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A Quarter Century of Challenges and Progress in Education, and an Agenda for the Next Quarter Century

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**A QUARTER CENTURY OF CHALLENGES AND PROGRESS
IN EDUCATION, AND AN AGENDA FOR THE NEXT
QUARTER CENTURY**

ALBERT H. KAUFFMAN*

INTRODUCTION 5
I. WHERE WE HAVE BEEN 6
II. WHERE ARE WE NOW 8
III. SO, WHAT CAN WE DO ABOUT IT? 9

INTRODUCTION

Congratulations to *The Scholar: St. Mary's Law Review on Race & Social Justice* on their twenty-fifth birthday. It has been twenty-five years of dedication, leadership, scholarship, and advocacy. You have truly honored our law school.

As a native Texan who attended intentionally segregated Texas public schools, then an effectively segregated Texas public law school, litigated many cases against discrimination in Texas education, and now teaches Texas education law, I have what I think to be informed opinions on where we have been, where we are going, and what we should do next.

I will briefly describe our sad history of discrimination in segregation, school finance, testing, higher education, and lack of responsiveness to newer issues in education at all levels. I will then summarize some of our

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ongoing challenges and some possible approaches that I think will improve Texas education.

I would also like to note that *The Scholar* shares its 25th anniversary with the 50th anniversary of the tragic decision of the United States Supreme Court in *San Antonio ISD v. Rodriguez*, 411 U.S. 1 (1973). *Rodriguez* made three major holdings, and all three were wrong. First, the Court recognized that the Texas school finance system would not withstand strict scrutiny review, so they concocted a way to deny the low-wealth districts' claims that education is a fundamental right under the United States Constitution and that wealth is a suspect category.¹ Then, the Court determined that Texas had shown a rational basis for the school finance system based on false notions of local control, and the relation between the irrationality of the system and state and local taxation.² The shocking holding that education is not a fundamental right sucked the oxygen out of many state and national efforts to equalize education.³ And the Court also made the irrational holding that a school finance system that sent twice as much money to rich districts as to poor districts was based on a rational relationship to any state interests.

Fortunately, the *Rodriguez* decision was effectively overruled in Texas by the Texas Supreme Court in *Edgewood v. Kirby*, 777 S.W.2d 391 (Tex. 1989), which held that the Texas school finance system was inefficient and was not related to local control or fairness in taxation.⁴ But *Edgewood* applies only to Texas and *Rodriguez* continues to remain, like a "brooding omnipresence in the sky" as a barrier to the use of federal courts to address educational inequality.

The Scholar has struggled against the inequalities of such decisions as *Rodriguez*, and I again commend their many contributors for their work to confront inequality and inhumanity in education.

I. WHERE WE HAVE BEEN

In its Constitution, legislature, and litigation, Texas fought to segregate its students by race and national origin. Segregation morphed from district segregation to campus segregation to in-school segregation to

1. *San Antonio Inde. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 28 (1973).

2. *Id.* at 54.

3. *Id.* at 35.

4. *Edgewood v. Kirby*, 777 S.W.2d 391 (Tex. 1989).

tracking and lack of bilingual education. Now that the state has majority Latina/o students in public schools and graduating classes that are plurality Latino, the state has improved in recognizing the importance of educating its low-income and minority students. Challenges to public schools by voucher plans and deconstruction of school districts have so far been unsuccessful though the opponents of public schooling are continuing to challenge the whole concept of public schools as our greatest route to equality and opportunity.

Texas won the most egregious decision made by the United States Supreme Court on school finance (*San Antonio ISD v. Rodriguez*) and then lost the most important case on education for the undocumented (*Plyler v. Doe*).⁵ Texas also lost several state court school finance battles as discussed above (*Edgewood I*, *Edgewood II*).⁶ These losses lead to significant improvement in the equity and adequacy of the Texas school finance system and great improvement in opportunities for the Latino population. Unfortunately, there are still consistent efforts to regress.

After Texas's unfortunate infatuation and hyper-focus on standardized tests as the method to improve its education system, the state has begun to bring human decision-making and a variety of factors into its evaluation of the progress of students and school districts. The Texas school accountability system still focuses too much on standardized test scores, but through painful experience and reluctant review, the state has begun to weigh school and student progress and other factors more heavily with a concomitant decrease in the negative effects of its testing system.

Over the last twenty-five years, Texas has continued to improve its support for higher education in areas of Latino population concentration in the Texas borderlands, with greatly increased opportunities for undergraduate, graduate, and professional education (*Richards v. LULAC*).⁷ However, these gains are under constant attack by the university systems so accustomed to flagship university hegemony. Nevertheless, the flagship universities have begun to recognize that their

5. Compare *San Antonio ISD v. Rodriguez*, 411 U.S. 1 (1973) with *Plyler v. Doe*, 457 U.S. 202 (1982).

6. *Edgewood v. Kirby*, 777 S.W.2d 391 (Tex. 1989); *Edgewood v Kirby* 804 S.W. 491 (Tex. 1991).

7. *Richards v. League of United Latin Am. Citizens (LULAC)*, 863 S.W.2d 449 (Tex. 1993).

futures are tied directly to their inclusiveness. Both by the necessities of the demographic changes in the student population and the increased competition in higher education, I am under the impression that the University of Texas and Texas A&M systems competition and control of state higher education have begun to diminish.

About the time of the founding of *The Scholar*, Texas minority education suffered a significant blow when the Fifth Circuit sought to reverse twenty years of United States Supreme Court precedent by outlawing any consideration of race in university admission systems (*Hopwood v. Texas*), leading to a disastrous decline in minority enrollment at the most competitive Texas graduate university programs.⁸ However, minority advocates and legislators lead an important effort to overcome this decision through the top ten percent plan (Tex. Educ. Code § 51.803 (2020)) and restructuring of graduate school admission systems to focus on the diversity of student bodies. The ten percent plan worked well because it removed standardized tests—what I believe to be the largest barrier to minority participation in highly competitive universities from the admission equation. This movement toward diversity was supported by the United States Supreme Court in 2003 (*Grutter v. Bollinger*), effectively reversing the Fifth Circuit decision outlawing Texas affirmative action plans.⁹ Later, the United States Supreme Court upheld the limited use of race and national origin as one of many factors in admission systems (*Fisher II*).¹⁰ But upcoming Supreme Court opinions might again remove these tools.

II. WHERE ARE WE NOW

Education is now confronted with increasingly partisan and wedge issues in education—the rights of LGBTQ+ students, the teaching of sensitive issues such as United States racial discrimination, sex education, competing political systems within the schools, and guns and school security. It is my view that the 2021 Texas Legislature was particularly focused on ways to limit the rights of LGBTQ+ students (athletics bills), the ability of teachers to confront difficult issues in their classrooms, and efforts to control curriculum to reflect only one approach

8. *Hopwood v. Texas*, 78 F.3d 932 (5th Cir. 1996).

9. *Grutter v. Bollinger*, 539 U.S. 306 (2003).

10. *Fisher v. Univ. of Tex.*, 579 U.S. 365 (2016).

to political thought. (Texas Senate Bill 3 (2021)). Yet the resistance to these approaches from so many civil rights groups and national businesses might be substantial enough resistance to impede this new political dogma.

III. SO, WHAT CAN WE DO ABOUT IT?

Money cannot buy you love or remove all disparities in education, but it surely does help! And while test scores are a permanent part of our education system, they can surely be deemphasized. Recognition of our historical and present relationship with Mexico can lead to more equity in both higher education and public education.

Over time, I have seen Texas invest more and more resources into education. But we are still not even average in the United States, and our state's needs are greater than almost all the other states.¹¹ I support the notion that other sources of income for the state, including an income tax, would greatly improve the fairness of taxation and minimize the overly heavy reliance of our school finance system on local property taxes that we know are of such great and dis-equalizing disparity. A state income tax would make it comparatively easy to distribute funds to districts based only on their needs, rather than their property wealth. And the system should compensate for the decades of inadequate funding by sending more, not just equal funding to the poorest school districts.

Additionally, it is my opinion that standardized tests should be deemphasized at all levels. In public education, that deemphasis would lead to richer and more diverse methods of evaluating students and schools and remove at least some of the built-in disadvantages of past discrimination. At the university, graduate, and professional levels, deemphasis on test scores would help us redefine what we regard as quality in students and almost surely lead to increased diversity in our higher education system. So much of the resistance to affirmative action comes from the knee-jerk assumption that a higher test score always accurately reflects the quality of the student and that any variance from pure reliance on test scores is “blatant discrimination” against students with higher test scores.

11. See Melanie Hanson, *U.S. Public Education Spending Statistics*, EDUC. DATA INITIATIVE (June 15, 2022), <https://educationdata.org/public-education-spending-statistics> [<https://perma.cc/F38E-GCSB>] (reporting Texas's average public education spending per K-12 pupil at \$9,871 compared to the national average of \$13,185 per pupil).

Finally, responding to the wedge issues of LGBTQ+, guns, and specific curriculum will require more of a societal change than just an educational change. But I believe calling out clear homophobia in our leaders and supporting LGBTQ+ students in their legislative and litigation efforts will be helpful. And consistent comments and scholarship on the differences between studying our racial history and Critical Race Theory will help at least to minimize this downward trend. Many business and political leaders are opposing these efforts to demonize students and history, and we should both encourage this resistance and disseminate this opposition when it occurs.

In general, I think this State has made significant progress in several of these areas, though my study of Texas history has shown me that all progress is under attack and retrenchment is always over the next hill.