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The Original Intent of the Education Article of the Texas Constitution.

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ARTICLES

THE ORIGINAL INTENT OF THE EDUCATION ARTICLE OF THE TEXAS CONSTITUTION

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I. INTRODUCTION

In *Edgewood Independent School District v. Kirby*,¹ the Texas Supreme Court looked to the history of the Texas Constitution in order to interpret and breathe life into section 1 of the document's education article, article VII.² The court held that the Texas school financing system was unconstitutionally inefficient as it failed to provide for a "general diffusion of knowledge." Brief references to the framers and their intent appear in the opinion.³ Some professors, lawyers, and commentators immediately criticized this use of history by the court.⁴ Lawyers and historians, however, have not yet produced a thorough account of the education article's origins. To further a better understanding of the education article and its future application, we here describe in some detail its historical context and the original intent of its framers and ratifiers.⁵

The Texas Supreme Court has announced a variety of rules for constitutional construction that give great weight to original intent. In an

1. 777 S.W.2d 391 (Tex. 1989).

2. Article VII, section 1 provides:

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

TEX. CONST. art. VII, § 1 (1876)(emphasis added).

3. See *Edgewood Indep. School Dist. v. Kirby*, 777 S.W.2d at 395-97.

4. E.g., Murchison, *Robbing Peter to Pay Paul*, Texas Lawyer, Oct. 23, 1989, at 21; Pauken, *Edgewood Decision Contrived*, Dallas Times Herald, Oct. 15, 1989, at A-21; Borges, *Edgewood and the Art of Courtly Compromise*, Texas Lawyer, Oct. 9, 1989, at 15.

5. We do not argue that contemporary judges should be, or in practice even can be, bound by the desires of a relatively small group of male citizens from nineteenth-century Texas. We do not claim to have found final objective historical truth. For the most part we have tried to avoid all the philosophical, political, and jurisprudential debates over these matters. For discussion of these issues, see generally P. NOVICK, *THAT NOBLE DREAM: THE "OBJECTIVITY QUESTION" AND THE AMERICAN HISTORICAL PROFESSION* (1988); Powell, *Rules for Originalists*, 73 VA. L. REV. 659 (1987); Meese, *The Attorney General's View of the Supreme Court: Toward a Jurisprudence of Original Intention*, 45 PUB. ADMIN. REV. 701 (1985); Tushnet, *Following the Rules Laid Down: A Critique of Interpretivism and Neutral Principles*, 96 HARV. L. REV. 781 (1983); Brest, *The Misconceived Quest for the Original Un-*

1888 case, *Smisson v. State*,⁶ Chief Justice Stayton asserted, “[T]he intention of the framers of a constitution is of but little importance,—the real question being, what did the people intend by adopting a constitution framed in the language submitted to them?”⁷ The next year, in *Galveston, Harrisburg & San Antonio Railway v. State*,⁸ Justice Henry wrote an opinion for the majority interpreting the constitution’s education article. His reasoning was rooted in repeated suppositions of the framers’ intent,⁹ and one reference to the intent of “the people.”¹⁰ In his dissent,¹¹ Chief Justice Stayton countered with his rule that it was the intent of the ratifiers that governed constitutional construction. But Stayton, too, ended up relying on the framers’ intent, and conceded that

[C]ourts in construing a constitution may look in doubtful cases to the proceedings of the convention that framed it, and so upon the theory that the people may be supposed to have adopted it with the same construction placed on it by their delegates.¹²

derstanding, 60 B.U.L. REV. 204 (1980); Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1 (1971).

Professor Levinson has argued that state constitutions should be less flexibly interpreted than the U.S. Constitution. Courts are more legitimately bound by original intent when interpreting state constitutions because they are more easily amended than is the U.S. Constitution. Levinson, *Interpreting State Constitutions by Resort to the Record*, 6 FLA. ST. U.L. REV. 567, 568 (1978). This attribute has led one judge to the opposite conclusion. To the extent a state electorate can easily amend its constitution and elect its judiciary, state court judges are more legitimately activist in their constitutional interpretations than are their federal counterparts, whose constitutional lawmaking cannot be so easily corrected by the democratic process. See Utter, *State Constitutional Law, the United States Supreme Court, and Democratic Accountability: Is There a Crocodile in the Bathtub?*, 64 WASH. U.L. REV. 19, 35 (1989).

6. 71 Tex. 222, 9 S.W. 112 (1888).

7. *Id.* at 232, 9 S.W. at 116.

8. 77 Tex. 367, 12 S.W. 988 (1889).

9. *Id.* at 379, 380, 382, 383, 12 S.W. at 990, 991, 992. Both Stayton and Henry were delegates to the constitutional convention as members of the non-Grange minority faction. N. HENDERSON, DIRECTORY OF THE OFFICERS AND MEMBERS OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF TEXAS A.D. 1875, at 1-4 (1875); see also *infra* notes 78-97 and accompanying text (discussion of Grange’s influence on convention). A central irony of Texas constitutional law is that those whose approach to framing the constitution was rejected are the ones who after the convention obtained the authority to interpret it.

10. *Galveston, H. & S.A. Ry.*, 77 Tex. at 379, 12 S.W. at 990.

11. *Id.* at 410, 13 S.W. at 619 (1890)(Stayton, C.J., dissenting).

12. *Id.* at 435, 13 S.W. at 362 (Stayton, C.J., dissenting). Stayton’s dissent contains several citations to the Journal of the Constitutional Convention. *Id.* at 434-36, 13 S.W. at 631-32 (Stayton, C.J., dissenting); see also *Cox v. Robison*, 105 Tex. 426, 429, 150 S.W. 1149, 1151 (1912)(reaffirming rule that courts must give effect to intent of people who adopted constitution). The court in *Cox* went on to say:

In 1920, the court declared its willingness to follow the intent of the ratifiers and framers “[n]o matter how far reaching and disastrous would be the consequences. . . .”¹³ Through the next decades, the court reiterated its commitment to follow the original intent of both the framers and the ratifiers in light of the history of the era during which the provision was incorporated into the constitution.¹⁴

If the terms of a particular provision are ambiguous, and other parts of the instrument do not make them plain, under another well established rule the court is at liberty to consider the prior state of the law, the subject matter and the purpose sought to be accomplished, as well as to consult the proceedings of the convention and the attending circumstances, for whatever extrinsic aid they may render the court in its effort to discover the true meaning of the provision.

105 Tex. at 430, 150 S.W. at 1151.

13. *Koy v. Schneider*, 110 Tex. 369, 378, 218 S.W. 479, 481 (1920). Compare the deference accorded to original intent under the common law rules of statutory construction. See *State v. Terrell*, 588 S.W.2d 784, 786 (Tex. 1979)(ruling intention of legislature must be followed even if intent inconsistent with strict letter of statute); *Wortham v. Walker*, 133 Tex. 255, 278, 128 S.W.2d 1138, 1150 (1939)(ruling that “[a] literal interpretation of a statute which denies to it the historical circumstances under which it was drawn is to make mummery of its provisions”); *Rains v. Herring*, 68 Tex. 468, 472, 5 S.W. 369, 370-71 (1887)(in following intent of legislature, the permissive “may” can be construed as the imperative “must”); *Russell v. Farquhar*, 55 Tex. 355, 362 (1881)(ruling “that it is the duty of the court ‘to try out the right intendment’ of the law, and, when found, to observe and follow it though there may be a conflict between its intent and words”).

14. See *Sears v. Bayoud*, 33 Tex. Sup. Ct. J. 228, 230 (Feb. 14, 1990)(intent of framers and ratifiers prevails over strict grammatical construction); *Gragg v. Cayuga Indep. School Dist.*, 539 S.W.2d 861, 865-66 (Tex. 1976)(construction of constitution should demonstrate framers’ intent); *Deason v. Orange County Water Control Improvement Dist. No. 1*, 151 Tex. 29, 35, 244 S.W.2d 981, 984 (1952)(ruling construction of constitution must give effect to intention of framers and adopters); *Markowsky v. Newman*, 134 Tex. 440, 449, 136 S.W.2d 808, 813 (1940)(ruling words in constitution “to be interpreted as the people generally understood them”); *Travelers Ins. Co. v. Marshall*, 124 Tex. 45, 54-55, 76 S.W.2d 1007, 1011-12 (1934)(asserting meaning of constitution does not change over time); *Collingsworth County v. Allred*, 120 Tex. 473, 478, 40 S.W.2d 13, 15 (1931)(declaring adherence to framers’ and ratifiers’ intentions). Most of the cases and their interpretations of rules of constitutional construction were summarized and cited in *Director v. Printing Industries Ass’n of Texas*. 600 S.W.2d 264, 268-70 (Tex. 1980).

Texas is not unique in taking a historical approach to constitutional construction.

Legal argument is a struggle for the privilege of recounting the past. To the victor goes the right to infuse a constitutional clause, or a statute, or a series of prior decisions with a meaning that it will henceforth bear by recounting its circumstances of origin and assigning its place in history.

Luban, *Difference Made Legal: The Court and Dr. King*, 87 MICH. L. REV. 2152, 2152 (1989).

No set of legal institutions or prescriptions exists apart from the narratives that locate it and give it meaning. For every constitution there is an epic, for each decalogue a scripture. Once understood in the context of the narratives that give it meaning, law becomes not merely a system of rules to be observed, but a world in which we live.

In *Edgewood Independent School District v. Kirby*,¹⁵ the Supreme Court cited *Smisson* and reasserted the rule of adherence to the ratifiers' intent,¹⁶ yet repeatedly referred to the intent of the framers.¹⁷ The court also used an original intent argument to inject ambiguity into this long-standing rule of rigid adherence to original intent. The court stated, "The Constitution was ratified, to function as an organic document to govern society and institutions as they evolve through time."¹⁸

In this article we rely on evidence of the framers' and ratifiers' intentions to reconstruct the constitutional history relevant to the school financing scheme of the state of Texas. In section II, we provide a brief history of education in Texas prior to 1875, and outline several political forces which determined the philosophy of education and government embodied in the 1876 constitution. In section III, we show that the framers intended section 1 of article VII to impose upon the legislature the duty to equalize by providing a substantial education to each child in Texas. The reasons for the original limitation on local and statewide school taxation in article VII, section 3 also are explained. In section IV, we show how the original scheme of school taxes and expenditures reflected the framers' commitment to equality. In section V, we show how the framers' intentions were frustrated in the decade after the convention, giving rise to a need to amend article VII, section 3 so that all regions of the state could impose a supplemental local educational tax. We conclude that radical disparities between local taxing districts' abilities to raise tax revenues

Cover, *The Supreme Court, 1982 Term—Forward: Nomos and Narrative*, 97 HARV. L. REV. 4, 4-5 (1983).

15. 777 S.W.2d 391 (Tex. 1989).

16. *Id.* at 394.

17. *Id.* at 395, 395 n.4, 396 & 396 n.5.

18. *Id.* at 394; *Damon v. Cornett*, 781 S.W.2d 597, 599 (Tex. 1989)(restating rule in *Edgewood v. Kirby*); *cf.* *Koy v. Schneider*, 110 Tex. 369, 465, 221 S.W.2d 880, 918 (1920)(Hawkins, J. on reh'g)(noting that "it does sometimes happen that a certain word, whether in a statute or a Constitution, may be found to have been therein used in a sense broad enough to include things not then within human experience or knowledge . . .").

The origin of this rule of flexible non-literal interpretation can perhaps be found in an opinion by Justice Oliver Wendell Holmes:

[T]he provisions of the Constitution are not mathematical formulas having their essence in their form; they are organic living institutions transplanted from English soil. Their significance is vital, not formal; it is to be gathered not simply by taking the words and a dictionary, but by considering their origin and the line of their growth.

Gompers v. United States, 233 U.S. 604, 610 (1914).

due to differing levels of property wealth was not an intended or expected consequence of this amendment.

II. MAIN INFLUENCES BEHIND THE 1876 CONSTITUTION

A constitutional convention in 1875 framed the constitution that still governs the state of Texas. This constitution was preceded by seven others,¹⁹ and by a long history of corrupt legislatures and governors who abdicated their duties to provide for education which were repeatedly imposed on the government by these constitutions. Of the education provisions in pre-1875 constitutions, the centrally-administered authoritarian school system established by the Radical Republicans under the constitution of 1869 was particularly oppressive to Texans. The state Grange, a grass-roots farmer's organization, led the backlash against this system, and in doing so, dominated the 1875 convention, affecting every issue debated with its protopopulist ideals.

A. *Education and Texas Constitutions Prior to 1875*

In this section, we seek to determine "the meaning, intent and purpose" of the "efficiency" provision of the Texas Constitution's education article by reviewing "the history of the times out of which it grew," and "the evils intended to be remedied and the good to be accomplished."²⁰

The Texas Declaration of Independence, drafted in 1836, declared the Mexican government's failure to provide a public school system to be one of the grievances that moved the Texas people to revolt.²¹ In

19. The Mexican government promulgated a constitution for the State of Coahuila and Texas in March 1827. F. STEWART & J. CLARK, *THE CONSTITUTION AND GOVERNMENT OF TEXAS* 2 (1933). In April 1833, a constitution for the proposed state of Texas was promulgated and a petition was started for its adoption by the Mexican authorities. *Id.* at 3. For the proposed constitution of 1833, see D. EDWARD, *THE HISTORY OF TEXAS* 196 (1836), cited in F. STEWART & J. CLARK, *THE CONSTITUTION AND GOVERNMENT OF TEXAS* 2 (1933). After gaining its independence from Mexico, the Republic of Texas framed its constitution in 1836. Following the annexation of Texas in 1845, a convention was held which created the first constitution for the state of Texas. A confederate constitution was adopted in 1861 and Reconstruction constitutions were framed in 1866 and 1869. For a brief history of the education provisions of the prior constitutions of Texas, see *Galveston H. & S.A. Ry. Co. v. State*, 77 Tex. 410, 410-13, 13 S.W. 619, 619-21 (1890)(Stayton, C.J., dissenting).

20. *Markowsky v. Newman*, 134 Tex. 440, 449, 136 S.W.2d 808, 813 (1940)(citing *Travelers Ins. Co. v. Marshall*, 124 Tex. 45, 76 S.W.2d 1007 (Tex. 1934)).

21. Texas Declaration of Independence, *reprinted in* W. BENTON, *TEXAS POLITICS—CONSTRAINTS AND OPPORTUNITIES* 6 (5th ed. 1984). The grievance as to education in the Texas Declaration of Independence stated:

the 1836 constitution, the Republic of Texas responded to this deficiency by requiring its congress to provide "a general system of education."²² The first Texas Congress, however, made no provision for public education.²³

In 1839, the Republic passed a law providing that three leagues of land²⁴ should be set apart in each county for the purpose of establishing a primary school system.²⁵ In 1840, the Texas Congress increased the county school land allotment to four leagues.²⁶ At the height of the Republic of Texas' support for its educational system, the public school system and new university system were endowed with almost 42 million acres of public lands.²⁷ However, the Republic never established a system of common public schools.²⁸

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

Id.; see also W. HOGAN, *THE TEXAS REPUBLIC—A SOCIAL AND ECONOMIC HISTORY* 136 (1949).

22. TEX. CONST. general provisions § 5 (1836). "It shall be the duty of congress, as soon as circumstances will permit, to provide by law, a general system of education." *Id.*; see also 1 H. GAMMEL, *LAWS OF TEXAS* 1078-79 (1898).

23. F. STEWART & J. CLARK, *THE CONSTITUTION AND GOVERNMENT OF TEXAS* 103 (1933).

24. Three leagues of land constitute 13,284 acres. TEX. CONST. art. VII, § 2, interp. commentary 379 (Vernon 1955).

25. 2 H. GAMMEL, *LAWS OF TEXAS* 134-36 (1898); see also TEX. CONST. art. VII, § 2, interp. commentary 379 (Vernon 1955); F. STEWART & J. CLARK, *THE CONSTITUTION AND GOVERNMENT OF TEXAS* 103 (1933).

26. 2 H. GAMMEL, *LAWS OF TEXAS* 320-22 (1898). The original three leagues could only be leased, while the fourth league could be sold by the county to meet its educational expenses. TEX. CONST. art. VII, § 2, interp. commentary 379 (Vernon 1955). The act provided that "the chief justice and his associates in each county were empowered to set up school districts, examine teachers, and inspect and supervise schools." F. STEWART & J. CLARK, *THE CONSTITUTION AND GOVERNMENT OF TEXAS* 103 (1933). For the first time, Texas had state participation and financial support for education. *Id.* Between 1839 and 1840 the Republic of Texas had granted 4,209,413 acres of land to support its educational system. The funds secured from the sale and lease of these lands were given to the counties unconditionally, with Congress retaining no supervisory powers over the money. TEX. CONST. art. VII, § 2, interp. commentary 379 (Vernon 1955).

27. T. R. FEHRENBACH, *LONE STAR—A HISTORY OF TEXAS AND THE TEXANS* 436 (1968).

28. W. HOGAN, *THE TEXAS REPUBLIC—A SOCIAL AND ECONOMIC HISTORY* 138 (1949); see also F. STEWART & J. CLARK, *THE CONSTITUTION AND GOVERNMENT OF TEXAS* 103 (1933) ("There was no evidence that any county in early times used its lands for the establishment of schools. The only opportunities for the education of the children of the Texas pioneers continued to be those at their mothers' knee or those provided in the 'old-field'

When Texas joined the Union in 1845, Texas introduced a second source of funding for its educational system—taxes.²⁹ The legislature was required to set aside at least 10 percent of state property taxes for a perpetual free public school fund.³⁰ In language similar to that contained in section 1 of the education article of the current constitution, the 1845 constitution proclaimed:

A general diffusion of knowledge being essential to the preservation of the rights and liberties of the people, it shall be the duty of the Legislature of this State to make suitable provision for the support and maintenance of public schools.³¹

Still the legislature failed to make provisions for a statewide system of public schools until 1854, when, by an act of the United States Congress, the state received a \$2 million windfall from the New Mexico boundary settlement.³² The \$2 million, in United States 5 percent bonds, was set aside for a permanent endowment of Texas schools and was referred to as the special school fund,³³ out of which was paid sixty-two cents per student per year.³⁴ In 1856, however, the railroads persuaded the Texas Legislature to allow them to borrow from the permanent school fund.³⁵ The 1861 secession constitution did not

schools conducted by their itinerant teachers.”)(citations omitted). Small private academies existed in Galveston, Matagorda, Velasco, Quintana, Brazoria, Richmond, Gonzalez, Columbia, Washington, Independence, Austin, Caldwell, Clarksville, DeKalb, San Augustine, Nacogdoches, Huntsville, and in Corpus Christi. W. HOGAN, *THE TEXAS REPUBLIC—A SOCIAL AND ECONOMIC HISTORY* 140 (1949). However, education of children in rural districts was woefully inadequate due to decrepit school buildings, a lack of books, the need for farm labor, and the likelihood of Indian attacks. *Id.* at 142.

29. See F. STEWART & J. CLARK, *THE CONSTITUTION AND GOVERNMENT OF TEXAS* 104 (1933).

30. TEX. CONST. art. X, § 2 (1845). The constitution also provided that all public lands granted in the past or in the future for public schools could not be sold and could only be leased for twenty years. *Id.* art. X, § 3.

31. TEX. CONST. art. X, § 1 (1845).

32. T.R. FEHRENBACH, *LONE STAR—A HISTORY OF TEXAS AND THE TEXANS* 303 (1968).

33. F. STEWART & J. CLARK, *THE CONSTITUTION AND GOVERNMENT OF TEXAS* 104 (1933).

34. T.R. FEHRENBACH, *LONE STAR—A HISTORY OF TEXAS AND THE TEXANS* 303 (1968).

35. The 1854 legislature passed “an act to encourage the construction of railroads in Texas by donation of lands,” which provided that when a company finished 25 miles of roadbed, it would receive 16 sections of land. TEX. CONST. art. VII, § 2, interp. commentary 379 (Vernon 1955). One section of land constitutes 640 acres. Thus the legislature granted almost 410 acres of land for each mile of railroad construction.

By an act of the legislature of date January 31st, 1854, two million of the United States

compensate for these loans by changing the plan of operation for the Texas education system.³⁶ Therefore, education and the interests of the railroads continued to be entwined³⁷ and the legislature continued to mortgage the educational future of Texas children in favor of development of the state through railroads.³⁸

In 1864, the railroads successfully lobbied the Legislature to be allowed to use worthless Confederate treasury warrants to pay a large portion of the \$1 million in interest the state owed on the \$2 million borrowed from the permanent school fund between 1858 and 1861.³⁹ By the end of the Civil War, the funds gained from the New Mexico land settlement were practically gone.⁴⁰ Repudiation also "prevented the state from repaying \$1,137,406 that it had borrowed" from the permanent school fund.⁴¹ "From 1861 to 1870 no funds were appropriated from the state treasury for the support of the school system."⁴² By the time Reconstruction began at the end of the Civil War, the permanent school fund was completely depleted.⁴³

five per cent bonds were set aside as a fund for the support of free schools, the bonds to be loaned to railroads and the interest accruing to be distributed among the counties. By another act the one-tenth of the revenues which had previously accrued, and were afterwards to accrue, were required also to be invested in the five per cent bonds and loaned in the same manner. Other acts require the proceeds arising from the sale of the public domain to be added to the school fund.

JOURNAL OF THE SECESSION CONVENTION OF TEXAS 1861, at 160 (1912)(minority report of Committee on Finance of 1861 Secession Convention).

36. See TEX. CONST. art. X (1861).

37. See *id.* art. VII, § 2, interp. commentary 379 (Vernon 1955); see also *Minority Report of the Finance Committee*, in JOURNAL OF THE SECESSION CONVENTION OF TEXAS 1861, at 162 (1912)(education and railroads should "go hand in hand together").

38. In 1855, the state government distributed \$1.50 per student per year. T.R. FEHRENBACH, *LONE STAR—A HISTORY OF TEXAS AND THE TEXANS* 303 (1968). By 1861, the scholastic population had reached 101,000 and \$104,447 remained for distribution. An equal distribution of the funds provided little more than \$1 to each student. JOURNAL OF THE SECESSION CONVENTION OF TEXAS 1861 160 (1912).

39. See C. MONEYHON, *REPUBLICANISM IN RECONSTRUCTION TEXAS* 87 (1980).

40. F. STEWART & J. CLARK, *THE CONSTITUTION AND GOVERNMENT OF TEXAS* 105 (1933).

41. C. MONEYHON, *REPUBLICANISM IN RECONSTRUCTION TEXAS* 39 (1980). For a history of the legislation effectively giving away to the railroads state lands earmarked for education, see *Galveston H. & S.A. Ry. v. State*, 77 Tex. 367, 369, 12 S.W. 988, 989 (1889).

42. F. STEWART & J. CLARK, *THE CONSTITUTION AND GOVERNMENT OF TEXAS* 104 (1933).

43. C. MONEYHON, *REPUBLICANISM IN RECONSTRUCTION TEXAS* 17 (1980).

The greatest source of investment capital in the prewar era, the school fund, had been plundered when the legislature allowed local railroads to pay back loans from the fund in

The Reconstruction constitution of 1866⁴⁴ established a more elaborate administrative system for public education.⁴⁵ The constitution greatly restricted the legislature's ability to make loans from the new perpetual school fund⁴⁶ and provided that alternate sections of land reserved by the state out of previous and future grants to railroads and other corporations were to be set aside as part of the new perpetual school fund.⁴⁷

By means of the 1869 constitution, the Radical Republicans⁴⁸

Confederate and state paper at face value. As a result the school fund was practically bankrupt at a time when the state needed money to accomplish reconstruction.

Id.

44. Governor Andrew Jackson Hamilton called the Constitutional Convention to meet in Austin on February 7, 1866. The delegates met from February 7 to April 2, 1866, to create what is referred to as the Reconstruction constitution of 1866. W. BENTON, TEXAS POLITICS—CONSTRAINTS AND OPPORTUNITIES 17 (5th ed. 1984).

45. F. STEWART & J. CLARK, THE CONSTITUTION AND GOVERNMENT OF TEXAS 11 (1936); *see also* TEX. CONST. art. X, § 3 (1866)(setting aside land for perpetual school fund).

46. *See* TEX. CONST. art. X, § 5 (1866). Article X, section 5 provided in part, "The Legislature shall have no power to appropriate or loan or invest, except as follows, any part of the principal sum of the perpetual school fund for any purpose whatever." *Id.*

47. *See id.* art. X, § 3 (provision reserving land for perpetual school fund); *see also id.* art. VII, § 2, interp. commentary 380 (Vernon 1955)(1866 constitution set aside land for school fund).

48. E. REDFORD, THE TEXAS CONSTITUTION—ITS IMPACT ON: ADMINISTRATION 31 (1973). The 1866 constitution was never ratified by the United States Congress. The Radical Republican element of Congress took control of Reconstruction, and insisted that Texas again revise its constitution. Delegates to the resulting state constitutional convention were elected in early 1868. The convention met at Austin in June 1868 to "rewrite the Texas instrument in accord with Northern prejudices." T.R. FEHRENBACH, LONE STAR—A HISTORY OF TEXAS AND THE TEXANS 411 (1968).

A democratically inspired campaign to invalidate the elections by sitting them out—a majority of registered voters had to cast ballots—barely failed. . . . The Democratic slogan was 'Better Yankee than Nigger Rule,' but just enough whites voted to legalize the result. . . . The Republican slate of delegates won 44,689 to 11,440. . . . So complete was the political revolution that only six men who had sat in the convention of 1866 came to Austin in 1868.

Id. The 1869 constitution was adopted by a vote of 72,466 to 4,928. *See* L. COOK & A. MCREYNOLDS, CONSTITUTIONAL CONVENTION—A NEW BEGINNING—TWO CONSTITUTIONS—1875 AND 1974, at 13 (1974)(discussing history of 1869 Texas Constitution). A radical legislature and congressional delegation were elected as well. *Id.* When the military commander of the district, General Reynolds, issued a proclamation reestablishing civil authority within the state on April 16, 1870, Governor E. J. Davis was inaugurated. W. BENTON, TEXAS POLITICS—CONSTRAINTS AND OPPORTUNITIES 18 (5th ed. 1984). "Considering the military supervision of elections and the disenfranchisement of so many Democrats, it would have been fruitless for the Democratic Party to have nominated a candidate. Consequently, E. J. Davis, a member of the radical wing of the Republican Party was elected governor and a legislature in sympathy with Davis was elected." *Id.* at 18-19. Davis won the

forced a new system of education upon the people of Texas.⁴⁹ According to one scholar, the resulting school law⁵⁰ “set up the most imperial system of education known to any American state. It was organized along military lines and assumed absolute authority over the training of the children.”⁵¹ Moreover, the legislature reduced the new system of education to a mere vehicle for political patronage.

The adoption of the constitution of 1869 led to the election of a radical legislature,⁵² which passed the Act of June 1870,⁵³ providing that the governor had the power to fill by appointment all offices of the state made vacant by an act of the United States Congress on March 30, 1870. The law led to the reinstatement of Texas into the United States,⁵⁴ but it also enabled the governor to fill vacancies oc-

election by only 771 votes. C. MONEYHON, *REPUBLICANISM IN RECONSTRUCTION TEXAS* 122 (1980).

49. See F. STEWART & J. CLARK, *THE CONSTITUTION AND GOVERNMENT OF TEXAS* 105 (1933)(discussing education in Texas after Civil War).

50. See Act of Apr. 24, 1871, ch. 50, §§ 1-7, 1871 TEX. GEN. LAWS 57-60, 6 H. GAMMEL, *LAWS OF TEXAS 959-62* (1898)(enacting public education system).

51. F. EBY, *THE DEVELOPMENT OF EDUCATION IN TEXAS* 157 (1925). The constitution required four months' compulsory attendance of all children between the ages of six and eighteen years. Article IX, section 1 provided:

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

TEX. CONST. art. IX, § 1 (1869).

52. White Democrats labelled the acts of this legislature as the “‘obnoxious acts’ of the 12th Legislature.” One commentator has stated that the 12th Legislature, “if measured in terms of responsibility and statesmanship, was, undoubtedly, the worst in the history of the state. . . . [The 12th Legislature] has never been equalled in corruption throughout the legislative history of Texas.” W. BENTON, *TEXAS POLITICS—CONSTRAINTS AND OPPORTUNITIES* 19, 47 (5th ed. 1984). One such “obnoxious act” gave the governor control over the registration of voters and elections. Registration of voters in each county was controlled by a registrar appointed by the governor. Nearly all blacks were permitted to register while whites who constituted the opposition to the Davis regime were denied the right to register to vote. Davis used such control over the electoral process to postpone elections in order to stave off defeat at the polls. *Id.* Another “obnoxious act” of the 12th Legislature was the enactment of a police law. *Id.* One commentator argued that as a result, “[i]n actual fact the liberty and life of every citizen lay in the governor’s hands.” C. RAMSDALL, *RECONSTRUCTION IN TEXAS* 303 (1910). The police law enabled the governor to suspend habeas corpus, declare marshall law with little pretext, and raise a standing army in peaceful times. “[T]he governor became the Dictator of Texas, empowered to take property or life as his will desired.” L. COOK & A. MCREYNOLDS, *CONSTITUTIONAL CONVENTION—A NEW BEGINNING—TWO CONSTITUTIONS—1875 AND 1974* 14 (1974).

53. 6 H. GAMMEL, *LAWS OF TEXAS* 191 (1898).

54. L. COOK & A. MCREYNOLDS, *CONSTITUTIONAL CONVENTION—A NEW BEGINNING—TWO CONSTITUTIONS—1875 AND 1974*, at 13 (1974).

curing for any other reason in state, district, county, or city offices.⁵⁵ Additionally, the school law of 1871⁵⁶ gave the state superintendent of schools absolute control over the public schools.⁵⁷ As a result, Reconstruction Governor E. J. Davis successfully utilized the centralized system of public education⁵⁸ as a statewide bulwark for political patronage.⁵⁹ This patronage-based centralized school system was expensive and contributed to the great expansion of state taxation and debt during Reconstruction.⁶⁰

55. Under the new law, opponents of the governor estimated that he had the power to appoint 8,538 persons to public office. W. BENTON, TEXAS POLITICS—CONSTRAINTS AND OPPORTUNITIES 174 (5th ed. 1984); E. WALLACE, CHARLES DEMORSE—PIONEER EDITOR AND STATESMAN 174 (1943). The ability to appoint this many persons led to corruption in Davis administration. W. BENTON, TEXAS POLITICS—CONSTRAINTS AND OPPORTUNITIES 19 (5th ed. 1984)(much evidence of misrule and corruption in Davis administration).

56. Act of Apr. 24, 1871, Laws of the 12th Legislature 57-60, 6 H. GAMMEL, LAWS OF TEXAS 959-62 (1898). In 1870 and 1871, the state school acts removed control of education from the public completely, vesting this control in "a state superintendent, a state board of education, and 35 district supervisors, who appointed local school boards." T.R. FEHRENBACH, LONE STAR—A HISTORY OF TEXAS AND THE TEXANS 419 (1968).

57. F. STEWART & J. CLARK, THE CONSTITUTION AND GOVERNMENT OF TEXAS 105 (1933).

58. E. WALLACE, CHARLES DEMORSE—PIONEER EDITOR AND STATESMAN 174 (1943). The greatest complaint of Davis' opposition was directed "at the extreme centralization of the system." *Id.*

59. C. MONEYHON, REPUBLICANISM IN RECONSTRUCTION TEXAS 172-73 (1980). Charles H. Moneyhon observed:

[Republican] [p]arty officials had another weapon working for them in 1872, one that had not been available before: a fully organized public school system. The centrally supervised schools created by the Twelfth Legislature provided the administration with an enormous patronage. The law allowed the governor to appoint a state superintendent of public instruction. Together with the attorney general these two had a hand in naming district school supervisors and county school boards. Through these groups the governor even played a role in the employment of individual teachers. In short, the school system could be filled entirely with people who owed their jobs to the governor and would work for him. School jobs provided the administration with a way to secure reliable information on county politics and a means to reward party loyalty. The system provided party officials with an apparatus they could control that worked at the local level.

Id.

60. *Id.* at 161. From 1866 to 1870, the cost of state government increased almost 400 percent, from \$500,000 to \$2 million per year. In 1866, the legislature levied an ad valorem tax of \$.225 per hundred dollars and a \$1 poll tax to finance state government. By 1871, that tax burden increased to \$.175 per one hundred dollar valuation, with a \$2 poll tax. *See id.* (discussing findings of subcommittee at 1871 taxpayers' convention); *see also* T.R. FEHRENBACH, LONE HISTORY—A HISTORY OF TEXAS AND THE TEXANS 419 (1983).

The Davis administration increased tax rates not merely to meet increased expenditures. During Davis' years as governor, land values collapsed. Land values in some regions fell to a tenth of the 1860 price; throughout the state there was a general loss of land valuation averaging 80 percent. T.R. FEHRENBACH, LONE STAR—A HISTORY OF TEXAS AND THE TEXANS

In 1871, a rebellious taxpayers' convention convened in Austin to document and oppose the extravagance and corruption of the Davis Administration.⁶¹ Former Governor W. M. Pease was named president of the convention.⁶² Upon assuming the position, Pease reflected the sentiments of the people in stating the reason for the taxpayers' convention:

It is evident that there is a feeling pervading the public mind over the State that very little regard, if any, is paid in the management of public affairs to the welfare of the mass of the people. . . . It is evident to every reflecting mind that our State government is bankrupt; and you see no recommendation made by those in power for a reduction of the expenditures.⁶³

E. S. C. Robertson, a future delegate to the 1875 constitutional convention, was elected vice-president of this convention.⁶⁴ E. L. Dohoney, another future constitutional convention delegate, was also a delegate to the taxpayers' convention.⁶⁵ Two hundred and twenty delegates⁶⁶ represented ninety-four counties at the convention.⁶⁷ This convention signaled the beginning of the end of Governor Davis' ad-

419 (1983). Governor Davis insisted, however, that the only solution of the state's problems was increased funding on education. *Id.* at 136. Davis estimated in 1871 that the cost of schools would be \$5.38 million. Galveston Daily News, Aug. 17, 1871, at 3, col. 4. Davis calculated that in 1871, the entire assets of the school fund constituted \$2.5 million. *Id.*; F. STEWART & J. CLARK, *THE CONSTITUTION AND GOVERNMENT OF TEXAS* 105 (1933). To make up the difference, the system advocated by Davis utilized monies from the new permanent school fund, and an available school fund derived from various sources. The education system of Texas in 1871 was financed by "(1) the income from the permanent fund; (2) one-fourth of the annual revenues from general taxation; (3) a poll tax from every voter between twenty-one and sixty years of age; and (4) local taxation sufficient to provide schoolhouses" for all students for 10 months each year. F. STEWART & J. CLARK, *THE CONSTITUTION AND GOVERNMENT OF TEXAS* 105 (1933). By 1871, the expenditures of the state government were out of control. *Id.*

61. E. WALLACE, CHARLES DEMORSE—PIONEER EDITOR AND STATESMAN 175 (1943); see also *The Democratic Statesman*, Sept. 23, 1871, at 1, col. 2.

62. *The Democratic Statesman*, Sept. 23, 1871, at 1, col. 2.

63. *Id.* at col. 2-3.

64. *Id.*; see also Ericson, *The Delegates to the Convention of 1875*, 67 SW. HIST. Q. 22, 27 (July 1963)(Robertson a delegate to 1875 convention).

65. *The Democratic Statesman*, Sept. 23, 1871, at 1, col. 2-3; see also Ericson, *The Delegates to the Convention of 1875*, 67 SW. HIST. Q. 22, 27 (July 1963)(Dohoney delegate to 1875 convention).

66. *The Democratic Statesman*, Sept. 23, 1871, at 2, col. 4.

67. E. WALLACE, CHARLES DEMORSE—PIONEER EDITOR AND STATESMAN 175 n.10 (1943).

ministration.⁶⁸ Democrats regained the legislature in 1872. The Democratic 13th Legislature assumed control over the administration of education in Texas, placing control of the free schools in the hands of local authorities.⁶⁹ The Republican Party strongly condemned this act.⁷⁰

68. Governor Davis reacted to the convention by organizing hundreds of African American supporters in a march around the capitol, the site of the taxpayers' convention. The Democratic Statesman, a press organ for white Democratic forces, quoted Governor Davis giving the following speech to the marchers:

Fellow citizens—in ancient times it was the custom of the people to purify their temples when defiled by burning and sprinkling incense around the same. This temple, our capitol, has been polluted by the presence of the taxpayers of the state, and, therefore, it devolves upon you, my colored brethren, to purify the place. As we have no incense, I would suggest that you form in double lengths and march around this building, singing those glorious hymns of freedom, with which you all are so familiar.

Revolting Proceedings—Davis Heads a Band of Negroes March, Yelling, to the Capitol—They Duly Purify the Same—Disgusting Ceremonies, etc. . . ., The Democratic Statesman, Sept. 26, 1871, at 3, col. 2.

In the 1873 gubernatorial election, Richard Coke defeated Governor Davis, 85,549 to 42,663 votes. The election had been characterized by fraud and intimidation by both parties. Davis refused to leave office, proclaiming that he had a constitutional right to finish out his four year term. The Texas Supreme Court, filled with Republican appointees, held the election to be illegal in the case of *Ex Parte Rodriguez*, generally referred to as the "Semicolon Case." 39 Tex. 706, 774-76 (1873). The court, branded thereafter as "Semicolon Court," based its invalidation of the election on the wording and punctuation of article III, section 6 of the Reconstruction constitution of 1869. The case, whether right or wrong, clearly was political. See *Ex parte Rodriguez*, 39 Tex. 706, 776 (1873)(note of reporters Terrell and Walker)(question before court in *Ex Parte Rodriguez* determined to be political not judicial). The decision proved to be the last act of the Semicolon Court. The decision voiding the election of December 2, 1873 was never effective, as the Democrats secured the keys to the second floor of the capitol and took possession. Davis had troops on the lower floor. This situation lasted until President Grant sent a telegram stating that he would not invade Texas on behalf of Davis. 1 W. WEBB, THE HANDBOOK OF TEXAS 370 (1952). For an excellent discussion of the *Ex Parte Rodriguez* decision and the Semicolon Court, see Norvell, *Oran M. Roberts and the Semicolon Court*, 37 TEXAS L. REV. 279 (1959).

69. The author of this school law was E. L. Dohoney, chairman of the Senate Education Committee and a future delegate to the 1875 Convention. See E.L. DOHONEY, AN AVERAGE AMERICAN 155-58 (1903).

70. Prior to this act of the 13th Legislature, the Republican Party had softened its stand on its elaborate and centralized system of education. At the 1872 Republican Convention, the delegates renewed the party's pledge to free public education, although now under the condition that it be "at the smallest cost possible to the people." C. MONEYHON, REPUBLICANISM IN RECONSTRUCTION TEXAS 174 (1980). They promised "rigid economy and the best administration experience possible in running these schools." *Id.* The 1873 Republican Convention strongly criticized the 13th Legislature for opening "the state to violence . . . [and causing] the destruction of the school system." *Id.* The Republicans criticized the 13th Legislature's increase in taxes and promised to restore the public schools, reduce taxes, and protect the civil rights of all citizens. *Id.* at 187-88; see also E. WINKLER, PLATFORMS OF POLITICAL PARTIES

B. *The Domination of the 1875 Convention by the Grange*

“Texas Democrats emerged from Republican rule united in a desire to replace their Reconstruction Constitution as part of a general re-vamping of their public institutions.”⁷¹ The Democratic Party’s leadership longed for a return to the type of government created by pre-Reconstruction constitutions. They sought to frame a new constitution by commission or by legislative amendment.⁷² The population, however, feared this undemocratic maneuver and successfully forced the Democratic Party leadership to allow a constitutional convention.⁷³

During the campaign to elect convention delegates, the public was exposed to heated constitution debates. Leading the attack against the Democratic Party leadership was a new agrarian reform organization known as the Grange, whose members numbered “45,000 out of the state’s electorate of approximately 250,000—easily the largest organized interest group in Texas.”⁷⁴ Although the Grange condemned the earlier Republican regime, it loathed the current Democratic administration even more.⁷⁵ In the elections the Grange candidates prevailed against the Democratic Party leadership.⁷⁶ Thirty-eight of the

IN TEXAS 155-57 (1916); *Platform of the Republican Convention, Adopted at Dallas*, Galveston Daily News, Aug. 21, 1873, at 2, col. 3.

71. Address by John W. Mauer, *State Constitutions in Time of Crisis: the Case of the Texas Constitution of 1876*, TEXAS L. REV. Symposium on the Texas Constitution 15 (Oct. 6, 1989)(intended for publication in 68 TEXAS LAW REVIEW).

72. *Id.*

73. *Id.* at 16. In 1875, the Legislature passed a joint resolution ordering the question of whether to call a convention to be submitted to the people. Tex. S.J. Res. of Mar. 13, 1875, 14th Leg., 1875 Tex. Gen. Laws 201-02, 8 H. GAMMEL, LAWS OF TEXAS 573-74 (1898). By a three-to-one margin, the people voted for a constitutional convention. *Id.*

74. C. BARR, RECONSTRUCTION TO REFORM TEXAS POLITICS, 1876-1906, at 9 (1971).

75. Address by John W. Mauer, *State Constitutions in Time of Crisis: The Case of the Texas Constitution of 1876*, TEXAS L. REV. Symposium on the Texas Constitution 25 (Oct. 6, 1989)(intended for publication in 68 TEXAS LAW REVIEW). “The Grangers’ dissatisfaction had a strong basis in fact. Democrats under Governor Coke had kept taxes at the historically high rates first established by the Republicans, while further mimicking their predecessors by continuing to rely on deficit spending.” *Id.*

76. The 1875 delegate elections were atypical. In 1875, the Grange had no influence over the legislature comparable to their influence over the convention. See D. BARNES, FARMERS IN REBELLION: THE RISE AND FALL OF THE SOUTHERN FARMERS ALLIANCE AND PEOPLES PARTY IN TEXAS 65 (1984)(describing failure of Grange to persuade 1875 legislature to enact laws of importance to them). After the 1875 delegate election, the Democratic Party became more adept at suppressing future instances of grass roots insurgency. Also, the Grange leadership failed to follow up the convention election successes with partisan political activism. Grange members were more radical than their leaders and left the Grange to join the more

ninety delegates to the 1875 convention were members of the Grange.⁷⁷ They comprised the largest block of delegates and dominated the convention.⁷⁸ The Grange delegates and their allies rejected philosophies of prior state constitutions and the United States Constitution that were inconsistent with their protopopulistic and antiplutocratic concerns.⁷⁹

activist Farmers Alliance, which was formed in 1877. R. MCMATH, *POPULIST VANGUARD* 20-21 (1975); L. GOODWYN, *DEMOCRATIC PROMISE: THE POPULIST MOVEMENT IN AMERICA* 44-46 (1976); D. BARNES, *FARMERS IN REBELLION: THE RISE AND FALL OF THE SOUTHERN FARMERS ALLIANCE AND PEOPLES PARTY IN TEXAS* 66-69 (1984). For example, after being elected a district judge, delegate Thomas Nugent became active in the Farmers Alliance. McIlhany, *Judge Nugent and the Farmers Alliance*, in *THE LIFE WORK OF THOMAS L. NUGENT* 99, 101 (C. Nugent, ed., 1896). Membership in the Texas Farmers Alliance eventually reached 200,000. D. BARNES, *FARMERS IN REBELLION: THE RISE AND FALL OF THE TEXAS SOUTHERN FARMERS ALLIANCE AND PEOPLES PARTY IN TEXAS* 142 (1984).

During the 1875 elections, a young populist editor, Charles Macune, was elected secretary of the executive committee of the Burnet County Democratic Party. Macune, *The Wellsprings of a Populist: Dr. C. W. Macune Before 1886*, 40 SW. HIST. Q. 139, 152 (1986). Although he later became a nationally prominent figure within the Farmers Alliance, he was not again able to obtain any position of influence within Democratic Party. See L. GOODWYN, *DEMOCRATIC PROMISE: THE POPULIST MOVEMENT IN AMERICA* 234-36 (1976)(describing Macune's isolation within the Democratic Party).

In 1891, after their reforms had been blocked by the Democratic Party leadership, Farmers Alliance members and independent populists formed the Peoples Party. L. GOODWYN, *DEMOCRATIC PROMISE: THE POPULIST MOVEMENT IN AMERICA* 67-83, 217-25 (1976). At least three leaders of the majority block of delegates to the 1875 convention, Marion Martin, E. L. Dohoney, and Judge Nugent, became Peoples Party candidates. Renowned Alliance and Peoples Party proselytizer Cyclone Davis also started his career in the Texas Grange. C. DAVIS, *MEMOIR* 19 (1935). Davis had practiced law with framers W. P. McLean and W. L. Crawford. *Id.* at 21. In the 1894 elections, Davis and two other Peoples Party congressional candidates probably had victory stolen from them by Democratic Party election fraud. R. MARTIN, *THE PEOPLES PARTY IN TEXAS* 221 n.47 (1970); cf. L. GOODWYN, *DEMOCRATIC PROMISE: THE POPULIST MOVEMENT IN AMERICA* 332-33 (1976)(describing vote fraud contributing to Judge Nugent's loss in gubernatorial race).

77. Ericson, *The Delegates to the Convention of 1875: A Reappraisal*, 67 SW. HIST. Q. 22, 22 (1963); C. BARR, *RECONSTRUCTION TO REFORM TEXAS POLITICS, 1876-1906*, at 9 (1971).

78. Address by John W. Mauer, *State Constitutions in Time of Crisis: The Case of the Texas Constitution of 1876*, TEXAS L. REV. Symposium on the Texas Constitution 25 (Oct. 6, 1989)(intended for publication in 68 TEXAS LAW REVIEW); see also N. HENDERSON, *DIRECTORY OF THE OFFICERS AND MEMBERS OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF TEXAS A.D. 1875*, at 1-4 (1875).

79. See S. MCKAY, *DEBATES IN THE TEXAS CONSTITUTIONAL CONVENTION OF 1875*, at 42-46 (1920)(rejecting argument that all constitutions fundamentally same); Address by John W. Mauer, *State Constitutions in Time of Crisis: The Case of the Texas Constitution of 1876*, TEXAS L. REV. Symposium on the Texas Constitution 26-32 (Oct. 6, 1989)(intended for publication in 68 TEXAS LAW REVIEW)(describing delegates' rejection of liberal constitutionalism as embodied in U.S. Constitution and prior state constitutions); Waco Examiner and Patron, Sept. 10, 1875, at 6, col. 2 (arguing that in light of changed circumstances and new

The Grangers sought an active government that would protect ordinary citizens from exploitation by economic elites. They opposed the laissez faire philosophy of government embodied in the U.S. Constitution as interpreted by the federal courts.⁸⁰ In 1875, the bulwarks of federal laissez faire doctrine were found in the contracts clause, article I, section 10 of the U.S. Constitution, and the doctrine of vested rights.⁸¹ During the Texas convention the official Grange newspaper criticized these doctrines in the following way:

experiences the convention must reject old prejudices and adopt new theories); Waco Examiner and Patron, Nov. 12, 1875, at 8, col. 1 ("What business has the Convention to regard the old Constitution in their work? They were sent to create a new instrument, not to revise an old one"). In their attempt to convince the voters to ratify the 1876 constitution, the framers noted, "Texas is peculiarly and differently situated from any other State of the Union [and possesses a] peculiar jurisprudence . . ." COMMITTEE OF THE CONVENTION, ADDRESS TO THE PEOPLE OF TEXAS 8 (1875).

80. See Rockwell, Access to Public Forums Under the Texas Bill of Rights 11-12 (unpublished 1989)(on file at ST. MARY'S L.J.); cf. Westin, *Populism and the Supreme Court*, in 1980 SUP. CT. HIST. SOC. YEARBOOK 62 (1980)(describing populist opposition to laissez-faire decisions of U.S. Supreme Court).

Fundamental to laissez-faire doctrine is a sharp conceptual distinction between the allocation of rights and resources democratically by a legislature and the allocation of rights and resources by contract and property law derived from the common law. The former is considered "state action," the latter is "private." See Sunstein, *Lochner's Legacy*, 87 COLUM. L. REV. 873, 874 (1987). By restraining state action, so defined, laissez-faire doctrine protects common law distribution of rights of ownership, transfer, and possession of property from democratic allocation. See *id.* at 882 n.49. The most famous application of contracts clause laissez-faire doctrine is *Lochner v. New York*, 198 U.S. 45 (1905). Professor Sunstein points out that Lochnerism still pervades federal constitutional law. See Sunstein, *Lochner's Legacy*, 87 COLUM. L. REV. 873, 883-902 (1987); see also Tushnet, *An Essay on Rights*, 62 TEXAS L. REV. 1363, 1386-94 (1984)(describing contemporary laissez-faire constitutional doctrines as protective of economically privileged).

81. U.S. CONST. art. I, § 10; see also G. STONE, L. SEIDMAN, C. SUNSTEIN & M. TUSHNET, CONSTITUTIONAL LAW 1427-28 (1986); Corwin, *The Basic Doctrine of American Constitutional Law*, 12 MICH. L. REV. 247, 275-76 (1914). The vested rights doctrine protected economic privilege from democracy. "Vested rights are rights vested in specific individuals in . . . what the law recognizes as property[,] the right namely of one who had already acquired some title of control over some particular piece of property . . . to continue in that control." *Id.* at 271, 275. According to Chancellor James Kent, one of the founders of American constitutional law, the vested rights doctrine bars civil government from regulating "the uses of property in the hands of the owners by sumptuary laws or any other visionary schemes of frugality and equality. The legislature has no right to limit the extent of the acquisition of property." *Id.* at 262. In *Trustees of Dartmouth College v. Woodward*, Chief Justice Marshall applied the vested rights doctrine to protect private corporations from state regulation. 17 U.S. 518 (1819). An attempt by a state to assert control over a corporation was held to be in violation of the Contracts Clause. *Id.* at 643-54. Between the *Dartmouth College* decision in 1819 and the 1875 Texas convention, the contracts clause was commonly used to protect private privilege, corporations, and monopolies. See, e.g., *Chenango Bridge Co. v. Binghamton Bridge Co.*, 70 U.S. 51 (1865)(upholding monopoly charter against state attempts to promote

It is the very acme of asinine stupidity . . . to say . . . the mistakes of our fathers . . . shall not be corrected, and that their contracts or grants of privileges may and must be suffered to grind the face of the poor, and murder the efforts of the worker, because forsooth, of 'vested rights' or some other antiquated notion of the sacredness of existing contracts. . . . The tendency of the age is toward reform, and the Texas Constitutional Convention of 1875, will prove but the almoner of the new spirit which is quickening into life here, and this throttling of a 'vested' humbug is the first blow they will strike.⁸²

State government, as perceived by these protopopulists, should democratically provide essential services and have the power to regulate industrial enterprises. The official Grange newspaper described the main issues confronting the convention as education, railroad regulation, and suffrage.⁸³ The Granger delegates protected democracy by uniting with Republicans against the Democratic Party leadership to beat back attempts to make payment of a poll tax a prerequisite to voting.⁸⁴ The delegates incorporated specific railroad regulations into the constitution and granted the state further authority to regulate the railroads, which were the largest industrial enterprises in the state.⁸⁵

competition); *Cleveland, P. & A. R.R. v. Pennsylvania*, 82 U.S. 300 (1872)(striking down a state tax on proceeds from railroad bonds).

82. *Waco Examiner & Patron*, Sept. 3, 1875, at 4, col. 2; *see also* PROCEEDINGS OF THE SECOND ANNUAL SESSION OF THE TEXAS STATE GRANGE 15 (1875)(arguing that legislature should interfere with vested rights of private corporations when such corporations tyrannize the public). However, at least one Granger appeared to respect the vested rights doctrine. *See* JOURNAL OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF TEXAS BEGUN AND HELD AT THE CITY OF AUSTIN SEPTEMBER 6, 1875, at 798-99 (1875)(protest by delegate Charles DeMorse).

83. *Waco Examiner & Patron*, Oct. 29, 1875, at 8, col. 2.

84. *See* S. MCKAY, DEBATES IN THE CONSTITUTIONAL CONVENTION OF 1875, 167-94 (1920).

85. *See* TEX. CONST. art. X (1876); PROCEEDINGS OF THE THIRD ANNUAL SESSION OF THE TEXAS STATE GRANGE 22 (1877)(criticizing legislature for failure to act after being bound by constitution to regulate railroads). Although the convention did not provide for expropriation of the railroads as some protopopulists had suggested, the convention delegates defined the railroads as public works. Macune, *The Wellsprings of a Populist: Dr. C. W. Macune Before 1886*, 40 SW. HIST. Q. 139, 151 (1986); *see also* TEX. CONST. art. XVI, § 35 (1876). The convention, through the passage of article X, acknowledged the power of the railroad provision to negate the vested rights of corporations. An Ordinance in Relation to Railroads, 1875, 1876 Tex. Gen. Laws 756, 8 H. GAMMEL, LAWS OF TEXAS 753 (1898); *see also* TEX. CONST. art. XVI, § 18 (acknowledging ability of Texas Constitution to divest property). Four delegates opposed article X as violative of the contracts clause of the U.S. Constitution. JOURNAL OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF TEXAS BEGUN AND HELD AT THE CITY OF AUSTIN SEPTEMBER 6, 1875, at 796-99 (1875).

The fact that railroad regulation was a main purpose for calling the convention is a measure

Indeed, Granger demands for railroad regulation initiated the modern administrative state.⁸⁶ Most importantly, the Grange sought and obtained an antimonopoly clause that would obligate the government to protect citizens from economic exploitation by the private market.⁸⁷

But the Grange delegates also mistrusted governmental elites, and therefore incorporated strict constitutional constraints on the manner in which government, particularly legislative, power was to be exercised.⁸⁸ The framers of 1875 chose not to grant government broad

of the framers' rejection of laissez-faire constitutional doctrines. Although the Texas Bill of Rights has a contracts clause and a takings clause, it also has an antimonopoly clause which obligates the government to reallocate common law entitlements should they be used by the few to oppress the many. See TEX. CONST. art. I, §§ 16, 17, 26 (Vernon 1955)(contracts, takings, and anti-monopoly clauses); see also *infra* note 87 (describing anti-monopoly clause).

86. See Rabin, *Federal Regulation in Historical Perspective*, 38 STAN. L. REV. 1189, 1189 (1986). The rise of the modern administrative state was based largely on a rejection of common law ordering. Sunstein, *Lochner's Legacy*, 87 COLUM. L. REV. 873, 892 (1987).

87. See TEX. CONST. art. I, § 26 (1876)(proscribing establishment of monopolies); see also Waco Examiner and Patron, July 30, 1875, at 5, col. 3 (constitutions intended to protect people not foster monopolies); C. OTKEN, THE ILLS OF THE SOUTH 161-64 (1894)(speech of Governor Hogg arguing that concentration of land ownership by corporations violated section 26 of constitution and that legislature obligated to enact laws protecting Texans from these land monopolies); see also Address by Chief Justice Thomas R. Phillips, *Independence Without Activism*, TEXAS LAW REVIEW Symposium on the Texas Constitution 7 (Oct. 6, 1989)(noting section 26 "mandates governmental action regulating private conduct"); 1 G. BRADEN, THE CONSTITUTION OF THE STATE OF TEXAS: AN ANNOTATED AND COMPARATIVE ANALYSIS 81 (1977)(noting section 26 prohibits private action).

Although previous Texas constitutions contained antimonopoly clauses, by 1875 the term meant something quite different to Granger populists than it did to the Jacksonian Democrats who framed the 1845 constitution. The Jacksonian Democrats defined monopoly as a form of government intervention in the market, a granting of exclusive charters by the government. 1 G. BRADEN, THE CONSTITUTION OF THE STATE OF TEXAS: AN ANNOTATED AND COMPARATIVE ANALYSIS 79 (1977); 15 PENNY ENCYCLOPEDIA 341 (1839). The government was the problem and the private market was the solution. To the populists, monopolies were oligopolistic corporations that achieved their dominance through the operation of the market. See E. MARTIN, HISTORY OF THE GRANGE MOVEMENT; OR THE FARMER'S WAR AGAINST MONOPOLIES 76-87, 237-51, 256-57 (1873)(describing railroad, communications, and coal monopolies). The "private" market was the problem and the government offered the solution, sometimes by taking exclusive control over the market. *E.g.*, *City of Brenham v. Brenham Water Co.*, 67 Tex. 542, 565-66, 4 S.W. 143, 155-56 (1887)(exclusive control of water utility market by municipally-owned company not monopoly within meaning of section 26 because company democratically under control of consumers). Delegate E.L. Dohoney, for example, later argued that all charters and exclusive privileges should be eliminated and monopolistic corporations replaced with cooperatives and state-owned enterprises. See E. DOHONEY, THE CONSTITUTION OF MAN IN THE PHYSICAL, PSYCHICAL AND SPIRITUAL WORLDS 294-97 (1903).

88. Address by John W. Mauer, *State Constitutions in Time of Crisis: the Case of the Texas Constitution of 1876*, TEXAS L. REV. Symposium on the Texas Constitution 27 (Oct. 6, 1989)(intended for publication in 68 TEXAS LAW REVIEW).

plenary powers as did the United States Constitution and prior state constitutions. Instead, the Texas legislative and executive branches were granted only those powers expressly enumerated in the constitution.⁸⁹

The Grangers and most other delegates went to the convention to prevent the recurrence of the centrally administered, bureaucratic school system established under the Reconstruction Constitution of 1869.⁹⁰ But the Grangers' opposition to the corrupt and authoritarian administration of schools did not mean they lacked commitment to education.⁹¹ Three days before the convention began, the Grange newspaper had the following to say about the subject:

89. *Id.* at 29.

90. See COMMITTEE OF THE CONVENTION, ADDRESS TO THE PEOPLE OF TEXAS 1 (1875)(complaining of "vast political and partisan scheme under the pretense of sustaining free public schools" foisted on Texas by 1869 constitution). See generally TEX. CONST. art. IX, § 3 (1869)(establishing centralized authority for superintendent of schools); TEX. CONST. art. VII, § 1, interp. commentary 374-75 (Vernon 1955)(discussing development of centralized schooling); see also F. EBY, THE DEVELOPMENT OF EDUCATION IN TEXAS 159 (1925)(condemning 1871 school law). One commentator noted:

Another cause for great dissatisfaction and protest was the lavish manner in which money was appropriated. Expenditures bore no relation to available funds A host of officials was employed at salaries far in excess of what was really necessary. . . .

After the radical system had been eliminated by the return of the democracy of the state, . . . a floating indebtedness of approximately \$1 million was still owing for the conduct of the system.

F. EBY, THE DEVELOPMENT OF EDUCATION IN TEXAS 165-66 (1925).

91. Indeed, many of the Granger delegates were educators. In 1875, delegate Charles DeMorse was a director of the Agricultural and Mechanical College. E. WALLACE, CHARLES DEMORSE—PIONEER EDITOR AND STATESMAN 177 (1943). The convention's presiding officer, E. B. Pickett, had been the first president of Texas A & M. 2 W. WEBB, THE HANDBOOK OF TEXAS 375 (1952). Three years after the convention, delegate J. L. German moved to Whitewright where he worked to establish public schools. 1 W. WEBB, THE HANDBOOK OF TEXAS 683 (1952). In 1880, he incorporated Savoy Male and Female College, known for being the first co-ed college in the state and for its high enrollment of Indians. 2 W. WEBB, THE HANDBOOK OF TEXAS 575 (1952). Before the convention, E.S.C. Robertson had been instrumental in establishing Salado College.

Grangers and other populists, however, most actively promoted practical agriculturally-based education through speeches, newspapers, institutes, agricultural experimental stations, and agricultural colleges. See L. CREMIN, THE TRANSFORMATION OF THE SCHOOL 42 (1961)(Grangers supported teaching of home arts); M. CURTI, THE SOCIAL IDEAS OF AMERICAN EDUCATORS 213-14 (1950)(Grangers promoted agricultural and industrial education). Formal education was perceived to be "secondary in importance to agitation and legislation in solving pressing agrarian problems." M. CURTI, THE SOCIAL IDEAS OF AMERICAN EDUCATORS 214 (1950). Informal populist methods of education should not be lightly dismissed. Nineteenth-century Texas farmers, with virtually no formal education, had a more sophisticated understanding of macroeconomics and the nation's monetary system than do today's citizens who have benefited from 10 to 19 years of state-financed education. See W. GREIDER,

[W]e never will rest satisfied until our State is running her public school system on a broader, better basis and with more liberal and perfect machinery than any other state in the Union. [If the convention] presumes to lay hands upon this, the great idea of the 19th century, it will provoke a storm of opposition . . . which will prove dangerous to the instrument they are expected to fashion.⁹²

III. THE 1875 CONVENTION, ARTICLE VII, SECTION 1 AND THE RIGHT TO AN "EFFICIENT" EDUCATION

No subject at the convention created more agitation than that of education.⁹³ The Constitutional Convention of 1875 bitterly debated the education provisions of the proposed Texas Constitution of 1876. Article VII, section 1 remains today as it was framed by this convention:

A general diffusion of knowledge being essential to the preservation of the liberties and rights of the people, it shall be the duty of the Legislature of the State to establish and make suitable provision for the support and maintenance of an efficient system of free public schools.⁹⁴

The framers of the Texas Constitution intended this section both to grant to Texas children a right to education and to impose on the legislature a duty to provide that education.⁹⁵ Section 1 was intended to equalize educational opportunity by ensuring that even the poorest child had access to tax revenues from the wealthiest Texan.

A. *Intent of the Framers—Efficiency and Equality*

A majority report from the Committee on Education first introduced to the convention what was to become section 1 of article VII.⁹⁶

SECRETS OF THE TEMPLE 242-46 (paperback ed. 1987). This, of course, says as much about the purpose and defects of public schools as it does about populist self-help educational efforts.

92. Waco Examiner and Patron, Sept. 3, 1875, at 6, col. 2.

93. F. EBY, *THE DEVELOPMENT OF EDUCATION IN TEXAS* 169 (1925).

94. TEX. CONST. art. VII, § 1 (Vernon 1955).

95. See *Mumme v. Marrs*, 120 Tex. 383, 395, 40 S.W.2d 31, 35 (1931). In *Mumme*, the Texas Supreme Court stated, "The purpose of this section [article VII, section 1] as written was not only to recognize the inherent power in the Legislature to establish an educational system for the state, but also to make it the mandatory [sic] duty of that department to do so." *Id.*

96. See *JOURNAL OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF TEXAS BEGUN AND HELD AT THE CITY OF AUSTIN SEPTEMBER 6, 1875*, at 243 (1875). "A general diffusion of knowledge being essential to the preservation of the liberties of the people, it shall be the duty of the legislature of this state to make suitable provisions for the support and

On the floor of the convention, the chairman of the Education Committee, Granger J. W. Whitfield proclaimed education to be

among the abstract rights, based on apparent natural justice, which we individually concede to the State, for the general welfare, when we enter into a great compact as a commonwealth. I boldly assert that it is for the general welfare of all, rich and poor, male and female, that the means of a common school education should, if possible, be placed within the reach of every child in the State. . . .⁹⁷

Republican delegate Henry Cline⁹⁸ proposed some additions to the committee's proposed version of article VII, including the requirement that the system of public education be "efficient."⁹⁹ In support of his proposal requiring the legislature to establish an efficient system of education, Cline criticized the existing inequality of educational opportunity and spoke of the necessity to direct state funds to those districts most in need.¹⁰⁰ He observed that those with some wealth already were making extravagant provisions for the schooling of their own children, and described a state public school system in which funds that had selfishly been used by the wealthy would be made available to educate all the children in the state.¹⁰¹ To Cline, then,

maintenance of public schools." *Id.* Nine members of the Education Committee supported this report. Five were Grangers: J.W. Whitfield, B. Abernathy, Edward Chambers, A.C. Graves, and William Neal Ramey. *See* N. HENDERSON, DIRECTORY OF THE OFFICERS AND MEMBERS OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF TEXAS A.D. 1875, at 1-4 (1875).

97. S. MCKAY, DEBATES IN THE TEXAS CONSTITUTIONAL CONVENTION OF 1875, at 198 (1920). Delegate Whitfield's proclamation of a right to education correlative to the legislature's duty to provide an efficient education for the general diffusion of knowledge, is consistent with Hohfeldian rights analysis. *See* W. HOHFELD, FUNDAMENTAL LEGAL CONCEPTIONS 38 (1919); *see also* K. LLEWELLYN, THE BRAMBLE BUSH 85-86 (1951). Duty is "the other end of a right. *The right is indeed the duty*, a duty seen other end to. The relation is identical; the only difference is in the point of observation." K. LLEWELLYN, THE BRAMBLE BUSH 85 (1951).

98. *See* JOURNAL OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF TEXAS BEGUN AND HELD AT THE CITY OF AUSTIN SEPTEMBER 6, 1875, at 318 (1875). After the convention Cline helped establish Houston's public free schools and became supervisor of that city's schools. 1 W. WEBB, THE HANDBOOK OF TEXAS 363 (1952).

99. JOURNAL OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF TEXAS BEGUN AND HELD AT THE CITY OF AUSTIN SEPTEMBER 6, 1875, at 318 (1875). Cline's proposal would have required the legislature to "establish a thorough and efficient system of public instruction." *Id.*

100. S. MCKAY, DEBATES IN THE TEXAS CONSTITUTIONAL CONVENTION OF 1875 217 (1920).

101. *Id.* at 216. Cline argued:

[W]e are met with a great argument that we are too poor.

this unequal distribution of educational resources was inefficient.

On this point the Grangers and Republicans were in agreement.¹⁰² J. W. Whitfield, the chairman of the Education Committee, endorsed Cline's remarks¹⁰³ and reasoned that any apparent injustice in taxing the rich to pay for the education of poor children was outweighed by the poor child's great, natural law right to an education.¹⁰⁴ Delegate S. H. Russell, who favored immediate implementation of section 1, argued that the poorer communities most in need of school funds should not be the ones burdened with the obligation of providing these funds.¹⁰⁵ Delegate George McCormick criticized rich men "who are opposed to a pitiful tax to educate the children of the heroes who carried their flags during the war."¹⁰⁶ The convention referred the proposals of Cline, Whitfield and others to a select committee.¹⁰⁷ This committee presented a compromise to the floor which retained Cline's requirement that the system of public education be efficient.¹⁰⁸

....

There are 1,700 of our Texas children being educated abroad. The amount of money expended upon them is almost sufficient alone to educate all the poor children of the State in public schools.

....

I see that we gentlemen are educating our children, but the people are not. Well, sir, we are expending money in that direction selfishly.

Id.

102. In his autobiography, delegate E. L. Dohoney recalled that it was a coalition of Grangers and Republicans such as Cline that "saved the public schools of Texas. . . in spite of the Democrats." E. DOHONEY, *AN AVERAGE AMERICAN* 166 (1903). Dohoney credited himself with convincing the coalition of the need for a school tax. *Id.*; see also S. MCKAY, *DEBATES IN THE TEXAS CONSTITUTIONAL CONVENTION OF 1875*, at 199-200 (1920)(account of Dohoney's floor-speech on education cited in *Edgewood Indep. School Dist. v. Kirby*, 777 S.W.2d 391, 395-96 (Tex. 1989)).

103. S. MCKAY, *DEBATES IN THE TEXAS CONSTITUTIONAL CONVENTION OF 1875*, at 218 (1920)(statement of J. W. Whitfield).

104. *Id.* at 198.

105. *Id.* at 336-37.

106. *Id.* at 210.

107. *JOURNAL OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF TEXAS BEGUN AND HELD AT THE CITY OF AUSTIN SEPTEMBER 6, 1875*, at 337 (on October 12, 1875, motion to refer article on education and pending amendments to select committee of seven was adopted 43 to 28); see also *id.* at 395-96 (committee's final report).

108. *Id.* at 395-96. One delegate criticized the efficiency standard as vague. See S. MCKAY, *DEBATES IN THE TEXAS CONSTITUTIONAL CONVENTION OF 1875*, at 328 (1920)(statement of delegate West). Historian Frederick Eby also had this criticism. No "suggestion was given as to what was to be understood by the term efficient system; and in the absence of all recognized standards of educational merit, this catchword was not merely meaningless but deceptive and harmful." F. EBY, *THE DEVELOPMENT OF EDUCATION IN TEXAS* 159 (1925).

The committee draft ultimately became article VII, as only a minority of delegates¹⁰⁹ opposed section 1's requirement that the legislature maintain an efficient system for the general diffusion of knowledge.¹¹⁰ One member of this oppositional minority was E. S. C. Robertson,¹¹¹ who described the proposed "efficient system" as one that would "give a substantial education to every child in the country."¹¹² Robertson believed that the state could not then afford an efficient school system. "When the day arrives that this country is in a prosperous condition, and is able to pay the taxes that will guarantee an efficient system that will give a substantial education to every child . . . I shall be prepared to support such a measure heart and soul."¹¹³

B. *Financing Efficiency*

The question that dominated the education debates of the convention was whether the state, in the short run, could afford to fully implement section 1's prescript. Texans have perhaps never faced a greater financial catastrophe than the one existing at the time of the convention. The state was in the midst of an economic depression.¹¹⁴ Farmers, in whose hands lay the wealth of the state,¹¹⁵ were impover-

109. Among this minority were a handful of delegates who believed that education was not the duty of the state. These delegates believed that education was properly administered in the home. Four members of the committee (R. Sansom, Asa Holt, A. J. C. Dunnam & G. B. Cooke) refused to concur in the majority's report as they believed "the education of children to be a private duty—devolved upon the parent by God. . . ." JOURNAL OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF TEXAS BEGUN AND HELD AT THE CITY OF AUSTIN SEPTEMBER 6, 1875, at 245 (1875).

110. See S. MCKAY, DEBATES IN THE TEXAS CONSTITUTIONAL CONVENTION OF 1875, at 230 (1920).

111. *Id.* Robertson was the lone dissenter of the select committee of seven. *Id.*

112. *Id.* at 351.

113. *Id.*

114. E. MILLER, A FINANCIAL HISTORY OF TEXAS 199 (1916). From 1873 to 1879, prices fell sharply; thereafter prices continued to fall at a slower rate until 1897. Laird & Rinehart, *Deflation, Agriculture, and Southern Development*, 42 AGRIC. HIST. 115, 116 (1968). By 1880, the income levels of the South were less than they had been in 1840. The South suffered from severe monetary deflation. Only a few banks survived the Civil War. In 1869, Texas and seven other Southern states had only 26 national banks "compared to 829 national banks for the four states of New York, Massachusetts, Pennsylvania, and Ohio." *Id.* at 117-20. In the single city of Bridgeport, Connecticut, more money was in circulation than in Texas, Alabama, and North and South Carolina combined. What little capital there was flowed to the urban areas to support industrial enterprises. *Id.* at 117-18 n.8.

115. In 1875, the Texas economy was overwhelmingly agricultural. *Id.*; E. MILLER, A FINANCIAL HISTORY OF TEXAS 197-98 (1916). Only 8.5 percent of Texans lived in towns

ished and indentured into the crop lien system.¹¹⁶ State government was burdened by massive Reconstruction debt.¹¹⁷ The annual expenses of state government were three times the annual receipts¹¹⁸ even though property taxes had increased threefold since 1867.¹¹⁹ Education Committee chairman J. W. Whitfield expressed fear of a school tax that would “impose too heavy a burden on the *present* population of the state.”¹²⁰ He “thought the poverty of the people was too great for them to build up an adequate system of free schools *just then*.”¹²¹ Another delegate sought to forestall the possibility of taxes creating “an enormous revenue to be expanded for educational purposes; not because I do not believe it would be beneficial in the long run, but because we are yet too poor for this. . . .”¹²² Delegate Jacob Waelder argued that section 1 should be implemented immediately and not delayed for years.¹²³ Yet, the majority of delegates apparently agreed with J. W. Whitfield when he characterized another delegate who advocated immediate and complete funding of public schools as “thirty or forty years ahead of his time.”¹²⁴

having populations greater than 2,500. During the 1870's, manufacturing production grew at a slower rate than the population.

116. See C. OTKEN, *THE ILLS OF THE SOUTH* 78 (1894); see also Laird & Rinehart, *Deflation, Agriculture, and Southern Development*, 42 *AGRIC. HIST.* 115, 120-22 (1968).

117. E. MILLER, *A FINANCIAL HISTORY OF TEXAS 191-96* (1916). Compounding the state problem, counties and cities had also been swindled by the railroads into using their credit to purchase worthless railroad bonds. See *City of Cleburne v. Gulf C. & S.F. Ry.*, 66 *Tex.* 457, 457, 1 *S.W.* 342, 342 (1886); see also *TEX. CONST.* art. III, § 52, interp. commentary 718-19 (Vernon 1955); Westin, *Populism and the Supreme Court*, in 1980 *SUP. CT. HIST. SOC. YEARBOOK* 62 (1980). The U.S. Supreme Court sided with the investors against the swindled towns. Westin, *Populism and the Supreme Court*, in 1980 *SUP. CT. HIST. SOC. YEARBOOK* 62 (1980); see also *Humbolt Township v. Long*, 92 *U.S.* 642, 650-51 (1875); *Supervisors v. Schenck*, 72 *U.S.* (5 *Wall.*) 772, 778-79 (1866); *Commissioners of Knox County v. Aspinwall*, 62 *U.S.* (21 *How.*) 539, 545 (1858). The delegates to the Texas Constitutional Convention of 1875 framed several provisions to put an end to this practice. See *TEX. CONST.* art. III, §§ 50-52 (1876).

118. E. MILLER, *A FINANCIAL HISTORY OF TEXAS* 197 (1916).

119. Laird & Rinehart, *Deflation, Agriculture, and Southern Development*, 42 *AGRIC. HIST.* 115, 123 (1968).

120. S. MCKAY, *DEBATES IN THE TEXAS CONSTITUTIONAL CONVENTION OF 1875*, at 197 (1920)(emphasis added).

121. *Id.* at 215 (emphasis added).

122. *Id.* at 327 (statement of C.S. West).

123. *Id.* at 221.

124. *Id.* at 218. At the close of the convention the delegates appointed a committee to prepare an address to the people of Texas, explaining the desirability of and need for the proposed constitution. In this address the committee noted that the delegates shared an intense desire to create a school system which provided for universal education. The majority,

1. Article VII, Section 3—Prospective Duty

Recognizing necessity, the delegates voted to include section 3¹²⁵ in the education article in order to restrict the amount of ad valorem school tax that could be imposed upon the population. In so doing, the delegates knew that they were postponing for perhaps decades the ability of the legislature to fully comply with section 1. Section 1, then, as conceived by the delegates to the 1876 convention was to be prospective.¹²⁶ The framers intended to impose a duty on future legislatures that their own generation was unable to assume. Their intent was for the legislature to become increasingly obligated under the constitution, and as Texans became more prosperous in the decades ahead, to develop a statewide educational system that would equalize the opportunity of all Texas children to obtain their right to a substantial and adequate education.

The framers did not use the word “efficient” as a synonym for “cheap,” as some scholars have suggested.¹²⁷ The framers knew that

however, believed that the economic deprivation of the state “made it unwise and unjust to impose on the parents and tax-payers of to-day an onerous money tax to maintain *at once* a gigantic system of free public schools.” ADDRESS TO THE PEOPLE OF TEXAS 4-5 (1987)(emphasis added).

125. TEX. CONST. art. VII, § 3 (1876). Section 3 provided: “There shall be set apart annually not more than one-fourth of the general revenue of the State, and a poll tax of one dollar on all male inhabitants in this state between the ages of twenty-one and sixty years, for the benefit of the public free schools.”

126. This was the interpretation given by Governor O. M. Roberts in his 1879 address to the legislature:

The convention must be supposed to have intended . . . not that the Legislature should or could at once speak into existence an institution in this new country with complete efficiency. . . . But rather it is to be supposed that they required that the Legislature should at once set about it, and continue their efforts from time to time as the condition of the country might permit and require and develop the means placed at their command, and step by step advance in its improvement until it should mature into ‘an efficient system of public free schools’.

Message of Governor O. M. Roberts to the Legislature of the State of Texas, Extra Session, June 10, 1879, H.J. OF TEX., 16th Leg., Extra Sess. 15-16 (1881).

127. *E.g.*, Yudof, *School Finance*, Texas Lawyer, Aug. 14, 1989, at 16; *cf.* TEX. CONST. art. VII, § 1, interp. commentary 375 (Vernon 1955)(“Those preferring the old system of state-subsidized private schools introduced the word ‘efficient’ on the theory that efficiency was the equivalent of simplicity and deeply in great custom and hence would be an effective deterrent to the continuation of the reconstruction state-controlled free public school system”).

Although funds set aside for education proved to be insufficient, this shortcoming in no way constitutes evidence that the framers intended a “cheap” system of education. *See infra* Section V(A)(discussion of framers’ intent and political reaction to funding shortfalls). The framers prominently established the high goal of efficiency. They attempted to provide for such a system without immediately increasing the state’s already-staggering tax rates. The constitu-

an efficient public school system providing for the general diffusion of knowledge would be expensive.¹²⁸ As poor as Texas was in 1876, the convention still “dealt more generously with the public schools than had many of the other states of the union.”¹²⁹ The constitution reserved one-half of all public lands and trusts for the schools,¹³⁰ including permanent funds invested in bonds amounting to \$3,259,970.¹³¹ Up to one-quarter of the state’s general revenues could be devoted to public schools¹³² and the revenues from a poll tax were dedicated exclusively to public schools.¹³³ One of the delegates, without contradiction, speculated that it would cost \$900,000 of annual ad valorem tax revenues to run state government.¹³⁴ One-fourth, or \$225,000, of these ad valorem tax revenues would be directly available to education under the constitution. If the permanent fund bonds were to bring an 8 percent return, that added an additional \$260,000 per year for education. The \$1 poll tax, on an electorate of 250,000,¹³⁵ could be expected to bring in perhaps another \$200,000 for education. Adding this \$460,000 to the expected \$900,000 of ad valorem revenues, it appears that the framers contemplated that perhaps \$685,000 out of

tion provided for the endowment of a permanent school fund and an available school fund by earmarking twenty-one million acres of surveyed land, and half of all vacant domain. TEX. CONST. art. VII, § 5 (1876). Thus, the 1876 constitution set apart 15 million acres for education in addition to the lands already put aside for that purpose. Speech of Gov. O. M. Roberts to the 16th Legislature, Feb. 10, 1879, H. J. OF TEX., 16th Leg., Reg. Sess. 342 (1879). By contrast, the provisions for state government in general were sorely inadequate. The meager provisions for state government brought severe criticism during the ratification campaign. The San Saba News complained: “It will secure the vote of everyone who desires a cheap government. A new constitution is extreme in this respect, it is almost too cheap to be healthy. . . .” Daily Democratic Statesman, Nov. 28, 1875, at 2 (quoting San Saba News); see also Daily Democratic Statesman, Jan. 13, 1876, at 2, col. 1 (“It is a cheap government we are about to have in all its intolerable aspects”). A strong sentiment for cheap government at the convention should not be confused to indicate a strong sentiment for cheap education.

128. See *supra* notes 113-24 and accompanying text (discussion of framers’ knowledge of education costs and state’s ability to pay).

129. F. EBY, *THE DEVELOPMENT OF EDUCATION IN TEXAS* 171 (1925).

130. TEX. CONST. art. VII, § 2 (1876).

131. F. EBY, *THE DEVELOPMENT OF EDUCATION IN TEXAS* 171 (1925).

132. TEX. CONST. art. VII, § 3 (1876).

133. *Id.* This “poll tax” was not a prerequisite to suffrage and was really a head tax. 2 G. BRADEN, *THE CONSTITUTION OF THE STATE OF TEXAS: ANNOTATED AND COMPARATIVE ANALYSIS* 512-14 (1977).

134. S. MCKAY, *DEBATES OF THE TEXAS CONSTITUTIONAL CONVENTION OF 1875*, at 303 (1920)(statement of Thomas Nugent).

135. See C. BARR, *RECONSTRUCTION TO REFORM TEXAS POLITICS 1876-1906*, at 9 (1971).

\$1.36 million or half of the state budget for current expenses, would immediately be spent on education.¹³⁶

Even this degree of commitment was fully recognized by the framers as insufficient to create an efficient system.¹³⁷ But, recognizing the extreme poverty of the state, the framers through section 3 imposed percentage limitations on the amount of revenue the legislature could expend on schools. Again, at least one scholar has mistakenly interpreted section 3's limitation on taxation as a negation of section 1's declaration of educational rights and duties.¹³⁸ The section 3 limitations were a simple acknowledgement of the economic realities of the 1870's and also reflective of the delegates' rejection of the constitutional liberalism of the U.S. constitution and prior Texas constitutions. The 1875 framers sought to expand many of the duties of government while simultaneously imposing numerous specific restrictions on how these duties might be carried out.¹³⁹ The framers sought an active government on a short leash. They were extremely doubtful of the ability of the legislature to resist wealthy special interests, especially on matters of taxation.¹⁴⁰ The one branch of government not subject to strict limitations was the judiciary. The framers, then,

136. The framers in fact told the voters that \$775,000 would be available for education. See COMMITTEE OF THE CONVENTION, ADDRESS TO THE PEOPLE OF TEXAS 5 (1875). For fiscal year 1876, about \$706,712, or 35 percent, of the \$2,029,177 in current net receipts actually was allocated to the schools fund account. See Message of Governor O. M. Roberts to the Legislature of the State of Texas, Extra Session, June 10, 1879, H.J. OF TEX., 16th Leg., Extra Sess. 23, 42 (1881). When one subtracts the \$400,000 annual debt service, school expenses equaled 43 percent of current expenses. *Id.* at 7, 27. In fiscal year 1878-79, approximately 42 percent of revenues allocated for current expenses were allotted to schools. See Message of the Governor O. M. Roberts, Jan. 11, 1881, TEXAS DEPARTMENTAL REPORTS (1881). By comparison, in fiscal year 1988, Texas allocated 45 percent of state revenues to education. See COMPTROLLER OF TEXAS, 1988 STATE OF TEXAS ANNUAL FINANCIAL REPORT CASH BASIS 3, 11 (1989).

137. See *supra* notes 122-26 and accompanying text (full funding necessary to implement efficiency standard would have to be postponed).

138. See 2 G. BRADEN, THE CONSTITUTION OF THE STATE OF TEXAS: AN ANNOTATED AND COMPARATIVE ANALYSIS 506 (1977). "In reality the education article was not a mandate to establish an efficient public free school system at all but was intended, rather, as a restrictive document to prevent establishing an elaborate and expensive system . . ." *Id.* Braden's analysis also runs afoul of the rule that one part of the constitution should not be interpreted to defeat another. *Jones v. Williams*, 45 S.W.2d 130, 137 (Tex. 1931); *Galveston, H. & S.A. Ry. v. State*, 77 Tex. 367, 384 12 S.W. 988, 993 (Tex. 1889).

139. See *supra* notes 88-91 and accompanying text (delegates wished to limit governmental powers while enlarging duties).

140. See *infra* notes 143-53 and accompanying text (delegates believed legislators would be pawns of wealthy).

drafted a separation of powers scheme that placed great reliance on an elected judiciary which would regulate the behavior of the legislature by interpreting and enforcing the myriad duties, rights, and restraints identified in the Texas Constitution. Even more important, the framers placed in the Texas Constitution an easy method of amendment¹⁴¹ that would enable the voters to change the details of specific constitutional constraints when such details became outmoded over the course of time.

2. An Equitable Scheme of Taxation

Under the original scheme Texans were burdened equally by statewide education taxes. Section 1 of article VIII of the constitution required these taxes to be assessed equally and uniformly.¹⁴² In the debates over article VIII, delegates on both sides repeatedly expressed their desire for a constitution that would prevent the wealthy or any other special interest from avoiding an equal burden of taxation.¹⁴³ Said delegate S. H. Russell,

If the burdens must bear a little harder on one class than another, they [the delegates] preferred that it should be upon the class which was the better able to bear them. The whole question resolved itself into this: Should they pass a Constitution that should compel the powerful and wealthy to come up to the mark and pay their share toward the support of the government?¹⁴⁴

The framers mistrusted the legislature. They feared that wealthy special interests would prevail upon legislators to devise tax schemes that

141. TEX. CONST. art. XVII (1876, amended 1972). “[A]n easy and simple mode is provided for its amendment in any particular, where experience may prove its provisions unwise. . . .” COMMITTEE OF THE CONVENTION, ADDRESS TO THE PEOPLE OF TEXAS 8 (1875).

142. *Id.* art. VIII, § 1 (1876, amended 1989). The framers’ requirement that article VIII, section 1 taxes be assessed equally and uniformly must not be confused as a mandate of article VII, section 1 that education be administered uniformly across the state. At the convention, one delegate (Morris) proposed an article identical to article IX, section 1 of the Reconstruction constitution of 1869. JOURNAL OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF TEXAS BEGUN AND HELD AT THE CITY OF AUSTIN SEPTEMBER 6, 1875, at 136 (1875). The proposed article provided, “[T]he Legislature shall establish a *uniform* system of public free schools throughout the State.” *Id.* at 137 (emphasis added). The article was referred to the committee on education, and subsequently was rejected in the committee’s report in favor of the term “efficient.” *Id.* at 139.

143. *E.g.*, S. MCKAY, DEBATES IN THE TEXAS CONSTITUTIONAL CONVENTION OF 1875, at 198, 303, 306, 315 (1920).

144. *Id.* at 315.

protected their properties from equal taxation.¹⁴⁵ When John Reagan¹⁴⁶ offered a substitute for section 1 of article VIII that would give the legislature some discretion to make exceptions to the requirement of equal taxation, the convention reacted vehemently against it.¹⁴⁷ According to Granger Charles DeMorse,¹⁴⁸ chairman of the Revenue and Taxation Committee,¹⁴⁹

[T]he question was whether the people were properly represented, and whether corporate interests should control the Convention as they had controlled the Legislatures for the past three or four years. The committee . . . endeavored to reach every class that had hitherto avoided taxation.¹⁵⁰

Reagan's defense that he, too, "was not willing to trust questions of

145. *Id.* at 296 (statement of Granger delegate Charles DeMorse).

146. Reagan had been a member of the United States Congress, and had served as Postmaster General in the cabinet of Jefferson Davis, President of the Confederacy. In the years immediately preceding the convention, he had been a lobbyist for the International Railroad Corporation. At the time of the Convention, he was a congressman-elect and due to take his seat in December of 1875. E. WALLACE, CHARLES DEMORSE—PIONEER EDITOR AND STATESMAN 177 (1943)(citing G. WILSON, JOHN HENNINGER REAGAN AND THE TEXAS CONSTITUTION OF 1876, at 1-39 (manuscript)). In Congress, Reagan introduced the Interstate Commerce Act, authored by railroad lawyers, to co-opt the Granger demands for railroad regulation. See G. KOLKO, RAILROADS AND REGULATION (1970). Reagan later served as Texas Railroad Commissioner from 1891 to 1903. *Id.* For a brief biography of Reagan, see W. MCGRAW, PROFESSIONAL POLITICIANS 177-221 (1940).

147. See S. MCKAY, DEBATES IN THE TEXAS CONSTITUTIONAL CONVENTIONAL OF 1875, at 295-301 (1920).

148. DeMorse had finished second to Governor Coke in the Democratic primary for governor. E. WALLACE, CHARLES DEMORSE—PIONEER EDITOR AND STATESMAN 177 (1943). Clearly, DeMorse held a prominent place among the delegates attending the Texas Constitutional Convention of 1875. DeMorse was a member of eight important committees of the Constitutional Convention: legislative, judiciary, executive, general provisions, revenue and taxation, printing and contingent expenses, land subsidies to railroads, and postponement of the election. See JOURNAL OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF TEXAS BEGUN AND HELD AT THE CITY OF AUSTIN SEPTEMBER 6, 1875, at 15-16 (1875); E. WALLACE, CHARLES DEMORSE—PIONEER EDITOR AND STATESMAN 178 (1943). Wallace concluded his biography of Charles DeMorse as follows:

Charles DeMorse was more than a newspaper man. As editor, publisher, lawyer, soldier, public official, merchant, student, and quiet farmer, he served the people of his state. On all public questions of his time he spoke honestly, courageously, unequivocally . . . [H]is was a profound influence upon the political and constitutional history of his state.

E. WALLACE, CHARLES DEMORSE—PIONEER EDITOR AND STATESMAN 236-37 (1943).

149. DeMorse was also chairman of the Committee on Postponement of the Election. E. WALLACE, CHARLES DEMORSE—PIONEER EDITOR AND STATESMAN 178 (1943).

150. S. MCKAY, DEBATES IN THE TEXAS CONSTITUTIONAL CONVENTION OF 1875, at 296 (1920).

morality and ethics to the Legislature”¹⁵¹ failed to prevent his proposal from being defeated.¹⁵²

Later in the debate over the tax article, delegate Marion Martin, a Granger, future lieutenant governor and Peoples Party candidate for Congress, made the following comment:

A . . . noted ex-judge of this State, a short time ago declared that ‘none but fools and poor men ever pay taxes in Texas,’ and the records at the Comptroller’s Office appear to prove the truth of the assertion. He is rich and pays but a small amount of taxes. It is this class, and these stupendous and overshadowing corporations, grown insolent over the millions they have wrung from the bone and muscle of the country, [that must not be allowed exemption from taxation].¹⁵³

The framers did not contemplate that an efficient education for the general diffusion of knowledge could have been funded by a school tax scheme enabling communities with the most property wealth to erect districts as barricades, preventing the collection of revenues for the education of the children of the poorer families. In regard to economic matters, the framers tended to radical egalitarianism. E. L. Dohoney,¹⁵⁴ the delegate who first obtained the convention’s approval for the methods of taxation authorized by the constitution,¹⁵⁵ was to

151. *Id.* at 298.

152. *Id.* at 301.

153. *Id.* at 306.

154. Dohoney was a delegate from Lamar County and was editor of the North Texan in Paris, Texas. The Daily Democratic Statesman referred to Dohoney as “one of the clearest-headed, most honest and earnest, self-reliant members of the Constitutional Convention. . . .” Daily Democratic Statesman, Nov. 26, 1875, at 1, col.7. Although he was not a member of the Grange, he proclaimed at the convention his support for Grange goals and positions. S. MCKAY, DEBATES IN THE TEXAS CONSTITUTIONAL CONVENTION OF 1875, at 210 (1920). Dohoney was one of the delegates recommended by the official Grange newspaper to preside over the convention. See Waco Examiner & Patron, Aug. 20, 1875, at 5, col. 2. When the convention voted to choose a president, Dohoney came in second to E. B. Pickett. See JOURNAL OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF TEXAS BEGUN AND HELD AT THE CITY OF AUSTIN SEPTEMBER 6, 1875, at 5 (1875). In 1882, Dohoney was an unsuccessful candidate for the United States Congress as a member of the Greenback Party. Four years later, he ran unsuccessfully as the Prohibition Party candidate for governor of Texas. Dohoney also helped organize the Peoples Party in Texas, serving as chairman of its platform committee in 1891. Finally, Dohoney ran unsuccessfully as the Peoples Party candidate for Chief Justice of the Court of Criminal Appeals in 1894, polling almost 200,000 votes. L. COOK & A. McREYNOLDS, CONSTITUTIONAL CONVENTION—A NEW BEGINNING—TWO CONSTITUTIONS—1875 AND 1974, at 40-41 (1974).

155. See S. MCKAY, DEBATES IN THE TEXAS CONSTITUTIONAL CONVENTION OF 1875, at 303 (1920)(ad valorem, occupation, and income taxes). Dohoney also played a key role in the development of the education article. See *supra* notes 69 & 102.

later describe himself as a believer in communism.¹⁵⁶ When he campaigned for governor, delegate Thomas Nugent expressed broad populist principles which foreshadowed the problem of educational inefficiency in the twentieth century:

[I]t is not the excessive production of wealth, but its unequal distribution, which constitutes the menacing evil of the times. As population increases and society becomes more highly organized, so ought the means and facilities of civilized life to be more and more within the reach of the great body of people. . . . The point ought to be thus reached at which poverty would disappear. Such a condition can only be brought about, however, in a community all of whose members were afforded fair opportunity for the exertion of their faculties. . . .¹⁵⁷

The work of the convention came to a close on November 24, 1875.¹⁵⁸ The delegates approved the constitution by a vote of fifty-three to eleven.¹⁵⁹ Judge Flournoy of Galveston declared it to be "the noblest instrument ever submitted to the verdict of a free people."¹⁶⁰

C. *Ratification of the Constitution in 1876*

A central tenet of constitutional construction is that courts shall seek to follow the intent of the ratifiers.¹⁶¹ Although extracting a collective intent of more than 193,000 ratification voters from century-old and scattered circumstantial evidence is often difficult, if not futile,¹⁶² the courts purport to be bound by this intent.¹⁶³ Realizing the

156. See E. DOHONEY, *THE CONSTITUTION OF MAN* 299 (1903). Dohoney wrote: The form of government outlined by extreme socialists is substantially correct, and is really communism. The perfect government we will finally attain to is Christian communism, . . . but this can never be until the great monopolies are broken up . . . by the strong hand of revolution. The right of revolution is a natural right and belongs to every people.

Id.

157. Nugent, *Opening Speech for Governor*, in *THE LIFE WORK OF THOMAS NUGENT* 179, 184 (C. Nugent, ed. 1896).

158. After the resolution of the education article in late October, the attendance of the delegates began to fall off. By November 1, there were 75 members of the convention at work; during the last week the total number of delegates voting usually was between 50 and 60. L. COOK & A. McREYNOLDS, *CONSTITUTIONAL CONVENTION—A NEW BEGINNING—TWO CONSTITUTIONS—1874 AND 1974*, at 20 (1974).

159. W. BENTON, *TEXAS POLITICS—CONSTRAINTS AND OPPORTUNITIES* 51 (5th ed. 1984).

160. E. WALLACE, *CHARLES DEMORSE—PIONEER EDITOR AND STATESMAN* 199 (1943).

161. See *supra* notes 13-14.

162. See Levinson, *Interpreting State Constitutions by Resort to the Record*, 6 FLA. ST. U.L. REV. 567 (1978). "State constitutions, on the other hand, are adopted by a direct vote of

inherent difficulty of the task, we seek to determine the collective intent, if any, of those who ratified the Texas Constitution and its education clause in 1876.

Between November 24, 1875, and February 15, 1876, a lively ratification campaign was carried on across the state.¹⁶⁴ The majority of the state press recommended ratification of the constitution.¹⁶⁵ Governor Coke immediately endorsed the constitution and encouraged its ratification¹⁶⁶ "on the grounds that it was easy to amend and it was a Democratic replacement of the Reconstruction constitution of 1869."¹⁶⁷ Party platforms, campaign statements, and newspaper editorials indicate that the ratification campaign constituted a referendum on the centralized government and educational system of the Davis administration¹⁶⁸ and the protopopulist approach of the state Grange. The vote on ratification indicates a decisive popular rejection of the Davis administration's highly centralized educational system, with the protopopulist¹⁶⁹ positions of the Grange overwhelmingly adopted.

the people, and the people's intent may be virtually impossible to ascertain, except from circumstantial evidence." *Id.*

163. See *supra* note 14 (discussing role of ratifiers' intent in constitutional construction).

164. W. BENTON, *TEXAS POLITICS—CONSTRAINTS AND OPPORTUNITIES* 51 (5th ed. 1984).

165. E. WALLACE, *CHARLES DEMORSE—PIONEER EDITOR AND STATESMAN* 199 (1943).

166. *Daily Democratic Statesman*, Nov. 30, 1875, at, col. 1.

167. Address by John W. Mauer, *State Constitutions in Time of Crisis: the Case of the Texas Constitution of 1876*, *TEX. L. REV.* Symposium on the Texas Constitution 32 (Oct. 6, 1989)(intended for publication in 68 *TEXAS LAW REVIEW*). Governor Coke stated, "[W]hile I cannot approve all the provisions of the instrument, I do not hesitate to say that as a whole it possesses much of the intrinsic merit, and is a great improvement on the existing Constitution . . . I will support the Constitution and advocate its adoption, and . . . I believe it to be in the interest of the people and state that it be ratified at the polls." *Daily Democratic Statesman*, Nov. 30, 1875, at 2, col. 1.

168. See W. BENTON, *TEXAS POLITICS—CONSTRAINTS AND OPPORTUNITIES* 51 (5th ed. 1984)(previous unlimited power of executive branch restricted by ratification of new constitution).

169. The ratification campaign progressed with repeated references to basic populist concepts. With respect to the education clause, the tone of this debate was set toward the end of the convention debates. The *Galveston Daily News* harshly criticized those refusing to support universal education:

They [the convention delegates] talk about the rights of property and the injustice of a school tax. One of them tells us that it is contrary to natural right to compel the rich to contribute to the education of the children of the poor. He would, in the name of natural rights, and even in the name of democratic liberty, entail ignorance as the heredity penalty of poverty—what mockery, what folly, what madness! . . . Universal education must

The education chapter was vigorously discussed during the canvass. The Republican state convention's platform adamantly opposed adoption of the constitution, in part because of its "specious provisions in relation to the schools."¹⁷⁰ The platform clearly did not oppose the mandate of an "efficient system of free public schools" in article VII, section 1; rather, the Republicans opposed the taxing limitation contained in article VII, section 3. They argued that with such a limitation, the almost universally accepted objective of "efficiency" could not be achieved.¹⁷¹ While the Democratic platform did not officially support ratification of the constitution generally,¹⁷² it did sup-

qualify universal suffrage, intelligence must qualify self-government, or republican institutions will be engulfed in a vortex of social despair.

Suffrage and Education, Galveston Daily News, Oct. 13, 1875, at 1, col. 2.

170. See E. WINKLER, PLATFORMS OF POLITICAL PARTIES IN TEXAS 177 (1916).

171. Former Governor E. J. Davis reported the Republican platform, which stated in part:

Resolved. That we denounce the Constitution framed by the late convention at Austin, and now submit it to the people of Texas for ratification as unfit to become the organic law of the state . . . (2) Because the said Constitution seeks to cheat the people with specious provisions in relation to schools, while it utterly fails to secure an efficient system of free schools, which is the greatest necessity of the State, the surest guarantee of progress and the best defense of liberty.

See Galveston Daily News, Jan. 14, 1876, at 1, col. 4. The Republican delegates also passed a resolution stating:

Whereas, the late Democratic Constitutional Convention of this State has, by its action, made the maintenance of public free schools in this State, in case the new constitution is adopted, an impossibility; therefore, be it *Resolved*, that the Republicans expose this trick on the part of the Democrats to prevent the education of the poor of the State, and that the attention of civil officers of the United States government be called to the active Congress read meeting Texas into the Union under certain condition, *viz*: That the Constitution of Texas shall never be so changed as to deprive any citizen or class of citizens of any of the school rights guaranteed therein, and ask that said act be enforced.

Id.

172. Some proponents of the new constitution attempted to secure an endorsement of the document by the State Democratic Convention. Colonel W. L. Crawford declared that the party was responsible for the Constitution and should therefore endorse it. The opposition was led by Judge W. P. Ballinger. E. WALLACE, CHARLES DEMORSE—PIONEER EDITOR AND STATESMAN 200 (1943). The Daily Democratic Statesman reported:

Opposition to the proposed Constitution was a marked feature of the Galveston convention. When Col. Crawford made his speech claiming that the Democratic Party was responsible for its creation, the assertion was met with a universal cry of "NO!" and at the same moment the body swayed with the most violent commotion. Again, when the resolution was introduced, even mildly recommending Democrats to vote for the Constitution, a number of delegates started to withdraw from the body, and had it not been tabled, the convention would at once have broken in pieces. This is the way in which the party represented by 1200 intelligent men, treated this instrument . . .

Daily Democratic Statesman, Jan. 11, 1876, at 2, col. 1-2. The resolution to officially endorse

port the education clause. The second of the platform's six planks provided:

The Democracy now, as in the past, adhering to its policy of maintaining an efficient system of general education, declares it to be the duty of the legislature of the State to speedily establish and make provision for the support and maintenance of the public free schools, and to this end to exercise the whole power with which it is vested.¹⁷³

The Granger and Democratic Party press organs also supported the adoption of the new constitution.¹⁷⁴ As a result, the constitution was adopted by a vote of 136,606 to 56,653.¹⁷⁵

Along with the adoption of the new constitution, voters also selected a full slate of state officers. The campaign for ratification split closely along party lines, with most Democrats and Grangers supporting it and most Republicans opposing it. The Democratic candidates, Richard Coke, who was running for governor, and Richard Hubbard, who was running for lieutenant governor, repeatedly contrasted their administration with that of E. J. Davis, characterizing his administration as "wasteful, turbulent and undemocratic."¹⁷⁶ The Republican candidates, gubernatorial nominee William Chambers and F. W. Minor, a candidate for lieutenant governor, strongly opposed the constitution and supported the actions of the Davis administration.¹⁷⁷

In view of the overwhelming vote for the Democratic Party and the

the constitution was voted down by a vote of 674 to 176. E. WALLACE, CHARLES DEMORSE—PIONEER EDITOR AND STATESMAN 200 (1943); *see also* C. BARR, RECONSTRUCTION TO REFORM TEXAS POLITICS, 1876-1906, at 19-20 (1971).

173. E. WINKLER, PLATFORMS OF POLITICAL PARTIES IN TEXAS 175 (1916).

174. *See* C. BARR, RECONSTRUCTION TO REFORM TEXAS POLITICS, 1876-1906, at 25 (1971) ("Only nine of the 186 newspapers in Texas identified themselves with the Republican party").

175. REPORT OF THE SECRETARY OF STATE BAR FOR THE STATE OF TEXAS FROM DEC. 1, 1874, TO MAY 1, 1876, at 38-43 (1876).

176. C.A. BARR, RECONSTRUCTION TO REFORM TEXAS POLITICS, 1876-1906, at 25 (1971). Governor Coke told the State Democratic Convention that "Texas needs, and the people will require an efficient, economical state government. . . ." Galveston Daily News, Jan. 6, 1876, at 2, col. 4. Lieutenant Governor Hubbard criticized the excesses of the Davis administration more directly, referring to the constitution as "this war to the knife and to the bitter death upon all corruption and maladministration of this government." *Id.* at 2, col. 5; *see also* *The State Canvass—Governor Coke Speaks at Terrell and Lieut. Governor Hubbard at Willis*, Galveston Daily News, Feb. 3, 1876, at 1, col. 2.

177. The Republican support for the actions of the Davis administration is explained by his important role at the Republican State Convention in Galveston. The Republicans elected Davis to be the convention's Chairman of the Committee on Platforms and Resolutions. E.

constitution, the similarity between the intent of the ratifiers and that of the framers regarding education is clear.¹⁷⁸ Of all Texans voting, 70.69 percent voted for ratification and 75.05 percent voted for Governor Coke.¹⁷⁹ Only seventeen counties voted against Governor Coke, and of those, sixteen voted against ratification.¹⁸⁰

The powerful populist influence of the Grange dominated the ratification campaign as it had done in the convention.¹⁸¹ The rural sections of the state, whose interests the Grange had advocated, voted overwhelmingly for ratification.¹⁸² The Grange enjoyed considerable success not only in its support of the constitution, but also in the election of Grangers to the new legislature.¹⁸³ The intent of the ratifiers appears to mirror that of the framers. Many of those ratifying the constitution harbored the protopopulist views of the state Grange. The ratifiers abhorred the corruption and extreme centralization of the previous government, and chose to restructure the state's educational system in such a way as to facilitate a system of uniform taxation and equalized distribution of educational resources.

IV. SCHOOL TAXATION AND ADMINISTRATION UNDER THE 1876 CONSTITUTION

Looking at the 1876 constitution as a whole,¹⁸⁴ it is apparent that

WINKLER, PLATFORMS OF POLITICAL PARTIES IN TEXAS 177 (1971). Additionally, the convention reelected Davis as chairman of its state executive committee. *Id.* at 179.

178. The returns for the February 15, 1876, election show a striking correlation between the constitution's "for" vote and the vote for Democratic Governor Richard Coke. Fifty counties showed less than a 1 percent disparity between those votes; 102 counties showed less than a 5 percent disparity, and 127 of 149 counties voting showed less than a 10 percent disparity. Overall, the constitution was adopted by a vote of 136,606 to 56,653, while Coke won by 150,681 to 47,719. Other Democratic nominees won by a similar margin. REPORT OF THE SECRETARY OF STATE FOR THE STATE OF TEXAS FROM DEC. 1, 1874, TO MAY 1, 1876, at 38-43 (1876).

179. *Id.*

180. *Id.*

181. W. BENTON, TEXAS POLITICS—CONSTRAINTS AND OPPORTUNITIES 51 (5th ed. 1984). "Since the new document was a Granger product, it was natural that almost all of the Grangers would support adoption. The influence of the 50,000 Grangers and their friends was no small consideration in ratification." *Id.*

182. *Id.*

183. C. BARR, RECONSTRUCTION TO REFORM TEXAS POLITICS, 1876-1906, at 27 (1971).

184. When construing a particular constitutional provision that is ambiguous, the courts can glean the intent from other provisions. *Gragg v. Cayuga Indep. School Dist.*, 539 S.W.2d 861, 866 (Tex. 1976); *Collingsworth County v. Allred*, 120 Tex. 473, 479, 40 S.W.2d 13, 15 (1931). "One part may qualify another so as to . . . apply it otherwise than the natural con-

the framers of 1875 sought to limit the legislature to systems of substantially equal tax burdens and educational benefits. As the Texas Supreme Court noted in *Edgewood Independent School District v. Kirby*,¹⁸⁵ the “1876 constitution provided a structure whereby the burdens of school taxation fell equally and uniformly across the state, and each student in the state was entitled to exactly the same distribution of funds.”¹⁸⁶ Article VII, section 5 of the 1876 constitution mandated that “the available school fund herein provided shall be distributed to the several counties according to their scholastic population. . . .”¹⁸⁷ The school finance statute enacted after the 1876 convention provided for per capita disbursement of all school funds.¹⁸⁸

School administration became radically decentralized. Any parents desiring schooling for their children could form school communities and apply to a county judge who appointed trustees to oversee the school community—however it was defined by the parents—and receive the per capita distribution of school funds.¹⁸⁹ Texas school children were segregated by race, rather than by school district as they are today. Yet the 1876 constitution and subsequent funding statutes contained language designed to ensure that such segregation would not prevent equal funding for education.¹⁹⁰

School taxation and funding, in sharp contrast to school administration, was fully centralized. No provision was made for school dis-

struction would require if it stood by itself.” *Jones v. Williams*, 45 S.W.2d 130, 137 (Tex. 1931). See generally C. ANTEAU, CONSTITUTIONAL CONSTRUCTION § 2.13, at 25 (1982)(constitution must be interpreted as whole).

185. 777 S.W.2d 391 (Tex. 1989).

186. *Id.* at 396 (footnote omitted).

187. TEX. CONST. art. VII, § 5 (1876, amended 1989).

188. See Law of Aug. 19, 1876, §§ 1, 15, 1876 Texas Laws 199, 201, 8 H. GAMMEL, LAWS OF TEXAS 1035-37 (1898).

189. F. EBY, THE DEVELOPMENT OF EDUCATION IN TEXAS 172 (1925).

190. See TEX. CONST. art. VII, § 7 (1876, repealed 1969)(separate schools and impartial treatment provided for white and non-white children); Law of Aug. 19, 1876, § 15, 1876 Tex. Gen. Laws 201, 8 H. GAMMEL, LAWS OF TEXAS 1037 (1898)(equal funding but segregated schools). The statute stated:

The available public free school fund shall be appropriated in each county for the education alike of white and colored children, and each race shall receive its just pro rate, as far as practicable, in each county, according to the number of children of each race within scholastic age.

Law of Aug. 19, 1876, § 15, 1876 Tex. Gen. Laws 201, 8 H. GAMMEL, LAWS OF TEXAS 1037 (1898).

tricts other than by cities.¹⁹¹ In an 1882 opinion, *City of Fort Worth v. Davis*,¹⁹² the Texas Supreme Court concluded that the framers did not intend for these urban districts to have general school taxing authority.¹⁹³ Even so, the court found the framers did intend a minor exception to their denial of local taxing authority for schools. In section 10 of article XI, the court held the framers intended to allow cities like New Braunfels, which at the time of the convention was imposing local school taxes under the terms of its city charter, to retain the ability to impose these taxes.¹⁹⁴ This was a small exception indeed because, as school historian Frederick Eby later pointed out, the New Braunfels Academy was "the only free academy open to all children and supported by public taxation."¹⁹⁵ However, in an abdication of the role assigned to it by the convention, the Texas Supreme Court declared the actual language of the constitution ambiguous on this point and deferred to a legislative reading of the constitution that was contrary to framers' intent.¹⁹⁶ After *Davis*, only incorporated cities

191. See TEX. CONST. art. XI, § 10 (1876, repealed 1969)(empowering the legislature to designate any city or town as school district).

192. 57 Tex. 225 (1882).

193. *Id.* at 237-38.

Taxation by school districts was familiar to the framers of the present constitution. It was the system generally prevailing in other states, by which the deficiencies of a general or state school were supplemented. The omission of a provision authorizing that system was plainly intentional, for, in addition to what has been said, the journals of the convention show that all propositions embracing that system were voted down.

Id. at 232.

194. *Id.* at 233-34.

195. F. EBY, THE DEVELOPMENT OF EDUCATION IN TEXAS 133 (1925). Prior to the Civil War, Galveston was the only city which used the local school tax authority granted in its charter. This school tax, however, lasted only three years. *Id.* at 109. From 1876 to 1880, none of the urban school districts in Texas had levied a school tax. E. MILLER, A FINANCIAL HISTORY OF TEXAS 212-13, 228 (1916).

196. In *Davis*, the Texas Supreme Court stated:

[If t]he construction given that clause by the first legislature that met under the constitution, and which has since been followed by successive legislatures . . . be not the correct construction . . ., we must be clearly satisfied to that effect, or we will not be justified in pronouncing the statutes based upon it to be unconstitutional and void. . . . It must be confessed that the true meaning of this section is involved in doubt; and because of that fact, we are justified in giving weight to the construction given it by the legislature and executive departments. I am constrained to say that, in my opinion, this construction is unauthorized and wrong. But it is the opinion of the court that it cannot be said to be clearly wrong, and that the statutes authorizing town taxation for the support of public schools . . . cannot be said to be clearly unconstitutional and void. . . . [T]he statutes in question must be held valid.

57 Tex. 225, 233-34 (1882).

had authority to impose supplemental local taxation for schools, authority that was unavailable to rural residents.

V. THE INTENT OF THE 1883 AMENDMENT OF ARTICLE VII, SECTION 3

Several circumstances created the need for amendments to the education article in 1883. Structural inequalities in school finance could not be remedied following the Supreme Court's ruling in *City of Fort Worth v. Davis*.¹⁹⁷ Continuing economic depression and the legislature's and governor's abdication of the duty imposed by article VII, section 1 caused severe revenue shortfalls for the schools. As will be discussed below, the amendments were not intended to negate the efficiency mandate of section 1, but to equalize the finance structure and provide a supplemental source of revenue to enable the promise of section 1 to be fully honored.

A. *Emerging Inequality and Shortages of Funds*

Even school historian Frederick Eby, a progressive who was sharply critical of the populist framers, had to acknowledge that the new school system established after the 1876 constitution "appeared to give rather satisfactory results for several years. The number of children enrolled in the schools increased remarkably. . . ."¹⁹⁸ However, shortages of funds and emerging inequalities, caused in part by

197. 57 Tex. 225 (1882).

198. F. EBY, *THE DEVELOPMENT OF EDUCATION IN TEXAS* 173 (1925). We rely upon Eby's history of Texas schools to reach conclusions he undoubtedly would disagree with. Eby's work is distorted by his intense antipathy to the Texas framers. Nowhere in his work, for example, do we see any discussion of the severe economic difficulties experienced by the framers or of the limited scope of options available to them. Eby praises agents for the Peabody Fund and other progressive educational reformers as much as he damns the proto-populist framers. These reformers generally adopted the point of view of northeast financiers and industrialists, and often described their objectives as expressly contrary to the goals of populism. M. CURTI, *THE SOCIAL IDEAS OF AMERICAN EDUCATORS* 209-10, 217-18 (1950). The Peabody Fund's agent, J. L. M. Curry, contended that public schools were "[t]he remedy for agricultural depression, bad roads, [and] many of the ills of which we complain. . . ." *Id.* at 274. Prominent educators urged teachers to remind farmers that education rather than the Grange or the Peoples Party platform offered solutions to rural problems. *Id.* at 214. Public schools in the hands of these reformers became a vital means of undermining the cooperative agrarian-based economy sought by the populists and they facilitated the growth of corporate capitalist industrialization sought by the northeast financiers. See generally S. BOWLES & H. GINTIS, *SCHOOLING IN CAPITALIST AMERICA* 176-79, *passim* (1976).

legislative, executive, and judicial acts of questionable constitutionality, precipitated an amendment to the education article in 1883.

Just as the framers had feared, immediately after the convention the legislature gave in to special interests and passed a statute giving cities special power to levy local school taxes.¹⁹⁹ The Supreme Court, expressly deferring to the legislature instead of following the framers' intent,²⁰⁰ upheld the constitutionality of these statutes in *City of Fort Worth v. Davis*.²⁰¹ Rural unincorporated areas still could not levy local school taxes, so the school finance system became unequal in a significant way. This inequality was exacerbated by the activities of the Peabody Foundation, which had sent organizers and a large amount of funds to Texas to create and maintain public schools.²⁰² All the efforts of this influential foundation, however, were directed at developing schools in cities.²⁰³

Even the city schools, though, were suffering from lack of funds. The economic depression continued. The government struggled

to pay the large floating indebtedness still remaining from the extravagance of the radical regime. The total annual revenues of the state were not sufficient to pay off the debt, to meet the running expenses of government, and to permit the use of one-fourth of the total for the maintenance of the free school system.²⁰⁴

To reduce debt without raising taxes, Governor O. M. Roberts vetoed the 1879 school appropriations bill which set aside one-fourth of state revenue.²⁰⁵ The veto was supported by those who favored the dismantling of the state's school system.²⁰⁶ Opponents of the veto said it violated the constitution's mandate of an efficient public school system.²⁰⁷ Governor Roberts' address to the legislature lent support to the accusation that his veto violated the spirit, if not the letter, of the

199. See Act of Aug. 19, 1876, § 15, 1876 Tex. Gen. Laws 201, § 56, 8 H. GAMMEL, LAWS OF TEXAS 1035, 1045 (1898)(municipal taxation for public schools granted).

200. See *City of Fort Worth v. Davis*, 57 Tex. 225, 233-34 (1882)(court must follow legislative construction of framers' intent even if incorrect).

201. See *id.* at 234 (statute authorizing municipal taxation for public school upheld).

202. See F. EBY, THE DEVELOPMENT OF EDUCATION IN TEXAS 185-87 (1925)(New England foundation sent money and organizers to Texas).

203. See *id.* (Peabody Fund promoted city schools).

204. *Id.* at 175.

205. *Id.*

206. L. Lewis, A History of the State School System in Texas 1876-1884, at 133, 137 (unpublished Ph.D. dissertation U.T. 1946).

207. *Id.* at 140, 149.

constitution. Roberts first spoke highly and longingly of the meager system of public schools established solely for the poor before the Civil War as the ideal type of school system.²⁰⁸ He then justified his veto by claiming that the fact that the constitution assigned to the government a positive and specific educational duty “is no criterion of its importance compared to other duties, and no evidence that it is given a special preference over others.”²⁰⁹ The “preferred creditors” of the state, Roberts said, are state officials who perform the “highest duty” of making and executing laws “for the protection of life, liberty and property. . . .”²¹⁰

In reacting to Roberts’ veto, the legislature cut the schools’ portion of general state revenues from one-fourth to one-sixth.²¹¹ Ostensibly to make up this shortfall in educational revenue, Roberts proposed a bill to allow rapid and cheap sale of state lands held in trust for the schools.²¹² The bill passed,²¹³ and through mismanagement and corruption²¹⁴ the state sold huge tracts of lands at prices far below market value to speculators and nonresident corporations.²¹⁵ Framer

208. See F. EBY, *THE DEVELOPMENT OF EDUCATION IN TEXAS* 124 (1925).

209. Message of Governor Oran M. Roberts to the Legislature of the State of Texas, Extra Session, June 10, 1879, H.J. OF TEX., 16th Leg., Extra Sess. 13 (1881).

210. *Id.* Roberts had it reversed. The framers imposed the education duty on the legislature because education was of great importance. See *supra* notes 91-93, 95-98 and accompanying text (detailing framers’ high regard for education). The framers also drafted provisions sharply limiting the salaries of government officials. See Address by John W. Mauer, *State Constitutions in Time of Crisis: the Case of the Texas Constitution of 1876*, TEXAS LAW REVIEW Symposium on the Texas Constitution 28-29 (Oct. 6, 1989)(intended for publication in 68 TEXAS LAW REVIEW); see also TEX. CONST. art. III, § 24, art. IV, § 5, art. V, §§ 2, 5 (1876, amended 1980)(limiting salaries of legislators, governor and appellate judges).

211. F. EBY, *THE DEVELOPMENT OF EDUCATION IN TEXAS* 175 (1925).

212. See E. EVANS, *THE STORY OF TEXAS SCHOOLS* 100, 104 (1955); E. WALLACE, CHARLES DEMORSE—PIONEER EDITOR AND STATESMAN 202 (1943); see also Roberts, *Message on Finance, Jan. 29, 1879*, TEXAS DEPARTMENTAL REPORTS 19-20 (1881).

213. See Act of July 14, 1879, ch. 52, 1879 Tex. Gen. Laws 48-49, 9 H. GAMMEL, LAWS OF TEXAS 80-81 (1879), amended by Act of Apr. 6, 1888, ch. 105, 1888 Tex. Gen. Laws 119-22, 9 H. GAMMEL, LAWS OF TEXAS 211-14 (1888).

214. See E. WALLACE, CHARLES DEMORSE—PIONEER EDITOR AND STATESMAN 206 (1943)(citing E. MILLER, *A FINANCIAL HISTORY OF TEXAS* 331 (1916)) (“Limitations on the amount of land that could be purchased were easily evaded, both legally and in spirit”).

215. See E. WALLACE, CHARLES DEMORSE—PIONEER EDITOR AND STATESMAN 207-28 (1943); REPORT OF THE BOARD FOR THE INVESTIGATION OF LAND FRAUDS IN THE STATE OF TEXAS (Jan. 3, 1884). By 1894, one English land syndicate owned 3 million acres in Texas. See C. OTKEN, *THE ILLS OF THE SOUTH* 142, 161 (1894). This acreage exceeded the total amount of land within the counties of Austin, Bastrop, Baylor, Bee, Bell, Bexar, Burleson, Dallas, Galveston, Hardin, Harrison, and Houston combined. The Texas Attorney General reported that corporations owned one-fourth of all the land in the state. *Id.*

Charles DeMorse and others denounced the land bill as an unconstitutional "destruction of the educational heritage of the state."²¹⁶ Lands not undersold were underleased and great fortunes were made by a small number of individuals who took advantage of this process.²¹⁷ Not surprisingly, the revenues produced by the fire sales and leases were inadequate to fulfill the needs of the state school system.²¹⁸ "The next several years saw a still further decline in school revenues and in the enrollment of children. These changes led to a speedy degeneration of the schools."²¹⁹

B. *The 1883 Amendment*

Additional taxation was necessary but Governor Roberts was unwilling to increase statewide taxes. *City of Fort Worth v. Davis*²²⁰ in-

216. E. WALLACE, CHARLES DEMORSE—PIONEER STATESMAN AND EDITOR 203, 206 (1943). In 1880, framer E.L. Dohoney's Greenback Party demanded a repeal of Robert's land law. And in 1884 the Greenbackers declared that "in a true republican government the ownership of these sovereign properties cannot be transformed or alienated in unequal share without destroying the equal rights and sovereignty of the people." Westin, *Populism and the Supreme Court*, in 1980 SUP. CT. HIST. SOC. YEARBOOK 64 (1980).

217. E. WALLACE, CHARLES DE MORSE—PIONEER STATESMAN AND EDITOR 212-14 (1943).

218. Upon succeeding Governor Roberts, Governor John Ireland demanded the change in the state's land policy. Proclaiming that "[w]hereas these lands are being daily sold, to the great detriment of the state, an imperative public necessity exists for the immediate passage of" the act, of January 22, 1883, which suspended all laws authorizing the sale of public lands. 9 H. GAMMEL, LAWS OF TEXAS 308 (1883).

On April 14, 1883, the Land Fraud Board was created by an act of the Legislature. *Id.* at 412-15. The Land Fraud Board was authorized to investigate alleged land frauds and initiate prosecutions for the state. The Board was given the power to annul purchases which violated the provisions of previous land acts. *Id.*

Governor Ireland appointed framer Charles DeMorse as chairman of the first Land Fraud Board. E. WALLACE, CHARLES DEMORSE—PIONEER STATESMAN AND EDITOR 207 (1943). The Land Fraud Board submitted its first report to Governor Ireland on January 3, 1884. In the report the Board referred to the Attorney General "claims to 750,000 acres of land procured by individuals in various parts of the state in violation of the land acts of 1879 and 1881." *Id.* at 209.

219. F. EBY, THE DEVELOPMENT OF EDUCATION IN TEXAS 76 (1925). Although the constitution added to the school fund one-half of the remaining unreserved portion of the public domain, in 1898 it was discovered that "the then-remaining unappropriated public domain was insufficient to satisfy the claims of the public school fund for its half of the unreserved lands as provided by the Constitution." TEX. CONST. art. VII, § 2, interp. commentary 380 (Vernon 1955). Consequently, in *Hogue v. Baker*, the Texas Supreme Court barred further locations on the public domain. 92 Tex. 58, 65, 45 S.W. 1004, 1006-07 (1898). An accounting made in 1899 showed a shortage to the school fund of 5,902,076 acres. TEX. CONST. art. VII, § 2, interp. commentary 380 (Vernon 1955).

220. 57 Tex. 225 (1882).

stitutionalized the growing inequality between cities and rural areas by granting to cities constitutional authority to raise supplemental local tax revenues for education.²²¹ As far back as 1881, Governor Roberts had suggested a need for a constitutional amendment to give rural students the same educational opportunities as urban students.²²² In January 1883, at the first regular session of the legislature after *Davis* was decided,²²³ Roberts argued for an amendment to section 3 of the education article. He directed the legislature's attention to the efficiency standard in section 1,²²⁴ and proposed the amendment to enable local school districts across the state to supplement the statewide finance scheme.²²⁵ Incoming Governor Ireland also supported the amendment as a means of allowing "a little local aid to supplement state educational aid" and give the school funds more stability.²²⁶ A joint resolution calling for the amendment passed the House and Senate and went to the voters.²²⁷

The Galveston Daily News described section 3 of the 1876 constitution as an "insurmountable obstacle to the establishment of an efficient system of free schools by the legislature,"²²⁸ and referred to the amendment as a means of "supplementing state aid with local taxes."²²⁹ The people of Texas ratified the amendment in August, 1883.²³⁰ The amendment authorized the legislature to create local

221. *Id.* at 237-38.

222. L. Lewis, *A History of the State School System in Texas 1876-1884* 171 (unpublished Ph.D. dissertation U.T. 1946); see also *General Message of Governor Oran M. Roberts on the Judiciary Education, the Dept. of Insurance, Statistics and History, Railroads, etc. to the 17th Legislature of the State of Texas, Jan. 3, 1881*, TEXAS DEPARTMENTAL REPORTS 12 (1881).

223. See *Shepherd v. San Antonio Junior College District*, 363 S.W.2d 742, 776 (Tex. 1962)(Calvert, J., dissenting); 2 G. BRADEN, *THE CONSTITUTION OF THE STATE OF TEXAS: AN ANNOTATED AND COMPARATIVE ANALYSIS* 512 (1977).

224. *Speech of Governor O. M. Roberts to the 18th Legislature*, S. J. OF TEX., 18th Leg., Reg. Sess. 15 (1883).

225. *Id.*; see also *The Fourth Amendment*, Galveston Daily News, July 20, 1883, at 4, col. 4. Governor Roberts explained: "The first amendment [article VII, section 1] places the school money where it can be had, and the third [1883 amendment of article VII, section 3] provides a place where it will do the most good—the school districts." *Id.*

226. L. Lewis, *A History of the State School System in Texas 1876-1884*, at 177, 180 (unpublished Ph.D. dissertation U.T. 1946).

227. Tex. S.J. Res. 5, 18th Leg., 1881 TEX. GEN. LAWS 134.

228. *The Proposed Amendments to the Constitution*, Galveston Daily News, Aug. 4, 1883, at 4, col. 5.

229. Galveston Daily News, July 24, 1883, at 3, col. 9; *The Proposed Amendments to the Constitution* Galveston Daily News, Aug. 4, 1883, at 4, col. 5.

230. *Returns of an election held on the 14th day of August, 1883, upon the adoption or*

school districts throughout the state.²³¹ These districts were also authorized to levy local ad valorem taxes for the support of public free schools.²³² The amendment also *required* that at least one-fourth of the general revenues be set aside, replacing the 1876 language that set a limit of not more than one-fourth of revenues for education.²³³ The amendment was intended to bring about more equality and lessen the disparity between communities' abilities to tax themselves to provide education.²³⁴ As the rural areas were given authority equal to the cities to impose local taxes, the proponents of the 1883 amendment expected rural districts to be as successful as the urban districts had been.²³⁵ Texans did not ratify the amendment of article VII, section 3 in 1883 for the purpose of creating a localized system of school finance. Rather, they saw supplemental local taxation as a way to begin to fulfill the prescript of section 1 of article VII.²³⁶

Although it is admittedly very difficult to ascertain the intent of the ratifiers,²³⁷ the election returns in 1876 and 1883 suggest that the people of Texas ratified the amendment in order to provide a new source of funds - local taxation - and thereby more effectively meet the "efficiency" mandate of article VII, section 1. In 1876, the central opposition to the article VII education provisions was in response to the funding limitation in section 3.²³⁸ However, the great majority of those counties voting against the constitution in 1876 because of the funding limitation of section 3 voted for the 1883 amendment of sec-

rejection of Amendments to the Constitution of the state of Texas, Secretary of State, REPORT OF THE SECRETARY OF STATE FOR THE STATE OF TEXAS (1884). The vote was 30,553 "for" and 20,237 "against" the amendment to article VII, section 3, which had been advocated by Governor Roberts, the State Board of Education, the teachers' association, and a majority of the political leaders. *Id.*

231. TEX. CONST. art. VII, § 3, historical note 385 (Vernon 1955).

232. *Id.*

233. *Id.*

234. F. EBY, *THE DEVELOPMENT OF EDUCATION IN TEXAS* 196-97 (1925).

235. *Id.* at 197.

236. *The Proposed Amendments to the Constitution*, Galveston Daily News, Aug. 4, 1883, at 4, col. 5. The Galveston Daily News, the state's largest and most influential newspaper at the time, stated that "[s]ection No. 3, article 7, as it stands [before enactment], is an insurmountable obstacle to the establishment of an efficient system of public free schools by the legislature; and the people, in whom alone lies the power, are asked to remove that obstacle by the amendment." *Id.*

237. See Levinson, *Interpreting State Constitutions by Resort to the Record*, 6 FLA. ST. U.L. REV. 567, 568 (1978).

238. See Galveston Daily News, Jan. 14, 1876, at 1, col. 4 (Republican platform denounced constitution for failing to ensure efficient public schools).

tion 3 which did not include the taxation limitations and did include the new local taxation source of funding.²³⁹ Sixteen of the 19 counties voting against the 1876 constitution and reporting election returns for the 1883 ratification election voted for the amendment of article VII, section 3.²⁴⁰ In Fort Bend County, only 13.75 percent voted for the 1876 constitution; 99.45 percent voted for the 1883 amendment of section 3.²⁴¹ In Mason County, only 12.28 percent voted for the 1876 constitution; 92.68 percent voted for the 1883 amendment of section 3.²⁴² In Matagorda County, 20.33 percent voted for the 1876 constitution; 93.10 percent voted for the 1883 amendment of section 3.²⁴³ The difference between the percentage of those voting for the 1883 amendment and the percentage of those voting for the 1876 constitution averaged 45.76 percent in the sixteen counties.²⁴⁴ These election results suggest the voters amended article VII, section 3 to achieve the constitutional standard of an efficient education contained in article VII, section 1.

C. *Current Local Wealth Disparities Not Intended in 1883*

Those who ratified the 1883 amendment could not have foreseen the vast disparities of wealth that now exist between school districts

239. REPORT OF THE SECRETARY OF STATE FOR THE STATE OF TEXAS FROM DEC. 1, 1874, TO MAY 1, 1876, at 38-43 (1876); *Returns of an election held on the 14th day of August, 1883, upon the adoption or rejection of Amendments to the Constitution of the State of Texas*, Secretary of State, REPORT OF THE SECRETARY OF STATE FOR THE STATE OF TEXAS (1884).

240. REPORT OF THE SECRETARY OF STATE FOR THE STATE OF TEXAS FROM DEC. 1, 1874, TO MAY 1, 1876, at 38-43 (1876); *Returns of an election held on the 14th day of August, 1883, upon the adoption or rejection of Amendments to the Constitution of the State of Texas*, Secretary of State, REPORT OF THE SECRETARY OF STATE FOR THE STATE OF TEXAS (1884).

241. REPORT OF THE SECRETARY OF STATE FOR THE STATE OF TEXAS FROM DEC. 1, 1874, TO MAY 1, 1876, at 38-43 (1876); *Returns of an election held on the 14th day of August, 1883, upon the adoption or rejection of Amendments to the Constitution of the State of Texas*, Secretary of State, REPORT OF THE SECRETARY OF STATE FOR THE STATE OF TEXAS (1884).

242. REPORT OF THE SECRETARY OF STATE FOR THE STATE OF TEXAS FROM DEC. 1, 1874, TO MAY 1, 1876, at 38-43 (1876); *Returns of an election held on the 14th day of August, 1883, upon the adoption or rejection of Amendments to the Constitution of the State of Texas*, Secretary of State, REPORT OF THE SECRETARY OF STATE FOR THE STATE OF TEXAS (1884).

243. REPORT OF THE SECRETARY OF STATE FOR THE STATE OF TEXAS FROM DEC. 1, 1874, TO MAY 1, 1876, at 38-43 (1876); *Returns of an election held on the 14th day of August, 1883, upon the adoption or rejection of Amendments to the Constitution of the State of Texas*, Secretary of State, REPORT OF THE SECRETARY OF STATE FOR THE STATE OF TEXAS (1884).

244. REPORT OF THE SECRETARY OF STATE FOR THE STATE OF TEXAS FROM DEC. 1, 1874, TO MAY 1, 1876, at 38-43 (1876); *Returns of an election held on the 14th day of August, 1883, upon the adoption or rejection of Amendments to the Constitution of the State of Texas*, Secretary of State, REPORT OF THE SECRETARY OF STATE FOR THE STATE OF TEXAS (1884).

today. If they had studied the matter, the framers and ratifiers would not have expected the abilities of the various school districts to raise supplemental school funds to be exactly equal. Yet it appears that there are much greater disparities of wealth between localities now than at the time the amendment was placed in the constitution.²⁴⁵ In 1883, Texas was primarily rural and substantially similar geographically and economically.²⁴⁶ Because productive wealth was largely tied up in farmland, property "accurately measured the ability of local school districts to finance education."²⁴⁷ The vast wealth disparities that exist between the state school districts today were not

245. The framers and ratifiers could not possibly have conceived the boundaries of future school districts in sufficient detail to enable them to know the degree to which these districts would have unequal abilities to raise supplemental education revenues. We do not now have statistics showing the 1883 disparities between these hypothetical districts, comparable to the statistics cited in *Edgewood* concerning disparities between districts in 1985. However, we do have data on property valuation by county in 1883. See REPORT OF THE COMPTROLLER OF PUBLIC ACCOUNTS OF THE STATE OF TEXAS FOR FISCAL YEAR FROM SEPT. 1, 1883 TO AUG. 31, 1884, at 48-55 (1884)(property valuations by county). Furthermore, we have census figures for school-age population by county. See DEPARTMENT OF THE INTERIOR, STATISTICS OF THE POPULATION OF THE UNITED STATES AT THE TENTH CENSUS 663-64 (1883)(census data). Utilizing this data we can conclude that the wealthiest county, Galveston (\$48,870 of property per square mile), had only *two times* more taxable property wealth per student than the poorest county, Edwards (\$65 of property per square mile). In comparison, the richest school district in 1985 had *700 times* more property wealth per student than the poorest district. *Edgewood Indep. School Dist. v. Kirby*, 777 S.W.2d 391, 392 (Tex. 1989). Although this would seem to indicate that property wealth was significantly more evenly distributed in 1883 than in 1985, one should not read too much into these figures. The data itself is unreliable. Despite the fact that the constitution required uniformity, there were great disparities between counties on the accuracy of their assessments of property. Moreover, Texas in 1883 was in flux. There is no reason to think that the framers and ratifiers thought the then-existing regional inequalities would or should continue. For example, because West Texas' King County had only eight school-age children in 1880, the county had an extremely high level of property wealth per student—more than 25 times higher even than Galveston County. No one would have expected this disparate level of wealth to continue in King County as the settlement of West Texas progressed.

246. *Kirby v. Edgewood Indep. School Dist.*, 761 S.W.2d 859, 874 (Tex. App.—Austin 1988)(Gammage, J., dissenting)(citing U.S. Department of the Interior, Compendium on the Tenth Census (June 19, 1980)), *rev'd*, 777 S.W.2d 391 (Tex. 1989). "In 1880, Texas was a land of small towns (only five with over 10,000 people and none with over 22,000 people) and sparsely settled rural areas." *Id.* While only five towns had more than 10,000 people, only four towns had between 5,000 and 9,999 people and only ten towns had between 2,500 and 4,999 people. See C. McClesky, *Urbanization and Politics in Texas*, in URBANIZATION IN THE SOUTHWEST 2 (Clyde J. Wingfield, ed. 1968)(providing a table with population of incorporated towns in different decades of Texas history).

247. Note, *Texas School Finance: The Incompatibility of Property Taxation and Quality Education*, 56 TEXAS L. REV. 253, 254 (1978)(citing *Property Taxation*, TEXAS LEGISLATIVE ISSUES, REPORT OF 65TH TEXAS LEGISLATURE PRE-SESSION CONFERENCES 67-68 (1977)).

contemplated, and as they began to occur, some of their underlying causes were opposed by the framers.²⁴⁸

The return to local taxation in 1883 predated industrialization, urbanization, and the discovery of oil,²⁴⁹ all of which contributed to the significant concentrations of property wealth currently existing in Texas.²⁵⁰ The emergence of power plants, heavy industry and com-

248. Members of the populist movement sought to stem what they saw as a widening gap between the rich and the poor resulting from the growth of corporate capitalism. *See generally* L. GOODWYN, *DEMOCRATIC PROMISE: THE POPULIST MOVEMENT IN AMERICA passim* (1976); H.U. FAULKNER, *AMERICAN ECONOMIC HISTORY* 378-79 (7th ed. 1954). Framers Thomas Nugent criticized the corporate monopolies and plutocratic capitalism for creating the millionaire and the tramp. *See* Nugent, *Opening Speech for Governor*, in *THE LIFE WORK OF THOMAS NUGENT* 183-84 (C. Nugent, ed. 1896). Populists marshalled figures to demonstrate that inequality of wealth increased in Texas and elsewhere as economic growth followed a corporate capitalist model. *See, e.g.,* W. MORGAN, *HISTORY OF THE WHEEL AND ALLIANCE, AND THE IMPENDING REVOLUTION* 376, 648-54 (1889). Although Texas-specific data is scarce and relatively unexamined, contemporary economists confirm this populist perception of rising disparity of wealth in the 19th century. *See* J. WILLIAMSON & P. LINDERT, *AMERICAN INEQUALITY: A MACROECONOMIC HISTORY* 33, 281 (1980); W. GRIEDER, *SECRETS OF THE TEMPLE* 245-48 (paperback ed. 1987). Moreover, this inequality was neither a necessary nor inevitable product of industrialization, but had to do with the growth of corporate capitalist modes of financing industrial development. J. WILLIAMSON & P. LINDERT, *AMERICAN INEQUALITY: A MACROECONOMIC HISTORY* 279 n.16, 280 (1980); W. GRIEDER, *SECRETS OF THE TEMPLE passim* (paperback ed. 1987). If implemented, the populist subtreasury banking system, designed by Texan Charles Macune, would have resulted in a compensatory redistribution of wealth to the indebted working class farmers. *See* L. GOODWYN, *DEMOCRATIC PROMISE: THE POPULIST MOVEMENT IN AMERICA* 580 (1976).

Now, at the close of the 1980s, there are greater wealth disparities than in any other period of American history for which records are available, with the possible exception of 1929. *See* Center on Budget & Policy Priorities, *Analysis of Poverty and Income Trends in 1988 passim* (Washington, D.C., 1989); L. Mishel & J. Simon, *State of Working America passim* (Economic Policy Institute, Washington, D.C., 1988). Professor Christopher Davies has described the growth of economic inequality in Texas as caused by corporate industrialization and urbanization. *See* *Life at the Edge: Urban and Industrial Evolution of Texas, Frontier Wilderness - Frontier Space, 1836 - 1876*, 89 SW. HIST. Q. 443, 461-62, 467, 508, 514-15 (1986).

249. One commentator noted that "[u]ntil around 1900, the search for water in Texas was more important than the search for oil; attempts were made to case-off the 'nuisance' oil when a driller struck oil in the search for water." W. BENTON, *TEXAS POLITICS—CONSTRAINTS AND OPPORTUNITIES* 28 (5th ed. 1984).

250. *E.g.,* L. ANDERSON, *THE STATE PROPERTY TAX IN TEXAS* 86-87 (1948).

In 1946, for example, property values in some sixty-six counties accounted for 68.2% of the total assessed valuations for the entire state. From those figures, it may be readily seen that property in approximately one-fourth of the counties bears more than two-thirds of the state's tax burden Some thirty-six of the sixty-six counties mentioned above are major oil-producing areas, and alone supplied 42.2% of the state's taxable property in 1946 [I]t is definitely known that petroleum resources in those jurisdictions are responsible directly for most of the wealth, and consequently make up a major segment of present taxable value Property in . . . the twenty-six counties having the highest

mercial retail centers have contributed to the clusters of wealth prominent in Texas today. The automobile also has "allowed economic areas to become specialized and residential areas to become economically homogenous."²⁵¹ Some of the vast wealth disparities between the state school districts were produced purposely by the manipulation of school district boundaries.²⁵²

Also significant is the fact that local school taxes, authorized by the 1883 amendment, generally were perceived to be a supplemental as-

annual petroleum production records in 1946 . . . accounted for 23.5% of the state's valuation in 1932. In 1946, property values in the same counties accounted for 35.1% of the state's total assessed valuation, an increase of almost 12% in fifteen years.

Id.

251. Coleman, *Foreword*, in J. COONS, W. CLUNE III & S. SUGARMAN, *PRIVATE WEALTH AND PUBLIC EDUCATION* viii (1970).

252. *Edgewood Indep. School Dist. v. Kirby*, No. 362, 516 (Dist. Ct. of Travis County, 250th Judicial Dist. of Texas, Oct. 27, 1987), Findings of Fact and Conclusions of Law, at 38-39, *rev'd*, 761 S.W.2d 859 (Tex. App.—Austin 1988), *rev'd*, 777 S.W.2d 391 (Tex. 1989).

Numerous school districts have been formed inside single counties. In Bexar County alone there are fifteen separate school districts. These districts possess vastly different abilities to raise revenue through equal rates of property taxation. For example, the Alamo Heights Independent School District, with 3,225 students, enjoys \$576,109 of taxable property per student, taxes at the rate of 72.76 cents per \$100 property valuation, and thereby produces taxable revenue of \$4,236.40 per student. By contrast, the Edgewood Independent School District, with 14,153 students, enjoys only \$40,666 of taxable property per student, taxes at the rate of 70.82 cents per \$100 property valuation, and thereby produces taxable revenue of only \$288 per student. Thus, while the two districts tax at roughly the same rate, Alamo Heights receives almost fifteen times the revenue per student through its tax effort than that received by Edgewood through its local tax effort. *See Texas Education Agency, SENATE BILL 1019 AS ADOPTED BY THE LEGISLATURE - SCHOOL DISTRICT CHARACTERISTICS 188 & Printouts (1989)*(containing raw data for above figures).

The intra-county configurations of school district boundaries have resulted in fundamental inequities in the Texas school finance system. *Edgewood Indep. School Dist. v. Kirby*, 777 S.W.2d 391, 393 (Tex. 1989). In *Edgewood*, the Texas Supreme Court stated:

The lower expenditures in the property-poor districts are not the result of lack of tax effort. Generally, the property-rich districts can tax low and spend high while the property-poor districts must tax high merely to spend low. In fiscal 1985-86, local tax rates ranged from 9 cents to \$1.55 per \$100 valuation. The 100 poorest districts had an average tax rate of 74.5 cents and spent an average of \$2,978 per student. The 100 wealthiest districts had an average tax rate of 47 cents and spent an average of \$7,233 per student. In Dallas County, Highland Park I.S.D. taxed at 35.16 cents and spent \$4,836 per student while Wilmer-Hutchins I.S.D. taxed at \$1.05 and spent \$3,513 per student. In Harris County, Deer Park I.S.D. taxed at 64.37 cents and spent \$4,846 per student while its neighbor North Forest I.S.D. taxed at \$1.05 and yet spent only \$3,182 per student. A person owning an \$80,000 home with no homestead exemption would pay \$1,206 in taxes in the east Texas low-wealth district of Leveretts Chapel, but would pay only \$59 in the high-wealth district of Iraan-Sheffield. As a result, many districts have become tax havens.

Id.

pect of the state school finance scheme.²⁵³ However, governors and legislatures came to increasingly rely on local funds. With characteristic prescience, framer Thomas Nugent criticized this development for its effect on the schools and for the opportunities for tax avoidance it offered the wealthy.

[T]he principle of moderate state taxation for school purposes, it is plain to see, is threatened with destruction. Even the governor perceives the 'idea of paternalism' involved in this method of providing for public instruction, and, in his message to the late special session of the legislature, expresses it as his 'own view,' that the state 'will finally be compelled to content itself with the preservation, collection and distribution of the annual income derived from its permanent fund among the several counties according to scholastic population, and leave to the counties and smaller subdivisions the entire matter of school regulation and maintenance by local taxation.' Whereupon, I have no doubt, that every bank president and railroad magnate in the state, and every non-resident landholder silently but fervently ejaculated, amen!²⁵⁴

VI. CONCLUSION

The history which preceded the framing of the current Texas Constitution was one in which high educational ideals announced in the Texas Declaration of Independence and in the state's successive constitutions were thwarted by legislative and executive branch corruption. The permanent school fund repeatedly was given away to railroad corporations. The ambitious post-Civil War system of free public schools became an extravagant vehicle for political patronage.

The framers of the current Texas Constitution convened with the intent of ending oppressive usurpation of government by wealthy and privileged classes. They sought to address inequalities in educational opportunity by forcing the wealthy to pay their fair share of taxes so that the children of the poorest Texans could avail themselves of their constitutional right to an education.

The convention thus imposed upon the legislature a duty to provide an efficient school system for the general diffusion of knowledge.

253. See *City of Fort Worth v. Davis*, 57 Tex. 225, 232 (1882)(local taxes intended to supplement state funding); see also L. Lewis, *A History of the State School System in Texas 1876-1884* 179-80 (unpublished Ph.D. dissertation U.T. 1946)(communities expected to rely on local taxes for additional school funds).

254. Nugent, *Judge T.L. Nugent Declines*, in *THE LIFE WORK OF THOMAS NUGENT* 279, 283 (C. Nugent, ed. 1896).

Meeting in the depths of a depression, and cognizant of the massive debt burdening Texas government, the framers placed limitations on taxation and made this duty partially prospective because they knew that contemporary legislatures lacked the resources to fully honor it. In 1883, Texans amended article VII, section 3 to facilitate the legislature's ability to fulfill the constitutional promise of an efficient education contained in section 1. Yet Texas school children have waited more than a century for their prospective right to education to become vested. In *Edgewood Independent School District v. Kirby*, the Texas Supreme Court has finally given some effect to section 1 of the education article and held the legislature to its duty to effectuate the right to education, a right which is essential to the preservation of all other liberties and rights of the people.