, p. 217. Thus, there is no mention of either a strict scrutiny test, based upon fundamental interest and suspect classifications, or a rational basis test, based upon the presence of a legitimate state purpose. However, this is not incongruous with *Rodriguez*. In the nine years between *Rodriguez*_ and *Plyler*, the application of the equal protection clause altered. In part this was a result of the *Rodriguez* reasoning.
[89] *Ibid.*, p. 231.

findings. Chief Justice Burger, in his dissenting opinion, shared Marshall's view of the inconsistency between the findings:

> In *San Antonio,* Justice Powell, speaking for the Court, expressly rejected the proposition that state laws dealing with public education are subject to special scrutiny under the Equal Protection Clause. Moreover, the Court points to no meaningful way to distinguish between education and other governmental benefits in this context. [90]

Thus, by echoing the wording of Powell's *Rodriguez* opinion, Burger illustrated that in his view, *Plyler* contradicted elements of *Rodriguez.* The finding in *Plyler* suggested, according to Burger, that "the Court mandates a constitutional hierarchy of governmental services." This, in Burger's view, lay at the heart of the Court's reasons for finding against the plaintiffs in *Rodriguez,* and the same reasoning should be applied in *Plyler.* Justice White joined Burger's dissent, and did not file separately, thereby agreeing with Burger's argument of the apparent contradiction between *Rodriguez* and *Plyer.*

Blackmun and Powell wrote separate concurrences, which were designed to illustrate the continuity between their findings in both cases. Blackmun pointed out the limitations of *Rodriguez*: "I believe the Court's experience has demonstrated that the *Rodriguez* formulation does not settle every issue of "fundamental rights" arising under the Equal Protection Clause. Only a pedant would insist that there are no meaningful distinctions among the multitude of social and political interests regulated by the States."[91] Blackmun, therefore, also expressed the opinion that a certain distinction existed among the different governmental services. He did not acknowledge, however, that this finding contradicted elements of *Rodriguez*: "This conclusion is fully consistent with *Rodriguez.*" This assertion was based upon the finding that "*Rodriguez* implicitly acknowledged that certain interests, though not constitutionally guaranteed, must be afforded a special place in equal protection analysis." The use of the word "implicit" was crucial; Blackmun was able to apply *Rodriguez* wording to the *Plyler* findings in order to illustrate a continuity.[92]

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[90] *Ibid.*, p. 247.
[91] *Ibid.*,p. 233.
[92] The section of the opinion to which Blackmun referred was the confirmation of "the constitutional underpinnings of the right to equal treatment in the voting process", even though the "right to vote, per se, is not a constitutionally protected right." 411 U.S. 1 at 34. Blackmun's concurrence in *Plyler* was illustrative of the development in his judicial philosophy that had occurred since *Rodriguez.* At the time of

Powell wrote his concurrence to "emphasize the unique character of the cases before us," not to distinguish *Plyler* from *Rodriguez. Rodriguez* was not mentioned at any point in his opinion. Out of five separate opinions (four concurrences and one dissent), Powell was the only justice not to mention *Rodriguez.* The main focus of Powell's concurrence was the legal complications of immigration and the rights of children under the Constitution. As a result, Powell cited his opinion in *Weber v. Aetna Casualty & Surety Co,* which had been quoted at length in the plaintiffs' brief in *Rodriguez.*[93] Thus, Powell approached *Plyler* differently to *Rodriguez.* He did not consider the fundamentality of education, but instead the rational basis of the statute. Powell declared: "The classification at issue deprives a group of children of the opportunity for education afforded all other children simply because they have been assigned a legal status due to a violation of laws by their parents. These children have thus been singled out for lifelong penalty of stigma."[94] Thus, little mention was made of the fundamentality of education, but instead Powell focused upon the consequential effect upon the children.

For Powell, the distinction between the two cases lay with the difference between absolute and relative deprivation. In *Rodriguez*, only a relative deprivation of education was under scrutiny. Powell commented in *Rodriguez* that: "Even if it were conceded that some identifiable quantum of education is a constitutionally protected prerequisite to the meaningful exercise of either right [the rights to speak and vote], we have no indication that the present levels of educational expenditures in Texas provide an education that falls short."[95] The plaintiffs in *Rodriguez* challenged a relative deprivation of education; they were provided with an education, it was simply an inferior standard to that received in property rich districts. The plaintiffs in *Plyler*, however, received no education. As a result, they had no educational opportunity, whereas the plaintiffs in *Rodriguez* had no equality of educational opportunity. The distinction, in the view of the majority, was

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Rodriguez, Blackmun was still known as the "Minnesota Twin", a reflection of both his friendship with Warren Burger, and his tendency to vote with him in many early cases. However, Blackmun gradually developed a more centrist philosophy, voting with increasing frequency with Brennan and Marshall. His decision in *Plyler*, although not instantly identifiable as a statement of centrist judicial philosophy given its apparent continuity with *Rodriguez*, nonetheless provided an indication of the development in Blackmun's judicial philosophy. For more detail on the changes in Blackmun's judicial philosophy, see Stephen L. Wasby, "Justice Harry Blackmun: Transformation from "Minnesota Twin" to Independent Voice". Lamb and Halpern (eds), *op.cit.*, pp.63-99.

[93] 406 U.S. 164 (1972). See Chapter Two, p. 183.

[94] *Ibid.*, p. 240.

[95] 411 U.S. 1, p. 37.

crucial. The Court in *Plyler* was able to invalidate the Texas statute whilst upholding the decision that education was not a fundamental right. Powell's approach in *Plyler* reflected this distinction and illustrated that *Rodriguez* had not affected the Court's defence of education.

Plyler provided the plaintiffs with a Supreme Court opinion that contained phraseology and constitutional concerns that supported their objectives. It suggested that "the Court was willing, or perhaps more willing than it has been, to afford constitutional protection to the 'right' or interest in acquiring a basic education for all children within this country."[96] *Plyler,* in effect, provided a narrower interpretation of *Rodriguez* and suggested that its main legacy was in equal protection analysis rather than the constitutional importance of education. It suggested therefore that a minimum level of education could be constitutionally guaranteed, thereby acknowledging the constitutional importance of education.

The advice by Browning and Rosen to postpone litigation attempts until a substantial body of precedents had been established proved relatively successful.[97] The continued litigation in states outside Texas ensured that by the time activists had decided to file suit, a number of cases had been decided. In the ten years since *Rodriguez*, fifteen cases had been decided and two legal strategies were identifiable.[98] Of the cases decided, five states had found for the plaintiffs and had declared the state finance system unconstitutional. The legal strategy employed by both the successful and unsuccessful plaintiffs was informative for the development of the new case in Texas. The first strategy employed, as indicated by the court in *Robinson*, used the state equal protection clause as a basis for its analysis. In this strategy, the legal reasoning was ostensibly the same as *Rodriguez.* Plaintiffs asserted that education was a fundamental interest and wealth was a suspect classification under the terms of the state equal protection clause,

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[96] Tamar L.Sobel, *loc.cit.,* p. 845.

[97] See above, p. 226.

[98] The 15 cases were: *Shofstall v.Hollins,* 110 Ariz. 88. (Ariz.,1973), *North Shore School District v. Kinnear,* 84 Wash.2d 685 (Wash.1974), *Thompson v. Engelking*, 96 Idaho 793 (Idaho, 1975),*Olsen v. State,* 276 Or. 9 (Or.1976), *Horton v. Meskill*, 172 Conn. 615 (Conn. 1977),*Seattle School Dist No.1 v.State* 585 P.2d 71 (Wash, 1978). *Cinncinnati School Dist. v. Walter,* 58 Ohio St. 2d 368 (Ohio, 1979),*Danson v. Casey,* 399 A.2d 360 (Penn., 1979) *Washakie Co.School District v. Herschler*, 606 P.2d 310 (Wyo., 1980), *McDaniel v. Thomas,* 248 Ga. 632 (Ga.,1981), *Lujan v. Colorado St. Bd. of. Educ.,* 649 P.2d 1005 (Colo. 1982), *Bd. of Educ., Levittown v. Nyquist,* 57 N.Y. 2d 27 (N.Y. 1982), *Pauley v. Kelly,* 255 S.E. 2d 859(W.Va. 1982), *Hornbeck v. Somerset Co.Bd. Of.Educ.*295 Md.597 (Md.1983), *Dupree v. Alma School Dist. No.30,* 279 Ark.340 (Ark.,1983).

and as a result, the finance system was unconstitutional. The contention that education was a fundamental interest was considered to be stronger due to the wording of the state constitutions. In all state constitutions, education was specifically mentioned. If the *Rodriguez* reasoning was applied, which declared a fundamental right to be one that was "implicitly or explicitly guaranteed within the Constitution", the specific inclusion of education within the state constitution was sufficient basis to declare it fundamental.

The first strategy of litigation, which used the state equal protection clause as the basis of its challenge, had mixed success. Only four states, Arizona, Connecticut, Wyoming, and West Virginia had found education to be a fundamental right under the terms of the state equal protection clause.[99] Of these, the Arizona decision still found the finance system to be constitutional; the state provided an acceptable rational basis to justify its current structure. Ten other states found education not to be a fundamental right, despite the existence of the word "education" in state constitutions.[100] Thus, the mention of education was insufficient to render it fundamental. This finding distinguished *Rodriguez* from those cases in the state courts. The contention that, in state constitutions, the fundamentality of education did not depend upon its explicit mention complicated litigants' chances of success with this strategy. It was not possible to apply the findings of the *Rodriguez* opinion to state equal protection clause.

The second litigation strategy, also used by the New Jersey Supreme Court in *Robinson,* predicated the legal challenge upon the education clause of the state constitution. Ten years after *Rodriguez*, only two states, Washington and West Virginia had petitioners who used this method successfully.[101] The first of these states, Washington, challenged the notion that the state government maintained and supported a "general and uniform system of public schools."[102] The Washington Supreme Court declared that the state "had a duty to make ample provision for the basic education of our resident children through a general and uniform system."[103] Thus, the Washington court held the school finance system violated the "general and uniform" clause. Similarly, the

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[99] *Shoftstall v. Hollins* (1973), *Horton v. Meskill* (1977), *Washakie Co. School District v. Herscheler* (1980), *Pauley v. Kelly* (1982).

[100] The ten states were Colorado, Georgia, Idaho, Kansas, Michigan, New York, Ohio, Oregon, Pennsylvania and Arkansas.

[101] *Seattle School Dist No.1 v. State,* (1978), *Pauley v.Kelly* (1979). Not including New Jersey in *Robinson v. Cahill.* See above, pp. 223-224.

[102] Washington Constitution, Article IX, Section 2.

[103] *Seattle School Dist.No.1 v. State,* at p. 585.

West Virginia Supreme Court found that state's school system to be violative of the "thorough and efficient" education clause. It declared that the education system must develop "as best the state of education expertise allows, the minds, bodies, and social morality of its charges to prepare them for useful and happy occupations, recreations and citizenship."[104] Thus, both the Washington and the West Virginia court found the wording of the education clause to be sufficient basis for overturning the finance system.

In eight other state decisions, however, the court found against the plaintiffs.[105] The education clause was more narrowly interpreted, and the limitations of this strategy were exposed. For example, in *Thompson v. Engelking*, the Idaho case, the court found that "general and uniform" system of education meant "uniformity in terms of curriculum, not uniformity in funding."[106] Similarly, the Oregon case interpreted "a uniform and general system of common schools" to mean "the minimal level of educational opportunities."[107] According to this criterion, the state had an established a uniform and general system of common schools by providing a system of education for its citizens. The standard of education and the egalitarian nature of the financial system were non-justiciable concerns. It was also possible to combine the two approaches. Many of the legal challenges were predicated upon both the educational clause and the state equal protection clause. For example, in *Pauley v. Kelly,* the West Virginia case, the court found education to be a fundamental right and the finance system therefore violative of the state equal protection clause. The court also found the system violated the "thorough and efficient" clause of the state constitution. The mixed success of both tactics meant that there was no obvious choice of strategy for the potential litigants in Texas. The political and judicial character of each state, the condition of educational finance and the legislative attempts were all contributory factors in the eventual outcome and affected the litigation strategy of each state. Thus, the legal strategy in Texas was formulated to apply to the particular state concerned, rather than the overall statistical success of that strategy.

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[104] *Pauley v. Kelly* (1979).
[105] The eight decisions were: *Thompson v. Engelking* (Idaho, 1975), *Olsen v. Johnson*, (Or.1976), *Cincinnati School District v. Walter*, (Ohio 1979), *Danson v. Casey* (Penn., 1979), *McDaniel v. Thomas*, (Ga. 1981), *Levittown Union Free School Dist. v.Nyquist* (N.Y.1982), *Lujan v. Colo.State Bd. of Educ.*(Colo., 1982), *Hornbeck v. Somerset County Bd. of Educ.*(Md. 1983).
[106] 96 Idaho 793, at 795 (1975).
[107] 276 Or.9, at 15 (1976).

Accordingly, in the summer of 1983, MALDEF met with representatives from IDRA and Edgewood School District to examine the prospects for litigation. On 29th October 1983, MALDEF agreed to provide lawyers to pursue the suit, and IDRA agreed to assist in data collection and provide technical and expert assistance to the legal staff.[108] The involvement of MALDEF and IDRA immediately distinguished the new litigation from *Rodriguez*. Gochman worked alone, without the assistance of organisations until the district court trial, and had funded the suit personally. The involvement of legal defence and research organisations immediately altered the nature of the litigation attempt. It reflected the developments that had occurred in school finance reform since *Rodriguez*.[109] The movement had acquired a professional quality, with an organised base, research groups and well-established network. This change proved essential to the success of the new litigation.

The new suit was filed at a point when the state of American education had come increasingly scrutinised. In June 1983, a federal commission on education issued a report entitled *A Nation At Risk*. The report contained statistics that suggested that American students were outperformed on international academic tests by students from other developed countries.[110] In order to remedy this situation, the commission advocated increased state involvement in education. This report underlined the necessity for the improvement of educational standards and also suggested that local governments could not accomplish this task alone, thereby suggesting that increased central control was the most effective way to improve educational conditions. Concern for educational standards, therefore, had become an issue of national importance, which further affected the movement for school finance reform in all states.

The suit was also filed at a time in which the relationship between the federal and state governments was being redefined, and marked a resurgence in the power and responsibility of state governments The desire to return power to the states was a dominant theme of the Reagan administration. Reagan, like Nixon, emphasised the importance of smaller federal government. In his State of the Union Address in 1985, Reagan commented: "Nearly fifty years of government living beyond its means has

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[108] José Cárdenas, *op.cit.*,p. 217.
[109] MALDEF refused to assist Gochman in the original suit.
[110] National Commission on Excellence in Education, *A Nation At Risk: The Imperative for Educational Reform* (Washington D.C: Government Printing Office, 1983). As quoted in Theodore Sizer, *Horace's Compromise: The Dilemma of American Education* (Boston, 1987). p.32.

brought us to a time of reckoning. Every dollar the federal government does not take from us, every decision it does not make for us, will make our economy stronger, our lives more abundant and our future more free."[111] Reagan's desire to alter the federal balance in favour of state governments prompted a cutback in federal aid, deregulation which enhanced state responsibility in certain areas and increased use of the bloc grant system of funding, to replace categorical grants.[112] For example, in 1981, Congress passed Reagan's bill to place 57 categorical grants into nine block grants and also eliminate 60 categorical grants. Between 1980-1984, the number of categorical grant schemes fell from 539-404. Furthermore, government spending on Aid to Families with Dependent Children (AFDC) and Foodstamps was also cut. This increased the financial burden for all states. Texas in particular was affected by these changes in light of its high percentage of economically deprived Mexican American immigrants. Thus, the reformers faced the dual obstacles of the increasing political conservatism at both state and national level, and the increased financial demands on the state, particularly in social welfare payments. These changes, therefore, were occurring at the time of the *Edgewood* litigation and affected the state environment.

In June 1984, plaintiffs' filed suit in the case *Edgewood v. Bynum*.[113] Plaintiffs were the Edgewood, South San Antonio, Eagle Pass, Socorro, San Elizario, Brownsville, Pharr-San Juan-Alamo, La Vega Independent School Districts, and children and parents residing in those districts.[114] The lead lawyer for the plaintiffs was Albert Kauffman, from MALDEF. The defendants were Raymon Bynum, the Texas Commissioner of Education, the entire Texas Board of Education, and Governor Mark White. The lawyer for the defendants was Texas Assistant Attorney General, Kevin O'Hanlon. The suit, a class action, accused the defendants of discriminating against the plaintiffs and thereby depriving "one million children residing in property poor districts of their right to equal educational opportunity."[115] The plaintiffs' argued that "the financing approach is violative of Article VII of the Texas Constitution."[116] The plaintiffs also argued that the

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[111] Ronald Reagan, State of The Union Address, January 20th 1985.
[112] Categorical grants were grants given to states for specific programs, such as highway construction or welfare payments. Block grants were lump sums of money given to a state to determine the amount spent on each program on a state-by-state basis.
[113] Suit No. C-8353. (1984).
[114] Demetrio Rodriguez was one of the parents of Edgewood district who signed the suit.
[115] José Cárdenas, *op.cit.*, p. 218.
[116] See above, p. 230.

school finance system discriminated upon the basis of race and class: "The named defendants, through the existing school finance system, further violate Article I, Section 3 by depriving Mexican Americans and below poverty level students equal right", thereby reintroducing the two central concepts to the *Rodriguez* litigation. The first charge, therefore, invoked the "efficient" clause of the Texas Constitution, and accused the defendants of failing to provide an efficient system of education, thereby following the recent style of litigation. The second charge accused the state of unequal treatment of the laws; namely a deprival of equal protection guarantees. The re-introduction of this theme, which the Supreme Court ruling did not specifically mention, was a result of the additional research conducted since *Rodriguez.* The language of the plaintiffs' charges also reflected both the additional research and the lessons learnt from the Court's ruling. Throughout the list of charges, the plaintiffs referred to "property poor" districts instead of simply "poor." The assumption that poor children lived in property poor districts could not be proven, as Powell illustrated by citing the Connecticut study used in Wright's brief.[117] The plaintiffs in *Edgewood* were careful to avoid the same assumption. Thus, the legal charges combined both litigation strategies pursued in state litigation, and reflected post-*Rodriguez* research developments. The presence of the charge of racial and class discrimination, however, demonstrated the primary concerns of the activists. Both MALDEF and IDRA were dedicated the improvement of conditions of Mexican Americans. It was unsurprising, therefore, that the litigation continued to contain the charge of racial and class discrimination which provided the original impetus for the *Rodriguez* litigation. However, this charge was not as prominent in the *Edgewood* litigation, and would, through the course of the litigation, become increasingly marginalised. The marginalisation of the racial discrimination reflected the broader conservative political environment at both state and national level, yet its presence in the litigation demonstrated the primary concerns of the activists.

The filing of the *Edgewood* litigation prompted an immediate response from the governor. Governor Mark White, in June 1983, called a special session of the legislature to be adjourned to discuss the recommendations made by the most recent research group. The Select Committee on Public Education (SCOPE), chaired by Ross Perot, was created to address the statewide dissatisfaction with state public education, not just school

[117] See previous chapter, p. 201.

financing.[118] The committee finally issued its recommendations in March 1984, in which it called for a complete overhaul of the finance system, to be replaced by a more equitable finance system.[119] The committee's failure, however, to suggest a replacement, or specify any guidelines for equalisation, rendered the recommendations "incomplete."[120] Despite the shortcomings, however, Kauffman waited for the special session of the legislature to act upon the recommendations in order to ensure all legislative options had been pursued. This would then highlight the need for judicial involvement. The recommendations were encapsulated within HB72, a compromised form of which passed the special session of the legislature in July 1984.

HB72, however, did not sufficiently address the inequality of the school finance system. One compromise reached over the content of the bill removed the limitation of local enrichment. This meant that the local districts were still able to supplement the finance system in accordance with local desire and, more importantly, local wealth. This enabled rich districts to use district wealth to appropriate significantly more educational funds. IDRA conducted research into the effects of HB72, one year after its implementation: "As a result of HB72, only 30 percent of the disparity had been eliminated, and even this amount is misleading since much of the small reduction can be attributed to the increased funding for special populations, which were more prevalent in Edgewood than in Alamo Heights."[121] The 30% increase was, for IDRA, offset by the proportional financial disparity that still existed. This illustrated that the objectives for reform lay not with the amount expended, but the actual differences between the rich and poor districts. Increased expenditure was insufficient, if the rich districts received an equal increase as the gap between the rich and poor districts remained. DRA and the plaintiffs in the suit wanted the expenditure between rich and poor districts to be equitable, which might ultimately involve an increase only for the poor districts, and the elimination of the use of local funds to supplement the basic funding. Plaintiffs were,

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[118] This was in the shadow of "No Pass, No Play" policy which prompted a great deal of controversy. This policy prevented students from participating in sports unless they maintained a "C" average. Opponents of the policy argued that participation in a sports team often provided students of a lower income background with the opportunity to attend college. The academic specification would reduce their chances of earning a college scholarship, thereby depriving them of the opportunity to receive a higher education.

[119] It called for "the development of a new system for financing public schools that is based upon the actual cost of educating children in different localities and giving proportionately more money to districts with the poorest tax bases." José Cárdenas, *op.cit.*, p.208.

[120] José Cárdenas, *op.cit.*, p. 208.

[121] Report by IDRA, April 1985.

therefore, seeking a level of equality that remained beyond the scope of the democratic political process.

As a result of the failure of HB72 to provide increased equalisation of the finance system, the plaintiffs amended their suit in the 250th Judicial District Court in Travis County (Austin) Texas.[122] Plaintiffs waited 18 months for the case to come to trial, during which time, the number of school districts and interested parties involved in the case increased. Another group of districts joined the suit as Plaintiff-Intervenors.[123] These districts did not agree with the contention that the finance system discriminated on the basis of race, and thus did not wish for that aspect to be address in their suit. This difference amongst the plaintiffs demonstrated the continued divisiveness of the racial discrimination charge. 53 districts were unwilling to challenge the finance system on the basis of race, as it raised too many contentious issues and instead challenged solely upon its "inefficiency." This further demonstrated the declining importance of racial discrimination to the litigation. 115 school districts were involved in the case to some degree. The high number of districts, and the differences that existed within them, demonstrated both the universal importance of school finance and the controversial elements contained within it. However, the reluctance of many school districts to challenge on the basis of racial discrimination further demonstrated the changes in school finance litigation since *Rodriguez.* Race was no longer an integral element to school finance litigation, instead many wished to avoid it entirely.

The issue of race had become increasingly complex. The rising multiculturalism and the increased immigration rate of the 1980s created new problems that government legislation could not adequately address. During the 1980s, 9 million immigrants entered the U.S., the largest number since 1901-1910 and 2.9 of these immigrants were Mexicans, which was the largest single group.[124] Hispanics were the fastest rising ethnic

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[122] The suit was now *Edgewood v. Kirby*, as the Texas Commissioner of Education, Raymon Bymun, had now been replaced by William Kirby.

[123] The Plaintiff-Intervnor school districts were: Alvardao, Blanket, Burleson, Canutillo, Chilton, Copperas Dove, Covington, Crawford, Crystal City, Early, Edcouch-Elsa, Evant, Fabens, Farwell, Godley, Goldthwaite, Grandview, Hico, Jum Hogg County, Hutto, Jarrell, Jonesboro, Karnes City, La Feria, La Joya, Lampasas, Lasara, Lockhart, Los Fresnos, Lyfod, Lytle, Mart, Mercedes, Meridian, Mission, Navasota, Odem-Edroy, Palmer, Princeton, Progresso, Rio Grande City, Roma, Rosebudd-Lott, San Antonio, San Saba, Santa Maria, Santa Rosa, Shallowater, Southside, Star, Stockdale, Trenton, Venus, Weatherford and Ysleta.

[124] Bruce Cain, "Developments in Racial and Ethnic Politics", *Developments in American Politics II,* (London, 1992), p.47.

group in U.S. schools, which prompted an increased awareness of their specific educational concerns.[125] The rising number of Hispanic immigrants in Texas was altering the political and social landscape and rendered the concept of racial discrimination far more complex than during the 1960s. Racial issues now encompassed a variety of other concerns, and were now difficult to isolate, such as housing, jobs, immigration and welfare. Furthermore, the national political climate, shaped by the policies of the Reagan Administration, marked the decline of liberalism and with it widespread sympathy with minority rights, which further accounted for the broad desire to exclude racial discrimination from the litigation. Reagan's veto of the renewal of the Voting Rights Act of 1965 indicated the extent of his conservatism. Congress subsequently passed this act over presidential veto, yet the declining political sympathy for further racial advances was evident. However, although conservatism was on the ascendant, the low voting turn out in 1984, coupled with the rise of the Rainbow Coalition led by Jesse Jackson, indicated that apathy and disaffection with the political process were also key factors in the national political mood.[126] Thus, immigration, minority rights of gays, women and disabled, as well as the continuing debate over abortion and Affirmative Action were all prominent items on the political agenda.

Between the 20th January and 8th April 1987, arguments were heard in *Edgewood v. Kirby,* during which time forty witnesses testified and hundreds of exhibits were presented to the court.[127] Albert Kauffman, lawyer for the plaintiffs, focused primarily upon the ineffectiveness of recent legislation and the persisting inequalities inherent within the finance system. Kauffman submitted a wealth of IDRA findings that supported the contention that vast discrepancies existed, in spite of HB72. Texas, he argued, was failing to provide an "efficient" standard of education as mandated by its Constitution. HB72, according to the Assistant Attorney General O'Hanlon, who represented the state, indicated the state's commitment to school finance reform and to the overall improvement of the educational system. The state also invoked arguments used by Wright during *Rodriguez*: that financial expenditure had no significant bearing on

[125] In 1972, Hispanics constituted 6% of the public school population in the U.S. By 1988, this figure had increased to 11%. *Ibid.,* p.48.
[126] 53.1% of eligible voters voted in 1984, with Reagan winning 58.4% of the popular vote. Thus, approximately 30% of the American public voted for Reagan.
[127] José Cárdenas, *op.cit.,* p. 220.

educational quality and that complete reform of the finance system would eliminate local control of education.[128]

Thus, elements of both the defendants' and plaintiffs' cases were reminiscent of *Rodriguez*. The plaintiffs alluded to the profound importance of education in the life of an individual, and the implications of the inequitable system of finance upon the educational opportunities of the residents of the poor districts. The legal analysis of the plaintiffs' case, however, contained significant distinctions to *Rodriguez.* Instead of contending the fundamentality of education, Kauffman focused upon the system itself. The central element of the legal challenge was the efficiency of the educational system; the fundamentality of education was a secondary concern. The system itself and the effect of the recent legislation provided the thrust of plaintiffs' arguments. The state, in response, stressed the efficiency of the system, its positive features and the recent injection of money into the finance system. The issue of local control added a further dimension to their case, and verified the positive features of the current school finance structure.

On 27th April 1987, three weeks after the trial ended, the court declared the finance system unconstitutional. Judge Harvey Clark stated that "education is a fundamental right for each of our citizens" and wealth was a suspect classification, as the Education Clause in the Texas Constitution was, for Clark, sufficient basis for finding for its fundamentality.[129] The decision made no reference to the state equal protection clause. As education was a fundamental right, "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."[130] The use of the word opportunity was crucial, as the Court was not mandating absolute equalisation. Instead, however, the only discrepancy allowed was the varied local tax rate. This finding thereby allowed for local differences to influence the finance system, but it ensured that varied tax rates would be the only differing feature.

Thus, the Texas District Court decision found education to be a fundamental right and the educational system to be inefficient. The Texas system, given the degree of

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[128] Dr. Jonathon Medor, Assistant Chairman of the State Board of Education Commission of Finance testified for the defendants. He testified to "budgetary restraints, financial difficulties and the recent high injection of finance into the educational system." *Ibid.*, p. 218.

[129] *Edgewood ISD, et al. v. Kirby, et al.,* Case No. 362,516, 250th District Court, Austin, Travis County, Texas.

[130] *Ibid.*

inequity that existed, wasted the talents of the poor children. However, the court made no ruling on the claim of racial discrimination. This was similar to the original district court ruling in *Rodriguez*, which also omitted mention of race discrimination. Thus, the Court's ruling declared the finance system unconstitutional on the basis of the education clause and in so doing limited the potential implications of the decision. Thus, the focus of the decision was solely the efficiency of the finance system. Although the decision, by its very nature would be controversial, the implications of the decisions were limited by the nature of the Court's opinion. The original recommendation by Browning and Rosen that litigation in state courts awaited the establishment of a body of legal precedent proved instructive. Clark relied upon decisions from courts in other states for guidance and for support of his findings, which provided an extra dimension and increased authority to his opinion.[131] *Plyler v. Doe* was also cited frequently throughout the decision, in particular the Court's statement regarding the importance of education.[132] Thus, the court declared the school finance system unconstitutional on both counts; the equal protection clause and the education clause of the Texas Constitution.

In August 1987, however, the defendants filed an appeal in the Texas Court of Appeals. The coverage of the opinion focused upon its negative effect on school districts and local control. On 21st April 1988, the *Dallas Morning News* reported: "Governor Bill Clements has said that the district judge's ruling could result in massive consolidation-possibly into as few as four or six school districts statewide- and a subsequent loss of local control."[133] This assertion either illustrated the lack of understanding that still existed regarding the implications of school finance reform or the wilful political manipulation of the issue.

On the 14th December 1988, the Texas Court of Appeals declared the finance system constitutional in a 2-1 decision.[134] The legal analysis of the opinion relied heavily upon *Rodriguez*, denying the fundamentality of education and, by implication, the strict scrutiny examination. The court also held that the system did not violate the education

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[131] For example, Clark frequently cited the West Virginia case, *Pauley v. Kelly.* He used its definition of "thorough and efficient" as a standard for his decision. He cited: "The West Virginia Supreme Court has defined a thorough and efficient education as one that: "develops, as the best the state of education expertise allows, the minds, bodies, and social morality of its charges to prepare them for useful and happy occupation, recreation and citizenship, and does so economically." *Ibid.,* p. 103.

[132] 457 U.S. 202 (1982), See above, pp. 236-241.

[133] "Court to reconsider School Finance Case", Wayne Slater, *Dallas Morning News,* 21st April 1988.

[134] *Kirby v. Edgewood,* 781 S.W. 2d 859 (1988).

clause of the Texas constitution, as this was a question for the legislature. It found the legal analysis unpersuasive, and an over-extension of judicial authority, echoing the concerns of the *Rodriguez* Court. The inequities of the finance system was, therefore, a political question. The concern for local control of education, a lack of judicial intrusion in legislative affairs, the consequential effects on future litigation claims provided the central focus of the decision.

A primary element of the decision was a desire to preserve the balance of federalism, an obvious similarity with *Rodriguez*: "Local control is a vital element in any educational system. It prevents uniformity, and allows experimentation and excellence to flourish. Increased centralisation would destroy these values." However, an important distinction existed between the elements of federalism under scrutiny. In *Rodriguez*, the Supreme Court was concerned with an over-extension of federal authority, at the expense of both state and local governments. *Rodriguez* had the potential to overturn the finance system in all but one state, thereby involving the federal judiciary in the provision of education in 49 states. *Edgewood*, however, involved the balance of power between state and local governments, not federal. Although concern for local power remained the same, *Edgewood* litigants were not seeking to prevent the involvement of Washington judges in local affairs, but Texan judges in local affairs. The *National Law Journal* described the federalism under scrutiny in the state cases as "mini-federalism", a concern for the balance of power between two of the three components of the federalist structure.[135] This comparison was legally erroneous as it ignored the legal status of local governments, which are not mentioned in the federal constitution. It illustrated, however, the continuing desire to preserve localism against further interference by larger governments.[136]

Albert Kauffman contested the legal reasoning employed by the court of appeals. *Rodriguez* was, according to Kauffman, not strictly relevant to the question of the fundamentality of education; "*Rodriguez* was a federal case talking about the federal constitution. The state constitution mentions education but also mentions poor homes,

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[135] "School Funding Fight Moves to State Courts", Marilyn J. Morheuser, *National Law Journal,* Monday, 31st August 1987.

[136] The Supreme Court determined that local governments are creatures of the state governments, and thereby has no jurisdiction over them.

farms, water, storage facilities, etc."[137] Thus, the issue of fundamentality in *Edgewood* was distinguishable from that of *Rodriguez.* Education was not mentioned in the federal constitution, but it was specifically mentioned in the state constitution. Thus, according to Kauffman, the same reasoning could not be applied.

Furthermore, the court of appeals also disputed the finding that the poor could be found in the poor districts. This was an argument advanced by Wright, with which the *Rodriguez* Court agreed. However, since the time of *Rodriguez,* a substantial degree of research had been conducted, which was presented to the Texas district court. The research findings illustrated that a correlation did exist between poor children residing in poor districts. As a result of this finding, the district court declared wealth a suspect classification. The court of appeals, however, overturned this holding, and found that no clear delineation which rendered the poor an "easily identifiable category."[138] Thus, the court of appeals applied the rational basis test to the finance system. Local control provided the rational basis for the current structure of the finance system, which the court found "constitutionally compelling."[139] Finally, the court noted the inequalities of the system, but ruled that it was not a subject for judicial review:

> The system does not provide an ideal education for all students nor a completely fair distribution of tax benefits and burdens among all of the school patrons. Nevertheless, under our system of government, efforts to achieve those ideals come from the people through constitutional amendments and legislative enactments and not through judgments of courts.[140]

Thus, the court of appeals decision, according to Kauffman, relied heavily upon *Rodriguez*, despite the changes that had occurred since the decision. Furthermore, the court of appeals took no notice of the numerous legislative attempts to find a solution, which had not occurred at the time of the *Rodriguez*.

The next and final stage of the proceedings was the plaintiffs' appeal to the Texas Supreme Court. The state supreme court agreed to hear the case on 11th March 1989, and oral arguments were presented to the court on 5th July 1989, six months after the court of

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[137] "Court of Appeals Reverses School Finance Decision", Albert Kauffman, *IDRA Newsletter*, February 1989.
[138] *Ibid.*
[139] *Ibid.*
[140] *Ibid.*

appeals decision. Kauffman relied upon the same arguments as those presented in the lower court; in which he contended that the inequitable system of finance violated both the equal protection and the education clause of the Texas Constitution.[141] O'Hanlon also employed the same arguments, arguing that the current system of finance was justified on the basis of "effectuating local control of education."[142] Localism, therefore, provided the primary defence for the state. The second central element of their defence was the question of justiciability and whether this was a desirable or appropriate area for judicial involvement: "how much money we spend on our children should not be a matter for the courts to decide."[143]

On 2nd October 1989, the Texas Supreme Court delivered its decision.[144] In a unanimous 9-0 decision, the court declared the finance system unconstitutional. Justice Oscar Mauzy, former state senator and advocate of school finance reform, wrote the opinion.[145] Mauzy began by describing the factual findings of the case, which the court of appeals had accepted. The court described the widest financial margin: "the wealthiest district, Alamo Heights, has over $14,000,000 of taxable property per student, while the poorest, Edgewood, has approximately $20,000; this disparity reflects a 700 to 1 ratio."[146] As a result of this disparity in property tax wealth, the per pupil expenditure varied greatly: "ranging from $2,112 [Edgewood] to $3,750 [Alamo Heights], which affirmed the increase of the discrepancy between per pupil expenditure from 1.6- 1.7.[147] In *Rodriguez,* $241 difference existed between the richest and poorest district. In *Edgewood,* the difference was $1548. These statistics verified the plaintiffs' contention that the recent reform measures served to exacerbate, rather than reduce, the inequalities of the system.

Mauzy also noted that the financial difference was not a result of reduced tax effort. The discrepancy in local tax rate between the rich and poor districts, which existed

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[141] *Ibid.*
[142] "*Edgewood* Provides High Drama for High Court," Diane Burch, *Texas Lawyer,* Dallas, 10th July 1989. C.W.P.
[143] *Ibid.*
[144] *Edgewood et al v Kirby et al.,* 777 S.W.2d 391 (1989).
[145] See above for further details of Mauzy's legislative involvement in school finance reform.
[146] 777 S.W. 2d, at 393.
[147] *Ibid.,* p. 394.

at the time of *Rodriguez* remained, and had been noted by the district court.[148] This statistic illustrated the inherent inequalities within the finance system. The structure of the finance system actively prevented the poorer districts from raising equitable funds, even if local districts wished it. The court noted: "Property-poor districts are trapped in a cycle of poverty from which there is no opportunity to free themselves."[149] Mauzy then answered the contention that financial expenditure had no bearing upon educational quality. He asserted: "the amount of money spent on a student's education has a real and meaningful impact on the educational opportunity offered that student."

After establishing the factual basis of the ruling, Mauzy turned to the legal analysis. The district court's assertion that school finance reform was a matter for legislative, rather than judicial action, was rejected: "The language of Article VII, Section 1 imposes on the legislature an affirmative duty to establish and provide for the public free schools."[150] He acknowledged the ambiguity of the term "efficiency", but insisted that it was a constitutionally recognisable standard.[151] In order to provide a workable standard, the court then defined efficient: "'Efficient' conveys the meaning of effective or productive of results and connotes the use of resources so as to produce results with little waste."[152] Using this standard as a basis, the court then considered the intent of the framers when writing the educational clause. Mauzy concluded:

> ....in mandating "efficiency", the constitutional framers and ratifiers did not intend a system with such vast disparities as now exist. The present system provides not for a diffusion that is general, but for one that is limited and unbalanced. The resultant inequalities are thus directly contrary to the constitutional vision of efficiency.[153]

The court acknowledged the legislative attempts to improve the system, but ruled that the legislation was inadequate and did not render the system "efficient."[154] In its final

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[148] Mauzy referred to the same data, citing the 1985-1986 tax rates in which the 100 wealthiest districts had an average tax rate of 47 cents, compared with the 100 poorest districts with an average tax rate of 74.5 cents.

[149] 777 S.W. 2d, 394.

[150] *Ibid.*, p. 397.

[151] "While these are admittedly not precise terms, they do provide a standard by which this court must, when called upon to do so, measure the constitutionality of this legislature's action." *Ibid.*, p. 397.

[152] *Ibid.*, p. 398.

[153] *Ibid.*, p. 398

[154] "....the legislature has attempted through the years to reduce disparities and improve the system. There have been good faith efforts on the part of many public officials, and some progress has been made.

section, the court defined the limitations to its decision. First, it declined to rule upon the plaintiffs' equal protection claims, viewing it as unnecessary because the system had already been found to be unconstitutional.[155] The court then considered the question of local control. Mauzy denied that this decision in any way detracted from local control of education: "some have argued that reform in school finance will eliminate local control, but this argument has no merit. An efficient system does not preclude the ability of communities to exercise local control over the education of their children."[156] The court confirmed the importance of localism in the provision of education, and asserted that the decision "will allow for more local control, not less."[157] Thus, the court sought to assuage concerns that upholding the plaintiffs' case would result in further state control of education, thereby disrupting the federal balance. The court further sought to alleviate concerns that the decision marked an over-extension of judicial authority. In order to ensure that the court did not intrude into areas beyond its justiability, it left the question of remedial action to the legislature:

> Although we have ruled the school financing system to be unconstitutional, we do not now instruct the legislature as to the specifics of the legislation it should enact; nor do we order it to raise taxes. The legislature has primary responsibility to decide how best to achieve an efficient system. We decide only the nature of the constitutional mandate and whether that mandate has been met.[158]

The court defined the parameters of the decision. The decision was simply a constitutional mandate for reform, and did not attempt to specify any form of remedial action. The decision was intended to compel the legislature into action, rather than providing the blueprint for reform measures. As a result, the court set a time limit of 1st May 1990 for the state to design an efficient and thereby constitutional system of school finance.

The plaintiffs' reaction to *Edgewood* was predictably one of "elation."[159] Albert Kauffman called the decision "probably the most important judicial decision in the

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However, as the undisputed facts of this case make painfully clear, the reality is that the constitutional mandate has not been met." *Ibid.*, p. 400.

[155] "Because we have decided that the school financing system violates the Texas Constitution's efficiency provision, we need not consider petitioners' other constitutional arguments." *Ibid.*, p. 406.

[156] *Ibid.*, p. 404.

[157] *Ibid.*, p. 405.

[158] *Ibid.*, p. 406.

[159] José Cárdenas, *op.cit.*, p. 221.

history of Texas regarding public schools" as it held "far reaching beneficial effects on both legal and educational progress in Texas."[160] The Chairman of MALDEF, Frank Herrera, spoke of the immense implications of the case, calling it "one of the most significant of this century." The effect of the decision, according to Herrera, will be twofold: "First, it will allow all children in the state to receive a quality education. The quality will no longer be governed by accident of birth or the parents' income, but the students' capabilities." [161] The second effect related to the broader implications of the decision for the children concerned: "it has given those kids a new self image. As one San Antonio high school girl told me after the decision: 'this means that I'm just as good as they are."[162]

Andy Hernandez, president of the Southwest Voter Registration Education Project and resident of Edgewood with children in the school system, heralded the decision but was also aware of its limitations. He commented: "There is still much that must be won and other battles that must be fought. No one is arguing that the decision will solve all the educational problems facing the community. A level playing field doesn't guarantee you're going to score, it just means you have a fair shot at it."[163] José Cárdenas summarised the importance of the judicial ruling for the struggle for effective legislation. He commented: "Now we have an ace in the hole. We now will rely upon the state constitution in order to come up with a system that affords every child in Texas equal or appropriate resources for pursuing equal educational opportunity."[164] This was the primary effect of the *Edgewood* ruling. It increased the authority of the activists' claims and ensured that the legislature was now constitutionally required to make effective change.[165] It was, therefore, a ruling which illustrated the immediate need for reform and the responsibility of the Senate to enact the necessary reform, which *Rodriguez* had failed to do.

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[160] "*Edgewood v. Kirby:* Its Legal and Educational Ramifications"; Albert Kauffman, *San Antonio Express,* Special Edition, November 1989, p. 4.
[161] Frank Herrera, "Decision One of Most Significant of Century", *San Antonio Express,* Special Edition, November 1989, p. 2.
[162] *Ibid.,* p. 2.
[163]" *Edgewood v. Kirby* represents hope for change of inequalities", Andy Hernandez, *San Antonio Express,* Special Edition, November 1989, p. 6.
[164] "IDRA leader will wait and see how legislature finds enough funds", *San Antonio Express,* Special Edition, November 1989, p. 3.
[165] It is not the objective of this chapter to consider the effect of the *Edgewood* ruling. Thus, no consideration will be given to the legislative reforms which occurred as a result of the ruling.

Thus, the legal struggle that began with *Rodriguez* concluded with *Edgewood.* Twenty-one years after the *Rodriguez* suit was originally filed, the Texas school finance system was found to be violative of the state constitution. *Rodriguez* resulted in the litigation fight moving from a national scale, which challenged the constitutionality of 49 state finance systems to the state level. After *Rodriguez*, each state tackled the issue of school finance separately, which created a wide diversity in degree of reform across the country. This diversity ensured the federal balance, in the area of school finance, remained intact. As the *Edgewood* litigation highlighted, however, the desire to preserve localism, particularly in education, continued to provide one of the central obstacles for the enactment of substantive legislation.

However, the decision, although marking the fruition of 25 years of activism and eventually overturning the school finance system, did not mark the realisation of the *Rodriguez* litigation. Although the end result was the same, the court eventually found the school finance unconstitutional on the basis of efficiency, rather than race or class. The court did not respond to the claim of racial discrimination or discrimination against children in property-poor districts. This difference reflected the developments in both litigation and the broader political environment. By the 1980s, sympathy for minority rights had diminished. The continuing controversy over Affirmative Action was the primary racial issue on the national political agenda, and support was deeply divided. The federal government, under Ronald Reagan, showed no desire to appropriate federal funds for the further improvement of minority education, or other areas of minority concern. His emphasis upon a smaller federal government and a retrenchment of social welfare programs moulded the political environment. In Texas, the state continued to show commitment to the improvement of minority education through the establishment of a State Coalition on Hispanic Education in 1987 which assisted in the development of a bilingual education program. However, the ideological direction of the Texas state government reflected, in general, the conservatism of the federal government. Thus, the state court opinion, which failed to mention race or class discrimination, limited the implications of the decision. It demonstrated that the elements of race and class, which were untenable in the politically charged atmosphere of the early 1970s, continued to be so in the conservative environment of the 1980s. The charges of racial and class discrimination, however, were not as prominent as within the *Rodriguez* litigation. The

Edgewood litigation contained more elements and thereby enabled the Court to rule in favour of the plaintiffs without addressing some of the implications of *Rodriguez*. Concern for local control of education remained, but the emphasis upon the educational clause removed concerns for the further equalisation of governmental services. The court were able, therefore, to omit mention of the racial and class discrimination claim, but still find the school finance system unconstitutional. Thus, *Edgewood* achieved the practical aims of *Rodriguez* insofar as it declared the finance system unconstitutional but through different means and in a different context.

The political problems inherent in school finance reform were illustrated by the failed attempts of the Texas State Legislature to enact the necessary legislation. With no constitutional mandate to compel action, the pressure of reform was reduced. It is not possible to assert, however, that a ruling for the plaintiffs in *Rodriguez* would have provided the necessary instrument for radical change. That assumption can never be proven. The legislature had been compelled to act, but the numerous political issues intertwined within school finance remained present, with or without a constitutional ruling. Legislators, many not wishing to offend wealthier and usually more powerful constituents, would still be reluctant to enact reform which in any way detracted or reduced the financial advantages of that particular district. The history of the school finance struggle after *Edgewood* confirmed this. Plaintiffs' returned to the courts on four separate occasions to challenge the constitutionality of the new finance systems.[166] The continued litigation further illustrated the political problems inherent in school finance reform. However, the ability of the plaintiffs' to petition the Court if dissatisfied with the legislative action provided a vital check on their actions. On three of the four occasions, the challenge was successful, and the Supreme Court once again ordered the legislature to create a constitutionally viable system. The final decision, *Edgewood IV,* handed down on 30th January 1995, found the new school finance structure constitutional, and effectively ended the use of litigation as the tool to propel the legislature into action.[167]

This decision upheld the constitutionality of SB7, the most recent school finance legislation. Under this plan, the wealthiest school districts could choose from five options in which the revenue from their taxable property wealth would be in accordance with the

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[166] *Edgewood v. Kirby,* 804 S.W. 2d 491 (Tex.1991) and *Carrolton-Farmer's Branch I.S.D. v. Edgewood,* 826 S.W. 2d 489 (Tex.1991).
[167] *Edgewood v. Meno,* 917 S.W. 2d 717 (Tex. 1995).

standard set by the legislation.[168] The wealthiest districts selected one scheme by which the wealth of their district was distributed more evenly. If a district failed to select a method by 19th October 1995, a penalty would be incurred. The penalties would be either the reassignment of commercial property tax revenue to less affluent areas or the forced consolidation of wealthy school districts with poorer ones. SB7 would, therefore, reduce the disparity in tax bases which had been the key source of the differences in educational funding. It required only the wealthiest districts to act. The court commented: "SB7 is a genuine attempt by the legislature to fulfil its very difficult responsibilities under Article VII, Section 1. The judiciary owes the legislature the respect of giving SB7 a chance to work. Perhaps it will not work. Perhaps it will not be funded. But we cannot say today that it will not. Given the progress that has been made in providing equity, further orders can await further development."[169] Thus, the Court did not present SB7 to the long awaited solution to school finance. Instead, the Court decided to give the legislature the opportunity to implement the new legislation, in the hope that it may provide adequate equalisation of the finance system.

The different legislative circumstances surrounding *Rodriguez* and *Edgewood* were, however, an important distinction between the cases. The continued failure of the legislature to provide an effective solution underlined the need for a judicial ruling. At the time of *Rodriguez*, the legislature had not yet made any concerted reform attempt. This enabled Charles Alan Wright to argue that judicial interference was unnecessary; the legislature was intending to tackle the problem.[170] However, in the fifteen years that had passed since *Rodriguez*, the failure of the legislature to enact effective reform illustrated the need for judicial action. Despite its limitations, therefore, a constitutional ruling in a contentious area such as school finance proved to be an essential stage in the reform attempt. Despite these limitations, it gave litigants a vital instrument with which to contest their claims. It enabled them to return to the Court on three more occasions until the legislature enacted a system with a higher degree of inequality. However, the final stage in the litigation struggle illustrated that, instead of finally achieving a system with a sufficient level of equalisation, the Court upheld a system to which reformers were still

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[168] These five options were voluntary consolidation, voluntary de-annexation of property, education of non-resident students enrolled in less affluent school systems, the purchase of "Average Daily Attendance Credits" to reduce the tax base to the required level, and voluntary tax base consolidation.
[169] *Edgewood v. Meno,* p. 754.
[170] See defendants' brief, Chapter Three, p. 129.

opposed. When the Court finally upheld the system in 1995, Justice Rose Spector was the only dissenter.[171] Spector was formerly Arthur Gochman's assistant and helped him prepare *Rodriguez* for the district court trial. Her dissent, therefore, held symbolic implications for the twenty five year school finance struggle. She commented:

> This case is about a court that has come full circle. Just six years ago, faced with gross inequalities in the school financing system, we unanimously decided that every school district must have similar revenues for similar tax effort. Today's opinion rejects that mandate, and instead sanctions dissimilar revenues for similar tax effort. This holding....is based on the *previously rejected* premise that the state's constitutional responsibility is satisfied by providing most school children with the very least, and the favoured few with the best that money can buy.[172]

Spector therefore, considered the level of equality upheld by the state court to be inadequate. This attitude was shared by IDRA. School finance reformers were still unsatisfied with the degree of reform achieved. The notion, as expressed by Spector, that "every school district must have similar revenues for similar tax effort", proved to be judicially, as well as politically, untenable. Although the court had, since 1989, demonstrated its commitment to an equitable finance system, it finally decided to step back to allow the long term results of the legislation to become evident. It stated that the decision emphasised that "our judgement in this case should not be interpreted as a signal that the Texas school finance crisis is over". However, the plaintiffs' ultimately sought a level of equality that Texas state court could not continue to sanction, and the Texas legislature had not been able to achieve. The acute inequalities of which the plaintiffs' complained in *Rodriguez* had been reduced, but not eradicated. The twenty five year struggle since *Rodriguez* ended with a new system of finance, but not one that pleased the reformers. The continuing necessity for reform was further illustrated by a report by the Presidential Advisory Commission on Educational Excellence for Hispanic Americans in 1994. This report confirmed that a disproportionate number of Hispanic American students attended predominately non white schools which lacked educational resources. In 1992, the drop out rate for Hispanic Americans was 12%, compared 5% for white

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[171] The personnel of the Court had changed significantly in the six years between *Edgewood I* and *Edgewood IV*. Only four of the nine justices that had invalidated the finance system in 1989 remained on the court in 1995. Justice Mauzy, author of the majority opinion in *Edgewood v. Kirby*, was no longer on the court.

[172] *Edgewood v. Meno,* 917 S.W. 2d 717 (1995), Justice Spector, dissenting.

students.[173] Although these were national statistics, it illustrated that the problems the reformers sought to improve in 1968 were still present in 1994. It illustrated that the reformers sought more than the political and judicial process could grant. Thus, a struggle that begun in the federal courts, ended in the state courts, but with an unsatisfactory conclusion. The reaction of the IDRA to *Edgewood IV* summarised the ideals and aims of the reformers: "We hereby reject the high court's judgment and remain committed to working for a truly equitable funding system that provides equitable and high quality educational opportunities for *all Texas students*."[174]

Ultimately, the school finance system was predicated upon inequality and localism: the right of individual local communities to achieve the highest standard of education possible. Reformers were seeking change within the parameters of local control and individual desires. Local choice was predicated upon the assumption that local communities had different needs, and therefore substantial equality conflicted with this notion. The right of individuals to determine and mould their own educational system provided the rationale for localism in education. Individual choice provided, therefore, an additional element to school finance reform. Bilingual educational reform met with a greater degree of success, as this was a more specific educational reform and less of a perceived threat to local control. Thus, although *Rodriguez* failed to provide the reformers with the instrument to fight school finance inequality, complete victory in this fight proved elusive even with a constitutional ruling fifteen years later. Whereas *Rodriguez* marked the limits to federal constitutional equality at least for the remainder of the twentieth century, *Edgewood* extended the guarantees of the state constitution further. However, despite its expansion of guarantees, it proved unable to find a solution that satisfied the reformers.

The developments in litigation between *Rodriguez* and *Edgewood* also reflected the broader political environment. The increasing marginalisation of the claims of racial and class discrimination and the development of litigation based upon the educational clause reduced the implications of the original school finance litigation. This development in litigation reflected the growing political conservatism which occurred in the post-*Rodriguez* era and reached a peak during the Reagan presidency. It also reflected the changing dynamics of race. With Hispanics as the fastest growing racial minority in

[173] George McKenna, *op.cit.*, p.134.
[174] José Cárdenas, *op.cit.*, p. 364.

the U.S., the race question became increasingly complex and became increasingly marginalised in school finance litigation. The *Edgewood* opinion, therefore, overturned the school finance system on a different basis to that sought in *Rodriguez.* The reliance upon the education clause in *Edgewood* effectively removed the issues of race and class from the litigation. Although the claim appeared in the plaintiffs' brief, it was not mentioned in any of the court opinions. Thus, the ideological and legal implications of *Rodriguez* were narrowed in *Edgewood.* The reliance upon state rather than federal constitution, and the emphasis upon the educational clause, ensured that the ruling could only apply to school finance. The ruling could not, therefore, be interpreted as a move towards equalisation of all governmental services. Similarly, the emphasis upon the efficiency of education minimised the charge of racial and class discrimination. However, the political volatility of school finance education remained unchanged. To this extent, the reformers proved unable to achieve their original objectives through the litigation process by 1995.

Issues of federalism and local control remained at the heart of school finance throughout the decades after *Rodriguez.* To this extent, school finance contains values that are core to American political philosophy. Issues of local control and federalism are evident throughout American history. Although the exact dimensions of the issues will be moulded by contemporary trends, the continuing relevance of these concerns from 1968 to 1995 illustrates their importance to the political structure. They are not concerns that are relevant to a particular decade, but instead have moulded beliefs and actions throughout American history. The continuing controversies surrounding the federal structure illustrate that adherence to tradition and federal political philosophy are obstacles to school finance reform. The emphasis upon race and class reflected the political trends of the 1960s. Their subsequent marginalisation, but the continued emphasis upon local control, illustrates one of the enduring features of American political debate. When considering the expanse of American history, widespread political concern for race and class is sporadic and is determined by external factors such as the degree of outside agitation. However, political concern for the federal structure and the desirability of local control is constantly present. Adherence to principles of federalism, therefore, rather than race and class, account for the unsatisfactory achievement of the plaintiffs' claims. The desire to preserve local control in education has been evident throughout

American history. Although the dimensions of local control have changed and, in many aspects, been diminished, the desire to preserve the remaining elements is shared throughout the states and endures beyond issues of race and class. Developments in litigation provided the basis for an affirmative ruling, but the political issues intertwined in school finance proved an unsurpassable obstacle. However, the unsatisfactory resolution of the litigation for the plaintiffs ensured the continuing pressure upon the state legislature for substantial reform after *Edgewood.*

CONCLUSION

In order to understand the historical significance of *San Antonio Independent School District v. Rodriguez* the broader political context must be known. However, just as the historical context enhances comprehension of *Rodriguez*, *Rodriguez* also enhances understanding of the clashing beliefs and attitudes of the time. The historical significance of *Rodriguez* derives, therefore, from the issues contained within it. It could have become a defining moment in American History. It had the potential to become the third *Brown*: "*Rodriguez* upheld is the equal of *Brown*- at least the equal."[1] The plaintiffs' case challenged fundamental features of American society, raised questions regarding its social and political structure, and sought to extend constitutional guarantees. Just as *Brown* challenged the long-standing practice of segregation, *Rodriguez* challenged the consequences of public school finance on property taxation. The Supreme Court's denial of the plaintiffs' claims ensured *Rodriguez* did not acquire immediate landmark status in American history. The plaintiffs ultimately failed in their objectives, and the case did not precipitate immediate change. As a result, its historical importance has been minimised. The importance of the case, however, lies in the reasons for the plaintiffs' failure and the issues contained within it. The ideological basis of the suit came from the changed definition of equality that had occurred during the 1960s, yet it used the traditional method of litigation in order to achieve its objectives. Thus, the filing of the suit was a combination of the old and new elements of the civil rights movement. Ideologically, it was a progression, yet tactically it employed the traditional method of litigation. The arguments for both sides encapsulated many issues fundamental to American society, and it is here that the importance of *Rodriguez* lies. The plaintiffs wanted to expand the constitutional guarantees of equality, yet according to the defence, this challenged fundamental features of federalism. It challenged the school finance system on the basis of race and class. Thus, *Rodriguez* presented a constitutional crossroads to the Court. The opinions of Justices Powell and Marshall revealed pervasive differences regarding the role of the Court, the guarantees of the Constitution and the ability of the political process to facilitate substantial change. The reasons for the Court's ultimate denial of the plaintiffs' claims derived from their profound implications and their incompatibility with the jurisprudence and other attitudes of the majority of the justices. The case held momentous implications for the fight to eradicate socio-economic discrimination in

[1] "The Court, Schools and Race", Mary Eisener, *The New Republic*, 11th March 1973.

American society. Thus, as George Macaulay Trevelyan famously said with regard to 1848, *Rodriguez* was a "turning point that did not turn."

The first element of *Rodriguez* was race. The plaintiffs claimed that the school finance system inherently discriminated against racial minorities. This claim was based upon the education offered to those in the economically deprived area of San Antonio that had a high proportion of minority students in comparison with the affluent, predominately white area. The plaintiffs challenged, therefore, the patterns of *de facto* residential racial segregation that existed within San Antonio. The high percentage of the minority students within the poor district typified the prejudices and discrimination that resulted in the constricted life chances commonly afforded to minorities in American society. The challenge to the school finance system on the basis of race sought a constitutional acknowledgement of the correlation between race and class inherent within American society. Ideologically, therefore, the case reflected the broader realisation that the eradication of legal segregation had not resulted in the attainment of racial equality. In order to achieve full racial equality, the elimination of socio-economic segregation was also necessary. The claim of racial discrimination in *Rodriguez* was premised upon this notion.

The second element of class also typified the recent ideological developments. *Rodriguez* asserted that the school finance system discriminated against the poor, the majority of whom were from racial minorities. Thus, the legal challenge was premised upon the notion that the poor constituted a distinct category, comparable to blacks. This legal challenge wished for the Court to acknowledge that class was a permanent feature of American society and that the poor did not receive equal life chances. This contradicted the meritocratic ideal of the "American Dream"; that self-improvement is possible through personal ability and hard work. According to the plaintiffs, the poor did not share in this ideal. The differences between the educational expenditure of the poor and rich districts encapsulated the broader discrimination within American society. The condition of schools in the poor districts prevented poor children from receiving an adequate education, which in turn led to reduced life chances. The school finance system, therefore, contributed to the cycle of poverty. An affirmative court ruling would be the first step towards breaking this cycle. However, the plaintiffs sought a degree of equality that the majority of Court deemed beyond the guarantees of the Constitution. Gochman carefully framed his claims to apply only to education by emphasising its particular

constitutional importance.[2] The attempt to assuage the concerns of the Court proved unsuccessful, and instead of becoming the third *Brown, Rodriguez* marked the outer parameters of constitutional equality.

The justification for the school finance system and the basis of the majority opinion constituted the third element of *Rodriguez.* The defendants claimed, and the Court agreed, that the school finance system was a state matter and there was no constitutional basis for federal interference. *Rodriguez*, according to the defendants, challenged localism and, by implication, federalism. The plaintiffs sought to answer this charge by arguing that they did not challenge localism as the solution to the problem. Judge Spears accepted Proposition One as an enforceable constitutional standard which maintained localism, but the Court considered this unpersuasive, and found the finance system constitutional on the basis of states' rights. The *Rodriguez* opinion, therefore, defended the right of state governments to grant local districts the power to determine local expenditures. It preserved the right for states to use local resources to improve the quality of public services. Localism was an integral feature of the American political tradition and as central to American ideology as the principle of equality. These principles were encapsulated in the opposing arguments in *Rodriguez.*

Federalism constituted a central ideological tenet in *Rodriguez.* The majority of justices were opposed to the further expansion of federal government, believing that state governments were the proper forum with which to deal with certain affairs. The new Court appointees, chosen for their adherence to principles of judicial restraint and a small federal government, broadly reflected the attitude of the Nixon administration. An affirmative ruling would involve the federal government in a new area, traditionally the province of local governments. The typical structure of the school finance system in the majority of states illustrated the lack of federal government involvement. On average in the 1970s, the federal government provided 10% of school funds, the state provided 50%, and the local government provided 40%, at least 35% of which came from property tax revenues. The exact percentage may have differed between states, but the basic structure remained the same. Thus, the marginal contribution of the federal government ensured that the issue of school finance remained a predominately state and local issue. An affirmative

[2] The emphasis upon the particular constitutional importance of education in comparison with other governmental services showed that the legal analysis could be applied only to education.

ruling, in which the Supreme Court would oversee remedial action, would increase federal government intrusion into state and local affairs. This intrusion, however, would be more perceived than real: the Court would simply extend its authority over the structure of the finance system of local schools. The distribution of funds, curricular and personnel changes, would remain the province of state and local governments. However, the implications of any further extension of federal government authority, even on a limited basis, remained significant.

In addition to considerations of federalism, *Rodriguez* also raised concerns regarding the appropriate sphere of judicial activity. Institutional considerations regarding the appropriate role of the Supreme Court was an additional factor in the Court's decision making process. The increasing politicisation of the Court's role coupled with the rising number of social reform issues on its agenda raised fundamental concerns regarding the desired role of the Court in the political process. Powell's opinion incorporated the notion of judicial restraint: it acknowledged the imperfections of the finance system, yet referred the plaintiffs to the legislature for redress. It determined that the majoritarian political process, not the courts, was the correct forum for substantive change. The Court's involvement in the controversial areas of busing, capital punishment and abortion ensured that another area of controversy may threaten the institutional role of the Supreme Court. The practise of abortion and capital punishment had been effectively nationalised by the Court. The Court's necessity to stay within the broad spectrum of public approval constitutes an essential restraint upon judicial power. *Rodriguez* represents an example of the exercise of this restraint. A ruling in *Rodriguez* upholding the district court would have involved the Court in a fourth controversial area and its second involving education. This was judicially and institutionally unacceptable for the majority of justices. It further acknowledged that the judiciary should not be primary agent of social reform and thereby acknowledged the parameters of Court authority. *Rodriguez* signalled the Court's deference to the legislature, and was thereby interpreted as an ideologically and judicially conservative decision.

The Court's rejection of wealth as a suspect classification and education as a fundamental interest affected the future application of the equal protection clause of the Fourteenth Amendment. The majority's rejection of wealth as a suspect classification rejected the notion that the Constitution demanded the equalisation of resources devoted

to education and, by implication, governmental resources devoted to other areas as well. It determined that the poor was a relative term, and it had no particular constitutional meaning. The Constitution did not provide for the equalisation of government services. Thus, the different living conditions and educational quality between rich and poor districts did not warrant constitutional protection. This ruling, therefore, prevented further federal claims based upon socio-economic differences. The rejection of the constitutional right of education was, in a sense, more significant. In light of the Court's long standing commitment to education, it was the stronger of the two claims. At the time in which the Court sanctioned inter-district busing to achieve desegregation, it denied that education was a constitutionally protected right.

Powell determined that the Court had no basis for saying education was "implicitly so protected."[3] The Court denied that education was warranted constitutional protection on the basis of its connection with the First Amendment: "empirical evidence might well buttress an assumption that the ill fed, ill clothed and ill housed are among the most ineffective participants in the political process and they derive the least enjoyments from the benefits of the First Amendment."[4] This statement placed education on an equal constitutional level with housing and clothing, and denied that education was distinguishable from other governmental services. Although the Court emphasised its social and political importance: "nothing this Court holds today in anyway detracts from our historic dedication to public education", the decision was interpreted as a retrenchment of its previous commitment to education, most notably demonstrated in *Brown*.[5] J. Harvie Wilkinson reflected this view two years after *Rodriguez*: "Almost 20 years after *Brown,* the Court was asked to clothe the rhetoric with constitutional significance. It declined. Recognition of the constitutional fundamentality of education would be the boldest step towards equality of opportunity the Court may now take."[6]

Lewis Powell, as author of the opinion, enhanced the importance of the Court's rejection of the constitutional importance of education. Powell's previous involvement in education his understanding of the issues raised by the case. His long period of service in public education derived from his acknowledgement of its immense social importance.

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[3] *San Antonio Independent School District v. Rodriguez*, 411 U.S.1 (1973).
[4] *Ibid.*, p. 38.
[5] *Ibid.*, p. 30.
[6] J. Harvie Wilkinson, "The Supreme Court, the Equal Protection Clause and the three faces of Constitutional Equality", *Virginia Law Review,* Volume 61 (1975).

Rodriguez, therefore, appeared to undermine this belief. However, Powell's deliberations and reasoning within the decision illustrated that the decision was congruous with his judicial and political philosophy. Throughout his period of service, Powell wanted to improve the quality of education, but without further federal government involvement. He wished to preserve localism in education, particularly in regard to expenditure. Thus, *Rodriguez* reflected his previous philosophy, as it emphasised the importance of local control and the social and political importance of education.

The Court's refusal to declare education a fundamental right marked the end of one chapter of constitutional law. Powell's specific definition of a fundamental right restricted future claims. The rights deemed fundamental were travel, vote, access to the judicial process and privacy. Education was not added to this list, and as a result, it discouraged further use of the 'fundamental rights' legal analysis. *Rodriguez* was not, however, simply a product of the growing conservatism of the Court. Although the composition of the Court had altered greatly, the Burger Court had demonstrated its capacity for far-reaching controversial decisions two months before *Rodriguez* in *Roe.* In addition to entering a new controversy, the legal analysis employed demonstrated the Court's capacity for creating new rights. *Roe* "may indeed be taken as the very paradigm of the activist decision: the decision was based not upon principles worked out in earlier cases but upon "policy judgments" made upon an ad hoc basis which led to recognition of a new right."[7] The Burger Court continued to demonstrate its capacity to create new legal doctrine after *Rodriguez*, particularly in regards to sexual classifications: "During the Burger years the law on sexual classifications was completely changed."[8] *Reed v. Reed* (1971) and *Frontiero v. Richardson,* handed down two months after *Rodriguez*, in May 1973, were the examples of this change.[9]

Thus, in the same term as *Rodriguez*, the Court handed down decisions in *Roe, Frontiero* and *Keyes.* In all of these decisions, the Burger Court demonstrated its capacity for judicial activism, employed the sliding scale analysis and showed that, despite the

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[7] Bernard Schwartz, *A History of the Supreme Court*, (New York, 1993), p. 333.
[8] Wendy W. Williams, "Sex Discrimination: Closing the Law's Gender Gap", Herman Schwartz (Editor), *The Burger Years: Rights and Wrongs in the Supreme Court*, (New York, 1987), p. 110.
[9] 404 U.S. 71 (1971) and 411 U.S. 677 (1973). In *Reed* the Court overturned an Idaho law which gave preferential treatment to male estate administrators as violative of the equal protection clause of the Fourteenth Amendment. In *Frontiero* the Court outlawed gender classifications in the military. Four justices (Brennan, Douglas, White and Marshall), wished for sex classifications to be afforded equal treatment to racial classifications.

apparent conservatism of the new members, it had the capacity for liberal decisions. In addition to illustrating an ideological discrepancy, the legal reasoning employed in *Frontiero* and *Rodriguez* was also inconsistent. *Frontiero* was based upon the sliding scale analysis, which the Court had deliberately avoided in *Rodriguez*. Thus, the institutional considerations which had deterred Powell from using this analysis in *Rodriguez* were considered unpersuasive in *Frontiero*. Instead, the balance between judicial conservatism and liberalism was dependent upon the issues under consideration. The *Rodriguez* Court was not simply reactionary and determined to undo the work of the Warren Court. Thus, the Burger Court consolidated its predecessor's legacy but changed it only at the margins. The issues under consideration determined the outcome of the case and the Burger Court defied easy ideological categorisation. It also demonstrated that larger institutional considerations, namely the politically charged nature of school finance, were of larger importance in *Rodriguez* than the nature of the legal analysis.

The Burger Court's decisions regarding affirmative action after *Rodriguez* further demonstrated its continued capacity to balance conservative and liberal notions. *Regents of the University of California v. Bakke* and *Steelworkers v. Weber* illustrated the ideological diversity of the Court.[10] In both these decisions, the Court demonstrated its continued dedication to the eradication of racial discrimination. In upholding the constitutionality of affirmative action plans, the Court showed its willingness to eradicate *de facto* racial segregation. Affirmative action plans were premised upon the notion that minorities were not afforded equal life chances, and thereby required increased legislative assistance in order to place them on an equal footing with whites. The Court supported this notion: "The purpose of the plan mirror those of the statute [Civil Rights Act 1964], being designed to break down old patterns of racial segregation and hierarchy, and being structured to open employment opportunity for Negroes in occupations which have been traditionally closed to them."[11] In this comment, the Court recognised the pattern of discrimination inherent within American society. Thus, affirmative action plans were in accordance with the constitutional ideal of equality. The preferential treatment afforded to

[10] 438 U.S. 265 (1978) and 443 U.S. 193 (1979) respectively. In *Bakke*, the Court deemed the system of using racial quotas in the admissions process for Davis Medical School unconstitutional, but upheld the practise of using race as a factor. This decision was made possible by Powell's crucial vote. He joined both sides of the decision, and as a result, *Bakke* was essentially two 5-4 decisions. In *Weber,* the Court upheld the constitutionality of an affirmative action plan at a steelworkers plant.

[11] *Ibid.,* p. 200.

minorities was, according to the Court, a necessary consequence of the long-standing tradition of discrimination and segregation within American society.

Thus, *Rodriguez* was not simply a product of a conservative court. Although the composition of the Court provided an important context for the case, and influenced the litigation strategies of both Gochman and Wright, the issues of *Rodriguez* transcended mere political considerations. The outcome of the case was predictable. Despite the narrowness of the decision, only Justices Marshall and Douglas agreed with the lower court case in its entirety. This demonstrated its ideological and legal unacceptability of the lower court decision for the justices. The predictable failure of the case derived from the conflict between demands of the plaintiffs, the prominent political mood and the ideological implications of the decision which rendered it untenable for not only the majority of justices, but also many court commentators, journalists and politicians. Thus, Gochman's poor performance in oral arguments did not directly affect the outcome of the case. The contrast in calibre between the two counsel was evident, but related only to the presentation, rather than content, of the arguments. To argue that a better presentation by the plaintiffs' counsel may have resulted in a different outcome exaggerates the importance of oral arguments. Whilst it must be conceded that a more polished and confident performance by Gochman may have created a better impression on the Court, it cannot be asserted that the vote of any majority justice may have changed with a better performance and thus *Rodriguez* was ultimately destined to fail.

However, this is not to belittle the role of individuals in *Rodriguez.* The formation of the case, the development of the litigation strategies, and the content and presentation of oral arguments, were determined by individuals and influenced the shape and nature of the case. External factors provided the framework for the case, internal factors crafted the design. Wright's strategy of emphasising the Coons theory successfully altered the focus of the case. He began both his brief and his oral presentation with the Coons theory. This strategy thereby implied that an affirmative ruling and the application of the Coons theory were co-dependent. Thus, the emphasis upon the weaknesses upon District Power Equalizing were successfully interpreted as weaknesses in the plaintiffs' claims.

According to Gochman, however, oral arguments and briefing had no effect on the outcome of the case. The case was lost, in his view, when the new justices were

appointed.[12] When the composition of the lower court was considered, the merit of this argument becomes evident. Three Johnson appointees decided in favour of the plaintiffs. The remaining Warren Court justices, with the exception of Stewart, also favoured the plaintiffs. The clear contrast between the votes of the Warren Court justices and Burger Court justices, who were appointed after the filing of the case in the lower courts, marginalised for Gochman the importance of the briefing and oral arguments. Regardless of the truth of this view, Gochman made mistakes in the presentation and briefing of the case. His desire to pursue an independent course of action meant that he did not incorporate the advice of other, more experienced, litigators. Wolinsky, for example, had urged litigators to avoid federal courts wherever possible in order to build up a wealth of precedents at the state courts, but he was viewing the case from a national perspective. At the time at which Wolinsky advised this strategy, however, *Rodriguez* had been in the federal courts for two years. Further, Gochman's decision to file in the federal, rather than the state courts, was based upon his knowledge of the conservatism of the state courts in Texas and throughout the South and that federal courts had given steady, vital support to the civil rights movement. The passage of the case in federal courts was against the advice of school finance litigators, but should not be considered a mistake. However, Gochman also did not act upon the advice of Wolinsky regarding the content of the brief. He did not relate the case to the busing controversy in order to assuage justices' concerns regarding the effect of an affirmative decision upon the educational process, and did not sufficiently emphasise the freedom of choice available to states as result of an affirmative decision.

Gochman's failure to emphasise the limitations of the decision plaintiffs sought was his largest mistake in both his briefing and oral presentation of *Rodriguez.* He enabled Wright to alter the focus of the case, and did not manage to recentre the arguments upon the plaintiffs' claims. Although he stated in the Motion to Affirm that "all that the decision does is prohibit the state from distributing education according to wealth", this was not made with sufficient clarity in oral argument.[13] It was possible for the Court to strike down the finance system whilst making clear the variety of alternatives available. Gochman, however, did not emphasise this course of action sufficiently, and Wright successfully made the Coons theory central to the litigation. Spears' use of Proposition

[12] Interview with author, 10th December 1998.
[13] Motion to Affirm, p. 11.

One in the lower court decision enabled Wright to emphasise it in the Supreme Court, in both oral arguments and the briefing of the case. This detracted from the actual purpose of the case. The plaintiffs were simply asking the Court to invalidate the current finance system; they did not seek approval of an alternative. The effectiveness of District Power Equalizing was not the issue under consideration. To this extent, the plaintiffs sought a similar ruling as *Brown*: a short, principled legal statement that invalidated elements of the system in use.

Gochman also did not address the issue of localism in sufficient depth. The defendants' emphasis upon the potential threat *Rodriguez* posed to localism altered the focus of the plaintiffs' claims. It was a focus which the justices accepted. Powell commented in *Rodriguez* "it would be difficult to imagine a case having a greater impact on our federal system than the one now before us."[14] However, the threat to states' rights in the constitution was more perceived than real. First, the issue under consideration was the educational finance structure, not the educational system itself. The majority of state finance systems had between 40-50% state funding, approximately 10% federal funding, and the remainder, local funding. Thus, on average, only 30-40% of education funds was raised by local funds. To this degree, localism in educational funding was already secondary to state control. In order to answer this claim, which was made in Marshall's dissent, Powell included footnote 108. In this footnote, he emphasised the importance of local school boards and then proceeded to list their specific duties. However, this response illustrated the degree to which the issue of localism had been broadened beyond the actual scope of plaintiffs' claims. Local control of education, of which the school boards were part, was never directly threatened in *Rodriguez.* The current structure of the finance system was challenged, not the principles upon which it was based. Further, the reason for the disproportionate emphasis upon District Power Equalizing was its ability to incorporate local control with school finance reform. However, this was just one example of an alternative system, but Wright presented it as the primary focus of concern. Gochman realised the problems of Coons' work might cause the plaintiffs. His refusal to step aside to allow Coons to argue the case in the Court derived from Gochman's superior knowledge of the primary issue under consideration: the Texas school finance system. Coons obviously possessed greater knowledge of his own analysis

[14] *San Antonio v. Rodriguez,* 411 U.S. 1 (1973), p. 43.

and remedies, but this did not make him better equipped to argue the case. Further, he, not Coons, was Demitrio Rodriguez's lawyer, and Rodriguez wished for him to continue. He pursued the strategy he considered the best to win the votes of five Supreme Court justices. This strategy was to focus upon the constitutionality of the financial inequities in Texas. It was not to consider the case in the broader national or political context. In oral arguments, for example, Gochman attempted to resist Burger's efforts to expand the focus of the case beyond state boundaries. Further, he did not include Wolinsky's suggestion to relate *Rodriguez* to busing. Instead, he stressed the narrowness of the case, but did not do this sufficiently. Thus, Gochman's failure to emphasise the limitations of the suit with sufficient force, particularly regarding localism and the peripheral importance of the Coons theory to his case, was his biggest mistake.

The mistakes Gochman made in the arguments and briefing of the case did not alter the outcome. In order to blame Gochman for the plaintiffs' defeat, his performance must have altered the vote of one of the majority justices. Consideration, however, of the jurisprudence and political ideals of the five majority justices suggest that this notion is, at least, tenuous. Whilst Stewart was the crucial fifth vote, the examination of the opinion writing process revealed that it was only his vote for Powell's opinion that was tentative, rather than his vote to overturn the lower court decision. Instead, the five majority votes were influenced by judicial and political concerns raised by the broader context. Thus, on one level, *Rodriguez* was the product of the individuals involved: the plaintiffs, defendants, lawyers and justices. They gave *Rodriguez* its shape and facilitated its development and progress. On another level, however, the issues under consideration transcended the individuals involved and raised issues fundamental to American ideology, its political structure and the institutional role of the Supreme Court. Thus, the outcome of *Rodriguez* was predictable.

Gochman's view that the case failed simply because of the composition of the Court overlooked the complexity of the case. Whilst the division between the remaining Warren court justices and new Nixon appointees was evident, it does not fully account for the outcome. Justices White and Brennan only agreed with the district court decision in part, and Stewart disagreed with it entirely. It cannot be assumed, therefore, that plaintiffs would have won before the Warren Court. The plaintiffs sought an extension to Warren Court guarantees, not an enforcement of them. Similarly, even though the

composition of the district court was more favourable towards Gochman, the novelty of the plaintiffs' claims made a favourable outcome dubious. Thus, the issues raised by *Rodriguez* transcended simple ideological categorisation. It was new legal ground, which made the reaction of justices difficult to predict. The novel nature of the legal claims was the ultimate reason for the case's failure. The case sought an extension of constitutional guarantees to a degree deemed unacceptable by the Court as well as many others observing the case. The case emerged from the civil rights gains of the 1960s, it combined different elements of the movement and extended them further. The extension of the demands was critical and distinguished it significantly from previous civil rights claims. It was the nature of the extension which rendered the aims of the plaintffs' unattainable. Whilst the politics of the justices were an important element of the case, they do not adequately account for the outcome. Instead the ideological implications of plaintiffs' claims, which conflicted with the broader political mood, the constitutional analysis used, the institutional considerations of the Court, all combined to render *Rodriguez* untenable.

Events in Texas after *Rodriguez* illustrated both its immediate and long-term importance. Activists turned to the state legislature for reform, but this process proved frustrating. Although substantive legislation, in particular SB7, was passed, it did not involve sufficient change to satisfy activists as financial inequalities remained. The decision to return to the courts derived from the failure of the political process to enact sufficient change. The Court had referred the plaintiffs to the democratic political process as the correct forum for redress, but they were not satisfied. In part, the failure of the activists to achieve notable change reflected the problems inherent within the American political process. The widespread use of litigation by political activists generally arises from the recognition of the inability of the political process to enact substantive change. The political deadlock or political inaction caused by the abundance of competing interests within the political process led to the increasing widespread use of litigation. A ruling verifying the constitutionality of the plaintiffs' claims would provide the necessary weapon with which to start their particular fight. *Rodriguez* deprived the activists of this weapon, which increased the difficulty of achieving their aims. Thus, the decision to return to the courts to achieve a ruling based upon the Texas State Constitution was recognition of the importance of litigation in achieving substantial change.

The need for plaintiffs now to premise their arguments upon the state constitution illustrated the second important effect of *Rodriguez.* As a result of the decision, the federal constitution was closed for the time being as a means for school finance litigation. After *Rodriguez,* state constitutions became the focus of reform attempts. The education clause that existed in many state constitutions provided the basis for future suits. Thus, *Rodriguez* prevented uniformity in school finance reform, and subsequently, vast interstate differences existed. Even though the plaintiffs did not challenge the principle of local control, *Rodriguez* ensured that educational expenditure remained the province of state and local government, and the responsibility of reform rested with it. Gochman did not dispute this view, but wanted an effective weapon in order to precipitate reform. The continuation of national diversity was, therefore, a legacy of *Rodriguez.* Increased use of state constitutions meant that state constitutional guarantees could extend beyond those of the federal. Thus, at the time in which the Nixon administration's rhetoric advocated the return of some power to the states, the state courts became the dominant force in school finance reform. To this extent, *Rodriguez* also affected the balance of judicial federalism.

The decision to return to litigation in Texas was, therefore, largely a result of the inadequate state legislation after *Rodriguez.* This move illustrated the broader significance of *Rodriguez.* The legislative failures in Texas after *Rodriguez* confirmed the limits of the support of the American political system to socio-economic equality. The decision to use litigation once more, therefore, marked an attempt to further extend the limit by using different means. An U.S. Supreme Court ruling in 1982 gave new supporting material to the litigants. Almost ten years after *Rodriguez,* the Court expressed a sympathetic view towards educational deprivation in *Plyler v. Doe.* The issues of the case reflected the problems caused by the rising illegal immigration rate, which was particularly significant in Texas. The case, which challenged the constitutionality of excluding illegal immigrants from public education, demonstrated the new issues that now occupied the political agenda. Despite the illegal status of the immigrant children, the right to education was ruled to be constitutionally significant to compel attendance. This decision reaffirmed the constitutional importance of education, without declaring it fundamental: "neither is [education] some governmental benefit indistinguishable from other forms of social

welfare legislation."[15] Thus, the Court distinguished between education and other economic rights, which it had refused to do in *Rodriguez.* Thus, although the Court maintained its *Rodriguez* findings, it acknowledged the unique political importance of education: "the denial of education is the analogue of the denial of the right to vote."[16] This ruling provided litigants with crucial material to support their claims, as well as illustrated broader demographic and social trends.[17]

The litigants were successful in 1989 when, sixteen years after *Rodriguez*, the Texas Supreme Court declared the school finance system unconstitutional.[18] Instead of relying upon the state equal protection clause, the Court declared the system violative on the basis of the "efficient" clause of the state constitution: "The resultant inequalities are thus directly contrary to the Constitutional vision of efficiency."[19] Finding the system unconstitutional on the basis of the educational clause narrowed the implications of the decision. The court did not mandate the equalisations of all governmental services, but simply wished to ensure that the educational system was constitutionally efficient. Furthermore, the Court did not respond to the claims of racial and class discrimination. Thus, although *Edgewood* marked the fruition of 25 years of activism, it did not mark the achievement of the *Rodriguez* plaintiffs' original aims. Instead, it confirmed the limits of the plaintiffs' claims in both the judicial and political sphere. It demonstrated that at both federal and state level, the plaintiffs' primary aim to reduce socio-economic inequality remained untenable. The judiciary did not recognise the congruity between race and class, or the *de facto* discrimination in the poor school districts. In both *Rodriguez* and *Edgewood*, the judiciary did not respond to the claim of racial discrimination but it remained prominent in the *Rodriguez* plaintiffs' brief. However, in *Edgewood*, the charge of racial discrimination was accompanied by a number of other claims, including the charge based upon the Education Clause. Thus, through finding the school finance system unconstitutional on the basis of the education clause, some of the implications of the decision were narrowed. The litigation reflected the increased political conservatism at both national and state level and the increased emphasis upon the improvement of the

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[15] 457 U.S. 202 (1982), p. 221.
[16] *Ibid.*, p. 223.
[17] *Plyler* was cited, for example, in *Edgewood* and state court decisions in Illinois and Ohio. For further detail of these decisions, see Appendix A.
[18] *Edgewood v. Kirby* 777 S.W. 2d 391 (1989).
[19] *Ibid.*, p. 392.

quality of education for all, not just racial minorities. However, the events following *Edgewood* illustrated the incompatibility of the plaintiffs' demands with the majoritarian political process. Despite the ruling, the legislature did not enact sufficient reforms. This was demonstrated by the subsequent return to the courts on three occasions to challenge the constitutionality of the new system. The final decision in 1995, which upheld the new system, ultimately denied the plaintiffs' claims regarding the degree of equalisation required. The dissatisfaction of plaintiffs with *Edgewood IV* demonstrated the limitations of a constitutional ruling. A decision in support of activists did not result in the achievement of their aims. For the *Edgewood* plaintiffs, the system established did not result in sufficient equalisation and still contained inherent inequality. Thus, a ruling in *Rodriguez* upholding the district court may not have resulted in the achievement of plaintiffs' achievements. It would have strengthened the weight of their claims, but as events after *Edgewood* testified, the legislature refused to meet the demands of the activists. Despite the progress in school finance reform, therefore, plaintiffs' claims have never been fully realised. The Presidential Advisory Commission Report on Educational Excellence for Hispanic-Americans confirmed that the problems faced by Demitrio Rodriguez in 1968 still existed to some degree. This report confirmed that a disproportionate number of Hispanic American students attended predominately white schools that lacked educational resources. It also showed that the 1992 drop out rate of 12% for Hispanic students, compared to 5% for white students. This report confirmed that the educational equality sought by reformers since the 1960s had not yet been achieved.

The dissatisfaction of plaintiffs with the school finance reform legislation after *Rodriguez* and the subsequent *Edgewood* ruling demonstrated the inability of the political process to accommodate their aims. The U.S. Supreme Court denied their claims. The Texas state legislature did not enact sufficiently far-reaching legislation. The Texas State Supreme Court upheld the plaintiffs' claims, but refused to become embroiled in the continuing search for a satisfactory solution. At each stage of the reform attempt, however, external factors and institutional considerations influenced the outcome and the failure to satisfy the plaintiffs' demands cannot be attributed solely to the nature of the demands. The failure of the plaintiffs to accomplish their aims indicated that their objectives were difficult to achieve through the normal political process. The degree of

equalisation for which the plaintiffs pleaded extended beyond the degree of equality possible within an essentially individualistic society. This confirmed the historical importance of *Rodriguez*: its significance lies in the ultimate inability of the political process to fully satisfy the plaintiffs' objectives.

Rodriguez was a pivotal movement in school finance reform. It precluded further litigation attempts based upon the federal constitution for the time being and transferred the focus to state constitutions. The network between school finance litigants which had existed prior to *Rodriguez* dissipated, and instead, wide inter-state disparity existed in the degree of reform accomplished in each state. The present day complexity in school finance reform is largely a result of *Rodriguez*: it prevented any degree of national uniformity.[20] It also had a lasting effect upon constitutional law. It affected the future application of the equal protection clause, established clear definitions of fundamental rights and suspect classifications, and consequently ended one chapter of constitutional law.

The developments in school finance litigation also reflected the broader historical environment. The plaintiffs' demands reflected the ideological context of *Rodriguez* and encapsulated the primary elements of the second phrase of the civil rights movement. The attempt to combat socio-economic discrimination was represented in the plaintiffs' claims of race and class discrimination in the school finance system. The plaintiffs sought recognition of the congruity of race and class inherent within American society. This correlation reflected the changes that had occurred within the civil rights movement since the Civil Rights Act of 1964 and Voting Rights Act of 1965. Thus, at the time at which the case was filed, the Poor People's March had recently concluded and the federal government had passed the FHS Act. The original suit derived from the same ideological impulse that prompted the passage of the FHS Act, one month prior to the filing of the suit. The fight for socio-economic equality was its height. However, in the five year period to the handing down of the Supreme Court case, the movement fragmented and the sympathy for minority rights began to decline. Instead of marking a new era in the civil rights movement, the Poor People's March and FHS Act marked the final stages of the movement. Thus, the political momentum behind further civil rights gains gradually declined from 1968 onwards. This decline was reflected in developments in the litigation.

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[20] See Appendix.

The creation of Proposition One sought to assuage fears regarding the potential implications of the litigation and continued to champion local control. Its emergence reflected the increasing emphasis upon judicial restraint and political concerns about local control, typified by Nixon's "New Federalism." Coons *et al.,* also stressed the peripheral importance of racial discrimination claims to school finance litigation. They acknowledged that the political volatility of school finance was sufficient without the added element of race. They wished for the racial element to be minimised, and gradually, particularly in the post-*Rodriguez* era, this occurred. However, the creation of Proposition One was insufficient to alter the outcome. The predictability of the outcome derived from the conflict between the plaintiffs' demands and the broader political environment.

Developments in litigation in the post-*Rodriguez* period continued to reflect broader political changes. The declining significance of race and class and the emergence of litigation strategies based upon the education clause changed the nature of the litigation. It narrowed the implications of the litigation and introduced tangible legal standards. This thereby reflected the gradual marginalisation of race issues on the political agenda that had occurred during the 1970s and 1980s. Affirmative action was the primary race issue on the political agenda during this period, but the commitment to minority rights on the national level was on the decline. This was a result of the rising political conservatism and the redefinition of race and minorities that had begun in the late 1960s. By the 1980s, issues of race were significantly more complex, encompassing issues relating to immigration, language, as well as those relating to poverty. The increasing multiculturalism of American society, precipitated by the rising immigration rate from Asian and Latin American countries, altered the political dynamics of the race issue. The changes in the litigation reflected these changes and provided a means by which school finance reform could be distinguished from civil rights claims. In addition, the expansion of the concept of minorities to include gays, disabled and women further enhanced the complexity of civil rights issues, and added additional components to the broader goal to improve the quality of minority education. Thus, school finance litigation had, by the 1980s, become more to do with educational policy and less to with civil rights. Although the plaintiffs' motivation derived from the desire to improve the condition of minority education, as illustrated by the involvement of MALDEF, the *Edgewood* opinion did not

reflect this. Therefore, the development of litigation reflected the broader historical and political trends.[21]

Furthermore, the continued emphasis upon local control of education illustrated one of the key elements of American political philosophy. The federal structure, in particular local control, has been at the heart of American political debate since the inception of the United States. The desire to preserve the three key advantages of federalism; namely diversity, policy experimentation and grass roots government, has moulded political discourse throughout the nineteenth and twentieth Centuries. The changes to the federal balance during post-war period meant that, by the time *Rodriguez* was filed, the credibility of the expansion of federal government power had already been undermined. However, the critical importance of federalism to the American political structure has ensured its continuing relevance to school finance. Developments in litigation strategy have enabled race and class to be almost eliminated from the reform attempt. However, plaintiffs must still reconcile school finance with local control. This development reflects the different nature of the issues. Race and class are not always prime areas of widespread political concern. Widespread political concern for these issues is more sporadic, often influenced by agitation beyond the political arena. *Rodriguez* and events following it reflected the decline in political momentum for further civil rights gains. However, the continuing significance of local control, as part of the federal balance, reflects its centrality to American history. It is a core principle of the political structure but its exact dimensions are being constantly redefined. *Rodriguez* occurred at one of the moments in which the balance of power was being redefined, and thus the arguments of the two parties encapsulated both the advantages and disadvantages of federalism.

The historical significance of *Rodriguez*, however, is less immediately identifiable. It did not precipitate immediate change, and as a result, was largely ignored by historians. *Rodriguez* was overshadowed by other Burger Court decisions of that term, including *Roe* and *Keyes,* which precipitated immediate change. However, the reasons for the rejection of plaintiffs' claims in *Rodriguez* explain its historical importance. The ideological and practical implications of the plaintiffs' claims were unacceptable to the majority of the Court. Institutional considerations and the increasingly political prominence of Court decisions ensured that involvement in an additional controversy

[21] For detail of school finance litigation in the 1990s, see Appendix.

would threaten the institutional role of the Court within the political process. Ideologically, the plaintiffs sought a constitutional guarantee that minimised the effects of wealth differences in one area of American society. Although this area was education, the Court nevertheless found this principle to be unacceptable. The plaintiffs' claims were commendable and worthy of validation strictly from a policy viewpoint. The passage of the FHS Act in May 1968 demonstrated, to the activists at least, government acknowledgement of the inherent class discrimination within society. It provided an ideological link to the plaintiffs' claims. However, in a society dedicated to individualism, the notion of local communities using their own wealth to educate their children was of central importance, in spite of the state government providing the largest proportion of funds. The right of individuals to determine and influence the quality of local schools connected localism with individualism. If the affluence of the local community determines the quality of the local schools, a superior educational system is a benefit for achieving financial success. Thus, the desire to enjoy the benefits of financial success, which provides the rationale for economic individualism, further ties individualism with local control, particularly in education. Although the plaintiffs carefully denied that their case conflicted with the principle of localism, the broader ideological and practical implications of the case suggested that it did. Therefore, the defence of the system on the basis of federalism incorporated the notion of individualism. Protection of the individual against the excesses of government is an integral element of American political philosophy. Thus, the protection of local governments against the excesses of state or federal governments derives from the same basic philosophy. Further equalisation of governmental services and certain benefits of wealth, which, although not sought by the plaintiffs, were the ideological consequences of an affirmative ruling, and were deemed unacceptable. *Rodriguez* clashed with broader dynamics of the period. The implications of the plaintiffs' claims, the increasing political prominence of the Court, the rising number of socially controversial issues on its agenda and the increasing conservatism, combined to prevent the achievement of plaintiffs' aims in 1973. However, the continuing inability of the political process to satisfy the original aims indicates that those aims remain beyond the scope of the political process.

The plaintiffs' claims, therefore, would upset the delicate balance that has been struck in the late twentieth century between equality and individualism. According to

Samuel Huntington, "a continuing theme of American political discourse has been the effort to reconcile equality with liberty, most notably in the economic sphere, where ideas of equality of opportunity coexist with ideas of liberty of achievement."[22] These two ideals were critical to both the plaintiffs and defendants. They, according to the defendants and the majority, were championing equality to the detriment of the integrity of local government power. The advances in equality made during the 1960s were substantial and, according to the majority, sufficient. They now had to be consolidated rather than extended. *Rodriguez* was, therefore, a watershed in the continuing fight for equality. The Supreme Court refused to give constitutional sanction to the new definition of equality. It was possible for the Court to strike down the finance system whilst making explicit the myriad alternatives available, but it refused to become embroiled in the issue to any degree. This refusal was a reflection of the broader historical context. Institutional considerations, the desire to avoid involvement in another area of political controversy, combined with the desire to consolidate, rather than extend the civil right gains of the 1960s, accounted for the decision. The civil rights movement had begun in the courts, and then expanded into the streets. *Rodriguez* represented the continuance of litigation as a political strategy after the decline of the mass civil rights movement. Affirmative action and the continuing busing controversy were the next issues to be contested in the civil rights litigation struggle. Both these issues, however, represented the enforcement, rather than the extension, of previous guarantees.

An analysis of *Rodriguez* is an analysis of and so illuminates some fundamental features of American ideology and political process. At a time in which the forces of race, class and federalism were being redefined, all three elements were contained within *Rodriguez.* Thus, an examination of the case illuminates the nature of these changes and highlights the way in which society reacted to these changes. The marginalisation of the racial discrimination claim reflected the ideological developments of the 1960s. Class discrimination formed the primary basis of the plaintiffs' case, thereby seeking an acknowledgement of race and class within American society. This acknowledgement was ideologically and judicially unacceptable for the majority of justices. *Rodriguez*, in their view, had the potential to precipitate an avalanche of litigation that tested the

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[22] Samuel P. Huntington, *American Politics: The Promise of Disharmony,* (New York, 1981). As quoted in William Lasser, *Perspectives on American Government,* (Lexington, 1992), p. 120.

constitutionality of the inequalities in all government services. Although the threat to federalism was more perceived than real, the manifestation of these concerns illustrated the difficulty of extending guarantees of equality in an essentially individualistic and localised society. King commented in 1968 that "we are approaching an area in which the voice of the Constitution is not clear."[23] *Rodriguez* helped to clarify the constitutional position on socio-economic equality. It was a pivotal historical moment so far in U.S. Constitutional history, defining the outer parameters of constitutional equality in use today, thereby denying activists the instrument with which to fight class discrimination in the late twentieth century.

[23] Martin Luther King, "Where Do We Go From Here?", preface, (New York, 1968), p.x.

APPENDIX

School Finance Litigation in the 1990s.

An examination of School Finance in the 1990s demonstrated that the questions and issues raised by *Rodriguez* are still very much in evidence in the U.S. today. 26 school finance decisions were rendered in the 1990s, fourteen of which found the school finance system to be unconstitutional.[1] When considered in conjunction with the cases rendered between *Rodriguez* and *Edgewood*, school finance decisions have been delivered in total of 34 states since March 1973.[2] The high number of cases rendered during the 1990s illustrated the continued dissatisfaction that existed regarding the state school finance system two decades after *Rodriguez.* However, 15 of the 26 cases were delivered in states whose school finance system had already been challenged during the 1970s or 1980s. This figure illustrated that the litigation of the 1990s was significantly different to that of the period immediately after *Rodriguez.* The recent litigation had been called "the second wave" of school finance litigation, in that the legal challenges have differed significantly from the *Rodriguez-* style legal challenge and thereby represented a clear break.[3] In the majority of cases, the legal challenge was no longer premised upon the dual notions of the suspect nature of wealth and the fundamentality of education. Instead, the challenges were predominately based solely upon state constitutional notions of "adequacy" and "thorough and efficient." However, the possibility of an alternative litigation strategy was demonstrated soon after *Rodriguez* in *Robinson v. Cahill,* and was employed steadily during the 1970s and 1980s. Thus, the division between the first and second wave of litigation is tenuous as this suggests a clear break, whereas it developed more gradually. However, the categorisation of the "First" and "Second" wave is useful for the purposes of an examination into school finance in the 1990s. The litigation of the 1990s was significantly different to the *Rodriguez*-style litigation in that the broader implications of the earlier cases had been narrowed by the 1990s. The litigation no longer sought a recognition of the connection between race and class. Instead, litigants challenged the notion of "adequacy" and "efficiency", thereby raising questions of educational, not socio-economic, inequality. The court decisions of the 1990s also, in general, provided more remedial direction to the litigants than the first wave of litigation. The courts were

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[1] See Table 2.
[2] See Table 1.
[3] "The New Wave Of School Finance Litigation", Deborah Verstegen, *Phi Delta Kappan,* November 1994, Volume 76 Issue 3 p. 243.

more active in finding an appropriate solution to the problem of school finance than in the *Rodriguez* era.

The developments in litigation also reflected the political agenda of the 1990s. Federalism and the condition of education were prominent features of the agenda, whereas Affirmative Action continued to shape political discussions on race. The attempt to decrease the power of Washington had been growing during the 1980s and took on a new momentum after the Republican party gained control of Congress in 1994. The expansive use of bloc state grants demonstrated the desire to allow states to choose the appropriate way to spend federal grants. This method of federal funding for social policy had become increasing important during Reagan's presidency, during which time the amount of federal funding to the states was also reduced.[4] Reagan also pursued a policy of deregulation which increased the degree of state responsibility.[5] The heightened degree of responsibility, coupled with the decreased federal assistance, marked a growth in state political action. This signalled the rise of "state insurgency", a growth in power and importance of the states and their increasing independence from Washington policy initiatives.[6] Thus, the cuts in federal funding, the increased use of block grants and the deregulation of the Reagan era encouraged a greater degree of state autonomy in social policy. As a result, a wide inter-state diversity in social programs and economic initiatives emerged, which decreased state reliance upon Washington for policy initiatives.

Developments in educational policy further reflected the desire to preserve local choice and minimise the role of the federal government. The publication of Jonathon Kozol's *Savage Inequalities* in 1991 had illustrated the inadequacies of the educational system and prompted additional debates regarding appropriate remedies. Increasing dissatisfaction with educational conditions prompted discussions about a voucher system, in which parents would be given a voucher to pay tuition at any public school. Freedom of choice, therefore, lay at the heart of the voucher system. Although this system did not receive the widespread support of the federal government, it was

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[4] In 1981, for example, the federal government consolidated 54 categorical grants into 9 bloc grants.
[5] *The Federal Register*, for example, declined from 87,000 pages in 1980 to 55,000 pages in 1987. This effectively loosens the restrictions on federal government action, and in so doing enlarges the scope of state responsibility.
[6] John Kincaid, "Governing the American States", *Developments in American Politics II,* (London, 1992), p. 46.

increasingly used amongst the states and demonstrated the desire to improve educational opportunities for children whilst simultaneously preserving local control.

Affirmative action was the primary race issue on the political agenda. However, the emphasis upon the rights of all minorities was encapsulated by The Americans With Disabilities Act of 1990, which compelled employers and owners of public facilities to make adequate arrangements for disabled people. This legislation was followed a year later with the Civil Rights Act of 1991 was the first federal civil rights legislation since the Housing Act of 1968 and thereby demonstrated political awareness of the continuing problem of minorities. Civil rights legislation of the 1960s was primarily aimed at blacks, whereas the legislation thirty years later included all minorities. This reflected the broader the changes that had occurred during this thirty year period. This act confirmed that in racial discrimination claims the burden of proof was upon the employers, not the employees. It also stated that unlawful employment practise was established when an employment procedure was motivated by racial, sexual or religious discrimination, even if the employer could demonstrate that the same decision could have been rendered on a non-discriminatory basis. This act, therefore, acknowledged the continued existence of racial discrimination. *De jure* discrimination in the workplace provided the focus for the act, which illustrated the continuing socio-economic inequality that existed. The necessity for federal legislation after a 23-year gap demonstrated that the race problem was still a feature of American society. The act also demonstrated that socio-economic equality remained elusive. In 1990, a black household on average made 63 cents for every dollar made in a white household. 44% of black children under 5 lived in poverty compared to 13.8% of white children. Infant mortality rate was double that of whites and life expectancy for blacks was 69 years compared to 76 for whites.[7] Thus, the lack of federal civil rights legislation since the 1960s reflected its marginalisation on the political agenda and the lack of consensus of appropriate remedies rather than the elimination of the problem.

Developments in school finance, therefore, continued to encapsulate the primary political trends of the period. The continued emphasis upon local choice reflected the desire to reduce the power of Washington. However, the wide interstate variation

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[7] *Statistical Abstract of the United States, 1992* (Washington, D.C: US Department of the Census, 1992). Quoted in George McKenna, *The Drama of Democracy*, (Guilford, 1994), p.121.

demonstrated the increasing state autonomy and the increased effectiveness of state governments that had occurred since the 1960s. The increasing use of bloc grants allowed state governments greater control over social and economic policy. For example, in 1995, 18 states had created new work programs to reduce the number of welfare recipients, Washington state created a health care program for the poor and 26 states established "Enterprise zones", which used special tax breaks to attract new industries into disadvantaged areas. These developments illustrated the increasing autonomy amongst state governments in social and economic policy. School finance reform was one of a number of areas, therefore, which differed between states and reflected the changes in the federal structure that had occurred since the 1960s.

Three decisions rendered in 1989 and 1990 provided the standard for subsequent school finance litigation and, according to one commentator, "ignited a wildfire of school finance litigation that has enveloped the nation."[8] The first decision, *Rose v. The Council for Better Schools,* was rendered in Kentucky in 1989.[9] In this decision, the Supreme Court of Kentucky invalidated the entire system of education, not just the finance system. The court determined "the whole gamut of common schools in Kentucky" to be unconstitutional.[10] This encompassed the "statutes creating and implementing and financing the system and all regulations covering the creation of school districts, school boards, the department of education, the finance plan, construction and maintenance and teacher certification."[11] The reasoning employed in the decision was a "unprecedented in the entire history of school finance."[12] The court found education to be a fundamental right, but did not consider the case from an equal protection perspective. After verifying the constitutionality of education, the court then considered the notion of educational "efficiency." It defined an efficient system as one with the "twin attributes of uniformity and equality" and established seven criteria to measure efficiency, which would be used in subsequent state decisions. The criteria was:

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[8] *Ibid.*, p. 244.
[9] 790 S.W.2d 186 (Ky.,1989).
[10] *Ibid.*
[11] "School Financing Inequities Among the States: The Problem From A National Perspective", Linda Herbert, *Journal of Education Finance,* Winter 1994, Volume 19, p.231.
[12] "School Finance Litigation: A Review of Key Cases", Dore VanSlyke, *Paper prepared for the Finance Project*, December 1994.

> i. sufficient oral and written communication skills to enable students to function in a complex and rapidly changing civilization; ii. Sufficient knowledge of economic, social and political systems to enable the student to make informed choices, iii: sufficient understanding of governmental processes to enable the student to understand the issues that affect his or her community, state and nation; iv. Sufficient self-knowledge and knowledge of his or her mental and physical wellness; v. sufficient grounding in the arts to enable each student to appreciate his or her culture or historical heritage; vi. Sufficient training or preparation for advanced training in either academic or vocational fields so as to enable each child to choose and pursue life work intelligently and vii: sufficient levels of academic or vocational skills to enable public school students to compete favourable with their counterparts in surrounding state, in academics or in job markets.[13]

According to this detailed and specific standard, the court found the entire system of common schools to be unconstitutional and ordered the General Assembly to "re-create, re-establish a new system of common schools in the Commonwealth."[14] This decision, therefore, was the first time in which a court had found the entire system of education unconstitutional on the basis of efficiency. It illustrated the potential scope of a judicial ruling, and established a clear standard for efficiency.

The second 1989 ruling which increased the potential for future litigation was the Montana decision, *Helena v. Montana.*[15] In this decision, the Supreme Court of Montana found the school finance system unconstitutional, which overturned a 1974 decision upholding the finance system. In *Helena,* the Montana court determined that "the State has failed to provide a system of quality public education granting to each student the equality of educational opportunity guaranteed by the [state] constitution."[16] The notion that the state fulfilled its constitutional requirement if each child obtained a minimum education was, according to the Montana Court, unacceptable. This decision also illustrated the potential scope for judicial action, demonstrating the possibility of a filing a second suit in states where the first suit was unsuccessful.

The third decision, handed down in 1990, was the New Jersey decision *Abbott v. Burke.*[17] In this decision, the New Jersey Supreme Court held the school finance system unconstitutional for only a specific class of districts- the poorer, urban districts. The

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[13] *Rose v. Council for Better Education*, 790 S.W. 2d (1989), p.212.
[14] *Ibid.*, p. 207.
[15] 769 P.2d 684 (Mont.1989).
[16] *Ibid.*, p. 686.
[17] 575 A.2d 359 (N.J.1990).

decision encompassed all aspects of the educational process, holding that "what was determined to be sufficient in the past is inadequate today."[18] Thus, the court assessed the constitutionality of the system by considering whether the state provided the level of education that enabled all students to become "citizens and competitors in the labor market."[19] Under this standard, the court stated, the system did not fulfil its constitutional requirements. The decision urged for a reduction of the differences between rich and poor districts. Thus, whereas the plaintiffs in *Rodriguez* had deliberately avoided seeking uniform expenditure, the *Abbott* ruling called for the "same level of education funding to be available in poor urban districts as in property-rich districts."[20] According to the court, the differences between the rich and poor districts also included educational programmes and services, thereby extending the definition of inequality beyond that of financial expenditure. *Abbott* also extended the potential scope of judicial decisions relating to school finance. The invalidation of the school finance system in only certain districts enabled the court to focus upon the provision of education in poor districts.

Abbott also illustrated the differences between the school finance litigation of the 1990s and that at the time of *Rodriguez.* The first New Jersey school finance decision, *Robinson v. Cahill,* was handed down in October 1972. In *Robinson,* the Supreme Court of New Jersey found the system unconstitutional on the basis of the state constitution, employing the state equal protection clause and the "thorough and efficient" clause in its analysis. In *Abbott,* the court used the only educational provision of the state constitution as the basis for invalidating certain aspects of the educational system. The decision also established a clearer standard for remedial action and required more equalisation. *Abbott* added to the requirements of *Robinson,* it did not overturn it. It applied to specific geographical areas and certain general aspects of the educational system, whereas *Robinson* applied only to school finance. This decision was, therefore, in part, a criticism of the inadequate reforms enacted since *Robinson.* Despite a previous court ruling, the finance system still contained significant inequality. *Abbott* illustrated that one previous decision invalidating the system did not prevent further involvement. The second decision was more far reaching and sought a more precise equalisation of the finance system.

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[18] *Ibid.*, p. 360.
[19] *Ibid.*, p. 361.
[20] *Ibid.*, p. 367.

Helena, Rose and *Abbott* were all based upon the education clause of the state constitution. This provided one of the distinguishing characteristics of the school finance litigation of the 1990s. These decisions also, however, demonstrated the second distinguishing characteristic: the increasing willingness of some state judiciaries to become more involved in the education process. State jud*Helena, Rose* and *Abbott* involved the state courts more completely in the educational process. Both *Rose* and *Abbott* extended its analysis to include the entire educational process, not just financial expenditure. This, therefore, established the precedent of a more active judicial role in the achievement of equal educational opportunity. These decisions also coincided with *Edgewood.*[21] *Edgewood* did not employ landmark reasoning or mark a significant departure in the degree of Court involvement in comparison with other states, but the rendering of four decisions overturning, at least in part, four state finance systems, signalled the start of the new wave of litigation in the 1990s.

After the rendering of the three leading court cases, eleven states subsequently overturned their state school finance system during the 1990s. In general, these decisions found the educational system violative of the educational clause of the state constitution. The degree of remedial action recommended varied. The most far-reaching decision was in Alabama, *Harper v. Hunt* (1993).[22] In this decision, the court employed a similar analysis to *Rose,* and invalidated the entire public school system. The education system, according to the court, failed to provide an "adequate and equitable" education to every child in the state. In order to support this view, the court cited the absence of textbooks in some schools, the condition of the buildings and the infestation of termites, ants and rats. The court did not simply focus upon the educational expenditure, but the effect of the expenditure upon the learning environment. The decision, therefore, implicitly acknowledged the connection between financial expenditure and educational quality, which had been denied in *Rodriguez.* The court noted that some districts spent twice the amount of others. The finance system was "irrational and arbitrary and denied students the equal protection of the law."[23] The court found that the entire system of education had to be reformed in order for the inequality to be addressed.

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[21] See Chapter Five. 777 S.W. 2d 381 (Tex.1989).
[22] 227 Ala. 405 (Ala.1993).
[23] *Ibid.*

Alabama and Kentucky were the only states which invalidated the entire education system. However, the emphasis upon the learning environment as well as financial expenditure featured in other states. The Ohio Supreme Court in 1997, for example, stated that "the physical condition of certain schools illustrate that the school finance system does not operate in accordance with the thorough and efficient clause of the Constitution."[24] The combination of plaster off walls, cockroaches on floors, student teacher ratio and the lack of technology would prevent students competing in the "competitive job market", thereby rendering the system unconstitutional.[25] These decisions progressed beyond a mere analysis of the finance system, but instead examined the results of the finance system. The constitutional notion of educational adequacy or efficiency, therefore, encompassed more factors in certain states.

The decisions varied in the legal reasoning applied and degree of remedial action recommended. For example, the Tennessee Supreme Court offered little guidance for the legislature. The analysis in *Tennessee Small School Systems v. McWherter*, struck down the school finance system on narrow basis.[26] The Tennessee court stated: "There has been no showing that a discriminatory funding scheme is necessary to local control."[27] Thus, it demonstrated that it was possible to strike down the existing system whilst preserving local control, and without proposing an alternative system. It was, therefore, a narrow decision, simply striking down one system without examining the effectiveness of a replacement. This was the strategy Gochman failed to emphasise sufficiently in *Rodriguez.* The decisions in Massachusetts, on the other hand, provided far more remedial recommendations. The Massachusetts Supreme Court found the finance system inadequate as it "failed to meet the demands of modern society."[28] In its opinion, the court provided strict guidelines for the legislature. It emphasised that the state has primary responsibility for education, and directed it to set a minimum amount that each local government must appropriate for the education funding system. The state then had the responsibility to make up the differences between wealthy and poor districts.

One court has demonstrated its willingness to extend its ruling beyond that of the plaintiffs' suits. In Arizona the plaintiffs challenged the constitutionality of the state

[24] *De Rolph et al. v. the State of Ohio*, Oh.S.C. 3d 95-2066.
[25] *Ibid.*
[26] W.L. 11203 (Tenn., 1995).
[27] *Ibid.*
[28] *McDuffy v. Secretary of Education*, 615 N.E. 2d 516, 554 (Mass. 1993).

system for financing the construction of educational buildings, asserting that it favoured affluent districts.[29] In its decision, however, the Arizona Supreme Court overturned the entire school finance system, declaring the use of property tax unconstitutional if those taxes had inequitable results. The plaintiffs had employed a different litigation strategy in order to distinguish the case from a 1973 ruling which upheld the finance system.[30] Thus, the court in 1994 overturned the previous ruling and directed the state to create a "general and uniform" finance system.

The most recent state to invalidate the school finance system, New Hampshire, encapsulates the main features of the litigation in the 1990s. On 17th December 1997, the Supreme Court of New Hampshire declared the state finance system unconstitutional.[31] The analysis employed by the court was reminiscent of plaintiffs' arguments in *Rodriguez*: "Public education differs from all other services of the states. No other governmental service plays such a seminal role in developing and maintaining a citizenry capable of furthering the economic, political and social viability of the state."[32] Thus, the court emphasised the political and social importance of education. It then declared it a fundamental right, defining a fundamental right as "the right to a State funded constitutionally adequate public education."[33] This definition, therefore, went beyond declaring education fundamental. Instead, the court incorporated specific notions of adequate funding into the definition of the fundamental right. The ruling then employed the definition of adequacy as established by the Kentucky court in *Rose*, which were "the benchmarks of constitutionally adequate public education."[34] Under these criteria, the finance system for New Hampshire was inadequate and therefore unconstitutional.

Finally, the court addressed the question of appropriateness of judicial involvement into this area and assessed local control as justification for the current inequities. The court was not denying the importance of local control of education, merely its justification for the current inequities. The opinion also acknowledged the variety of alternatives available to the state, which further reduced the effectiveness of local control as a rational basis for the current system: "Several financing models could be fashioned to

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[29] *Roosevelt Elementary School District 66 v. Bishop*, 172 Ariz. 65 (Ariz. 1994).
[30] *Shoftstall v. Hollins,* 110 Ariz. 88 (Ariz. 1973).
[31] *Claremont School District v. Governor,* 142 N.H. 462 A.2d 1353 (1997).
[32] *Ibid.,* p. 1356.
[33] *Ibid.*, p. 1359.
[34] *Ibid.*, p. 1360. For details of the criterion, see above, p. 290.

fund public education. It is for the legislature to select one that passes constitutional muster."[35] This aspect of the ruling emphasised the flexibility available to the legislature in creating an alternative finance system. Thus, like the Tennessee Supreme Court in *McWherter*, the New Hampshire Supreme Court struck down the finance system on a limited basis. The court did not, however, give specific guidelines for remedial action. To this extent, *Claremont* did not typify school finance litigation of the 1990s. However, the legal analysis did contain the central characteristics of the recent litigation. The court declared education to be a fundamental right, but then used the educational clause, rather than the equal protection clause, as the constitutional standard. Thus, finding for the fundamentality of education did not necessitate application of the equal protection clause. Instead, the educational provision remained at the heart of the new litigation, and the question of fundamentality was only employed in certain cases.

The use of the courts illustrated the problems inherent in finding a satisfactory solution to school finance. In addition to Texas and New Hampshire, litigants also used the state courts in Arizona, New Jersey and Tennessee. For example, in June 1998, the Arizona Supreme Court ruled the new school finance legislation unconstitutional for the third time. The court found that the new law "failed to create a 'general and uniform' system", and directed the legislature to create another school finance plan.[36] Similarly, in New Jersey, the court rejected proposed legislation three times before finally upholding the constitutionality of legislation in January 1999.[37] This demonstrates that, despite a constitutional ruling, the establishment of a truly equitable system remains problematic.

Vermont is the current exception to this. It was the first state to establish a completely equal funding system. Following the state Supreme Court ruling in February 1997, the state legislature passed Act 60, which abolished the local property tax and created a new statewide education tax. It also created a "sharing pool", in which individual districts were free to raise additional funds, but these were also collected by the state and redistributed on the basis of wealth. Each district received a state block grant, in which $5,010 was allocated for each pupil. However, this system has created widespread controversy. On average, the wealthiest 20 districts have received a 35% tax increase, but

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[35] *Ibid.*, p. 1364.
[36] "Arizona High Court Again Rules Finance Plan Unconstitutional", Lynn Schnaiberg, *Education Week,* 24th June 1998.
[37] See, for example, "For the Fourth Time, Court Rejects N.J. Formula", *Education Week,* 21st May 1997.

a cut of 20% in educational funding. However, the poorest 20 districts have received a 7.5% tax reduction, but a rise of 12% in educational expenditure. As a result, public opinion is polarised between residents of rich and poor school districts. Currently four cases are pending in the state courts challenging various provisions of the act. One such case has already been unsuccessful.[38] Thus, the controversy in Vermont demonstrates the possible consequences of enacting equal expenditure.

Overall, it is difficult to identify any coherent pattern to account for the outcome of litigation. An examination of the twelve unsuccessful suits illustrates that there is no discernible pattern to the litigation. Courts have employed a variety of different reasoning to uphold the finance system, which indicate the absence of a favoured litigation strategy. For example, in *Scott v. Virginia*, the Virginia Supreme Court found that education was fundamental and therefore requiring strict scrutiny, yet upheld the finance system.[39] This decision illustrated the broader trend of 1990s litigation; claims of whether education was a state constitutional right were becoming increasingly marginal. Success or failure of a suit no longer depended upon the court finding in favour of this claim. However, overall, the opinions upholding the constitutionality of a finance system contained the same concerns as demonstrated by the Court in *Rodriguez.* The question of the appropriateness of judicial involvement, the potential threat to local control and the lack of an agreed solution were all evident in the opinions of the 1990s. For example, the 1996 Illinois decision, *The Committee for Education Rights v. Edgar,* shared many characteristics of *Rodriguez* and *Edgewood.*[40] The plaintiffs challenged the finance system on the basis of the "efficiency" aspect of the education clause, and asserted that education was fundamental. However, the decision rejected the plaintiffs' arguments on both counts. First, the court denied explicit constitutional mention rendered a right fundamental. Thus, unlike the Virginia decision, which found education to be a constitutional guarantee but upheld the finance system, this decision determined that inclusion of education in the state constitution does not make that right fundamental. Relying upon *Rodriguez*, the court found education to be an "important governmental

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[38] On March 4th 1999, the Vermont Supreme Court denied that the "sharing pool" of Act 60 was unfair to wealthy districts. *Stowe v. Hull.* Case no. 98-1332.
[39] 245 Va.1 387 (1994). The system was declared constitutional under the education clause which Powell had helped draft in 1968. See Chapter Four, p. 187.
[40] Case no. 78198 (1996).

function", but not a "fundamental right."[41] Instead, the court determined that "while the federal government is one of limited or delegated powers, all powers not delegated to the U.S. or prohibited to the states are reserved to the states or to the people. As such, states can touch upon a range of subjects, not all of which are fundamental."[42] This statement implied that state courts apply a different measure to determine fundamentality to that of the U.S. Supreme Court. Under the *Rodriguez* standard, explicit or implicit mention of a right renders it fundamental. According to the Illinois court, however, the same standard cannot be applied. State constitutions generally detail more specific rights and duties, not all of them can be fundamental. Inclusion does not render a right fundamental. This ruling, therefore, illustrated the different legal reasoning employed at federal and state levels, thereby demonstrating a key feature of judicial federalism.

The court also deferred to the legislature, stating "we conclude that questions relating to the quality of education are solely for the legislature branch to answer. Courts may not legislate in the field of public school education any more than they may legislate in any other area." The court then implied that an affirmative ruling in this case would threaten the very essence of a representative democracy:

> To hold that the question of educational quality is subject to judicial determination would largely deprive the members of the general public of a voice in a matter which is close to the heart of all individuals in Illinois....An open and robust political debate is the lifeblood of the political process in our system of representative democracy. Solutions to the problem of educational quality should emerge from spirited dialogue between people of the state and their elected representative.[43]

Thus, according to the Illinois court, a decision supporting the plaintiffs' claims would have profound repercussions upon the entire political structure. Unlike previous rulings which emphasised the limitations of the decision and stressed the alternatives available to the legislature, Illinois focused upon the broader ideological implications of the decision. The final element also contained a strong continuity with *Rodriguez.* The court denied the peculiar constitutional importance of education, questioning its importance beyond that

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[41] *Ibid.*
[42] *Ibid.*
[43] *Ibid.*

of other governmental services: "the same [financial difference] may also be said for a variety of important governmental services. For example, the police and fire protection have traditionally been funded at local level." Thus, the court implied that the decision would eventually result in the equalisation of all governmental services.

Overall, therefore, the legacy of *Rodriguez* is still very much in evidence and unresolved. Powell's concerns were echoed in *Edgar*. The similarity demonstrates the universal nature of the issues raised in *Rodriguez*. The preservation of local control of education and appropriate areas of judicial involvement are consistent themes throughout American history and remain intertwined with school finance. However, in some respects, the implications of the *Rodriguez*- type school finance litigation have been narrowed by the 1990s. In general, suits of the 1990s challenged the finance system on the basis of the educational provision and, to a lesser extent, the constitutional status of education. *Rodriguez* challenged the finance system on the basis of race and class discrimination. The charge of racial discrimination was not brought in cases during the 1990s, until *Powell v. Ryan* currently pending in Pennsylvania.[44] This change, therefore, reflected the broader ideological and political environment and the increasing political marginalisation of race in law. Concern for the quality of education, rather than the advancement of minority rights, constituted the primary motivation for litigation. The increasing complexity of race and minority rights meant that its inclusion in litigation would raise a number of additional issues and thereby expand the implications of the litigation. The charge of class discrimination had also been reduced due to the increasing reliance upon education, rather than equal protection, clause for litigation. Emphasis upon the education clause raised issues of educational policy, rather than questions relating to social structure. In those decisions, such as Ohio and Alabama, where poor physical conditions of schools were noted, the courts did not draw any broader conclusion regarding socio-economic inequality. Thus, school finance had to share primacy of place in litigation with learning environment issues. Instead, school finance litigation became one of a number of educational policy issues, all of which were designed to improve the quality of education.

As the Illinois court showed, however, school finance litigation still contained numerous controversial implications. Any school finance litigation forced a judicial ruling upon the competing interests of localism and educational quality. Issues of federalism, in

[44] For more detail, see below, p. 294.

a sense, persisted, but have developed into concern regarding the expansion of state governmental power at expense of local, rather than the expansion of federal at expense of state and local. Although this is not a constitutional relationship except insofar as local governments are limited by state constitutions, the balance of power remained a pressing concern. The attempt by Reagan to turn spending power back to the states and thereby decrease the role of government was continued throughout Bush's presidency. The election of a Republican majority in Congress in 1994 sought to preserve the principles of the previous Republican Presidents. In addition, the implications of the further extension of equality remained present in the litigation of the 1990s. In general, reliance upon the educational clause meant that those courts which overturned the finance system mandated a greater degree of equalisation than during the *Rodriguez* era. The use of the education clause restricted the scope of the decision; the claim that the ruling applied only to education was now much more secure. This, therefore, enabled the Courts to overturn litigation on a more limited basis. As a result, the courts in some states occupied a more prominent role in the search for a solution. Further, as the Kentucky court decision showed, certain states established clear standards for the legislature to follow. Thus, the degree of judicial involvement in school finance varied from state to state and demonstrated that the state political context determined the degree and nature of school finance reform.

Overall, there is no coherent pattern for either success or defeat in state litigation. More states have struck down the system rather than upheld it. However, it is a narrow margin which may be only be temporary as the situation is constantly changing.[45] A school finance case currently pending in Pennsylvania illustrates the dynamic nature of school finance.[46] The case, *Ryan v. Powell*, differs dramatically from all school finance litigation thus far, and could mark the emergence of a third type of school finance litigation.[47] This case challenges the state finance system on the basis of Title VI of the Civil Rights Act of 1964. According to the plaintiffs, who are residents of the impoverished Philadelphia school district with its high percentage of racial minorities, the

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[45] For example, a suit was filed in Florida in November 1999. At the time of writing, the case was still pending. For further information, see "Florida Sued Over Educational Adequacy", Jessica Sandham, *Education Week,* 20th November 1999.

[46] At the time of writing, the case is currently pending in the Federal District Court for the Eastern District of Pennsylvania. The U.S. Court of Appeals for the Third Circuit had, in December 1999, ruled that the case was allowed to proceed to trial after a federal district court had originally thrown it out.

[47] Case no. 99-527.

school finance system contains a "pattern of racial discrimination."[48] Although no discriminatory intent exists, students in predominately minority school districts receive substantially less funding than those students who live in equally impoverished but predominately white districts. Plaintiffs assert that "the Pennsylvania method of public education funding yields racially different results."[49] Thus, this "novel and far-reaching case" is a significant departure from the post-*Rodriguez* style litigation.[50] The charge of racial discrimination forms the basis for the suit, thereby signifying a return to one of the key elements of *Rodriguez.* It also marks a return to the federal courts. Instead of the federal Constitution, plaintiffs have based their claims upon federal legislation. The U.S. Supreme Court, in December 1999, agreed for the case to proceed to trial, and school finance litigation is once again in federal courts. The success of this strategy, however, remains undetermined. *Rodriguez* did not, therefore, prevent all future federal claims, but claims based upon the federal constitution.

The outcome of each case is determined primarily by the state context as a variety of factors influence each decision. According to one commentator:

> Rulings in school finance cases seem to be influenced by a variety of factors. Because state constitutions vary in their provision of education, the courts have arrived at different conclusions about the intent of constitutional law. Other factors may be equally important in determining the outcome of a case. In particular, the nature of the evidence presented, the body of case law existing within the state, and the breadth of jurisdiction that the courts define for themselves have contributed to the different outcomes. [51]

The nature of the state judiciary, the internal political environment, the state constitution can all affect the result. Thus, the same factors that influenced *Rodriguez* were present at the state level, and account for the wide interstate and intrastate diversity that currently exists in school finance reform. The changes in school finance reform movement continue to reflect broader political trends. *Rodriguez* prevented nation-wide reform of school finance and ensured that each state addressed the issue independently. So, the interstate

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[48] Mark Walsh, "High Court Allows Funding Suit in Pennsylvania to Proceed to Trial", *Education Week*, 15th December 1999.
[49] *Ibid.*
[50] *Ibid.*
[51] Dore Van Slyke, "School Finance Litigation: A Review of Key Cases", Prepared for *The Finance Project*, at URL: http://www.financeproject.org/litigation.html.

diversity is a legacy of *Rodriguez.* However, the interstate diversity that current exists is also reflective of broader political trends. The increased state autonomy in social policy, prompted by the resurgence in state authority during the 1980s and 1990s, is reflected in the varying degrees of school finance reform in each state. School finance is, therefore, one of a growing number of areas in which the states are addressing the issues independently of Washington. Thus, the current trends in school finance are both a legacy of *Rodriguez* and a reflection of broader political trends. Just as *Rodriguez* reflected the broader political environment, so too does current school finance litigation. The ruling in *Rodriguez* provided the starting point for much of the subsequent litigation, but the wealth of litigation since 1973 has increased the complexity and changed the nature of the litigation. The emphasis upon education policy, the willingness of state judiciary to become more involved and the continuing desire to keep federal assistance to a minimum, reflect broader political trends.

The lack of agreed solution is another hallmark of the *Rodriguez* era litigation. The previous emphasis upon the Coons theory has now gone, but there is no agreed alternative. This is, apparently, one intractable problem with school finance reform. The problems of the reliance upon the property tax are now widely recognised, but the continual failure of politicians in many states to enact substantial legislation illustrate the difficulty of reforming the system. Vermont, which has abolished the property tax and replaced it with an alternative system, is the current exception to this. It is a small homogenous state, and yet this action has precipitated a great deal of controversy. The reaction in Vermont further illustrates the political dangers of enacting substantive reform. The continual involvement of some courts after the original ruling demonstrates the limitations of litigation in achieving change. The absence of an agreed solution, and the general legislative reluctance to enact far-reaching change, reflects the political complexity of school finance. This problem has been a matter of political and judicial concern for approximately thirty years, but the situation is far from resolved. It further verifies that the plaintiffs' original objectives in *Rodriguez* are politically and judicially untenable. Even though there has been a considerable degree of reform in some states, problems still persist and show that there are too many intractable issues contained within school finance to achieve a satisfactory resolution. To this extent, the constitutional invalidiation of the school finance system is only one stage in the reform attempt. The overall effect of

the litigation, therefore, has been to raise awareness of the problem and, in some states, to achieve a powerful instrument with which to achieve change: "Whether plaintiffs have won or lost in supreme courts, they have brought the issue of equity in American schooling to the foreground, energizing state legislatures, transforming the terms of public debate, and providing a potent lever for systematic change and reform of the entire system of public education."[52] Thus, as a result of school finance litigation, educators and state politicians alike are concerned with the establishment of an equitable system of education. The degree of success is dependent upon the political process, but litigation has incorporated the problem of school finance into state political discourse all across the country.

[52] Deborah A. Verstegen, *loc.cit.*, p. 248.

TABLES

Table 1: Summary of School Finance Decisions from *Rodriguez* to 1990

Year	State	Case	System unconstitutional?
1973	New Jersey	*Robinson v. Cahill* 62 N.J. 473	Yes
	Arizona	*Shoftstall v. Hollins* 110 Ariz. 88	Yes
1974	Washington	*North Shore School District v. Kinnear* 84 Wash. 2d 685	Yes
1975	Idaho	*Thompson v. Engelking* 96 Idaho 793	No
1976	Oregon	*Olsen v. State Board of Education* 276 Or. 9	No
1977	Connecticut	*Horton v. Meskill* 172 Conn. 615	Yes
1979	Ohio	*Cincinnati School District v. Walter* 58 Ohio St. 2d 368	No
	Pennsylvania	*Dansen v. Casey* 399 A.2d 360	No
1980	Wyoming	*Washakie SD v. Herschler* 606 P.2d 310	Yes
1981	Georgia	*McDaniel v. Thomas* 248 Ga. 632	No
1982	Colorado	*Lujan v. Colorado St. Bd of Education* 649 P.2d 1005	No
	New York	*Levittown v. Nyquist* 57 N.Y. 2d 27	No
	West Virginia	*Pauley v. Kelley* 255 S.E. 2d 859	Yes

1983	Maryland	*Hornbeck v. Somerset County* 295 Md. 597	No
	Arkansas	*Dupree v. Alma School District* 279 Ark. 340	No
1987	North Carolina	*Britt v. State Board of Education* 31 N.C. 210	No
1988	South Carolina	*Richland v. Campell* 114 S.C. 27	No
1989	Wisconsin	*Kukor v. Grover* 321 Wisc St. C. 20	No
	Kentucky	*Rose v. The Council for Better Schools* 790 S.W. 2d 186	Yes
	Montana	*Helena v. Montana* 769 P.2d 684	Yes
	Texas	*Edgewood v. Kirby* 777 S.W. 2d 381	Yes

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