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## Public Free Schools: A Constitutional Right to Educational Choice in Texas

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# PUBLIC FREE SCHOOLS: A CONSTITUTIONAL RIGHT TO EDUCATIONAL CHOICE IN TEXAS

*Allan E. Parker, Jr. \**

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## I. INTRODUCTION

THE Texas Supreme Court's decision in *Edgewood Independent School District v. Kirby*<sup>1</sup> has aroused much controversy, political maneuvering, and some "educational reform" by the Texas legislature.<sup>2</sup> As a result of *Edgewood*, the state's educational leadership has grappled with many issues of educational reform beyond the pure finance equity issues addressed in *Edgewood*, including the idea of public/private educational choice. This article will deal with two issues. First, whether the Texas Constitution gives parents the right to select an educational provider of their choice and receive tuition funding from the state, rather than being compelled to select an unsatisfactory state-operated institution of public education. Second, whether the legislature could constitutionally choose to adopt a plan of public/private educational choice as a method of providing public education in Texas. Many believe that a system of competition fostered by public/private choice, which would empower parents with greater control over their children's education, would invigorate public education with particular benefit to the economically disadvantaged.

The Texas Constitution requires the legislature to establish a system of "public free schools," not free public schools in the modern sense. What is a public free school system? This article will demonstrate that a "system of public free schools" must include educational choice for parents and tuition reimbursement for providing education, especially for indigent students. At an absolute minimum, such a plan could be constitutionally adopted by the legislature.

The idea of educational choice as a desirable social policy is currently experiencing a national rebirth.<sup>3</sup> The Bush Administration has made school

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

2. See Act of June 7, 1990, 71st Leg., 6th C.S., ch. 1, 1990 Tex. Gen. Laws 1. This reform legislation was declared unconstitutional by the district judge on September 24, 1990. *Edgewood Indep. School Dist. v. Kirby*, No. 362516 (Dist. Ct. of Travis County, 250th Judicial Dist. of Tex., Sept. 24, 1990), *judgment vacated in part*, 804 S.W.2d 491 (Tex. 1991). The statute introduces accountability into the government monopoly on education in a number of ways such as publishing test results and other performance data. More data on low performance will contribute to a growing public clamor for choice in education as the deficiencies of current schools become more widely known and glaringly apparent.

3. See J. CHUBB & T. MOE, *POLITICS, MARKETS AND SCHOOLS* (1990); REPORT TO THE PRESIDENT, U.S. DEPT. EDUC., *EDUCATING OUR CHILDREN: PARENTS AND SCHOOLS TOGETHER* (1989); Chubb & Moe, *America's Public Schools: Choice is a Panacea*, BROOKINGS REV. 4 (Summer 1990); Clark, *The Future Civil Rights Agenda: Speculation on Litigation, Legislation, and Organization*, 38 CATH. U.L. REV. 795, 798 (1989); Clinchy, *Public School Choice: Absolutely Necessary but not Wholly Sufficient*, PHI BETA KAPPAN, Dec. 1989, at 289; Finn, *The Choice Backlash*, NAT'L REV., Nov. 10, 1989, at 30; Glenn, *Putting School Choice in Place*, PHI BETA KAPPAN, Dec. 1989, at 295; Mitchell, *Secularism in Public Education: The Constitutional Issues*, 67 B.U.L. REV. 603, 681-82 (1987); Nathan, *Helping all Children, Empowering all Educators: Another View of School Choice*, PHI BETA KAPPAN, Dec. 1989, at 304; *A New Escape Route from Public Schools*, U.S. NEWS & WORLD REP., Apr. 9, 1990, at 10; Shapiro, *Pick a School, Any School*, U.S. NEWS & WORLD REP., Sept. 3, 1990, at 70; 1 R. Domanico, *Model for Choice: A Report of Manhattan's Dist. 4* (October 1989) (Education Policy Paper for the Manhattan Institute for Policy Research); H. Levin, *The Theory of Choice Applied to Education* (May 1989) (Paper prepared for the conference on "Choice and



choice a centerpiece of its educational restoration plan.<sup>4</sup> Some public schools have already adopted public school choice plans voluntarily,<sup>5</sup> giving each school a special emphasis and allowing students to choose their own schools. Schools that cannot attract students are closed and reopened under new management.

An even more far reaching and innovative experiment is taking place in the Milwaukee public schools. As of September 4, 1990, Wisconsin will allow a few fortunate indigent students to attend private non-sectarian schools of their own choice in Milwaukee, with the state reimbursing up to \$2500 of their tuition expense.<sup>6</sup> Voters in Oregon were asked in November 1990 to approve a plan for every school student to receive \$2500 to attend any school of his choice, public or private, sectarian or non-sectarian. While the plan failed to elicit majority support, almost forty percent of the voters approved of this fundamental restructuring of public education. Clayton Williams, the Republican gubernatorial candidate in Texas, advocated public/private tuition vouchers, and was only narrowly defeated.

The constitutionality of any educational choice plans which include private schools will certainly be a key factor in their implementation. The currently entrenched educational monopoly has spent decades consolidating its power; vast sums of money and massive numbers of jobs are at stake. Both teachers unions and educational management are, as a group, overwhelmingly opposed to allowing parents the normal economic right to choose the providers of educational services to their family.<sup>7</sup> Any state that implements a true choice plan or voucher system that allows students to opt out of the current public school monopoly can expect the same reaction experienced in Wisconsin. The teachers unions at least, and often other special interest groups, will challenge the plan's constitutionality. Even the state superintendent of education charged with implementation of the plan may sabotage the plan. In Wisconsin, the State Superintendent has practically invited the unions to challenge the plan and is openly hostile to the plan.<sup>8</sup> The teachers unions and the NAACP immediately sued to enjoin the Milwaukee Plan.<sup>9</sup>

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Control in American Education" by the Center for Educational Research at Stanford [CERAS]); F. Newman, A State Policy Maker's Guide to Public-School Choice (February 1989) (unpublished manuscript); 2 The Right to Choose: Public School Choice and the Future of American Education (June 1989) (Education Policy Paper for the Manhattan Institute for Policy Research).

4. San Antonio Light, Dec. 5, 1990, at B8, col. 6.

5. Richmond Independent School District in California and East Harlem Independent School District in New York are the most prominent national examples.

6. WIS. STAT. ANN. § 119.23 (1990) (Milwaukee Parental Choice Program). The plan is limited to Milwaukee public school students whose family income is below one hundred seventy-five percent of the federal poverty level.

7. Debate Transcript, *The Merits or Demerits of the Public Funding of Private Education*, 1 NOTRE DAME J.L. ETHICS & PUB. POL. 453, 455 (1985); Rebell, *Educational Voucher Reform: Empirical Insights from the Experience of New York's Schools for the Handicapped*, 14 URB. LAW. 441, 441, 449-50 n.26 (1982); Solet, *Educational Vouchers: An Inquiry and Analysis*, 1 J. LAW & EDUC. 303, 312, 316-17 (1972).

8. Kent, *State School Chief Hoping for Lawsuit Over Choice Issue*, La Crosse Tribune, May 8, 1990, at B1, col. 1.

9. Organizations participating in the legal challenge are the Wisconsin Association of

Only one half of the money the state would have spent on these children will be paid to their private school, with the Milwaukee public schools keeping the other half even though they no longer educate the child.<sup>10</sup> This pilot program is heavily encumbered with protection for the public school monopoly in three major ways: (1) the supply of competitors is reduced by cutting out sectarian schools; (2) the demand by eligible students is limited to those with family incomes under one hundred seventy-five percent (175%) of the federal poverty level; and (3) even if the public school is so bad that a parent will not send his child there unless forced to do so, the school still keeps one half of the child's share of education dollars. But, despite these protections, the public school unions have sued to block the pilot program rather than wait to see how the program works. It is ironic that the NAACP is one of the plaintiffs since the great majority of the eligible students under this program are black.<sup>11</sup>

What is the source of a constitutional right to educational choice and why is it not being implemented in Texas at the current time? The answer lies in the Texas Constitution itself, of course, but even more importantly in this instance than in other cases of constitutional interpretation, the answer lies in the history of the constitution and the intent of the framers and ratifiers at the time of the constitution's adoption. We shall find that the constitution's original intent and our current educational system are diametrically opposed. The reason for this unusual divergence lies in the fact that the Texas Constitution's education article is couched in language which means one thing in today's intellectual climate, but had an entirely different meaning at the time of its adoption. If one reads the constitutional language today and simply interprets it using the current definition and understanding of those words, he may reach a result which supports the current system of state-financed, state-operated public education. On the other hand, if one is aware of the constitution's history, the understanding of its framers, and the intent of its ratifiers, he will conclude that Texas courts should recognize parents' constitutional right to the education of their choice, whether a "public" school in the current sense, or a private school which becomes "public" in

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School District Administrators, Inc., Wisconsin Education Association Council, National Association for the Advancement of Colored Persons, Milwaukee Branch, Association of Wisconsin School Administrators, Milwaukee Teachers Education Association, Wisconsin Congress of Parents and Teachers, Inc., Milwaukee Administrators and Supervisors Council, Inc., and the Wisconsin Federation of Teachers as intervenors, petitioners and appellants. Reply Brief of Intervenors-Petitioners-Appellants, *Davis v. Grover*, 159 Wis. 2d 150, 464 N.W.2d 220 (Wis. Ct. App. 1990) (No. 90-1808-LV), *petition for review granted*, 468 N.W.2d 27 (Wis. 1991).

10. Oregon plan was also weighted toward public schools with the proposed private schools only receiving a set amount of \$2500 rather than an amount equal to that spent in public schools.

11. Julius Chambers, Director-Counsel of the NAACP Legal Defense and Educational Fund had previously stated "We cannot afford to overlook new ways in which to remedy the immediate harm now befalling so many poor and black students," yet the NAACP opposition to the new Milwaukee plan indicates perhaps they should take their own advice and look again. Chambers, *Adequate Education for All: An Achievable Goal*, 22 HARV. C.R.-C.L. L. REV. 55, 72-73 (1987).

the 1876 sense by the acceptance of state resources for tuition payments.<sup>12</sup> This right is far more historically valid than the one the Texas Supreme Court created in *Edgewood Independent School District v. Kirby*,<sup>13</sup> and far more potent as a social policy for true educational reform.

The evolution of the Texas educational system has involved a battle over the meaning of "public free schools." It is fascinating that the constitutional language has remained unchanged since 1876, but the social and cultural meaning of the phrase "public free schools" and "public education" in general have changed radically. With changes in the social definition came changes in the educational structure that reflect the change in social meaning, without, however, any constitutional amendment. In one sense the constitution has been "amended" by the cultural change in its meaning. This may be perhaps consistent with current majoritarian desires, but, in a legal sense, the original meaning of the phrase is still embodied in the constitution as the only official recording of the people's mandate. The original meaning can be resurrected today by advocates of educational choice to argue convincingly either that choice is a constitutional right, or, at the very least, that a legislatively enacted public/private choice system would clearly be constitutional.

As can be seen throughout the evolution of Texas education, two related but separate issues were often confused. The first is whether education should be publicly or privately financed. From 1840 to 1876, many Texans resisted state spending, and particularly taxation, for education on the grounds it was a purely private function.<sup>14</sup> The second issue follows the resolution of the first. If public financing of education is adopted, will there be private or state operation of schools? State funding does not automatically require state operation, though powerful incentives for state operation follow from state funding. Today, no one debates the propriety of public financing for education, but this was a hotly debated topic in the formation of the Texas Constitution and clouds some of the debate over state/private control of schools. The growing national debate today is not whether public financing of education should continue, but whether control of education should be taken from the state and returned to parents, primarily through a voucher system.

This Article is timely because the idea of educational choice is an appealing social policy with tremendous promise for reinvigorating education. However, the Article will generally leave the social policy arguments to another day and other scholars. If public/private choice is adopted, it will be

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12. The sense in which a private school becomes a "public" school by accepting students whose tuition is paid by the state means only that it is open to all, in the sense of public accommodation. This does not mean that merely by accepting state tuition it becomes the government, i.e., a state actor. Such schools may be subject to minimal state regulation, but only for compelling state reasons. Otherwise, all schools become government schools and the state monopoly is reestablished, supply is limited to one producer, and the benefits of competition for which public/private choice is designed are eliminated.

13. 777 S.W.2d 391 (Tex. 1989).

14. 1 G. BRADEN, THE CONSTITUTION OF THE STATE OF TEXAS: AN ANNOTATED AND COMPARATIVE ANALYSIS 505-06 (1977).

attacked in court. Given the fact that education is traditionally a state function, to which the United States Constitution is silent,<sup>15</sup> state constitutional attacks should be the primary means used by choice opponents to combat any threatening changes.<sup>16</sup> Thus, this Article will determine if public/private educational choice, whether in the form of tuition payments, vouchers, tax credits, or reimbursement plans, would be constitutional if adopted by the legislature or whether it would violate the principle of "public education." Surprisingly, history reveals that Texas had parental choice systems at times from 1856 to 1908,<sup>17</sup> as well as a strong early commitment to free education for indigents in private schools. Choice today is not only permissible, but may be a constitutional right guaranteed by the 1876 Constitution in force today.

In addition to arguing that a constitutional right to state reimbursement for "private" education is required by the history, intent, and language of the Texas Constitution, this Article will demonstrate that, despite current inexperience with proposed voucher systems, the tuition reimbursement system has worked before in Texas. Though the early voucher system became underfunded, and for that reason was abolished legislatively, if adopted today, a voucher system would be supported by a more than adequate educational funding base, as well as sound social policy reasons and proper constitutional interpretation. The advocates of parental choice acquire more adherents as the inadequacies of the current state educational monopoly become more glaringly obvious to all.

The starting point for any analysis must be article 7 of the 1876 Texas Constitution, still in effect today. Section 1 of that article is the general clause establishing the type of educational system required in Texas. Section 1 states:

Section 1. A general diffusion of knowledge being essential to the preservation of the liberties and rights of the people, it shall be the duty of the Legislature of the State to establish and make suitable provision for the support and maintenance of an efficient system of public free schools.<sup>18</sup>

As one reads this provision, the first error the modern mind must avoid is transposing the last three words of the constitutional provision from "public free schools," which is what the constitution actually says, to the more contemporary and customary concept of free public schools. This transposition is natural because free public schools have come to dominate American educational thought to such an extent that advocating any change in this system is almost considered heresy.

The danger of verbal transposition arising from a projection of our modern view into the past is so great that it even crept into a recent law journal

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15. See *San Antonio Indep. School Dist. v. Rodriguez*, 411 U.S. 1 (1973).

16. If sectarian schools are included in a choice plan Establishment Clause challenges will also be made under the United States Constitution.

17. Eby, *Education in Texas: Source Materials*, U. TEX. BULL. No. 1824, at 830-31 (1918) [hereinafter Eby, *Sourcebook*].

18. TEX. CONST. art. VII, § 1.

article purporting to ascertain the true intent of the education article. The article twice misquotes the education article as establishing a system of "free public schools."<sup>19</sup> The authors of that article further evince a lack of sensitivity to the meaning of these terms by misquoting a Galveston newspaper of 1883 as support for a modern system of public education.<sup>20</sup> The credibility of the authors' arguments as to the intent of the original framers is somewhat lessened when it appears they have lapsed into modernism. How can government establish a system of public free schools<sup>21</sup> if we do not know what the term means?

By analyzing the public debates surrounding the ratification of the 1876 Constitution, the actions of the early legislatures construing this constitution, and the educational system in place before and after its adoption, this Article will demonstrate that the current triumph of free public education has been so complete that the legislature is failing in its constitutional duty to maintain a "system of public free schools." A system of "public free schools" would include elements of private parental choice in education with state payment for educational expenditures. It will be shown that the state may provide state-supported, state-controlled educational institutions as part of an efficient system of "public free schools," because of the 1883 constitutional amendments, but it must also provide state financial support for parents who choose private schools for the constitutional system that was envisioned to be properly established.

A truly constitutional system of "public free schools" would allow three types of schools to exist in Texas. First, public schools would remain the same — state funded and state operated. Second, "free schools" would be schools chartered by the state as private enterprises subject to minimal regulation, which are public and open to all, and which accept state payments in lieu of tuition. They would be free — open to all; free — of government regulation and control; and free — tuition-free through total or partial reimbursement. Third, private schools would be completely unregulated and accept no state tuition payments. The "public schools" and "free schools" together would constitute the "public free school system."<sup>22</sup>

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19. Watts & Rockwell, *The Original Intent of the Education Article of the Texas Constitution*, 21 ST. MARY'S L.J. 771, 791, 804 (1990).

20. The same quotation from *The Proposed Amendments to the Constitution*, Galveston Daily News, July 24, 1883, at 4, col. 5, is quoted as "efficient system of free schools," *id.* at 813 (emphasis added), and "efficient system of public free schools," Watts & Rockwell, *supra* note 19, at 813 n.236 (emphasis added).

21. Another example of the modern transposition problem is seen in 5 GOVERNOR'S COMMITTEE ON PUB. SCHOOL EDUC., THE CHALLENGE AND THE CHANCE 1 (1969), wherein "free" is dropped completely. "The Texas Constitution requires the state Legislature to provide for an 'efficient system of public schools' and authorizes the establishment of financial support for such a system." Braden also recognizes this transpositional danger. See 1 G. BRADEN, *supra* note 14, at 505-06.

22. Of the states which have faced financing equity lawsuits, no other state constitutional provision uses the same terms in its education article; Idaho calls for "Public Free Common Schools." See Perry, *Financing Education in Minnesota: Equity and Constitutionality Questions Raised by the State Referendum Levy*, 8 LAW & INEQUALITY 229, 267 (1989) (appendix with state-by-state breakdown).

As the supreme court made clear even in *Edgewood*, in construing the constitution, the court must consider the "intent of the people who adopted it, . . . the history of the times out of which it grew and to which it may be rationally supposed to have direct relationship, the evils intended to be remedied and the good to be accomplished."<sup>23</sup> The court recognized some difficulty in determining intent after more than a century's passage, and relied "heavily on the literal text."<sup>24</sup> Consequently, any analysis of the constitutionality of choice must consider the history and times leading to the 1876 Constitution's education article.

## II. TEXAS EDUCATION PRIOR TO 1875<sup>25</sup>

### A. 1845 Constitution

To understand the 1876 term "public free schools," one must first analyze the provisions concerning education in the prior Texas Constitutions. The reason for this is that the term "public free schools" is actually a combination of two different concepts, i.e., "free schools" and "public schools," neither of which meant then what they mean today.<sup>26</sup> In 1845 the constitutional provision concerning education read as follows:

Section 1. A general diffusion of knowledge being essential to the preservation of the rights and the liberties of the people, it shall be the duty of the Legislature of this State to make suitable provisions for the support and maintenance of *public schools*.<sup>27</sup>

Notably, the language in the 1845 Constitution only concerns "public schools." This language is particularly misleading to modern ears because we use the same words — public schools — to mean state-supported, state-controlled, state-operated educational institutions. But the words had a completely different meaning in 1845, a meaning we have since lost.

The phrase public schools was used in a sense similar to the modern British usage; public schools were really private schools, but they were public in the sense that the government would assist in their funding.<sup>28</sup> So, great caution must be used in analyzing texts and speeches of the day since "public

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23. 777 S.W.2d 391, 394 (Tex. 1989).

24. *Id.*

25. Little of the Spanish or Mexican educational systems directly affects the issues discussed in this article, but it is interesting that San Fernando de Bexar in 1828 required an inscription over the door—"PUBLIC FREE PRIMARY SCHOOL." Cox, *Educational Efforts in San Fernando de Bexar*, 6 TEX. HIST. A.Q. 27, 53 (1902). The Texas Declaration of Independence criticizes Mexico for failing "to establish any public system of education, although possessed of almost boundless resources." The Declaration of Independence of the Republic of Texas (1836), TEX. CONST. app. 519 (Vernon 1955); Eby, *Sourcebook*, *supra* note 17, at 130.

26. See 1 C. DABNEY, *UNIVERSAL EDUCATION IN THE SOUTH* 407 (1936). During the Republic period, 1836-1845, the state laws and constitution contained "no vision of a state-endowed, state supported, or state controlled educational system." TEX. CONST. art. VII, § 1, interp. commentary (Vernon 1955).

27. TEX. CONST. of 1845, art. X, § 1 (emphasis added).

28. TEX. CONST. art. VII, § 1, interp. commentary (Vernon 1955) ("Section 1 envisions a state policy of assisting private schools . . .").

school" advocates were actually proposing what we would term public support for private schools.

Article X, section 2 of the 1845 Constitution went on to require that:

Section 2. The Legislature shall as early as practicable establish *free schools* throughout the State, and shall furnish means for their support, by taxation on property; and it shall be the duty of the Legislature to set apart not less than one-tenth of the annual revenue of the State derivable from taxation, as a perpetual fund, which funds shall be appropriate to the support of *free public schools*, and no law shall ever be made diverting said fund to any other use; and until said time as the Legislature shall provide for the establishment of such schools in the several Districts of the State, the fund thus created shall remain as a charge against the State passed to the credit of the *free common school fund*.<sup>29</sup>

In these two sections of the 1845 Constitution four different terms for education have been employed: (1) "public schools"; (2) "free schools"; (3) "free public schools"; and (4) "the free common school."<sup>30</sup> However, despite the apparent synonymity of these terms in our current usage, it is clear, as Professor Frederick Eby, the most prominent historian of Texas schools, has noted that the 1845 Constitution "did not propose free tuition for all children or the principle of general taxation for popular education or a system of state-owned and supported schools. The advocates of private and church schools fully expected the state to assist in promoting their particular enterprises."<sup>31</sup> The establishment of "public schools" indicated only "the adoption of a general policy of assisting the people in their private and community enterprises."<sup>32</sup>

What then were "free schools"? To the modern ear, the term "free schools" elicits a vision of state operated schools to which all children of scholastic age are able to attend without the payment of tuition. However, this is directly contrary to the concept of free schools at the time of the 1845 Constitution's adoption. The principle of providing for "free schools" funded by taxation on property was merely wise charity aimed at allowing the education of orphans and indigent children.<sup>33</sup> The state merely paid tuition of these students at what would today be considered "private" schools. The majority of the people of Texas did not expect separate free schools to be organized for orphans and indigents, but expected only that the orphans' and indigents' tuition be paid with public funds to allow their education at private schools.<sup>34</sup>

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29. TEX. CONST. of 1845, art. X, § 2 (emphasis added).

30. Professor Lang characterizes this provision as establishing "a state, free, common school fund." A. LANG, FINANCIAL HISTORY OF THE PUBLIC LANDS IN TEXAS 127 (1932).

31. F. EBY, THE DEVELOPMENT OF EDUCATION IN TEXAS 107 (1925) [hereinafter EBY, DEVELOPMENT].

32. *Id.*

33. See 1 G. BRADEN, *supra* note 14, at 505-06.

34. TEX. STATE TEACHERS ASS'N, ONE HUNDRED YEARS OF PROGRESS IN TEXAS EDUCATION: 1854-1954, at 7 (1954) [hereinafter TEX. STATE TEACHERS ASS'N], further states: It [1845 Constitution] had none of that undaunted enthusiasm for state education that characterized the men of 1836. A few definite steps were taken, however, toward a system of public schools. Ten percent of the state's annual

Texas in 1845 existed in an entirely different educational environment than the one we know today. The people in Texas at the time looked upon education as a

purely private concern to be left to the decision of the parents to train their offspring to their own ideals and habits of life as the primary duty of parents; a duty imposed at once by divine command and by the order of nature. Education is no business of the State. For the State to interfere in this solemn relationship is a rank impertinence and subversive of the inherent rights of parenthood. They looked upon public taxation to educate the children of others as an act of confiscation and robbery under the guise of law. Every parent was responsible for the education of his own children.<sup>35</sup>

While the above constituted the predominate view of most Texans in 1845,<sup>36</sup> a large second group of overlapping membership held that education was a religious function, and that training in and the development of Christian character and morals was the sole purpose of education. Consequently, the church had to be vitally involved in, if not in complete control of, education. The church was interested in institutions of higher education to educate ministers. But the churches also established local schools and academies as a means of spreading the Gospel and forming Christian morality. The reasoning of the Christian community, which certainly constituted the vast bulk of the community, was that since the state benefitted by the character training provided by their institutions, they should receive the benefit and support of state funding and sanction.<sup>37</sup> From 1836 to 1845, when Texas became a state, there were numerous instances of state lands being given directly to denominational schools for the establishment of educational institutions.<sup>38</sup> This was considered a proper use of government lands since the government's interest was only in seeing that education was provided to all, the church being legitimately capable of providing educational policy and actually implementing the educational goals. Even parents in the first group, who felt that education was primarily a parental responsibility rather than a state responsibility, were generally willing to send children to religious schools, particularly those of their own denomination.<sup>39</sup>

While Texas was predominantly composed of settlers from the old South with these views as to education, there was a slight northern influence at the

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revenue was set aside by law as 'a perpetual fund' to be used to educate children of indigent parents. This was a charity and was generally accepted without opposition.

35. EBY, DEVELOPMENT, *supra* note 31, at 105-06.

36. TEX. STATE TEACHERS ASS'N, *supra* note 34, at 7.

37. *Id.*

38. From 1839, when the first such grant was made to Dekalb College, until 1857, a total of 172,319 acres were given away to colleges and seminaries. A. LANG, *supra* note 30, at 99 (citing Land Office Report, Nov. 2, 1857; 9 H. GAMMEL, LAWS OF TEXAS 5 (1898) (Table XI)). The private schools did not even have to pay the statutory fees which all other land grant recipients such as settlers were required to pay. *Id.* See also T. MILLER, THE PUBLIC LANDS OF TEXAS 1519-1970, at 116-17 (1972); R. RICHARDSON, TEXAS: THE LONE STAR STATE 231 (1943).

39. EBY, DEVELOPMENT, *supra* note 31, at 106.



time. Northern settlers were more likely to favor what is now the current concept of free public education supported and controlled by the state, available without tuition to all students regardless of indigency. After all, when the northern settlers settled in the state, they brought with them their notions of education based upon those in effect in their place of birth or upbringing. The northern policy of state-operated public education was predominate in the New England states and in some of the north central states during the 1830s and 1840s. Most leaders of the Texas Revolution and its early government were from the south and, consequently, were more familiar with public education on the southern model.<sup>40</sup> The southern educational philosophy was not monolithic, for even in the Constitutional Convention of 1845, a few northern-educated leaders, who favored a complete state-controlled system of public education, exerted some influence.<sup>41</sup> These leaders attempted to use the language of "free public schools" in section 2 to establish a state-operated educational system, as opposed to the parental education model, but were never successful in establishing their desire by any legislation.<sup>42</sup>

The final strain of thought governing most people's view of education in Texas in 1845 was a belief, even among those who supported the parental education view as opposed to the state education view, that the state, as a matter of charity and not of right, owed an obligation to provide for the care of indigent and orphaned children. This concept, which arose in sixteenth century England, came to be viewed as a legitimate function of government and lead (in England) to the idea of the poor rates, a tax upon property for the care of paupers.<sup>43</sup> Even in the southern United States a form of pauper education was to be found. Texans still felt particularly deep sympathy for the orphans and indigent children of those men who had made the sacrifice of their lives during the battle for the Republic of Texas.

In summary, "public schools" in 1845 actually meant state-supported *private* education that was open to the public,<sup>44</sup> and "free schools" meant tuition grants for the orphan and indigent to attend private schools. As Professor C.E. Evans has noted: "Any attempt at this time to establish public free schools under laws and regulations similar to those of the twentieth century would have been condemned as tyranny."<sup>45</sup>

All of these diverse interests were represented at the Constitutional Convention of 1845, and this produced the diverse constitutional language in support of schools.<sup>46</sup> While the primary intent clearly was for parental control of education as indicated above, "the advocates of free schools for all

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40. C. DABNEY, *supra* note 26, at 397.

41. *Id.* at 401-02.

42. TEX. CONST. art. VII, § 1, interp. commentary (Vernon 1955).

43. EBY, DEVELOPMENT, *supra* note 31, at 107.

44. "The public schools of Texas during this period were actually private schools charging tuition and receiving bounty and support from the state in a per capita payment for each attending child." TEX. CONST. art. VII, § 1, interp. commentary (Vernon 1955).

45. C. EVANS, THE STORY OF TEXAS SCHOOLS 52 (1955).

46. During the 1854 legislative debates on establishing a school system to satisfy this 1845 constitutional mandate, the differing terms were called "peculiar phraseology" satisfied by

children accepted the language of this section which apparently supported their policy."<sup>47</sup> As Professor Eby goes on to state:

This constitutional article was accordingly an artful compromise of diverse policies and educational traditions. In the half century during which Texas was struggling to work out a system of public education, these antagonistic views fought bitterly for control. This is the explanation of the vacillating course of education in this State, of its frequent revolutions and retarded progress.<sup>48</sup>

The retarded progress to which Professor Eby referred was the slow growth of state-controlled education in Texas since Professor Eby was an active supporter of public education systems and a Professor at the University of Texas.<sup>49</sup> Watts and Rockwell attribute the slow development of state-operated education not to these conflicting philosophies, but to legislative and executive branch corruption.<sup>50</sup> Professor Eby's focus on the citizens' values, however, seems closer to the mark, and the "retarded development" of state educational monopoly power shows strongly the great vigor with which the concept of parental control of education continued to exist in Texas. This same concept remains embodied in the constitutional provision governing education today. As will be seen later, the ultimate triumph of the current public educational system was accomplished primarily through social and legislative change rather than through constitutional amendment. Thus, the basic constitutional right to parental control of education exists to this day.<sup>51</sup>

### B. School Law of 1854 (*Partial Voucher Plan*)

Following the Constitution of 1845, the next significant development in the history of Texas education was the school law of 1854. Like the Constitution of 1845, it was the result of a compromise between the proponents of the system of state-controlled public education and proponents of parent-controlled private education at public expense. However, reflecting the dominant mood of the day, the predominate intent was private choice.<sup>52</sup> Governor Pease in proposing a system of "public schools," stated that the per pupil allocation would be paid to "such teacher as the parents or guardi-

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schools which were in part free schools and in part supported by individual tuition. Eby, *Sourcebook*, *supra* note 17, at 254-55.

47. EBY, DEVELOPMENT, *supra* note 31, at 108.

48. *Id.*

49. Eby was on the Texas State Teachers Association Committee on Centennial Celebration. TEX. STATE TEACHERS ASS'N, *supra* note 34.

50. Watts & Rockwell, *supra* note 19, at 819.

51. See TEX. CONST. art. VII, § 1, interp. commentary (Vernon 1955).

52. See B. WALKER, EQUITY IN TEXAS PUBLIC SCHOOLS FINANCE: SOME HISTORICAL PERSPECTIVES 4 (1988) (available from Texas Center for Educational Research, Austin, Texas). In his Message to the 4th Legislature, Governor P.H. Bell suggested that the best mode of promoting education would be for the state to subscribe to scholarships at institutions of private enterprise already established. Eby, *Sourcebook*, *supra* note 17, at 222 (citing S.J. OF TEX., 4th Leg., R.S., 24, 30-31 (1852)).

ans of the children may choose to employ for their education.”<sup>53</sup> Especially after the repeal of districting in 1856, the system operated basically as what today would be considered a voucher system.

The 1854 school law's title was simply “An Act to Establish a System of Common Schools,”<sup>54</sup> not public or free, though the Act was promulgated pursuant to the 1845 Constitution's command to establish public schools. Section 1 set aside two million dollars “for the support and maintenance of Public Schools, which shall be called the Special School Fund.”<sup>55</sup> The interest was to be divided and distributed to the support of “schools.” Sections 2 to 4 *required* counties to be districted and three trustees were to be elected to run the schools. The County Assessor was to make a census of children between the ages of six and sixteen years.<sup>56</sup> The school fund was apportioned on a per student basis in section 6. Sections 7 and 8 required local elections to determine the site of a permanent school house, which had to be built by the local community without government funds before any state funds could be spent. Thus, facilities were built by the local community. In section 9 the school trustees were commanded to call a parents' meeting where a majority of those present selected the length of the school year, “the kind of teacher they want[,] and the amount of salary they are willing to pay.”<sup>57</sup> The trustees were to supervise the school in accordance with these wishes.

It is easy to see from this section and others that most of the tuition burden still fell on the parents. The 1854 School Law thus primarily established a parent-run tuition payment plan with fiscal responsibility controls. Compulsory attendance was not demanded, but the school was open to all. The teacher kept attendance records; sections 10 to 12 required the trustees to pay the teacher's salary as far as possible with the state funds, but then “to apportion equally among the patrons of the school” the remainder of the salary. Trustees could sue for non-payment of allocated tuition. If patrons of the school were financially “unable to pay their share of the salary apportioned,” i.e., were indigent, the trustees could so certify to the County Judge and the State would pay such tuition in full.<sup>58</sup>

Section 15 introduced a new term into the Act by designating the trustees “a body corporate and politic, by the corporate name of the Trustees of Common School District No. —,” with capacity to sue and be sued and hold property.<sup>59</sup> Section 16 made the State Treasurer “ex-officio Superintendent of *Common Schools*.”<sup>60</sup> His duties included recording the scholastic census,

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53. Message of Governor Pease to the Senate and House of Representatives, Dec. 23, 1853, reprinted in Eby, *Sourcebook*, *supra* note 17, at 226.

54. Act approved Jan. 31, 1854, 5th Leg., R.S., ch. 18, 1854 Tex. Gen. Laws 17, 3 H. GAMMEL, LAWS OF TEXAS 1461 (1898). See also Eby, *Sourcebook*, *supra* note 17, at 264-70.

55. § 1, 1854 Tex. Gen. Laws 19-20, 3 H. GAMMEL, LAWS OF TEXAS 1464.

56. §§ 2-4, 1854 Tex. Gen. Laws 20, 3 H. GAMMEL, LAWS OF TEXAS 1464.

57. § 9, 1854 Tex. Gen. Laws 20, 3 H. GAMMEL, LAWS OF TEXAS 1464.

58. §§ 12-13, 1854 Tex. Gen. Laws 20, 3 H. GAMMEL, LAWS OF TEXAS 1463-64.

59. § 15, 1854 Tex. Gen. Laws 20, 3 H. GAMMEL, LAWS OF TEXAS 1464.

60. § 16, 1854 Tex. Gen. Laws 20, 3 H. GAMMEL, LAWS OF TEXAS 1464 (emphasis added).

distributing per student money and the "amount due for the tuition of children exempt from tuition fees," accounting for all investments in something called the "Common School Fund,"<sup>61</sup> accounting for expenditures for "common schools," and making suggestions to the legislature for improvement in the "Common School System." Section 17 required the Trustees to apply for state funds once a year for both per student allocation and indigent tuition exemption application.

Section 18 is the heart of a choice system.<sup>62</sup> A majority of parents could instruct the Board of Trustees to adopt a private school as the common school for that district. In this manner, privately controlled education would receive state funding. The terms "common schools" and "public schools" during this time period thus referred to a joint system composed of truly public schools and private schools that received public funds. In practice, the private schools predominated, so that the system was really one of public support for private schools which were "common" in the sense of being open to all. While the provisions of the law included the creation of common school districts with election of trustees, the statute allowed the incorporation of private schools directly into the "public school" format.<sup>63</sup> The school trustees, upon instruction by a majority of the patrons of the school, could employ the teacher of a primary department in any private college or academy as the common school for that district. Thus, the private academies, operated by the private sector, were treated as a public school for tuition reimbursement. As Professor Eby, a proponent of state-controlled public education, noted, this provision was "one of the chief barriers to the establishment of a state system of public schools."<sup>64</sup> The reason that it was a barrier is that, while it allowed public districting and public schools, it also allowed private schools to operate in this system. When the two were allowed to compete side by side, most parents chose private schools. Of course, because funding levels were so low, there were very few public schools in the sense we know them today. Most of the schools in existence at the time were private institutions and, under this law, most parents continued to send their children to private schools and were partially reimbursed at public expense.<sup>65</sup> Only indigents and orphans received completely free tuition.

While the number of those who sought the establishment of a tuition-free

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61. § 16, 1854 Tex. Gen. Laws 21, 3 H. GAMMEL, LAWS OF TEXAS 1465. Cf. § 1, 1854 Tex. Gen. Laws 17, 3 H. GAMMEL, LAWS OF TEXAS 1461 (money set aside in a "Special School Fund").

62. Section 18 states "that nothing in this act shall prevent the trustees, after being instructed by a majority of the patrons of schools in such district, from employing the teacher of a primary department in any college or academy, and converting such primary department into a common school for such district." § 18, 1854 Tex. Gen. Laws 21, 3 H. GAMMEL, LAWS OF TEXAS 1465.

63. Choice was not completely open until 1856, since the exercise of choice required a majority of the parents to adopt one private school as the public school for that area. A proposal to allow unrestricted choice, made by Mr. Simms during the legislative debates, failed. Eby, *Sourcebook*, *supra* note 17, at 256-57.

64. EBY, DEVELOPMENT, *supra* note 31, at 118.

65. See TEX. CONST. art. VII, § 1, interp. commentary (Vernon 1955).

state-controlled public school system for all was now larger, they were still a minority.<sup>66</sup> The common school was not absolutely free, but free only to the poor, and partially subsidized with regard to the non-indigent student. The main proponents of the northern style educational system continued to be the Northerners, although proponents included some teachers, Germans, and the Masons.<sup>67</sup>

### C. School Law of 1856 (*Pure Voucher Plan*)

Even though the law of 1854 allowed districting, which can be viewed as one of the essential features of a public school system even today, the Governor and the State Superintendent of Education considered this feature of the law to have failed and, in 1856, a new school law was passed eliminating districting.<sup>68</sup> Thus the system became a pure voucher plan.<sup>69</sup>

The 1856 School Law was a complete triumph for private school interests. It continued "Support of Schools" in its title.<sup>70</sup> However, unlike the 1854 School Law, the legislature had now created a "General School Fund account," also called the "School Fund," combining one-tenth of state taxes and the old 1854 Special School Fund. Sections 2 and 3 required a scholastic census, accounting for children between the ages of six and eighteen. Section 4 required the County Court to distribute annually the state money on a per student basis in proportion to the student's actual attendance. It then proceeded to allow tuition reimbursement for attendance at *any* school.<sup>71</sup> Thus, in one stroke all private schools were declared to be "free public schools," a phrase which is even in quotes in the statute itself.<sup>72</sup> Priority is given to funding indigent education first, with the remainder allocated to all other students.

Section 5 required all teachers of any school to make a report of attendance and hold school for not less than three months to receive state reimbursement. Section 6 dealt with bonding requirements and indigents stating:

If any person or patron of any school is unable to pay his tuition, and the teacher shall be satisfied of this fact, it shall be the duty of said teacher to make out a list of all such patrons together with the amount of money due from each for tuition, and forward the same under oath to the Chief Justice of the county.<sup>73</sup>

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66. For example, Mr. Franklin's amendment to require tuition free schools operated by the state rather than privately controlled, but tuition supported common schools failed. Eby, *Sourcebook*, *supra* note 17, at 253-54.

67. EBY, DEVELOPMENT, *supra* note 31, at 119.

68. *Id.* at 121.

69. See TEX. CONST. art. 7, § 1, interp. commentary (Vernon 1955); R. RICHARDSON, *supra* note 38, at 230; B. WALKER, *supra* note 52, at 4.

70. Act approved Aug. 29, 1856, 6th Leg., Adj. S., ch. 180, 1856 Tex. Gen. Laws 107-12, 4 H. GAMMEL, LAWS OF TEXAS 525-30 (1898).

71. "And said schools are hereby declared 'free public schools'; provided, that no child whose entire tuition has been paid shall receive any money under the provision of this section." § 4, 1856 Tex. Gen. Laws 108-09, 4 H. GAMMEL, LAWS OF TEXAS 526-27.

72. See also OFFICE OF THE TREASURER OF TEX., CIRCULAR (Nov. 17, 1856), reprinted in Eby, *Sourcebook*, *supra* note 17, at 295.

73. § 6, 1856 Tex. Gen. Laws 109, 4 H. GAMMEL, LAWS OF TEXAS 527.

Section 7 now designated the State Treasurer as "ex-officio Superintendent of Schools," dropping the 1854 term "Superintendent of Common Schools."<sup>74</sup> The Treasurer was charged with maintaining a "School System" and a "School Fund," not a "Common School System" and a "Common School Fund" as was the case in the 1854 School Law.<sup>75</sup> Funding clearly is prioritized to pay:

first providing for those children whose tuition has not been paid from inability of the patrons; provided that orphan children, and children of widows, who have no other or greater amount of property than is exempted from forced sale, be considered indigent.<sup>76</sup>

In addition to this fairly modern sounding statutory test for indigency, sections 8 to 10 contained other fiscal safeguards and mechanisms for funding schools that had not yet sent in their requests for funds for 1854 and 1855. Finally, as a final financial safeguard for this voucher system of state subsidies to private education, section 11 stated:

The provisions of this act shall only extend to such children as are actually sent to schools of the State. That no school shall be entitled to the benefits of this act unless the English language is taught therein.<sup>77</sup>

We can see from this Act that most significant control of the schools passed from elected trustees to the patrons and teachers themselves. The common schools, very few of which actually existed anyway, were statutorily eliminated and all schools were called "free public schools" because the state reimbursed the parents for tuition payments.

#### *D. 1858 and 1860 School Law*

Rather than repealing the 1856 Act as that Act had done to the 1854 Act, the 1858 School Law supplemented and amended the state's "support of schools."<sup>78</sup> In a significant change of terminology, section 2 changed the names of all "private" schools to "Public Schools" from the 1856 term "Free Public Schools." The new law made prioritized funding for indigent and orphans even clearer, and converted the statute from a tuition reimbursement to a grant system, without regard to actual payments.<sup>79</sup> Section 2

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74. Compare § 7, 1856 Tex. Gen. Laws 109, 4 H. GAMMEL, LAWS OF TEXAS 527 with Act approved Jan. 31, 1854, 5th Leg., R.S., ch. 18, § 16, 1854 Tex. Gen. Laws 20, 3 H. GAMMEL, LAWS OF TEXAS 1464 (1898).

75. Compare Act approved Jan. 31, 1854, 5th Leg., R.S., ch. 18, § 16, 1854 Tex. Gen. Laws 20, 3 H. GAMMEL, LAWS OF TEXAS 1464 (1898) with Act approved Aug. 29, 1856, 6th Leg., R.S., ch. 180, § 7, 1856 Tex. Gen. Laws 110, 4 H. GAMMEL, LAWS OF TEXAS 528 (1898).

76. Act approved Aug. 29, 1856, 6th Leg., R.S., ch. 180, 1858 Tex. Gen. Laws 110, 4 H. GAMMEL, LAWS OF TEXAS 528 (1898).

77. § 11, 1856 Tex. Gen. Laws 111, 4 H. GAMMEL, LAWS OF TEXAS 529.

78. Act approved Feb. 5, 1858, 7th Leg., R.S., ch. 98, 1858 Tex. Gen. Laws 124-27, 4 H. GAMMEL, LAWS OF TEXAS 996-99 (1898).

79.

All Schools which avail themselves of the benefits of this Act, are declared to be Public Schools; and the County Court of each county shall annually apportion the School Fund among the children of scholastic age, who attend such Public Schools in the following manner:

They shall first pay the tuition of all children whose parents or guardians are

made it even clearer that paying patrons were entitled to their pro rata share regardless of their actual costs.<sup>80</sup> Section 5 set as a limit on the amount of regular tuition a maximum of "ten cents per day" per student.<sup>81</sup> Section 6 allowed payment of the pro rata share directly to the teacher or the parents. Section 7 also allowed children attending school out of their county to receive their pro rata share from their resident county. Thus, parents were free to send their children to any school regardless of residence. Section 8 imposed state certification of teachers, a requirement often proposed even in modern voucher plans.<sup>82</sup> Sections 9 to 11 are financial control provisions, and include a procedure for allowing a teacher to apply for an advance on anticipated revenues.

In summary, all private schools that accepted state tuition reimbursement were now denominated Public Schools, the only state control being teacher certification and oath and bonding requirements to prevent misapplication of funds. Clearly, the term "Public School" meant the exact opposite of what it means today. The School Law of 1860 continued this system, adding the requirement of an oath of a teacher and two others to obtain the indigent or widow tuition grant.<sup>83</sup>

Thus, under the 1856, 1858, and 1860 laws, a pure voucher system was in effect. As Professor Eby notes:

Any group of people anywhere were permitted to set up a school, large or small, and to employ a teacher at such a price and length of service as they pleased. They drew the state per capita for each child who attended the school. The result of this policy was the complete triumph of the private school interests, with the state doling out a public bounty for the maintenance of private enterprises. This plan of operation was

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unable to pay the same; of orphans whose tuition has not been paid, and of the children of widows who have no greater amount of property than is secured by the Constitution and laws of the State, from forced sale, and who choose to avail themselves of the benefits of this Act.

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

§ 1, 1858 Tex. Gen. Laws 124, 4 H. GAMMEL, LAWS OF TEXAS 996.

80.

The names of all such persons, being patrons of the School, as are entitled to the benefit of this Act, whether on account of inability to pay, or as paying patrons entitled to a pro rata interest in the distribution of the fund. The report thus furnished shall be examined, revised and corrected, by the County Court, in such manner as to show with accuracy the names of such children as are orphans or the children of widows, and whose tuition has not been paid, and the names of the paying patrons, and the full amount of all tuition money paid from all sources, and no School shall receive any benefit under this Act, which has not been taught at least three consecutive months.

§ 2, 1858 Tex. Gen. Laws 124-25, 4 H. GAMMEL, LAWS OF TEXAS 996-96.

81. § 5, 1858 Tex. Gen. Laws 126, 4 H. GAMMEL, LAWS OF TEXAS 998.

82. The County Court appointed a three-person Board of Examiners and only certified teachers could receive School Funds.

83. Act approved Feb. 8, 1860, 8th Leg., R.S., ch. 53, § 1, 1860 Tex. Gen. Laws 69, 4 H. GAMMEL, LAWS OF TEXAS 1431 (1898).

the extreme of educational individualism. No state system of public schools was possible under these conditions.<sup>84</sup>

In addition to the complete triumph of individualism noted above, the allocation of the state fund became ever more confined to the indigent because of low funding under the statutes. The total amount of state educational dollars was very small. In fact, the funding available was so small that many people did not even bother to collect their money.<sup>85</sup>

Professor Eby notes, despite the constitutional language calling for what would appear to be a system of pauper schools, i.e., "free schools,"

Properly speaking, there were no 'pauper schools' in Texas. There could not be schools organized primarily to meet the need of the indigent class of pupils. The available fund was used, first, to defray the tuition of the poor and any balance was then used to pay part of the tuition of the other children in case their full tuition had not already been paid. Thus practically all children were in part beneficiaries of the State's bounty. There is no evidence that the system in Texas was at that time characterized by the opprobrious epithet 'pauper schools'.<sup>86</sup>

Professor Eby further observes that:

Contemporary observers strongly favored the plan, praised its justice, and suitability for the conditions of the scattered population of Texas, and confined criticism to matters of detail.<sup>87</sup>

Even Governor O.N. Roberts, an advocate of a more integrated system of public education, declared in 1879 that "the best and most satisfactory common schools that we ever had were those during a number of years before the late civil war."<sup>88</sup> At any rate:

The system as finally developed in 1858 was simple in the extreme and apparently acceptable to the main body of the people. Those parents who desired could form a school and could secure their own teacher and receive the state apportionment for their children. Those who wished to patronize one of the existing private schools were permitted the same privilege. The state apportionment was not paid until the close of the year, when the teacher had made his full report of attendance. The patrons were naturally obliged to advance the salary of the teacher throughout the term. At the close of the school, the patrons would receive directly from the county treasurer the amount due them for each child.<sup>89</sup>

While the voucher system as described above was the dominant method of schooling in the 1850-60s until the Civil War, a few early city school systems supported by public taxation were established or attempted.<sup>90</sup> The germanic community in central Texas also advocated publicly controlled tuition-free

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84. EBY, DEVELOPMENT, *supra* note 31, at 121.

85. RAYMOND, REPORT OF THE STATE TREASURER AS EX-OFFICIO SUPERINTENDENT OF SCHOOLS FOR THE YEARS 1856-57, at 22-31, *reprinted in* Eby, *Sourcebook*, *supra* note 17, at 308.

86. EBY, DEVELOPMENT, *supra* note 31, at 123.

87. *Id.* at 124.

88. *Id.*

89. *Id.* at 125.

90. *See id.* at 127-34; B. WALKER, *supra* note 52, at 3. *Cf.* W. HOGAN, THE TEXAS



education and called them free schools.<sup>91</sup>

In 1948, the County of Galveston obtained a charter from the legislature allowing it to establish schools called "public free schools," in the title, though called "public schools" throughout the body of the act.<sup>92</sup> After a year or two of local taxation, opposition to this school increased, and it was abolished. Thus, while the idea of education somewhat in its current form was nominally present in Texas, nowhere was this actually put consistently into operation; rather, the idea of a private system of education supported by public funds was the dominant mode of education, both in thought and in practice.

Even the early city schools during the Republic, which were called public free schools and were supported by local taxation, were in fact "free" only to the poor. San Antonio, Gonzales, and Victoria by charter in 1837 were allowed "by every equitable means to promote the establishment of common schools, male and female, within the limits of the corporation, in which the English language shall be taught and *children of the poor class of citizens invited and thus received gratis.*"<sup>93</sup>

Prior to the Civil War, many institutions of a private religious character petitioned for and received support from the legislature. Many of the leaders of these same institutions were also influential in the movement toward the "public school" system, which actually meant public support for private colleges and academies.<sup>94</sup> For example Daniel Baker, founder of Austin College, one of the oldest educational institutions in Texas, was one of the "Friends of Education" who asked for a common school system in 1854.<sup>95</sup> Yet he and others clearly intended for the public school system to include state financial support for private secular and religious education.

In 1879, even one of the champions of the bureaucratic model of state-operated free public education looked back to the antebellum system and said it was better than either the Radical Reconstruction plan (named Davis-Degress for the Governor and Superintendent of Public Instruction) or the 1876 School Law choice system. Rufus C. Burleson, in a letter to Governor Roberts, stated that it was "wholly inexpensive and did educate every orphan and every indigent child in a good private school ten months in the year."<sup>96</sup>

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REPUBLIC: A SOCIAL AND ECONOMIC HISTORY, at 138 (1946) (states only one town, Houston, had a public school with "low tuition rates and free instruction for the indigent").

91. See Act approved Feb. 4, 1856, 6th Leg., R.S., ch. 75, 1855 Tex. Gen. Laws 76-77, 3 H. GAMMEL, LAWS OF TEXAS 331-34 (1898); An Act to Incorporate the German Free School Association of the City of Austin, 17th Leg., R.S., ch. 43, 1858 Tex. Gen. Laws 45, 4 H. GAMMEL, LAWS OF TEXAS 1223 (1898), reprinted in Eby, *Sourcebook*, *supra* note 17, at 359.

92. Act approved Jan. 24, 1848, 2d Leg., R.S., ch. 167, 1848 Tex. Gen. Laws 325-28, 3 H. GAMMEL, LAWS OF TEXAS 331-34 (1898), cited in Eby, *Sourcebook*, *supra* note 17, at 353-57.

93. C. EVANS, *supra* note 45, at 102 (emphasis added).

94. See EBY, DEVELOPMENT, *supra* note 31, at 128, 136-40.

95. Eby, *Sourcebook*, *supra* note 17, at 263-64 (Address to the Friends of Education Throughout the State, Feb. 3, 1854); 1 C. DABNEY, *supra* note 25, at 411.

96. R. BURLESON, THE LIFE AND WRITINGS OF RUFUS C. BURLESON, 364 (1901).

### E. *The Civil War and Texas Education*

Like all wars, the Civil War had a great influence upon the development of all social institutions in the South. No history of a southern state would be complete without understanding the consequences of the war upon its educational system. The same is true in Texas. Much of the educational infrastructure of the state that existed prior to the Civil War was destroyed during the war.<sup>97</sup>

The 1861 Secession Constitution contained the same education article as the 1845 Constitution.<sup>98</sup> However, the costs of the war and the sale of public lands to railroads which were repaid in worthless confederate currency resulted in no state appropriation for education from 1861 to 1870.<sup>99</sup> The only education was privately financed and controlled. "By the time reconstruction began at the end of the Civil War, the permanent school fund was completely depleted."<sup>100</sup> The provisions on education in the Constitution of 1866, again with the same operative clauses as 1845, though with a State Superintendent, never went into effect due to nullification by the federal government.<sup>101</sup>

### F. *Radical Reconstruction*

The devastating impact of the Civil War's end and the period of Reconstruction can hardly be imagined. The racial climate can only be described as shocking in modern terms, with the social upheaval in South Africa as apartheid crumbles constituting only a pale, civilized shadow of the post Civil War turmoil in Texas as federal troops imposed racial equality on Texas. In education, the 1869 Constitution's Radical Reconstruction program was "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 children."<sup>102</sup> It was the antithesis of the antebellum free choice plan, and required four months compulsory attendance.<sup>103</sup> While the 1869 Radical Reconstruction plan used the term public free schools, its use of this term was in the modern sense. This is made clear in that for the first time the Legislature was required to establish 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."<sup>104</sup> The system was also to be uni-

97. EBY, DEVELOPMENT, *supra* note 31, at 151.

98. TEX. CONST. of 1861, art. X.

99. Watts & Rockwell, *supra* note 19, at 779 (citing F. STEWART & J. CLARK, THE CONSTITUTION AND GOVERNMENT OF TEXAS 105 (1933)).

100. *Id.* (citing C. MONEYHAN, REPUBLICANISM IN RECONSTRUCTION TEXAS (1980)).

101. TEX. CONST. of 1866, art. X; *see* TEX. CONST. art. VII, § 1, interp. commentary (Vernon 1955).

102. EBY, DEVELOPMENT, *supra* note 31, at 159; *see* Edgewood Indep. School Dist. v. Kirby, 777 S.W.2d 391, 394 (Tex. 1989).

103. TEX. CONST. of 1869, art. IX. The 1869 Constitution's education article was quite detailed as befits a plan for state centralization. *See* Appendix A for a copy of the text of the education article from The Constitution of the Radical Republican Reconstruction.

104. TEX. CONST. of 1869, art. IX, § 1; TEX. CONST. art. VII, § 1, interp. commentary (Vernon 1955) (emphasis added).

form. Both these key features favoring a state-operated system would be dropped from the 1876 Constitution, but the phrase "public free schools" would be retained.

It must be kept clearly in mind that this system of compulsory, centrally-administered, state-operated education was not freely chosen, but was forced on the citizens of Texas. The hatred of this system was so intense that the predominant theme of the 1875 Constitutional Convention which produced our current education article was that such a system should never again raise its monstrous head in the state of Texas. What were the most hated features of this system? The evils were centralized administration, state selection of teachers and employees, high taxes, and lack of parental control.<sup>105</sup>

With respect to centralization, the School Law of 1871 gave the state superintendent of schools "absolute control over the public schools."<sup>106</sup> The 1870 and 1871 school acts took away any public input whatsoever, since all officials including the local school boards were appointed by state officials.<sup>107</sup> This vast system of appointed local and state government officials allowed a state-wide party-controlled system of patronage jobs. It became a powerful tool for corruption, the tendency of any monopoly. It also became a way for the governor to control local politics. Even today in many communities in Texas the monopoly school system is the largest single employer.

The Reconstruction system was supported by extremely high taxes on a war-depressed economy. The cost of state government increased from \$500,000 to \$2 million per year from 1866 to 1870, an increase of almost 400 percent.<sup>108</sup>

The Acts of the 12th Legislature dominated by Radical Republicans were later called the "obnoxious acts" by Democrats.<sup>109</sup> Even after the passage of more than 100 years, one recent commentator states that "if measured in terms of responsibility and statesmanship [the 12th Legislature] was, undoubtedly, the worst in the history of the state."<sup>110</sup> An earlier commentator states "[i]n actual fact the liberty and life of every citizen lay in the governor's hands."<sup>111</sup> The greatest complaint by contemporaries against Governor Davis and the Radical Republicans was the "extreme centralization of

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105. Rufus Burleson, President of Baylor and Waco Universities stated in a letter to Governor Roberts, April 29, 1879, that when the Democrats finally regained power the people were "chafing and maddened under the Davis-Degress system, and ready to proclaim an elimination of the whole system as an offshoot of radical misrule." R. BURLESON, *supra* note 96, at 363. See also *Superintendent Baker's Administration*, 1 TEX. REV. 703 (1886), reprinted in Eby, *Sourcebook*, *supra* note 17, at 792-93.

106. Watts & Rockwell, *supra* note 19, at 782 (citing F. STEWART & J. CLARK, *supra* note 99, at 105); see also EBY, *DEVELOPMENT*, *supra* note 31, at 159-61.

107. C. MONEYHON, *supra* note 100, at 170.

108. Watts & Rockwell, *supra* note 19, at 782 n.60 (citing C. MONEYHON, *supra* note 100, at 61).

109. *Id.* at 781 n.52.

110. *Id.* (citing W. BENTON, TEXAS POLITICS—CONSTRAINTS AND OPPORTUNITIES 19, 47 (5th ed. 1989)).

111. *Id.* (citing C. RAMSDALL, RECONSTRUCTION IN TEXAS 303 (1910)).

the system."<sup>112</sup>

The revolt against such extreme centralization was quick to develop. In 1871 taxpayers threatened a tax revolt and met in convention to oppose Governor Davis.<sup>113</sup> As a result of the general public's revulsion with state-controlled education and other excesses, the Democrats regained the legislature in 1872.<sup>114</sup> The intensity of the passions of the time can be best understood when it is remembered that the Democrats physically seized the keys and possession of the state capitol after the Texas Supreme Court, infamously known as the semicolon court, invalidated the 1873 election in which Democrat Richard Coke defeated Republican Governor Davis by a vote of 42,663 to 85,549.<sup>115</sup> Governor Davis's troops seized the lower floor of the capitol, but Davis surrendered his office when President Grant telegraphed "that he would not invade Texas on behalf of Davis."<sup>116</sup> Many Texans at the time of the 1875 Constitutional Convention thus felt strongly that compulsory attendance was a hated symbol of autocratic government, and that for the state to select teachers rather than parents was an abrogation of democracy.<sup>117</sup>

### III. REACTION TO RECONSTRUCTION—THE 1875 CONVENTION AND THE 1876 CONSTITUTION

Because of widespread dissatisfaction with the Reconstruction Constitution of 1869, and because the Democratic plan to create a new constitution by commission or legislative amendment was thwarted by popular vote,<sup>118</sup> ninety delegates to a Constitutional Convention assembled in Austin in the Hall of Representatives on September 6, 1875.<sup>119</sup> Represented among the delegates were thirty-eight members of the Grange, a nonpolitical association whose prime concerns were education, railroad regulation, and suffrage.<sup>120</sup> The Democrats had seventy-six representatives and the

112. *Id.* at 782 n.55 (citing E. WALLACE, CHARLES DEMORSE—PIONEER, EDITOR AND STATESMAN 174 (1943)).

113. See Watts & Rockwell, *supra* note 19, at 783.

114. "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." *Id.* at 784. The statute effecting this was authored by E.L. Dohoney, later a delegate to the 1875 Convention. See E. DOHONEY, AN AVERAGE AMERICAN (1903).

115. See Watts & Rockwell, *supra* note 19, at 784 n.68.

116. *Id.* See also Norvell, *Oran M. Roberts and the Semicolon Court*, 37 TEX. L. REV. 279 (1959).

117. TEX. CONST. art. VII, § 1, interp. commentary (Vernon 1955). See also B. BAKER, FIFTH BIENNIAL REP. OF THE SUPERINTENDENT OF PUB. INSTRUCTION 6-7 (1886), reprinted in Eby, *Sourcebook*, *supra* note 17, at 819.

118. A joint resolution passed in 1875 submitted the question of whether to call a constitutional convention to popular vote, which call passed by a three to one margin. Watts & Rockwell, *supra* note 19, at 785 n.73. See Tex. S.J. Res. 16, 14th Leg., 2d R.S., 1875 Tex. Gen. Laws 201-02, 8 H. GAMMEL, LAWS OF TEXAS 573-74 (1898).

119. Watts & Rockwell, *supra* note 19, at 785-86, 788. See also Ericson, *The Delegates to the Convention of 1875: A Reappraisal*, 67 SW. HIST. Q. 22 (1963).

120. Watts & Rockwell, *supra* note 19, at 785-86 (discussing the composition of the delegates).

Republicans had fourteen.<sup>121</sup> In reviewing the qualifications of the convention delegates, J.E. Ericson has concluded that "their background and training compares favorably with that of the delegates to any previous constitutional convention held in Texas."<sup>122</sup>

To understand fully the intent of section 1 of the 1876 Constitution, which is still the education article in force today, an exhaustive analysis of the convention proceedings on education is absolutely necessary.<sup>123</sup> Accordingly, a detailed look at the convention proceedings on education will follow a brief introduction of the makeup of the convention.

### A. *The Constitutional Convention*

The first vote of the convention was on the delegate oath, and the next important vote was for the presidency of the convention.<sup>124</sup> The two major contenders on the first ballot were E.B. Pickett, who received 36 votes and E.L. Dohoney who received 22 votes.<sup>125</sup> Dohoney was a former Chairman of the Senate Education Committee. On the second ballot, Pickett defeated Dohoney 43 to 23.<sup>126</sup> Dohoney was later to play a key role in the education debates.

On the second day business began with an offer by the Ministerial Association of Austin tendering "its gratuitous services to the Convention, to open its sessions with prayer daily, and whatever other religious exercises may be needed"; the offer was gratefully accepted.<sup>127</sup> Committees were established, including a Committee on Education, one of only six of the twenty-one total committees to have as many as fifteen members. The other committees having at least fifteen members were the committees on the Legislative Department, Executive Department, Judicial Department, General Provisions, and Agriculture and Stock-raising.<sup>128</sup> A letter from Governor Richard Coke promised the Executive Department's aid to the Convention and his confidence the Convention would "secure to Texas the blessings of honest, eco-

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121. Seventy-two of the 90 delegates were immigrants to Texas from southern states which favored private education with state tuition reimbursement. Ericson, *supra* note 119, at 22. Five African Americans, all Republicans, were present: Abner, Davis, McCabe, Reynolds, and Mitchell. *Id.*

122. *Id.* at 27.

123. Railroad matters are not included though peripherally affecting education funding since railroads and education competed for dedication of the public domain. The exact language has been quoted extensively to demonstrate the actual differences between such terms as general education, private education, public free schools, public schools, free public schools, and free schools as they were used and understood at the time. I have avoided using modern terms such as public education unless absolutely necessary for comparison to our modern usage of the terms. In order to accommodate both the need for these historical quotes and the flow of this article, I have summarized the pertinent portions of the record within the text and created an appendix for the education resolutions and reports.

124. JOURNAL OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF TEXAS 4-5 (1875) [hereinafter JOURNAL].

125. *Id.* at 5.

126. *Id.*

127. *Id.* at 9.

128. *Id.* at 13-14.

nomical, efficient and free government.”<sup>129</sup>

On the third day the President announced the members of the standing Committee on Education: Whitfield (chairman), Moore, Flournoy, Wright, Abernathy, Sansom, Graves, Chambers, Lynch, Ramey, Dunnam, Cooke of San Saba, Holt, Rugely, McCabe, and Cline.<sup>130</sup>

As early as the third day, September 8, 1875, in the debate over the per diem rate to compensate convention delegates, Mr. Weaver of Cooke assailed the Republicans and introduced the theme of retrenchment as follows: “The party [Republican] which made the existing organic law [1869 Constitution] and gave \$8 a day and expensive mileage to Legislators, were enemies of the Democratic administration and were not the friends of retrenchment and reform.”<sup>131</sup> Retrenchment and reform were key elements for most delegates and meant less expensive and less intrusive government. For example on the fourth day Judge Reagan stated “[t]he people had demanded that the expenses of state government be reduced.”<sup>132</sup>

Mr. Ramey spoke in favor of the Constitution of 1845 as the cry of the people for a return to its provisions as “simple, plain, and non-partisan in character, and under it they lived cheaply, happily, and contentedly.”<sup>133</sup>

### B. The Education Resolutions

On the sixth day DeMorse<sup>134</sup> introduced the first resolution on education.<sup>135</sup> DeMorse consistently supported free public education operated by the state with districting and heavy taxation. In his resolution, DeMorse uses the term “public education” to describe his bureaucratic model. On the same day Mr. Arnim offered a uniformity resolution.<sup>136</sup>

On the seventh day the Committee on State Affairs reported favorably upon a previous resolution to adopt the Constitution of 1845 as the basis of the new constitution, showing the desire for an antebellum form of govern-

129. JOURNAL, *supra* note 123, at 12-13.

130. *Id.* at 15.

131. S. MCKAY, DEBATES IN THE TEXAS CONSTITUTIONAL CONVENTION OF 1875, at 11 (1930) [hereinafter DEBATES].

132. DEBATES, *supra* note 131, at 15. This article will continue to quote exhaustively from the debates to allow the readers to form their own conclusions as to the meaning of the constitutional provisions. This material is not as widely available or as well known as the United States Constitution debates.

133. *Id.* at 44. In *Edgewood*, the supreme court ruled that “efficient” did not mean economical. 777 S.W.2d 391, 394 (1981). Instead, efficient conveys the meaning so as to produce results with little waste. *Id.* at 395. It can hardly be imagined that anyone in 1875 felt a government bureaucratic monopoly was an “efficient” method of providing services with little waste.

134. Introduced by DeMorse, a lawyer, farmer, and editor. Three convention delegates were farmer-teachers: McKinney of Denton County, McKinney of Walker County, and Ramey of Shelby County. Ericson, *supra* note 119, at 22, 24.

135. JOURNAL, *supra* note 124, at 63-64. See Appendix B-1 for the text of DeMorse’s resolution.

136. *Id.* at 65-66, referred to Education Committee. See Appendix B-2 for the text of Arnim’s resolution.

ment,<sup>137</sup> but the resolution was laid over under the rules.<sup>138</sup> Mr. Wade offered an education resolution using the modern term free public schools rather than public free schools.<sup>139</sup>

Mr. Whitfield offered a resolution seeking scholastic data, which resolution was adopted.<sup>140</sup> Public free schools in this request for current data refers to the Reconstruction system then in place. On the tenth day, Mr. Lockett, using the 1869 "public free school" terminology, offered a resolution providing that schools teach for a minimum of four months out of the year.<sup>141</sup>

On the eleventh day, Mr. Morris offered the most comprehensive, uniform, and bureaucratic model proposed at the convention up to that date. While using public free school terminology (it also uses the terms free schools or public school), the first section makes it clear that public free schools means tuition-free schools for all.<sup>142</sup> In general, the Morris article is similar to the 1869 Reconstruction Constitution. Several key points with regard to Morris's model must be noted. First, the term "public free schools" is initially and prominently qualified with the phrase "for the gratuitous instruction of all inhabitants," making clear that the popular pre-war system of partial state funding of private tuition was not intended by the term "public free schools" in this proposed clause. If the term "public free school" alone were used, it could have meant a system of tuition reimbursement for private schools. It is significant that this gratuitous tuition language was deleted from the final education article. Second, while the terms "free schools," "public free schools," "common schools," and "public school" are also used apparently interchangeably in this proposal, all the terms are qualified by the gratuitous instruction clause to show they are free in the sense of no tuition. This was the centralized, northern model Republican plan. The system proposed by Morris was to be *uniform* throughout the state, without local variation, a severe impediment to a free market choice approach. These uniformity provisions, however, though prevalent in many other state constitutions, never made it into the Texas Constitution. Districting, a central feature of state control, was mandatory in the Morris article. Local school district taxation was allowed. Further, centralized state control of curriculum, textbooks, and apparatus and state authority to remove the local Board were provided for in Morris's proposed article. Note that it is "the imperative duty of the Legislature to see to it that all the

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137. *Id.* at 77.

138. Action on this resolution was indefinitely postponed on Sept. 18, 1875. *Id.* at 148.

139. *Id.* at 79 (referring to Education Committee). See Appendix B-3 for the text of Wade's resolution.

140. JOURNAL, *supra* note 124, at 85. See Appendix B-4 for the text of Whitfield's resolution. On the ninth day O.N. Hollingsworth, State Superintendent of Public Instruction, reported on the state of education in response to this request. See Appendix B-5 for the text of Hollingsworth's response.

141. *Id.* at 123 (referring to Committee on Public Schools, an apparent reference to Education). See Appendix B-6 for the text of Lockett's resolution.

142. *Id.* at 136-39 (referring to Committee on Education). See Appendix B-7 for the text of Morris's resolution.

children in the State . . . are, without delay, provided with ample means of education." This model was overwhelmingly rejected by the convention in adopting the final education article.

Still, on the eleventh day, Mr. Cline, another proponent of the Northern-style bureaucratic model, offered his education resolution.<sup>143</sup> In Cline's proposed article explicit language was needed in section one to make it clear that "public schools" would mean "free education," i.e., no tuition, demonstrating arguably that "public school" or "public free schools" alone in the historical context of 1876 does not mean tuition-free education under government control. Also notable is the centralized state control and heavy funding provisions of Cline's proposal.

On the thirteenth day, Sept. 20, 1875, the Chairman of the Legislative Committee offered a substitute which in section 48 prohibited the legislature from levying taxes except for specific purposes, one of which was "the support of public schools."<sup>144</sup> The reference to public schools, and the context within which the term is used, provides no clue as to how the term was used.

On the fourteenth day Mr. Johnson of Collin made a proposal.<sup>145</sup> Mr. Johnson's proposed article, which, among other things, proposed abolishing the office of State Superintendent of Public Instruction, was motivated by a strong desire for local control.

On the fifteenth day Mr. Nunn took his turn to propose a resolution.<sup>146</sup> Notably, this proposal makes a request for a study of the feasibility of a system of public instruction and of aid to general education. General education may refer to a combination of public and private schools, but clearly the issue of whether school operation would be public or private was up for discussion.

On the twenty-first day, September 29, 1875, the question of the proper purposes for which the legislature could levy taxes was debated in connection with the legislature article. Mr. Russell of Wood expressed the opinion that for twenty years he had fought against taxes for education and would do so until he died.<sup>147</sup> One of the proposed proper objects for taxation was the support of public schools. Mr. Sansom, an important leader in education, followed with a long and impassioned speech. He admitted that, based on public sentiment of the age, he was not surprised that the committee supported taxation for "public free schools."<sup>148</sup> Sansom argued that the power to tax "implies the power to control the children" and compel attendance. He believed his ideas against taxation for education to be in keeping with the state's public sentiment, though opposed to "the greatest writers and speak-

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143. *Id.* at 142-43 (referring to Committee on Education). See Appendix B-8 for the text of Cline's proposal.

144. *Id.* at 164.

145. JOURNAL, *supra* note 124, at 185 (referring to Committee on Education). See Appendix B-9 for the text of Johnson's resolution.

146. *Id.* at 190. See Appendix B-10 for the text of Nunn's resolution.

147. DEBATES, *supra* note 131, at 100.

148. *Id.* at 101.



ers of the age.”<sup>149</sup> He viewed the task of the convention to frame “a government amply provided with power to afford protection to life, liberty, and property, and yet totally devoid of power to encroach upon the domain of either individual rights or private duty. . . . A system of public free schools to be supported by taxation is not adapted to the condition or wants of the people of Texas.”<sup>150</sup> He compared Texas with Massachusetts to show the poverty of the people and their inability to bear taxation.<sup>151</sup> Sansom used Massachusetts because it spent the most on education and “the advocates of public free schools in Texas frequently point to the success of the system in that state as a reason for the adoption of a like system in this State.”<sup>152</sup> This quotation seems to suggest that the “public free school” advocates wanted a Northern (Massachusetts) model, not that the term “public free schools” meant a mixed private system. However, this is one isolated instance, and Sansom most frequently uses the term “public schools” to describe the Massachusetts system.

After this discussion of the poverty of Texas and the cost of public schools, Sansom next questioned whether the government has the right to lay an educational tax.<sup>153</sup> With great, impassioned eloquence Sansom espoused the libertarian philosophy that taxing one man for the education of another is not just.<sup>154</sup> With accurate prescience he predicted that eventually taxation for the supposedly “free” schools would become so high that “the people could not pay their taxes and send [their children] to private schools, hence the destruction of all private school enterprises and the glorification of free schools.”<sup>155</sup>

It is clear on reading his whole speech that Sansom objected to general taxation and state control of all children.<sup>156</sup> However, he agreed with the proposal for public funding of private tuition reimbursement of indigent and orphan tuition with the remainder to be applied for the benefit of all other children. Sansom was an opponent of the Massachusetts model and the Reconstruction model, but a supporter of public payment from public domain funds for private school tuition. He called this support for general education. Sansom’s motion was tabled on a non-recorded vote for later consideration, and his plan eventually became the Minority Report of the Education Committee.<sup>157</sup>

### C. *The Reports of the Committee on Education and the Debates*

In a most significant development, after all the previous education resolutions had been referred to it, the Committee on Education reported an article

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149. *Id.* at 101-02.

150. *Id.* at 102-03.

151. *Id.* at 105-07.

152. *DEBATES*, *supra* note 131, at 106.

153. *Id.* at 107-08. See Appendix C-1 for a copy of Sansom’s speech.

154. *Id.* at 110-12. See Appendix C-2 for a copy of Sansom’s speech.

155. *Id.* at 111.

156. *Id.* at 111.

157. *JOURNAL*, *supra* note 124, at 246-47.

on education on the twenty-second day of the convention with majority support of nine members: J.W. Whitfield, Chairman, L.W. Moore, W.N. Ramey, W.B. Wright, A.C. Graves, F.J. Lynch, B. Abernathy, G. Flournoy and E. Chambers.<sup>158</sup>

The language of Section 1 in the majority report is somewhat similar to the final language of the 1876 Constitution, but two key elements are missing: the "efficient" system and "public free schools." In section 1 of the majority report, the term public schools was used; its meaning is not completely clear, but its reference to public schools probably includes both private and state operated types. The majority report thus appeared to espouse a hybrid public/private model. The meaning becomes clearer in light of section 7's admonishment to the Legislature to establish and maintain "free public schools" for four months instruction as soon as funds are sufficient. Free public schools, deleted in the final article, is thus used in the majority report in the modern sense of free public education in a state-controlled school.

Section 7 specifically allowed funds to be distributed to the counties in aid of private schools, though this was to be phased out eventually. The proposed article, therefore, envisioned state support initially for both public and private education. The clause eventually terminating state aid to private education was deleted later in committee and never made it into the final constitution.

In opposition to free public schools, the minority submitted a minority report.<sup>159</sup> While the majority wanted free public schools, the minority report focuses first on the parents' duty to educate their own child, at private not public expense. The minority's introductory material uses the term "public free schools" only once to characterize the majority report, which never used that term. In fact, the majority consciously chose not to use it. The minority report most frequently complains about "public education" and compulsory attendance. They say the majority report on "public education," with state control of children, endangers religious liberty. Recognizing the importance of education in general as a private good they accepted free tuition from public domain funds for indigent orphan children and partial tuition for all children, but reject taxation to support the education of all children.

Under the minority proposal, the general education fund was to be distributed first to support four months free tuition for indigent orphan children, the remainder distributed on a per student basis as partial payment of tuition. No taxes would be levied for education and no state department of education would be created. Two hundred copies of both reports were printed and debate set for another day.

The minority article sought to create a general education fund to replace the majority's public school fund, with the right of donors to the prior fund to refunds. This refund provision may have been included because the gen-

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158. *Id.* at 243. See Appendix D-1 for the text of the majority report (emphasis added).

159. *Id.* at 245. See Appendix D-2 for the text of minority report.

eral education fund was so different in purpose from the public free school fund. The minority proposal was a radical reaction which would have fully prevented any hybrid system of public/private education and mandated a fully privately operated system. The convention rejected both this extreme position as well as the radical northern model of state-funded, state-controlled education.

On the twenty-fifth day, Monday, October 4, 1875, showing the convention's abhorrence of a state educational bureaucracy, the delegates eliminated the office of Superintendent of Public Instruction.<sup>160</sup> A motion to reconsider made on the twenty-sixth day failed.<sup>161</sup>

On the twenty-ninth day, the Convention took up education again and began debate on the Committee's reports. H. Cline first submitted his own minority report, which differed in some details from his earlier proposal.<sup>162</sup> Cline introduces the phrase "thorough and efficient" system for the first time, and uses the term "free public schools" and "public schools" as explicit references to free education for all students. Notably, however, the term "thorough," which implies an elaborate and extensive system, did not make it into the constitution. Only the term "efficient" survived. As an exponent of the bureaucratic model, he does not use the term "public free schools." As with the Morris proposals<sup>163</sup> it again appears from section 1 that the mere use of the phrase "public schools" alone, without the qualification of free tuition for all, means a mixed system of public schools and state aid to parents for private education. A specific prohibition of direct grants from public funds for the benefit of religious schools is included.

Mr. Russell spoke at length, echoing (though not as eloquently) Sansom's attack on taxation for education and state control of education as a usurpation of parental rights.<sup>164</sup> He felt income from the public lands would be sufficient to educate every child and opposed taxation.

General Whitfield defended the Education Committee's majority report as a compromise between the two extremes of mandatory, free, state-operated education supported by very high taxes, and state aid to private education as the only models.<sup>165</sup> He opposed too great a burden for "maintaining free public schools for an arbitrary length of time in each year."<sup>166</sup> In Whitfield's view, the great problem was the lack of sufficient funds to sustain "common schools," but he hoped such funds would be available "within five or six years, when . . . taxation for schools will be no more."<sup>167</sup>

Common schools in this context does not refer either to state or private operation, but simply referred to what we would today call elementary

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160. DEBATES, *supra* note 131, at 151. The vote was 38 to 21.

161. *Id.* at 166.

162. JOURNAL, *supra* note 124, at 318-19. See Appendix D-3 for the text of Cline's minority report.

163. *Id.* at 136-39. See *supra* note 124 and accompanying text.

164. DEBATES, *supra* note 131, at 195-96.

165. *Id.* at 196-97. See Appendix D-4 for the text of Whitfield's comments.

166. *Id.* at 197. See Appendix D-4.

167. *Id.*

schools (through eighth grade).<sup>168</sup> It did not necessarily mean uniform, publicly-operated schools with free tuition. It is not clear whether Whitfield was simply naive to think no taxes would be necessary in six years or was opportunistically saying what the people wanted to hear. In opposing Russell and Sansom's argument that taxation for general education was unjust, Whitfield asserted:

[I]t 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; and it is upon this exceptional, yet well established, ground that a general levy for educational uses is justified. We do not propose compulsory education or the slightest invasion of the right of the parent over the control of his child. That right is sanctified by the laws of nature and of God, and may not be invaded by any human power; but the duty to place the means of knowledge, so far as to secure an intelligent citizenship, within the grasps of all is a different thing. It is no invasion of parental right, but a high and sacred duty, because it directly promotes the general welfare.<sup>169</sup>

The means of a common education could logically be provided either through a government operated school or full tuition payments for every child at private schools. Whitfield's plan supported both methods, though it envisioned phasing out private tuition payments eventually.

Recognizing that even one-tenth of the state revenue would be inadequate for a comprehensive, tuition-free, public school system, Whitfield proposed that the convention do what it could now on funding and "leave time and the people, through the Legislature, to develop and carry on such a system as experience may prove to be just, wise, and best for our descendants."<sup>170</sup>

Since section 1 of the majority report called for public schools and section 7 called for four months of free public schools as soon as feasible, it seems clear that Whitfield was generally a proponent of the free public school northern model and his language about not denying parental rights simply meant they could choose private schools if they could afford it without any state support. But he was pragmatic enough to allow the popular system of public aid to private education to continue until funds for free public schools could be allocated.<sup>171</sup> His pragmatic language demonstrates again that the unqualified phrase public schools, and even "public free schools," could well mean state reimbursement of private education for the most part. In order to avoid this system, the majority proposal never used the language "public

168. See also EXECUTIVE OFFICE OF THE STATE OF TEXAS, GENERAL MESSAGE TO THE 17TH LEGIS. ON THE JUDICIARY, EDUCATION, INSURANCE, STATISTICS AND HISTORY, RAILROADS 9 (Jan. 26, 1881) ("The natural division in the gradation of schools, in order to meet the wants of the people, is into three steps or degrees of education—the common schools for the millions, the academies for the thousands, and the college or university for the hundreds."), reprinted in Eby, *Sourcebook*, *supra* note 17, at 753.

169. DEBATES, *supra* note 131, at 198.

170. *Id.*

171. The last part of § 7 states: "But until such time . . . [t]he fund shall be distributed to the counties and applied in aid of private schools in such mode as the Legislature may provide." JOURNAL, *supra* note 124, at 244.

free schools," hoping eventually to abolish, rather than enshrine, the public free school concept in the constitution. Yet, "public free schools" is the language inserted into the final document, without any mention of tuition free instruction.

Mr. Dohoney, a strong advocate of free public education on the northern model, spoke in favor of the majority report. He admitted that the proposal was not meant "to establish the Prussian system of compulsory education, or even such a system as was established in this State in 1871."<sup>172</sup> In a strikingly contemporary argument, Dohoney urged education for all as the best deterrent to crime.<sup>173</sup> He boastfully predicted that with public education crime would be eliminated, and, since private charitable institutions had failed to provide the cure, government was required to provide it.<sup>174</sup> Dohoney supported the concept of universal, free public education, but criticized the majority for not funding it. He explicitly offered his amendment to fund "free instruction of all" for those "between . . . nine and fifteen years."<sup>175</sup> He challenged the Democrats to live up to their campaign promises. Sansom responded by arguing that crime was not due to "lack of education, but to other causes"<sup>176</sup> (a debate which still rages today). Abernathy was willing to compromise on the dedication of one-tenth of state revenues for education, but Graves said the people were "neither able nor willing" to support the Dohoney plan.<sup>177</sup>

Dohoney offered to amend section 1 of the Education Committee majority article, which called for "public schools," to include "free instruction of all the scholastic population."<sup>178</sup> This again shows that the phrase "public schools" by itself did not clearly mean free instruction in state-controlled institutions. The Dohoney amendment was tabled, 53-21,<sup>179</sup> with the Education Committee minority obviously voting to table since they were opposed to taxation to support free education for all. The vote on this amendment indicates that only twenty-one delegates supported completely state-controlled, fully-funded, public education.

The education article was next taken up again on the thirtieth day, October 9, 1875. A motion to substitute the Sansom minority report for the majority plan failed 19-46,<sup>180</sup> indicating that the radical plan to prohibit completely publicly operated schools also failed. Only nineteen delegates supported this proposal.<sup>181</sup> On the thirty-first day, the first order of debate

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172. *DEBATES*, *supra* note 131, at 199.

173. *Id.* See Appendix D-5 for the text of Dohoney's defense of the majority report.

174. *Id.* at 200. See Appendix D-5.

175. *JOURNAL*, *supra* note 124, at 319.

176. *DEBATES*, *supra* note 131, at 201.

177. *Id.*

178. *JOURNAL*, *supra* note 124, at 319.

179. *Id.* at 320. Mr. Chambers moved to lay Mr. Dohoney's amendment to section 1 on the table, which motion was carried by the vote. See Appendix E-1 for a record of the vote tabling the Dohoney amendment.

180. *Id.* at 325. See Appendix E-2 for a record of the vote regarding substitution of the minority report for the majority report.

181. *Id.*

was the Free School Question,<sup>182</sup> the proponents of which wanted tuition-free, state-controlled education for everyone who desired to attend. The majority proposal which called for "public schools," was an endorsement of this idea, but kept the hybrid private/public system temporarily in place, phasing in the public schools gradually as the money became available. Thus, the debate can be characterized as between two extreme camps in one sense, the heavy taxation, state-control camp led by Dohoney on one hand, and the no taxation, no state-operated schools camp, led by Sansom on the other. In the middle were people like General Whitfield who supported public education generally but were sensitive to the costs of any proposal; these moderates were willing to use either public or private operation, as the people desired.<sup>183</sup> The constant byword of all participants was retrenchment and reform, but just as happens in public budget debates today, one man's budget "fat" is another's "bone." Analysis of the debate is also complicated because neither side was against using the other camp's language for its own ends. For example, Dohoney usually used the terms "free public schools" or "public schools," particularly when he wanted to be most clear and accurate as to his own views. But he sometimes used the public free school terms if he was arguing the public supported his plans, as in the following exchange:

Mr. Dohoney said he was strongly in favor of public free schools, and thought if the Convention failed to provide some mode that the proposed Constitution would be defeated. He thought that the proposed amendment introduced by Mr. Johnson, of Collin, this morning was dodging the question by leaving the whole matter to the Legislature, but believing that was the best that could be done, he would vote for it on the ground that "a half loaf of bread is better than no bread."<sup>184</sup>

Further, the voting records of some of the players are hard to understand. For example, according to McKay, Mr. Flournoy spoke in opposition to any taxation for public free schools,<sup>185</sup> but he voted for the majority report and against Sansom's minority report condemning taxes.<sup>186</sup> Since the majority report only called for such taxes as the legislature might adopt, perhaps he felt the legislature never would adopt taxes despite its power to do so.

The education article debate resumed with Sansom, the minority reporter, and the opponent of taxation, who surprisingly offered an amendment limiting education funding to not more than one-tenth of annual state revenue and a two dollar poll tax for the support of "public free schools." Mr. Sansom used public free schools to mean the system of tuition support, first for

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182. DEBATES, *supra* note 131, at 212. The Committee on Counties and County Lands reported on the disposition of county land previously set aside for "education or schools." JOURNAL, *supra* note 124, at 327. See Appendix F for the text of the County Land Report.

183. Mr. Allison, in the debates said: "There were three parties in the Convention on the question before them—one against all taxation, one for small taxes, and one for something like the Ballinger substitute. . . . the people [are] opposed to that or any other magnificent school system." *Id.* at 213. The Ballinger "magnificent school system" proposal called for a state-wide tax on all property and a \$2 poll tax. This was the most expensive funding mechanism proposed and never made it into the convention's final education article.

184. *Id.* at 224-25.

185. *Id.*

186. JOURNAL, *supra* note 124, at 325.

indigents and then pro rata to all school children. This amendment was tabled 52-26.<sup>187</sup> A two dollar poll tax was quite high, so perhaps Sansom wanted to see how high the convention would go. Dohoney voted with Sansom on this tabled measure, perhaps showing that the "public free schools" language involved some common ground.

Ballinger offered a substitute for section 3 to provide a statewide property tax and a two dollar poll tax, again explicitly to educate all children for four months in each year; but the proposal lost, as did a lower tax substitute, and the issue was then tabled.

Section 7 as proposed by the majority left the funding question for "free public schools" entirely up to the Legislature with regard to the levels of funds, source of funds, and the timetable for implementation. Though its aspiration was free public education, Dohoney offered a compromise substitute for section 7 using Sansom's term "public free schools" for at least four months instruction of all students between nine and fifteen (this would approximately halve the cost of instruction for ages six to eighteen) to be funded by a local option county-wide poll tax of one dollar and ad valorem taxes of one-sixth of one percent.<sup>188</sup> The state officer's only duty with respect to education would be to distribute funds. This is a clear example of Dohoney using the term "public free schools" to make his proposal politically acceptable, for his true desire is made clear in his statement that "his proposition went as far as they could go in compromising. If the Democratic party was in favor of *free schools* it could not do less than what he had suggested."<sup>189</sup> His idea of compromise was to educate only older students, and only if the local county opted to do so. This was a substantial concession by a man who supported fully-funded, tuition-free, state-operated education for all. In his proposal, Dohoney uses the term public free schools, even while he advocated public education on the northern model.

DeMorse immediately countered with his own substitute plan as follows:

It shall be the duty of the Legislature, by the use of the available school fund, including a poll tax of two dollars, which shall be levied for educational purposes, to establish and maintain *free public schools* for such period of each year as the fund may be sufficient to accomplish,

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187. *Id.* at 328-29. See Appendix E-3 for a record of the vote tabling Sansom's proposal.

188. *Id.* at 330; DEBATES, *supra* note 131, at 213-14. Dohoney's amendment stated: "Section 7. The Governor, Comptroller of Public Accounts and Treasurer shall constitute a *public school* board, for the sole purpose and with the sole power of annually apportioning and distributing the available public school fund among the several counties according to their respective scholastic population. And if at any time the State fund apportioned to any given county, added to any county fund that may be existing, shall not be sufficient to provide *public free schools* in said county, for at least four months in the year, for the instruction of all the scholastic population between the ages of nine and fifteen years, the county court of said county shall have the power to supply the deficiency by levying a poll tax of one dollar on every male citizen over twenty-one years of age, to be supplemented by an ad valorem tax upon all the taxable property in the county; *provided*, that said ad valorem tax shall never exceed one-sixth of one per cent.; and *provided further*, that no part of the tax raised in any county shall ever be applied to any other purpose than the payment of teachers in said county." (emphasis added). JOURNAL, *supra* note 124, at 330.

189. DEBATES, *supra* note 131, at 214 (emphasis added).

and the Legislature may authorize each school district in every county to levy and collect such tax as the vote of a majority of the freeholders of the district may determine, not exceeding one-fourth of one per cent. The available school fund hereinbefore provided shall be distributed to the several counties of the State according to scholastic population, the distribution to be made by the Comptroller.<sup>190</sup>

Moreover, an additional section, to come in as section 8, was proposed by DeMorse.

Sec. 8. Each county shall be laid off into school districts by the county commissioners thereof, and one county superintendent, who shall have the examination of teachers, shall be elected by all the qualified electors; and a board of school trustees for each school district shall be elected by the qualified voters of the district.<sup>191</sup>

Notably, DeMorse used the term "free public schools" since his plan, which was eventually defeated, envisioned tuition-free schools run solely by the government in the modern sense, including districting. DeMorse's substitute for Dohoney's substitute was intellectually more forthright in prescribing the duty of the legislature to establish and maintain "free public schools," than trying to use the term public free schools.

Mr. Johnson offered a substitute to section 7:

Amend by striking out all of said section down to the word "year," in line 44, and insert "the Legislature shall establish *free schools* throughout the State as soon as practicable, and shall provide by law that the available school fund herein provided shall be equally distributed among all the school population of the State."<sup>192</sup>

It is not clear in what sense Johnson used the term "free schools," whether in the old pauper school sense or in the northern tuition-free sense, though the per capita distribution in his substitution suggests tuition paid equally for all rather than special provision for the indigent in the traditional sense. Thus, it appears Johnson used the term "free schools", the old term for pauper schools, but proposed equal distribution rather than priority to indigents and orphans. Johnson's offer had no provision for any funding. Johnson's amendment lost 36-42.<sup>193</sup> Perhaps this confusion in terms explains why Dohoney, Cline, and DeMorse, advocates of the bureaucracy model, voted with Sansom for the substitute.

In support of his motion, DeMorse argued that "they ought at least to keep some sort of semblance of a school system," and his proposal might "give the poor boy . . . perhaps three months in the year."<sup>194</sup> DeMorse's

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190. JOURNAL, *supra* note 124, at 332 (emphasis added).

191. *Id.* at 330-31.

192. *Id.* at 331 (emphasis added).

193. *Id.* at 331-32. See Appendix E-4 for a record of the vote on Johnson's substitution.

194. DEBATES, *supra* note 131, at 215. "Mr. DeMorse asked members of the Convention for a calm consideration of his substitute. He thought it would be found entirely free from any tangible objection. It contained the views he advocated during the canvass in his district, and he had never heard one person object to it. The difference between it and the report of the committee was substantial. The committee said that at some future day they would establish a school system. To this he wished to reply that they ought at least to keep some sort of sem-



substitute for "free public schools" without tuition lost, 33-42, in a stinging defeat for the bureaucratic model of free public schools.<sup>195</sup> The Dohoney substitute, which allowed a poll tax to support public free schools, lost 28-48.<sup>196</sup>

After the vote on DeMorse's proposal and Dohoney's substitute, Mr. Waelder offered his tax plan to support education of all children substituting section 3 of the majority report:

The Legislature shall provide for the levying and collection of an annual tax, of not more than one-sixth of one percentum upon the taxable property, real and personal, of this State, and also a poll-tax of two dollars on each voter of the State; and the taxes so levied and collected, as well as the income from the fund herein provided, shall be annually distributed for *the education of all children* between the ages of eight and fourteen years, among the several counties or school districts, according to their respective scholastic population.<sup>197</sup>

During the debate on the level of taxation, General Whitfield, as Chairman of the Committee on Education, spoke to the reasons for the majority report. Interestingly, though the majority report proposal speaks only of "public schools" and "free public schools," General Whitfield says that "common free schools" were "the idol of his heart."<sup>198</sup> In telling of his great desire for schools, he told how he had a school on his farm last year to which he had contributed \$125 while others only contributed \$55.<sup>199</sup>

Many delegates during the Convention stated that education was the most important topic they faced, including Cline and Whitfield that day.<sup>200</sup> As the report of the debate shows, although the terminology is not always consistent, the Northern-model advocates generally advocated "free public schools," "free schools," or the like, but did not get such a system into the constitution. Cline spoke in support of the most expensive proposals for education. He admitted that objections to a public school system existed because of local abuses.<sup>201</sup> Cline was a strong advocate of free tuition, state-operated, public education as we know it today. He used many terms for his proposed system including free schools, public schools, public education, and free education; but he did not use the term "public free schools" to

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blance of a school system, and not push it off into the future and say, 'we may establish a system when the school lands shall have acquired value.' He admitted that the land endowment was the most magnificent in the world, but he was opposed to its sacrifice now, because it would be extremely valuable in the future. The system he proposed would at least give the poor boy, who could otherwise get no schooling, perhaps three months in the year." *Id.*

195. JOURNAL, *supra* note 124, at 332. See Appendix E-5 for a record of the vote on DeMorse's proposal.

196. *Id.* at 332. See Appendix E-6 for a record of the vote on Dohoney's substitute proposal.

197. *Id.* at 333 (emphasis added).

198. DEBATES, *supra* note 131, at 215. See Appendix G-1 for a report of Whitfield's speech.

199. *Id.*

200. *Id.*

201. *Id.*

describe his system.<sup>202</sup> He provided interesting data on the cost of expensive private education (\$5 - \$15 monthly), and indicates that San Antonio, New Braunfels, and Brenham had public schools "at an expense of one dollar per month for each pupil."<sup>203</sup> General Whitfield agreed with Cline's ideas but remarked they were "thirty or forty years ahead of [their] time."<sup>204</sup> Sansom repeated his objection, and the people's, to any taxation for education, claiming the current school taxes were the most oppressive of all, and the main reason for the convention was to limit taxes.<sup>205</sup> Mr. Robertson of Bell weighed in on the side of no new taxes.<sup>206</sup> Mr. McCormick chided the rich for opposing a pitiful small tax for the benefit of poor men such as himself and challenged his fellow Democrats to fulfill the Democratic platform of 1873.<sup>207</sup>

Mr. Waelder, a supporter of the generous provisions of DeMorse's substitute, urged the friends of "free schools" to support it.<sup>208</sup> Mr. Murphy responded in opposition that "those who opposed the poll tax as an oppression to the poor man were now arguing in opposition to their former convictions," and that crime increased in Massachusetts despite its vast sums spent on education.<sup>209</sup> Colonel Ford, a supporter of the DeMorse substitute for public schools, called it a "public free school education."<sup>210</sup> Mr. Russell of Wood, staunch opponent of taxation, denounced the Prussian system again.<sup>211</sup> Mr. Lockett spoke of the great need for "public education," meaning the DeMorse plan.<sup>212</sup> Mr. Nugent stated he was not opposed to the "free school system," but the Legislature had "too much power" and taxes were too great.<sup>213</sup>

Waelder again spoke in favor of "direct taxation for free schools", favoring the Moore amendment.<sup>214</sup> Mr. Moore spoke in favor of "common free schools," which he envisioned as the next evolutionary step from the early

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202. *Id.* at 215-18. See Appendix G-2 for the text of Cline's speech in support of his proposal.

203. DEBATES, *supra* note 131, at 216-17.

204. *Id.* at 218.

205. *Id.* at 219. See Appendix G-3 for the report of Sansom's speech in opposition to taxation for education.

206. *Id.* at 219-20. See Appendix G-4 for the report of Robertson's speech.

207. *Id.* at 220-21. See Appendix G-5 for the report of McCormick's comments.

208. DEBATES, *supra* note 131, at 221. See Appendix G-6 for a report on Waelder's speech.

209. *Id.* at 221-22. See Appendix G-7 for a report on Murphy's response to Waelder.

210. *Id.* at 222. See Appendix G-8 for a report on Ford's viewpoint.

211. *Id.* See Appendix G-9 for a report on Russell's opposition to taxes.

212. *Id.* at 222-23. See Appendix G-10 for a report on Lockett's speech in support of the DeMorse plan.

213. DEBATES, *supra* note 131, at 223.

Mr. Nugent said that the people of the State were not opposed to the *free school system*. His views were well explained in the substitute of the gentleman from Red River. The trouble was that the Legislature had assumed too much power. The people wanted the schools under the proper restrictions. The prejudice against the system arose from burdensome taxation.

*Id.* (emphasis added).

214. *Id.* at 223-224. See Appendix G-11 for a report of Waelder's comments.

establishment in 1845 of "public free schools,"<sup>215</sup> meaning the old system of public support for private education. Moore proposed that the constitution be silent on education so that the people could decide as they saw fit, an option obviously not chosen by the convention. Mr. McLean said the state was too poor "to maintain a system of public free schools"; the current system was even a failure in his eyes.<sup>216</sup> Again, the reference to free schools meant free tuition for all by its proponents, usually in a state-run school.

According to McKay, Dohoney spoke in favor of "public free schools," but only after his proposals for free public schools had been defeated.<sup>217</sup> Dohoney meant what every other advocate called free education, public schools, since he was actually speaking in favor of the Johnson amendment calling for "free schools throughout the state as soon as practicable."<sup>218</sup> Flournoy replied with the no right to tax arguments,<sup>219</sup> "Mr. Wade said he strongly advocated a system of "public free schools,"<sup>220</sup> though based on his voting record and prior speeches, he apparently used his opponent's term in the same sense as Dohoney. Wade previously had supported "free public schools"<sup>221</sup> as his ideal plan, and he voted with Dohoney and DeMorse on the losing northern style amendments.<sup>222</sup> Mr. Graves moved to cut off the debate, and all the amendments were "voted down by decided majorities."<sup>223</sup>

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215. *Id.* at 224. See Appendix G-12 for a report of Moore's speech.

216. *Id.*

Mr. McLean said the country was too sparsely settled to maintain a system of *public free schools*. They had tried it, and made a miserable failure. They had been pointed to Massachusetts for an example. She was 200 years reaching her present facilities in the way of free schools; and they need not, especially in their financial condition, try to imitate her. The effort would bankrupt them. He wished they were so situated that *free schools* could be had, but saw no chance for the State to maintain them. He paid a glowing tribute to Prussia on account of her beneficent school system.

*Id.* (emphasis added).

217. *Id.*

He thought that the proposed amendment by Mr. Johnson, of Collin, this morning was dodging the question by leaving the whole matter to the Legislature, but believing that was the best that could be done, he would vote for it on the ground that's half loaf of bread is better than no bread.

*Id.*

218. DEBATES, *supra* note 131, at 224.

219. *Id.* at 225.

He contended that no free government could levy tribute on the citizens to force education on the children. Massachusetts and other states had been held up as having magnificent schools, sustained by their respective states. Were those people any happier, wiser, or more virtuous than those of Texas? Nay. He would venture the assertion that there lived no more virtuous, intelligent, and prosperous people than Texans. They were the peers of any people. They had no right to invade the mansion of the parent and take from him or her their bright-eyed child, and turn him over to the State. Whenever they should do that they could do anything. When that was done the science of free government was trodden under foot; the liberties of the country gone.

*Id.*

220. *Id.*

221. JOURNAL, *supra* note 124, at 79.

222. *Id.* at 332-33.

223. DEBATES, *supra* note 131, at 225.

Johnson of Collin's proposal that the legislature establish "free schools" as soon as practical with equal distribution of the funds among all, but with no specific funding formula, received only 36 votes, including the votes of such opposites as Dohoney and DeMorse (free public education) and Sansom and McLean (no taxes for schools).<sup>224</sup> Apparently, both sides hoped to win in the legislature what the convention would not give them, so they favored this general unspecific clause as half a loaf for their side.

DeMorse's substitute for tax-supported, tuition-free, centrally-administered education through "free public schools" received only 33 votes for and 42 against.<sup>225</sup> The Dohoney substitute of four months free education for ages 9 to 15 gathered even fewer supporters, losing 28 to 48.<sup>226</sup> However, it gained some surprising support from McLean and Sansom, who perhaps felt it was at least cheaper than the DeMorse amendment.

Some individual votes are somewhat difficult to understand. For example, on the motion to substitute the Education Committee minority report for the majority, a yes vote would mean taxes for schools would be prohibited. Nineteen voted for this, including Holmes and Flanagan.<sup>227</sup> Yet Flanagan and Holmes voted for the DeMorse substitute which provided for a statewide two dollar poll tax and an additional local option county property tax.<sup>228</sup> Perhaps they thought they could defeat this at the local level.

After these amendments were defeated, Mr. Waelder offered a substitute for Section 3 of a statewide property tax, and a two dollar poll tax, for educating "all children between the ages of 8 and 14 years."<sup>229</sup> The convention recessed until the next day.

Education was taken up again on the thirty-second day, October 12, 1875. Dohoney offered to amend Waelder's amendment, which Waelder himself amended to drop the poll tax to one dollar.<sup>230</sup>

Specifically, Dohoney moved to amend section 3 of the Waelder amendment to add that such taxes were to be spent only in the county.<sup>231</sup> Nunn

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224. JOURNAL, *supra* note 124, at 330-32.

225. *Id.* at 332. A comparison with the Johnson amendment vote shows that DeMorse lost Allison, Brown, Blake, Blassingame, Barnett, Dillard, Dohoney, Darnell, German, Johnson of Collin, Moore, Norvell, Nunn, Reagan, Ramey, Spikes, Sansom and Whitehead. He gained Ford, Flanagan, Holmes, Kilgore, Lockett, Mitchell, Nugent, Ross, Russell, of Harrison, Wade, Weaver and Waelder.

226. *Id.* at 332-33.

227. *Id.* at 325. The others were Arnim, Blassingame, Barnett, Burleson, Bruce, Cooke of San Saba, Douglas, German, Holt, Henry of Limestone, Killough, Norvell, Robertson of Bell, Russell of Wood, Spikes, Scott and Sansom.

228. *Id.* at 332.

229. DEBATES, *supra* note 131, at 225. "Mr. Waelder then offered the following as a substitute for Section 3: 'The Legislature shall provide for the levying and collection of an annual tax of not more than one-sixth of the per centum of taxable property, real and personal, of the State, and also a pool tax of \$2 on each voter of the State; and the taxes so levied and collected, as well as the income from the fund herein provided, shall be annually distributed for the education of all children between the ages of 8 and 14 years among the several counties or school districts according to their respective scholastic populations.'"

230. JOURNAL, *supra* note 124, at 335-36. Waelder's amendment to drop the poll tax to one dollar lost.

231. DEBATES, *supra* note 131, at 225-26. "Thirty-Second Day, Tuesday, October 12, 1875, Mr. Dohoney offered the following amendment to the amendment: 'Provided that the

spoke against the 1875 system and in support of free public education, which would require a high poll tax of three dollars.<sup>232</sup> Robertson spoke against high taxes, though he was not against the "free schools" as such.<sup>233</sup> DeMorse offered a substitute to Dohoney's substitute that "free schools might be established in populous districts by a vote of the majority of freeholders . . . not to exceed one-fourth of one per cent."<sup>234</sup> This local option, with voting limited to landowners who would pay the tax, appealed to McLean, who broadly opposed general taxation. But he saw no reason to oppose local taxes desired by the local populace to establish "free schools" at the local communities' own expense.<sup>235</sup> The DeMorse substitute was defeated 33 to 42.<sup>236</sup> Dohoney's amendment then lost, 28 to 48.<sup>237</sup>

Flournoy gave a long speech for "free schools," perhaps meaning free tuition for all.<sup>238</sup> He called the nineteen against "free schools," (i.e., the Sansom supporters) "old fogeys." Of course, the final constitution does not call for the free schools advocated by Flournoy. Nugent opposed the amendment as a special tax, though he was for public education.<sup>239</sup>

Mr. Martin of Navarro, then offered a substitute for the whole education article and used the term "common schools," though the system was again to be "thorough and efficient."<sup>240</sup> The principle feature of Martin's substitute was leaving the legislature free to make provision for a public school system when the proper time arrived. Martin was uncertain when such a system would be established, but he wanted the Legislature to have the power to institute a public school system when the conditions allowed for it.<sup>241</sup>

Bruce spoke of no taxes.<sup>242</sup> Colonel Crawford eloquently called the majority report "sugar coated, stupendous fraud," and "an abortion" because it promised free public education but gave no mechanism to provide it.<sup>243</sup> Mr. Ferris, a supporter of referring to a new committee, perhaps reveals some difference between "free schools" as established by the Constitution of 1845, private schools, and public schools. He said:

He had come to Austin as a friend of the *free schools*, and was ready to support the system as defined in the Constitution of 1845. He thought there was not a county in the state which would go back on

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taxes raised under this provision shall be applied to the public schools in the county where they are collected.' "

232. *Id.* at 226. See Appendix H-2 for a report on Nunn's statements.

233. *Id.* See Appendix H-3 for a report of Robertson's speech against new taxes.

234. *Id.*

235. *Id.* at 226-29. See Appendix H-4 for the text of McLean's speech supporting the local tax option.

236. DEBATES, *supra* note 131, at 229, though this is not reflected in the JOURNAL.

237. *Id.*

238. *Id.* See Appendix H-5 for a report on Flournoy's speech.

239. *Id.* at 230. See Appendix H-6 for a report on Nugent's opposition.

240. JOURNAL, *supra* note 124, at 336. See Appendix H-1 for the text of Martin of Navarro's substitution.

241. *Id.*

242. DEBATES, *supra* note 131, at 231.

243. *Id.* See Appendix H-7 for a report on Crawford's speech.

such a system. It would be indeed strange if, at that late day, they should change a system which had worked so well. If the majority report [which established "public schools"] prevailed it would be the death blow to *free schools*, and he wished to ask those who claimed it was a compromise to show where the compromise came in. It took away the trust fund for *free schools* and handed it to private schools, and hence would destroy public schools as a necessary consequence of the misappropriation of the funds. If they committed that crime against the people, it would defeat the Constitution, and it ought to do so. He was not in favor of public schools, for the people could not bear the necessary taxation. The Constitution of 1845 had left the Legislature to establish *free schools* throughout the State as soon as practicable, and as soon as sufficient means could be raised for the purpose. Could they not do as much?<sup>244</sup>

On the other hand, Judge Ballinger rose to excoriate the majority report as a fraud on the friends of "free schools," meaning tuition free public education; if tuition free schools were not funded, he would rather vote with Sansom and the others who at least took care of the orphan and indigent children first.<sup>245</sup> He used the free public education model in discussing the majority public schools report. Cooke of Gonzales promised to go as far as one-tenth of the annual tax and no more.<sup>246</sup> Mr. Nunn then moved to refer the original majority report and all pending education matters to a select Committee of Seven, which passed.<sup>247</sup> Because of the vast and bitter disparity of views, all of the education resolutions which had been introduced were referred to the Select Committee of Seven, 43-28.<sup>248</sup>

#### D. Select Committee on Education

On the thirty-third day, October 13, 1875, the Select Committee on Education, composed of Nunn, Norvell, Moore, Ross, Ballinger, Martin of Navarro, and Robertson of Bell, was announced.<sup>249</sup> Mr. Mills submitted an education resolution which used the term public free schools three times, public schools or public schools fund five times, and free schools once. His proposal also called for a uniform system which the convention never adopted and which would have been the antithesis of a free choice plan. The Mills plan was referred to the Select Committee on Education, and never made it out.<sup>250</sup>

The debate and voting on the committee reports clearly revealed deep divisions in the convention. It was apparent that the vocal minority for tuition-free, public education for all students (the Northern or bureaucratic model) did not have the votes to pass their proposal. On the other hand, the no taxes, completely private faction was also a minority. Some compromise

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244. *Id.* at 231-32 (emphasis added).

245. *Id.* at 232-33. See Appendix H-8 for a report on Judge Ballinger's viewpoint.

246. *Id.* at 233-34.

247. JOURNAL, *supra* note 124, at 336-37.

248. *Id.* at 337.

249. *Id.* at 339.

250. *Id.* at 340-42. See Appendix I for the text of the rejected Mills Plan.

appeared to be possible, and the select committee set to work. One important and obvious change in the select committee's education article from the prior Committee on Education majority report was the readoption of the public free school model of control, but with better funding for parental tuition reimbursement to make education more widely accessible. It also dropped most references to "free public schools" or simply "public schools."

On the thirty-eighth day, October 19, 1875, the Select Committee on Education reported 6-1 back to the convention. The select committee expressly recognized the conflicting opinions in the convention, and chose to use the term "public free schools" rather than explicitly to adopt a pure state-controlled free-tuition-for-all system of public education as the most practicable plan. Section 1 of the select committee's report became the final adopted language in the Texas Constitution; it required the legislature to make "suitable provision" for "an efficient system of public free schools." By substituting the term public free schools for "public schools" and "free public schools" present in the original majority report, the select committee displayed its intent to retain the private school system partially funded by state money. Nowhere is fully gratuitous instruction mentioned in the report. Little state control is allowed, though an ex officio Board does exist, leading to the conclusion that centrally-administered, state-controlled education was not the goal of the select committee. On the other hand, Northern style proponents were pleased with the liberal provision for educational funding, funded by a poll tax of two dollars and not more than one-fourth of the annual general revenues, as well as the extensive dedication of public lands. The full text of the select committee's report is reprinted below:

The undersigned members of the special committee of seven, to whom was referred the majority and two minority reports and pending amendments on the subject of public schools, beg leave to report that they have carefully investigated the subject; *and, in view of the conflicting opinions of this body*, have agreed on the following eight sections as the most practicable basis, under the circumstance, on which to organize the public free schools of this State. (emphasis added).

They would further submit that they have also considered the subject of the asylums, and find no cause of change the majority report thereon, heretofore presented, but suggest that it be placed among the general provisions, as it does not appropriately pertain to the public free school system. [D.A. NUNN, L.W. MOORE, L. NORVELL, W.P. BAL-LINGER, MARION MARTIN, L.S. ROSS.]

#### PUBLIC FREE SCHOOLS.

Section 1. 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*.

Sec. 2. All funds, lands, and other property heretofore set apart and appropriated for the support of public schools, all the alternate sections of land reserved by the State out of grants heretofore made, or that may

hereafter be made, to railroad or other corporations, of any nature whatsoever, one-half of the public domain of the State, and all sums of money that may come to the State from the sale of any portion of the same, shall constitute a perpetual public school fund.

Sec. 3. And there shall be set apart annually not more than one-fourth the general revenues of the State, and a poll tax of two dollars on all male inhabitants in this State between the ages of twenty-one and sixty years, for the *benefit of the public free schools*.

Sec. 4. The lands herein set apart to the *public free school fund* shall be sold under such regulations, at such times, and on such terms, as may be prescribed by law; and the Legislature shall not have power to grant any relief to the purchasers thereof. The Comptroller shall invest the proceeds of such sale, and of those heretofore made, as may be directed by the Board of Education, herein provided for, in the bonds of this State, if the same can be obtained, otherwise in United States bonds; and the United States bonds now belonging to said fund shall likewise be invested in State bonds, if the same can be obtained on terms advantageous to the *school fund*.

Sec. 5. The principal of all bonds or other funds, and the principal arising from the sale of the lands hereinbefore set apart to said school fund, shall be the permanent school fund; and all the interest derivable therefrom and the taxes herein authorized and levied shall be the available school fund, which shall be applied annually to the support of the *public free schools*. And no law shall ever be enacted appropriating any part of the permanent or available school fund to any other purpose whatever; nor shall the same or any part thereof ever be appropriated to or used for the support of any sectarian school. And the available school fund herein provided shall be distributed to the several counties according to their scholastic population, and applied in manner as may be provided by law.

Sec. 6. All lands heretofore or hereafter granted to the several counties of this State for education or schools, are of right the property of said counties respectively to which they were granted, and title thereto is vested in said counties, and no adverse possession or limitation shall ever be available against the title of any county. Each county may sell and dispose of its lands in whole or in part, in manner to be provided by the police court of the county. Actual settlers residing on said lands shall be protected in the prior right of purchasing the same to the extent of their settlement not to exceed one hundred and sixty acres, at the price fixed by said court, which price shall not include the value of existing improvements made thereon by such settlers. Said lands and the proceeds thereof when sold, shall be held by said counties alone as a trust for the benefit of public schools therein. Said proceeds to be invested in bonds of the State of Texas, or of the United States, and only the interest thereon to be used and expended annually.

Sec. 7. Separate schools shall be provided for the white and colored children, and impartial provision shall be made for both.

Sec. 8. The Governor, Comptroller and Secretary of State shall constitute a Board of Education, who shall distribute said fund to the several counties, and perform such other duties concerning public schools



as may be provided by law.<sup>251</sup>

The key issues, as with many public funding debates, was how big to make the pie (through the donation of public land funding, tax funding, or a combination of both) and how to slice it. If the pie was small, then even advocates of expansive public education seemed to want orphans and indigents to get the biggest slice of the pie. The new section 1 now called for "an efficient system of public free schools," rather than the previous majority report's simple "public schools." Section 7 of the original majority plan had clearly established that it advocated free public education. In it, public schools did not mean private schools, but state-controlled schools, as the term is used today. Otherwise, the designation between public and private schools in Section 7 of the majority report would have been unnecessary.<sup>252</sup> This distinction was dropped by the select committee.

Section 2 of the select committee's report introduces some confusion because it kept the dedication of public land, including one-half of the public domain, as a perpetual public school fund. This may be part of the intended mix of public and private education. Since this section was funded entirely with public funds, the committee may have felt appropriate to limit this money solely for the benefit of public schools, with none going to private education. On the other hand, since taxation takes money from the pockets of all the people, it was felt to be perfectly legitimate to return it to the pockets of all the people in the form of tuition grants or reimbursements for private schooling.

Section 3 of the select committee's report increased funding for the public free schools, *not* public schools, from the one-tenth of annual revenues for public schools that the majority report had set aside to not more than one-fourth of the general revenue for the benefit of the public free schools. This may show a separate funding formula for public free schools from general revenue whereas public schools were supported by public domain income. Section 3 also specified a poll tax of two dollars instead of the unspecified poll tax allowance in the majority report. Thus, a mix of public and private education was kept in place under the select committee's proposal, but better funding was provided for it.

Section 4, dealing with management of the school fund, was changed by the Select Committee to use the term "public free school fund" instead of "perpetual school fund" as in the majority report. This may be due to poor drafting since the only fund this can mean is the "public school fund" authorized in Section 2, but the drafters confused the issue by using different terms for the same fund. The change, however, seemed designed to satisfy those who wanted to preserve the public free school concept as it had existed.

Section 5 was first changed to delete "public schools" and make the available fund (interest from the sale of public funds and taxation) available for

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251. *Id.* at 395-97 (emphasis added).

252. See JOURNAL, *supra* note 124, at 243; Appendix D-1 (text of majority report); see also *supra* text accompanying notes 158-160 (discussion of section 7 of majority report).

public free schools. Section 6 of the majority report had provided, "and no law shall ever be made appropriating any part of the permanent or available school fund to any other purpose whatever, except as hereinafter provided."<sup>253</sup> The "hereinafter provided" referred to the explicit allowance of the distribution of the available school fund "in aid of private schools" until such time as the legislature could establish free public schools throughout the state (section 7). This was Whitfield's stopgap measure. Section 5 of the select committee's report now allowed both permanent and available fund use for public free schools, but it added the clause, "nor shall the same [available and permanent funds] or any part thereof ever be appropriated to or used for the support of any sectarian school."<sup>254</sup> The last change was an apparent compromise to leave the allocation of the fund to the legislature rather than spell out any preference for indigents or orphans.

The new section 6 kept most of the majority report's section 6, except that it changed public schools to "education or schools."<sup>255</sup> This was significant since the original majority report referred to lands previously dedicated to public schools, of which there technically had been none, since only public free schools existed. The new report more accurately reflected that in a generic sense previous constitutions had dedicated land to "education or schools."<sup>256</sup> Extensive protection for these lands were added in the select committee's proposal in addition to a trust impressed upon them alone "for the benefit of public schools therein [in the county]."<sup>257</sup> The select committee appears to have intentionally used "public schools" and not merely confused the terms. If the assumption is made that the committee intended to use the term "public schools" to mean something different from "public free schools," then only the public (i.e., state-operated) schools would get money from public land funds, but all public free schools, state and private, would get state general tax funds.

New section 8 was an addition by the select committee; it created a State Board of Education to distribute funds and perform other "duties concerning public schools as may be provided by law."<sup>258</sup> Why is the term public schools used here when section 1 calls for the establishment of public free schools? Did the select committee envision two distinct types of schools, with the Board of Education governing public schools and with the public free schools essentially unregulated? This is exactly the system choice proponents say will revolutionize education; a dual system of public schools (state run) and public free schools (private, but open to all with state tuition reimbursement at least in part). Is this the only consistent explanation of why the most gifted men in Texas would mix the language of the most important terms in the education article, the most important work of the convention? This appears the most likely resolution. Or is the education article

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253. JOURNAL, *supra* note 124, at 244. See Appendix D-1.

254. *Id.* at 396.

255. Compare majority report, *id.* at 244, with select committee report, *id.* at 396-97.

256. *Id.* at 396-97.

257. *Id.*

258. JOURNAL, *supra* note 124, at 397.

simply the proverbial camel, a horse designed by a committee that simply could not agree on whether it wanted the donkey of tuition-free, state-operated public education or the racehorse of private enterprise? An argument for poor drafting can be made from the last sentence of the section on asylums where the Select Committee still called the education article the article on public schools, even though it had been changed to public free schools.<sup>259</sup> In any event, two hundred copies were printed and debate was set for the following Saturday.<sup>260</sup>

In searching for the meaning of these terms, and the reason for the use of both "public schools" and "public free schools" in the same education article, moderns tend to assume that one system or the other won the battle for dominance. They tend to think of the two systems as mutually exclusive; but more likely the framers may actually have intended to create a hybrid school system to obtain sufficient votes to ratify the constitution. After all, the 1854 School Law had contained a dual, hybrid districting and voucher type, parent-controlled plan.<sup>261</sup> It would not be unthinkable for the select committee to endorse such a mixed proposal again, even though in 1856 the private system had achieved nearly complete domination. Both camps had strong followings, and both may have supported this compromise.

The six member majority of the select committee, which produced the above compromise, was composed of D.A. Nunn, L.W. Moore, L. Norvell, W.P. Ballinger, Marion Martin, and L.S. Ross.<sup>262</sup> Robertson of Bell, the seventh member of the committee, could not bring himself to support any taxation for "free public education."<sup>263</sup> His language in opposition is clear and emphasizes the differences between public free schools of the past, the free public schools being proposed on the northern model. Robertson, in his minority report, created a specialized term in describing his proposed system, the "General Education Fund," to avoid confusion.<sup>264</sup> Robertson's model was the purely private model that was clearly rejected by the convention. It is just as clear, however, that the select committee adopted many of the private model's elements into its draft, and rejected the tuition-free, solely state-controlled, public education model as well. Robertson's minority report adopted the extreme private control of education view, with no taxation for public education, but some funding for indigent orphans from the sale of public lands:

The undersigned, one of the special committee to which was referred the article reported by the majority of the standing Committee on Education, begs leave to dissent from the majority report of said special committee for the following reasons:

Section 1. To promote the general diffusion of knowledge the lands heretofore set apart by the Republic or State of Texas, and the moneys,

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259. *Id.*

260. *Id.*

261. *Id.* at 395.

262. *Id.*

263. JOURNAL, *supra* note 124, at 397-401.

264. *Id.*

bonds and other property now owned by the State, which have been devoted to the use of *public free schools*, shall constitute the basis of a permanent fund, to be called the *General Educational Fund*.

*Provided*, That the title to lands given to the State for the use and benefit of *public free schools* shall be surrendered to the donors at their option; but the right of the State to improvements put upon said lands by the State shall not be hereby affected. [emphasis in original].

Sec. 2. The Legislature shall provide for the sale of all lands set apart in section 1 of this article as soon as practicable, which have been located, or which may hereafter be located, by railroad or other corporations, and for the sale of all other property therein set apart; and all moneys derived from the same shall be invested in bonds of the State of Texas.

Sec. 3. The interest accruing on the General Educational Fund shall be distributed annually by the Comptroller of Public Accounts between the respective counties of the State, according to their scholastic population, as follows:

1 To the payment of tuition for four months in each year of all the indigent orphan children of the State between the ages of eight and sixteen years; the remainder to be applied *pro rata* to the payment of tuition of all children of the State within said ages; and the Legislature may set aside not more than one-twentieth of the annual revenues of the State in aid of said General Educational Fund."<sup>265</sup> [emphasis in original]

#### *E. Debate on the Select Committee on Education's Proposal*

On the forty-second day, Saturday, October 23, 1875, the education debate, now focused on the select committee's proposal for an "efficient system of public free schools,"<sup>266</sup> was postponed to Thursday.<sup>267</sup> The debate began in earnest then on the forty-sixth day, Thursday, October 28, 1875.<sup>268</sup> Erhard, in his first convention speech, argued in favor of "free schools," and "public schools" with taxation as the source of funds. It is not absolutely clear what he meant by free schools, but he appears to speak of tuition-free education for all.<sup>269</sup> His voting record is inconclusive. He has no recorded

265. *Id.* at 397, 400-01 (emphasis added except where otherwise indicated).

E.S.C. Robertson, a delegate to the 1845 Constitutional Convention reported:

That it was not the intention, as it was not the policy of the framers of the Constitutions of 1836 or 1845 to do more than to encourage education, and to aid the schools of the country that might be established by individual enterprise and money, by the donation of lands and a portion of the money received for the sale of our north-western territory, an amount sufficient to educate all the indigent orphans of the country.

*Id.* at 400.

266. *Id.* at 396.

267. *Id.* at 464.

268. DEBATES, *supra* note 131, at 326.

269. *Id.*

Mr. Erhard said he had never spoken before, but he thought he should say something in favor of free schools. He denied the wisdom of low appropriations for the public schools, which some members had advocated because of the poverty of the people. He said the late administration had left them a heavy debt,

vote on the question of substituting the Sansom minority report for the original majority report.<sup>270</sup> He voted no to table Sansom's proposal for public free schools.<sup>271</sup> He voted against the Johnson, DeMorse, and Dohoney amendments.<sup>272</sup>

Mr. Reagan moved to reduce the poll tax from two dollars to one.<sup>273</sup> Mr. Johnson offered a substitute, setting apart one-tenth of the annual revenue and a one dollar poll tax for "the benefit of the public free schools."<sup>274</sup> Reagan's amendment to reduce the select committee's two dollar poll tax to a one dollar poll tax passed 43 to 36.<sup>275</sup> Even advocates of no or low taxes, like McLean and Sansom, supported this reduction from two dollars to one.<sup>276</sup> They may also have supported the reduction for public free schools rather than public schools, because of the support of Robertson of Bell. Robertson, who voted for the reduction, supported the private system with tuition reimbursement, especially for the poor. Ballinger voted against low funding levels for any system.<sup>277</sup>

Still, on the forty-sixth day, Mr. West spoke for adequate funding for the

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but he thought the State could still bear some taxation for public schools. He insisted that six months of teaching was far cheaper in its results than four months. He said he wanted the children educated from the lowest to the highest branch of elementary knowledge and no farther at the State's expense.

*Id.*

270. JOURNAL, *supra* note 124, at 325.

271. *Id.* at 328-29.

272. *Id.* at 331-32.

273. *Id.* at 511; DEBATES, *supra* note 131, at 326.

274. JOURNAL, *supra* note 124, at 511.

"Sec. 3. And there shall be set apart not less than one-tenth of the annual revenue of the State derivable from taxation, 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."

*Id.*

275. *Id.* See Appendix J-1 for a record of the vote on Reagan's proposal to reduce the poll tax.

The journal lists the author as Johnson of Franklin County, JOURNAL, *supra* note 124, at 511. The Debates list the author as Johnson of Collin, DEBATES, *supra* note 131, at 326. A very important potential problem with source reliability appears here. In the Journal, reported by a paid stenographer during the Convention, the Johnson proposal is for public free schools. The debates by S. McKay are his summaries done in 1930 from newspaper accounts of the Convention debates.

No official report of the debates was kept or published by the Texas Convention of 1875, and the effort to supply such a report required drawing upon the contemporary newspapers for the material presented. Of those papers, the most useful was the *Daily State Gazette* (Austin). Other useful papers were the *Austin Statesman*, *Dallas Herald*, *Galveston News*, *Houston Telegraph*, and *Panola Watchman* (Carthage). . . . The editor's summaries on the debates are in the past tense; but the exact words of the delegates, when available, were used and quoted. In the latter case I have followed the speaker's punctuation and paragraphing exactly.

DEBATES, *supra* note 131, at preface. In the debates Johnson's proposed funding is "to be given to the free school fund." McKay, or the reporter for the *State Gazette* (Austin) on October 29, 1875, has misquoted Johnson of Franklin.

276. JOURNAL, *supra* note 124, at 511.

277. DEBATES, *supra* note 131, at 327. "Judge Ballinger said that if it was intended to establish a school system at all the reduction asked for by Judge Reagan would act injuriously and would be wholly ineffective for the purposes required."

public free schools.<sup>278</sup> West, in opposition to the select committee plan for public free schools, expressed a view that the people could not afford high taxes now, but might be able to in the future; therefore, West maintained the constitution should not prohibit free public education. Thus, West had to oppose the select committee plan because it did not mandate tuition-free state-operated education. He accused Flournoy and others of supporting Section 1 "public free schools" (the term in the 1876 Constitution) to create "in time a public sentiment in the State hostile to public education; and thus at last destroy the whole system."<sup>279</sup> West, an advocate of the bureaucratic model of education, viewed the select committee plan for public free schools with alarm because it did not mandate the public education model, but may have favored, or at least allowed, the private model. West said the select committee had determined not to set up a public education plan, then as a farce, set up a part-time board of education composed of the governor, comptroller and secretary of state.<sup>280</sup> He said the select committee plan will "shut the doors against public education . . . ."<sup>281</sup>

West opposed the select committee's plan for "public free schools" because it "shut the door on public education," free tuition, and state control,<sup>282</sup> and tied the hands of the legislature. West's opposition to the select committee's plan is strong evidence that the 1876 constitutional provision for public free schools does not mandate, or even allow, a complete and total system of state-operated education such as we have in place today. His position, which is in opposition to the final plan because it does not mandate the bureaucratic model, was also taken by others.

Reagan justified his amendment to drop the poll tax to one dollar as representing his constituents' view which opposed unusual taxes.<sup>283</sup> Mr. Russell of Harrison then delivered a long address which McKay correctly characterizes as being in favor of public schools in the state-operated, free tuition sense. Russell did at times use the term public free schools, but his general tone, clearest sense, and most frequent usage was free schools in the sense of state-operated, tuition-free schools.<sup>284</sup> Russell of Harrison, clearly advocated free public schools, but was not above occasionally arguing this is what the public free schools ought to be.

Mr. McCormick next spoke in favor of free public education, quite candidly and explicitly arguing for ample taxation for education for all. He never once referred to public free schools, but consistently spoke of free

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278. *Id.* See Appendix J-2 for text of West's speech.

279. *Id.* at 328.

280. *Id.* at 329.

281. *Id.* at 332.

282. He "was one of the minority who voted to retain the office of Superintendent of Public Instruction in the Constitution," because he believed it "essential to leave the Legislature with the power at the proper time to place a suitable head over that department." *DEBATES, supra* note 131, at 329.

283. *Id.* at 332. See Appendix J-3 for a report on Reagan's justification.

284. He also called this popular education, free schools, a liberal system of free schools, education of the masses, and free education. *Id.* at 332-340.

education.<sup>285</sup>

Mr. Johnson of Franklin spoke next on education, as he called it "the most important yet the most difficult question that has or will come before us."<sup>286</sup> Johnson then offered his substitute for section 3 of the select committee's plan which had designated "not more than one fourth of general revenues" and a two dollar poll tax to lower the percentage to "not less than one-tenth of the annual revenue . . . and a poll tax of one dollar."<sup>287</sup> Johnson was quite candid in stating his substitute for "public free schools" was designed to draw the "approbation of our various constituents for being taken literally from the Constitution of 1845."<sup>288</sup> His statement, however, is false since this substitute is nothing like the 1845 language, though his provision on the annual revenue is. His attempt to draw on the people's love for the antebellum system of private education shows the people's antipathy toward state-operated schools. The 1845 Constitution was quite popular and clearly did not identify with a northern-style, tuition-free, state-operated general education. Johnson, however, hoped to use its good name for his own purposes.

Mr. Graves complained that even a poll tax of three dollars would not support good systems of free schools, but "would destroy the private schools of the State."<sup>289</sup> Wade argued public schools would be cheaper than private schools.<sup>290</sup> Wade thought the legislature should be entrusted with the development of public education.

Clearly, the diehard proponents of tuition-free, general public education were opposed to the select committee plan, which had reembraced the concept of public free schools, although with slightly better funding. That the select committee took this position is seen even more clearly and dramatically when Whitfield complained that the report of the special committee was "but a return to the old system of education which had proven to be such a failure."<sup>291</sup>

Whitfield seemed to be complaining primarily of low funding, though in section 7 of his original education committee report he called for the gradual elimination of public aid to private education in favor of free public schools.

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285. *Id.* at 340-41. See Appendix J-4 for a report on McCormick's sentiments.

286. *Id.* at 341.

287. JOURNAL, *supra* note 124, at 511.

288. DEBATES, *supra* note 131, at 342. See Appendix J-5 for the text of Johnson's comments.

289. *Id.* at 348.

Mr. Graves said that even \$3 a head for the scholastic population would not amount to anything for free schools. He said the people could not bear sufficient taxation to establish an eloquent school system. To establish free schools for one, two, or three months in the year, while it would be inefficient as a system, would destroy the private schools of the State.

*Id.*

290. *Id.* "Mr. Wade contended that a public school system would be cheaper than the private schools. If the system could be localized it would present many advantages over the private schools. He was of the opinion that the Convention ought to trust the Legislature with the question." *Id.*

291. *Id.* at 348-349. See Appendix J-6 for a report on Whitfield's opposition.

Whitfield then offered a slightly altered version of the old majority report as a substitute for the pending education article.<sup>292</sup> His substitute dropped the efficiency and "public free schools" terms in favor of "public schools."<sup>293</sup> In section 7 of Whitfield's substitute the legislature was directed as soon as funds were sufficient to create "Free Public Schools," a newly capitalized and italicized term, a clear reference to the northern model.<sup>294</sup> This section also made it clear that until such time, the state education funds would continue to be distributed on a per student basis "in aid of private schools."<sup>295</sup> Whitfield's proposal implicitly recognized a "public free school system" as being one in which state aid was provided to private education. The Whitfield proposal was meant to be a transitional plan from public free schools to a pure state-operated free tuition system of "Free Public Schools." Essentially, Whitfield's proposal was that of the original education committee majority report.

On the forty-seventh day, October 29, 1875, the debate continued. Mr. Arnim argued against the select committee plan, stating his support for the original minority report favoring private education supported by public land sales and no taxes.<sup>296</sup> Mr. Moore, a member of the select committee, argued in support of the select committee plan: "The issue was simply whether the Convention felt authorized to destroy or promote a system of free schools, or would it pursue the more conservative course and leave the question to the people of Texas." He stated the Select Committee's object "was not to establish a school system, but to keep one alive and give it an opportunity to grow."<sup>297</sup> He further stated that the intent of the Select Committee plan, which was eventually adopted, was to give the money to the counties "to apply to education purposes."<sup>298</sup> This is very broad language; it clearly does not mean solely state controlled schools.

According to McKay, Mr. Robertson of Bell spoke next "against free schools." Robertson's position was one of no taxes for education. Though Robertson once mentions "public free schools," he most often argues against the proposals for "free education" and "free public schools."<sup>299</sup> Colonel Crawford urged the necessity of free schools as an aid to democratic government and, while admitting their extremely high cost, said he thought the State could not afford to be without them.<sup>300</sup> McLean admitted the necessity of free schools, but urged local tax options as proposed by the old DeMorse plan, probably and correctly supposing that the taxes would be defeated locally.<sup>301</sup>

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292. *Id.* at 327.

293. JOURNAL, *supra* note 124, at 512-14. See Appendix J-7 for the text of Whitfield's first amendment.

294. *Id.* at 513.

295. *Id.*

296. DEBATES, *supra* note 131, at 349.

297. *Id.*

298. *Id.*

299. *Id.* at 350-54.

300. *Id.* at 354.

301. DEBATES, *supra* note 130, at 354.



The Convention defeated Johnson's (of Franklin) substitute for section 3, 47-27.<sup>302</sup> Whitfield then withdrew his "Free Public Schools" substitute in favor of a new proposal.<sup>303</sup>

The most important difference in Whitfield's new proposal is that in section 7 "Free Public Schools" is deleted and "public free schools" is substituted. The education fund was to be in the aid of common schools, not private schools, with distribution of funds expressly to all students, not with any priority to the indigent poor. It failed to win passage.

Mr. Russell of Harrison's motion to amend Whitfield's proposal to fund education with not less than one-fourth of the general revenue and a one dollar poll tax failed, 59-14.<sup>304</sup> Dohoney offered an amendment to require local districting for "public schools" and allow local taxation.<sup>305</sup> Wright attacked the "free schools" plan of Dohoney and others and the general principle of taxing one man to educate another's children.<sup>306</sup> The Dohoney bureaucratic plan lost again.<sup>307</sup> Mr. Whitfield's general unspecified tax amendment also lost 36 to 40.<sup>308</sup>

Two issues clearly dominated the discussion of the select committee's proposal. The most dominant issue revolved around taxes, but the other was who would control education. The proponents of a northern style, state-controlled, free tuition, public education needed large revenues to support such a system. Opponents resisted both on ideological as well as economic grounds. Mr. Whitfield next offered a new, more innocuous taxation plan:

Sec. 3. The Legislature may provide for the levying of a tax for educational purposes. Said fund shall be annually distributed for educational purposes among the several counties, according to the population in each.<sup>309</sup>

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302. JOURNAL, *supra* note 124, at 516-17. See Appendix J-8 for a record of the vote on Johnson's substitute.

303. *Id.* at 517-18. See Appendix J-9 for the text of Whitfield's second amendment.

304. *Id.* at 518-19. See Appendix J-10 for a record on the vote of Russell's motion.

305. *Id.* at 519.

"Sec. 9. It shall be the duty of the County Court of each county to divide the county into school districts of proper size, and, under such regulations as the Legislature may prescribe, provide for the organization of public schools in such districts, by additional taxation or otherwise; *provided*, that no taxes shall be so levied in any school district, except upon a majority vote of the qualified electors therein, and all taxes so raised shall be applied exclusively to the payment of teachers in said district; and *provided, further*, that no *ad va lorem* [sic] tax so levied shall ever exceed one-quarter of one per cent. And whenever any such public school has been so organized in any school district, and provision made to keep up the same for at least four months in the year, and the number of scholastic population in said district is ascertained, it shall be the duty of the County Court to distribute to such district its proportion of the public school fund. The fund due school districts which fail to provide for public schools at least four months in the year shall remain in the county treasury for the benefit of the scholastic population to whom it belongs."

*Id.*

306. DEBATES, *supra* note 131, at 354. Stockdale also argued against "free schools" on this basis. *Id.* at 357.

307. JOURNAL, *supra* note 124, at 520.

308. *Id.* See Appendix J-11 for a record on the vote of Whitfield's tax amendment.

309. *Id.*

Whitfield wanted to leave the matter of taxes to the legislature in the hopes that it would adopt free public education in the future.<sup>310</sup> Mr. Waelder attempted to make the tax plan even more palatable by mentioning a possible future reduction, and using "public free schools" for the initial plan but switching to "free public schools" for the future.<sup>311</sup> Waelder was clearly attempting to make the large tax bill more palatable by using the terms public free schools and mentioning a potential tax reduction.<sup>312</sup> Stockdale's arguments against the defeated northern-style proposals clearly show that the opposition was not just to high taxes, but to the notion that the state had a duty to educate children other than orphans and indigents. The State had no power to tax other than for the education of indigents and orphans, and had no right to control all education.<sup>313</sup> West responded that taxation of the rich for the poor was proper where the poor were required to defend the rich man's property.<sup>314</sup> Colonel Ford responded to Stockdale that the state had some right to control children and the parents right was not absolute.<sup>315</sup> Interestingly, in support of "free schools," Ford said "he had yet to learn of any system of education where the parent would be denied the right to select the teacher, and this in turn regulated the right to select the books by which his children would be taught."<sup>316</sup> If Ford's statement is true, even the proponents of free public education appeared to desire parental choice of teachers and curriculum.

Mr. Brady praised the Waelder amendment to allow a "not less than one-tenth of one percent" state-wide property tax and "not more than two dollars" poll tax.<sup>317</sup> Clearly, Brady's argument shows three important things: (1) he often used the term public free schools to refer to free public schools or free public education, terms which he also used frequently; (2) the battle was clearly between two different models for control of education, not just funding levels — state control as opposed to parent initiative;<sup>318</sup> and (3) religion was not to be excluded even from free public schools.<sup>319</sup> Brady and the advocates of a northern style, state-controlled, free-tuition-for-all,

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310. DEBATES, *supra* note 131, at 348-49.

311.

Strike out all after the word "levying," in second line, and insert: "and collection annually of not less than one-tenth of one per cent. on all taxable property in the State, and a poll tax of not more than two dollars on all male inhabitants between the ages of twenty-one and sixty years, for the benefit and support of public free schools; but, if at any time hereafter a tax of less than one-tenth of one per cent. should be sufficient to maintain an efficient system of free public schools, the Legislature may reduce the tax accordingly."

JOURNAL, *supra* note 124, at 520.

312. DEBATES, *supra* note 131, at 355. See Appendix J-12 for a report on Waelder's speech.

313. *Id.* at 356-57.

314. *Id.* at 357. See Appendix J-13 for a report of West's response.

315. *Id.* at 357-58.

316. *Id.* at 358.

317. DEBATES, *supra* note 131, at 359-67. See Appendix J-14 for the text of Brady's speech.

318. *Id.* at 361.

319. *Id.* at 364.

public education system clearly lost the debates. Waelder's plan lost 33-43.<sup>320</sup> Whitfield's plan also was defeated as the proponents of a new system of "free public schools" on the Northern model continued to be defeated time and time again,<sup>321</sup> even as they asked for less and less.

The convention debated education again on the forty-eighth day, October 30, 1875. Mr. Ferris offered an amendment which shows perhaps most clearly the difference between "free schools" (i.e., northern-style schools) which did not exist at the time, and "public schools," which may have been private schools with free tuition at State expense for indigents.<sup>322</sup> The Ferris amendments lost by an unrecorded vote.<sup>323</sup> The main education article of the select committee then was engrossed 55 to 25,<sup>324</sup> making it clear that the constitution would maintain a system of public free schools, not free schools for all scholastics, not public schools, not common schools, not free public schools. Support was garnered from the bureaucratic wing such as Dohoney, McCormick, Johnson of Franklin, and the purely private wing, such as Sansom, Robertson of Bell, and Wright. On the other hand, the convention clearly did not adopt the solely private school system with tuition for indigents only. The hybrid public free school system, which the select committee had agreed upon, and which appealed to both camps in the convention, was chosen. The convention definitely rejected the state-operated public school model. The vote was reconsidered and tabled, 42-38.<sup>325</sup>

On the other hand, the fact that the education clause is open to differing interpretations is shown by Whitfield, a proponent of tuition-free, state-operated schools, who explained his vote against the select committee plan as follows:

... he desired to explain the vote he had cast on the article on free schools. He said it was known to the Committee on Education, of which he had had the honor of being chairman, that when he signed the majority report that it was understood with the committee that he was opposed to establishing as a rule that the Convention should restrict the Legislature on questions which the people had the right to change, alter, or amend through their Legislature, and that if the people had the desire to tax themselves for school purposes they certainly should not be denied that right. He said the article just engrossed was the old system which had been established by the Constitution of 1869, that had proved to be a total failure, so much so that a majority of the people had become disgusted with such a system, and that he was unwilling to return to his constituents with the same system they had when he left home. The present fund paid the teachers only one month out of four, and he was not willing to prevent the people by a positive constitutional

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320. JOURNAL, *supra* note 124, at 521. See Appendix J-15 for a record on the vote of Waelder's tax amendment.

321. *Id.* at 521. See Appendix J-16 for the voting results of Whitfield's plan.

322. DEBATES, *supra* note 131, at 367-68. JOURNAL, *supra* note 124, at 523. See Appendix J-17 for the text of the Ferris amendment and comments thereto.

323. JOURNAL, *supra* note 124, at 523.

324. *Id.* See Appendix J-18 for a record of the vote on the select committee's main education article.

325. *Id.* at 523-24. See Appendix J-19 for a record of votes on reconsideration.

provision from changing the free school system, and he, therefore, would vote "No."<sup>326</sup>

Whitfield seemed to feel the plan is the 1869 bureaucratic model, or at least was willing to label it that for political purposes.

On the same day, the convention voted to give tax exemption to all schools, public or private, because they wanted both systems to flourish equally, specifically rejecting the argument that only public schools should be exempt.<sup>327</sup>

On the fiftieth day, November 2, 1875, the Committee on Engrossed and Enrolled Ordinance reported the "Article—The Public Free Schools" was correctly engrossed.<sup>328</sup>

On the fifty-third day, Friday, November 5, 1875, in contrast to Whitfield, Flanagan accused the convention of destroying the 1869 Constitution, "the only bulwark of the Republican Party,"<sup>329</sup> which had guaranteed to all ample means for education of all school children in the state.<sup>330</sup> He clearly felt that the convention's education article would destroy a northern-style, state-operated, system of free public education for all.

On the fifty-fourth day, September 13, 1875, the Public Free Schools Article was read for the third time. Haynes moved to amend to increase the share of general revenue and increase the poll tax from one to two dollars, but his motion was tabled.<sup>331</sup> Kilgore's amendment to limit the poll tax so as not to exceed two dollars was also tabled, 40-32.<sup>332</sup> Wade proposed a state property tax for education and a one dollar poll tax, which failed 28 to 42.<sup>333</sup> A few other technical amendments were also defeated.<sup>334</sup>

Mr. Kilgore then offered an interesting motion "to amend section 5, line 35 by inserting after the word 'school' the following: 'But the Legislature may provide for the instruction of the scholastic population in private schools not sectarian, where public schools can not [sic] be organized.'" <sup>335</sup> This amendment, needing a two-thirds majority to pass, lost 43-27.<sup>336</sup> The fact that Sansom, Holt, and Cooke, three of the four original minority members of the Education Committee who supported private religious education so strongly,<sup>337</sup> voted for this measure, as well as private school supporters,

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326. DEBATES, *supra* note 131, at 369.

327. JOURNAL, *supra* note 124, at 526-27; DEBATES, *supra* note 131, at 371-72.

328. JOURNAL, *supra* note 124, at 534.

329. DEBATES, *supra* note 131, at 394.

330. *Id.* at 393-94.

331. JOURNAL, *supra* note 124, at 609. Mr. Haynes offered the following amendments:

In line 13, section 3, strike out the word more and insert less.

In line 14 strike out the word one and insert two.

Mr. Moore asked for a division of the question.

Mr. Scott moved to lay the first amendment on the table.

See Appendix J-20 for a record of the vote on Scott's motion.

332. *Id.* at 610. See Appendix J-21 for a record of the vote.

333. *Id.* at 610-11.

334. *Id.* at 611.

335. *Id.* at 612.

336. JOURNAL, *supra* note 124, at 612. See Appendix J-22 for a record of the vote on Kilgore's first amendment and comments preceding it.

337. The fourth minority member, Dunnam, did not vote on this issue.

Robertson of Bell and Stockdale, shows they may have wanted an explicit provision allowing public support of private schools. However, it was perhaps unnecessary since section 5 already allowed counties to distribute their state aid in any manner prescribed by law. The failure of this amendment could be interpreted to mean that private schools were not to be considered public free schools at all. Cline's opposition to the Kilgore amendment on the ground "it would virtually prevent the establishment of public schools in the state" supports this interpretation.<sup>338</sup> The fact that Kilgore got 43 votes, however, shows that the majority of the convention approved of this proposal which was probably already proper under section 5 of the select committee's proposal.

The select committee's section 5 distributed the available school fund "to the several counties according to their scholastic population, and applied in any manner as may be provided by law."<sup>339</sup> This followed a prohibition against use of the permanent or available fund for "the support of any sectarian school."<sup>340</sup> Only these two funds, generated from the sale of public lands, were so restricted. The one-fourth of the general taxation revenues of the state allocated for public free schools in section 3 were not similarly restricted.

Mr. Kilgore then offered a second amendment to section 5 by striking the word "manner" and inserting the words "to the education of such population, in public or private schools, in such manner and under such regulations", as may be provided by law.<sup>341</sup> Obviously, if Kilgore's amendment had been adopted, the constitutional language would be absolutely clear that parents of children at private schools could receive tuition reimbursement even from the available and permanent funds. Mr. Kilgore moved to adjourn until the afternoon session, but lost.<sup>342</sup> Sansom, a supporter of private education, was absent.<sup>343</sup> The vote on the Kilgore amendment was taken and, though it received a majority of votes, 37 to 33, it failed to get the required two-thirds vote necessary to amend on the third reading.<sup>344</sup> The failure of Kilgore's amendment does not necessarily show that private schools were not already allowed to participate, but that it was thought more appropriate to leave these matters to the legislature. The Article on Public Free Schools passed on final reading by a 44 to 27 vote, showing that even the Kilgore amendment supporters supported the final language.<sup>345</sup> On the fifty-fourth day, Whitfield and McCormick opposed higher poll taxes on the poor, though they claimed to be for free schools.<sup>346</sup> On the sixty-eighth day,

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338. DEBATES, *supra* note 131, at 398.

339. *Id.* at 396.

340. *Id.*

341. JOURNAL, *supra* note 124, at 613.

342. *Id.*

343. *Id.* at 614.

344. *Id.* at 615. See Appendix J-23 for a record of the vote on Kilgore's amendment.

345. *Id.* at 615-16. See Appendix J-24 for a record of the vote on the Education Article.

346. DEBATES, *supra* note 131, at 396.

the final Constitution passed in whole by a vote of 53 to 11.<sup>347</sup>

All the delegates agreed on the importance of education for all children. The divisive question throughout the debates was how to provide this education to all, by private funding and private control, by public funding and public control, or by some combination of both, such as public funding and private control. It is clear that the advocates of state-operated, state-funded schools with free tuition for all were unsuccessful in getting their proposals mandated in the Constitution. They supported "free public schools," "free public education," "uniform" schools, "public schools," and "common schools," but failed to get any of these phrases into the Constitution at all.<sup>348</sup> Dohoney, Whitfield, Russell, McCormick, Cline, Brady and their supporters were unsuccessful in getting an expansive, free-tuition system funded. The conservatives were successful in requiring public free schools under the constitution, not free public schools, not public schools. Further, the conservatives succeeded in requiring an "efficient" system on the theory that no state-operated, state-mandated, centralized bureaucracy could ever be considered "efficient," and thus they would preclude the northern model. Professor Evans noted that the education provision for public free schools "bears testimonial tribute to earlier efforts to meet educational needs through private schools."<sup>349</sup> In fact, the end result was that immediately after the constitution was ratified, the old system of state support for private education was reactivated,<sup>350</sup> but with some provision for municipal control.<sup>351</sup> The constitution eliminated all state, county, and district supervision, resting entirely on parental or city control.<sup>352</sup>

If the phrase "a uniform system of schools" or something similar had been included in the final education article of the constitution it would be difficult to constitutionally implement a choice plan. Choice by its very nature implies non-uniformity and a non-common system. If every school is substantively the same, choice is but a sham. Texas expressly did not adopt a uniform school system as Morris and others urged.

#### *F. Contemporaneous Political Meaning of Public Schools*

The conclusions drawn from the convention as to the true meaning of "public free schools" can be buttressed by the use of the term and other alternatives in contemporaneous political documents. A review of political party platforms during this time period shows consistently that Republicans such as Dohoney advocated free schools, not public free schools. For exam-

347. JOURNAL, *supra* note 124, at 818. See Appendix J-25 for a record of the vote on the entire Constitution.

348. Braden states: "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 like the ones devised by the hated Republicans." 1 G. BRADEN, *supra* note 14, at 506.

349. C. EVANS, *supra* note 45, at 6-7.

350. TEX. CONST. art. VII, § 1, interp. commentary (Vernon 1955).

351. TEX. CONST. art. XI, § 10.

352. Eby, *Sourcebook*, *supra* note 17, at 822.

ple, the Republican platform of 1867 declared the Republican party's intent "to establish, at the earliest practicable time, a system of *free common schools* for the equal benefit of all children and youths of the scholastic age, without distinction of race or color, to be supported by equal and uniform taxation, until a school fund can be made available for this purpose."<sup>353</sup> "Free common schools" were obviously the goal of the Republican minority at this time in history, but the Republicans were unable to elect a Governor of Texas until modern times. The Radical Republican platform in 1868 also called for immediate "establishment and support of a *complete* common school system."<sup>354</sup> The Republican commitment to "free education of all the children of Texas as a sacred duty" continued in its 1872 platform, calling for "free public schools."<sup>355</sup> These documents demonstrate the Republican minority's commitment to free public schools based on the northern model, not a public free school system of state support for private education through tuition reimbursement.

The Republicans in 1873 finally called for "the establishment and maintenance of a system of public free schools," but condemned "the practical abolition by the thirteenth legislature of the system that was in operation."<sup>356</sup> This could be viewed as Republican preference for the term public free schools since it was in the 1869 Constitution they had created, but they clearly disputed the Democratic dismantling of the system.

On the other hand, Democrats in 1872 called for "the State to establish common schools and furnish the means of a good common school education to every child in the state," but excoriated Republicans for mismanagement of the school fund.<sup>357</sup> Common schools in this context simply refers to elementary schools. It is notable that these schools were not expected to be free. The State could provide the means of an education by reimbursement for tuition expenses. The 1873 platform congratulated Texans for repealing the Republican's public free school law which had previously allowed "public officials to speculate in school books, in the building and furniture of school houses, in the salaries of teachers, and [which had] furnished high salaries for a large and useless number of officers."<sup>358</sup> It committed the state to "maintain an *efficient* system of free common schools, and secure the means of a free common education to every child in the state."<sup>359</sup> The means to attain this end was not envisioned to necessitate state operation. Funding was to come from the sale of alternate sections of the public domain, but not taxation.

The 1875 Convention knew that the constitution it formed would have to be sold to the people of Texas. It constituted a committee to prepare a writ-

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353. E. Winkler, *Platforms of Political Parties in Texas*, U. TEX. BULL. No. 53, at 101 (1916) (emphasis added).

354. *Id.* at 116 (emphasis added).

355. *Id.* at 142.

356. *Id.* at 155.

357. *Id.* at 146-47.

358. E. Winkler, *supra* note 353, at 159-60.

359. *Id.* at 160 (emphasis added).

ten address setting forth the principles of the constitution and the reasons calling for its support. Whitfield was again elected chairman of this committee. The address described the old Republican education system as evil, being "a vast political and partisan scheme under the pretense of sustaining free public schools."<sup>360</sup> The address admitted that while all agreed on the importance of education, the unsettled conditions and difficulties had produced "variant views as to the means to accomplish a common object."<sup>361</sup> Perhaps not surprisingly with Whitfield as chairman, the address generally uses the term free schools, recognizing that only partial provision for free schools had been accomplished, but that "it would be unwise and unjust to impose on the parents and taxpayers of today an onerous money tax to maintain at once a gigantic system of free schools."<sup>362</sup>

Not surprisingly again, since Democrats had dominated the 1875 Constitutional Convention, their 1876 platform called for "maintaining an efficient system of general education, declar[ing] it to be the duty of the legislature of the State to speedily establish and make provision for the support and maintenance of public free schools."<sup>363</sup> Notably, general education was to be supported through the public free school system, not just public schools. On the other hand, the Republicans in 1876 "denounce[d] the Constitution framed by the late convention at Austin,"<sup>364</sup> for among other reasons:

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 public schools*, which is the greatest necessity of the State, the surest guaranty of progress, and the best defense of liberty. . . .

. . . the Republicans will expose the trick on the part of the Democracy to prevent the education of the poor of the State.<sup>365</sup>

The Republican's serious charge that the 1876 constitution was a "cheat" and a "trick" to defeat the people's right to a northern-style, state-controlled, state-operated, tuition-free public educational system is further strong evidence that the 1876 Constitution does not enshrine our current educational bureaucratic monopoly. The attack by the educational establishment on any advocacy of a public/private educational choice in Texas will be that the 1876 Constitution mandates the current system, which is exactly what the Republicans denounced it for not doing.<sup>366</sup> The 1876 Republican Party (the teacher lobby counterpart) condemned the constitution for utterly failing to secure an "efficient system of free public schools," yet

360. *Id.* at 164.

361. *Id.* at 168.

362. *Id.*

363. E. Winkler, *supra* note 353, at 175.

364. *Id.* at 177.

365. *Id.* at 177, 179 (emphasis added).

366. Compare the attack by the Wisconsin teachers' unions, administrators, and the NAACP in *Davis*, that the Milwaukee public/private choice plan violated the public purpose and uniformity provisions of the Wisconsin constitution. See Reply Brief of Intervenor-Petitioners-Appellants at 7-8, *Davis v. Grover*, 159 Wis. 2d 151, 464 N.W.2d 220 (Wis. Ct. App. 1990) (No. 90-1808-LV), *petition for review granted*, 468 N.W.2d 27 (Wis. 1991).



today's education lobby will argue that a state-operated system of free public schools is mandated by that same constitution, that expending state funds for tuition reimbursement will be unconstitutionally diverting the funds from the public free school system. Yet the Republican proponents of their view in 1876, who clearly knew they lost in the 1875 Constitution, admit the constitution does not guarantee the northern model.

In 1878, after the school law of 1876 which established the community school voucher system<sup>367</sup> rather than a northern-style educational model, the Democrats simply called for "maintenance and perfection of a common school system" which they obviously felt they had established through community schools.<sup>368</sup> On the other hand, their opponents, the Greenback Labor party, pledged "to reestablish in fact common free schools, and denounce[d] the Democratic party for its failure to carry out its promises in this regard."<sup>369</sup> Here is another contemporary party recognizing that the Constitution did not establish free public schools. The Republicans were even harsher, accusing the Democrats of "the destruction of the public school system inaugurated by the Republican party [northern style, central bureaucracy, state-operated] and has utterly failed in its stead to secure an efficient system of free schools."<sup>370</sup> Thus, the Democratic legislature's interpretation of the 1876 Constitution through the 1876 school law was clearly recognized as not a system of free education for all on a state-operated, northern model.

By 1880, the Republicans were through with rabid denunciations, but continued to pledge to establish an efficient system of public free schools, to be supported by a liberal appropriation.<sup>371</sup> The Greenback Labor party favored "repeal of the present pretense of a school law."<sup>372</sup> The Democrats were more "practical," seeking the largest appropriation "justified by the financial condition of the state,"<sup>373</sup> which was not much. A minority report at the Democratic convention called for the largest appropriation for education allowed by the constitution.<sup>374</sup>

By 1882, the Democratic platform did call for increased funding of education by a special school tax, but no change in organization was proposed.<sup>375</sup> This was an obvious precursor to the 1883 School Tax Constitutional Amendment. The Republicans also supported a special school tax amendment sufficient to support ten months of schooling, while the Grangers wanted eight months.<sup>376</sup>

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367. See *infra* notes 371-419 and accompanying text.

368. E. Winkler, *supra* note 353, at 180.

369. *Id.* at 185.

370. *Id.* at 193.

371. *Id.* at 196.

372. *Id.* at 200.

373. E. Winkler, *supra* note 353, at 203.

374. *Id.* at 204.

375. *Id.* at 210.

376. *Id.* at 212-13.

## IV. THE SCHOOL LAW OF 1876 — "PUBLIC FREE SCHOOLS"

A. *The Statute*

An analysis of the very first statute enacted to implement the 1876 Constitution's education article will further demonstrate that the meaning of "public free schools," as interpreted by its contemporaries, required parental choice in education.<sup>377</sup> Contemporaneous construction of the constitution is certainly strong evidence of the drafters' and ratifiers' intent, particularly in an area such as education where the current system is so foreign to that of 1876, yet the language used to describe it is similar. The statute's very name shows its intent to "establish and provide for the support and maintenance of an efficient system of Public Free Schools,"<sup>378</sup> fulfilling the mandate of the first section of the education article. The leading feature of the system was the "School Community," a choice plan similar to many models espoused today.<sup>379</sup>

The choice plan was simple and loose in the extreme. Any number of parents could form a community, select a teacher and the kind of education they desired, and receive the use of the state school fund, all with minimal state regulation. The system was created uniquely for Texas and apparently not adopted anywhere else.<sup>380</sup>

The Act is quite lengthy. Section 1 required the governor, comptroller, and secretary of state, serving as the board of education, to perform the ministerial act of distributing the available fund (one-fourth of general revenue, poll taxes, and income from the permanent fund)<sup>381</sup> to the counties prior to September 1 of each year on the basis of scholastic population. Section 2 appointed the governor as president of the board of education and allowed a majority to perform all legal duties of the board.<sup>382</sup> Section 3 authorized the board to hire a secretary with an annual salary of \$1500 to be paid from the available fund.<sup>383</sup> Clearly, no state superintendent of education existed since that position had been specifically deleted from the constitution during the convention.

Section 4 dealt with the board's power over schools. Section 4 gave the board of education advisory status, but no supervisory or regulatory power with respect to county school officers.<sup>384</sup> The board was to keep all records and reports required by law, but could only "counsel and advise as to the best manner of conducting schools."<sup>385</sup> They were to give "such instruc-

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377. Professor Evans calls this law and the constitution a reaction to militant radical rule, and a tendency to move back toward private school days. C. EVANS, *supra* note 45, at 7-8.

378. An act to establish and provide for this support and maintenance of an efficient system of public free schools was approved Aug. 19, 1876, 15th Leg., R.S., ch. 120, 1876 Tex. Gen. Laws 199, 8. H. GAMMEL, LAWS OF TEXAS 1035 (1879).

379. *Superintendent Baker's Administration*, 1 TEX. REV. 703-06 (1886), reprinted in Eby, *Sourcebook*, *supra* note 17, at 792-93.

380. EBY, DEVELOPMENT, *supra* note 31, at 172.

381. §§ 1, 2, 1876 Tex. Gen. Laws 199, 8 H. GAMMEL, LAWS OF TEXAS 1035.

382. § 2, 1876 Tex. Gen. Laws 199, 8 H. GAMMEL, LAWS OF TEXAS 1035.

383. § 3, 1876 Tex. Gen. Laws 199, 8 H. GAMMEL, LAWS OF TEXAS 1035.

384. § 4, 1876 Tex. Gen. Laws 199-200, 8 H. GAMMEL, LAWS OF TEXAS 1035-36.

385. *Id.*

tions, not inconsistent with this act to county school officers in the interest of common school education, as they may deem advisable."<sup>386</sup> From time to time, the board was to distribute circulars advising "as to the best manner of conducting schools, constructing school houses, furnishing the same, and procuring competent teachers."<sup>387</sup> Their advice was to be given for "common school education."

Section 5 required reports on the "public free schools" before each legislative session including the "number of pupils, white and colored, receiving tuition free of charge; and the number paying tuition."<sup>388</sup> Clearly, tuition charges were expected, not free tuition for all. The reports also covered, among other things, "the amount of the public free school fund, . . . the number of public free school houses in each county, with a description of their kind and condition, together with such other information and suggestions as they may deem important for promoting education."<sup>389</sup> Section 6 required the board to furnish county school officers all necessary forms, and section 7 allowed the board to require reports as needed for collecting information.<sup>390</sup> Section 8 repeated the apportionment of the available fund to each county and required reporting to various officials. Section 9 was a broad grant of authority to issue such instruction to school officers as the board thought expedient.<sup>391</sup> Section 10 allowed the board all necessary expenses.<sup>392</sup> Section 11 defined school officers to "include any officer of this State upon whom is devolved, by law, a duty pertaining to public free schools, as well as such officers as are created by this Act."<sup>393</sup> Section 12 defined the available fund, and section 13 allowed gifts to be made to the state for education.

Section 14 is an extremely important provision:

The available public free school fund shall be distributed to school communities in the several counties, to be organized on the application of the parents and guardians of those to be benefitted thereby to suit their convenience, without reference to geographical lines within their counties.<sup>394</sup>

This section is the heart of what today could be called a pure educational choice voucher system. The parents' school community was organized for their convenience, not the state's. No residency requirements inside the county were allowed. The parents' school community received money directly from the state. The community was organized upon parents' application, not the state's.

While section 15 divided the funds equally for whites and blacks, section 16 banned payment to certain schools as follows:

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386. *Id.*

387. *Id.*

388. § 5, 1876 Tex. Gen. Laws 200, 8 H. GAMMEL, LAWS OF TEXAS 1036.

389. *Id.*

390. §§ 6, 7, 1876 Tex. Gen. Laws 200, 8 H. GAMMEL, LAWS OF TEXAS 1036.

391. § 9, 1876 Tex. Gen. Laws 200, 8 H. GAMMEL, LAWS OF TEXAS 1036.

392. § 10, 1876 Tex. Gen. Laws 201, 8 H. GAMMEL, LAWS OF TEXAS 1037.

393. § 11, 1876 Tex. Gen. Laws 201, 8 H. GAMMEL, LAWS OF TEXAS 1037.

394. § 14, 1876 Tex. Gen. Laws 201, 8 H. GAMMEL, LAWS OF TEXAS 1037.

No school in which sectarian religion is taught shall be entitled to any portion of the available public school fund, nor shall any form of religion be taught in any public free school in this State.<sup>395</sup>

Sections 17 and 18 dealt with the technical duties of the comptroller and treasurer. Section 19 established that "all children between the ages of eight and fourteen shall be entitled to the benefit of the available free school fund."<sup>396</sup> Sections 20 and 21 required the county assessor to conduct a scholastic census by July 1, to be paid for out of the "common free school fund,"<sup>397</sup> a term, though never defined in the act, that must mean the available free school fund. In section 22, the treasurer in each county is designated the treasurer for the county "available public free school fund,"<sup>398</sup> again a term never defined in the act.

Some confusion in the statute is evident, at least after the passage of more than one hundred years. Do the terms "common free school fund" in section 20, "available free school fund" in section 10, "available public free school fund" in sections 14 and 15, "available school fund" in Section 1, and "public free school fund" in section 5, all mean the same thing or different things? Is this statutory drafting at its nightmare worst? Have all these terms been jumbled together so much in the culture that anyone can use them to mean whatever system of public education he endorses? Does section 16's ban on sectarian religious schools receiving money solely from the "available public school fund" mean that while restricted from that fund, they can get money from the "common free school fund," the "available free school fund," the "available public free school fund," or, most importantly, the "available school fund," which is the only fund defined in the statute and which is funded generously? The county treasurer's duties are further outlined in sections 22 through 27. These sections further confused the issue by using a new term, "all school funds," which does seem to envision a multitude of different school funds.<sup>399</sup>

Section 25 explicitly notes the repeal of all school districts which had existed under prior law, equitably divides all district property and credits to the new parent-organized school communities and incorporated cities and towns within the old district. The section provides that "the fund so distributed shall constitute a part of the available school fund for said communities."<sup>400</sup>

Section 28 allows some minimal governmental control over teacher qualifications by establishing a Board of School Examiners composed of "three well-educated citizens of the county" appointed by the county judge to examine prior to employment "all teachers of public free schools."<sup>401</sup> No teacher could teach in the "public free schools" of the state without a certifi-

395. § 16, 1876 Tex. Gen. Laws 201, 8 H. GAMMEL, LAWS OF TEXAS 1037.

396. § 19, 1876 Tex. Gen. Laws 202, 8 H. GAMMEL, LAWS OF TEXAS 1038-39.

397. §§ 20, 21, 1876 Tex. Gen. Laws 202-03, 8 H. GAMMEL, LAWS OF TEXAS 1038-39.

398. § 22, 1876 Tex. Gen. Laws 203, 8 H. GAMMEL, LAWS OF TEXAS 1039.

399. §§ 22-27, 1876 Tex. Gen. Laws 203-04, 8 H. GAMMEL, LAWS OF TEXAS 1039-40.

400. § 25, 1876 Tex. Gen. Laws 203-04, 8 H. GAMMEL, LAWS OF TEXAS 1039-40.

401. § 28, 1876 Tex. Gen. Laws 204-05, 8 H. GAMMEL, LAWS OF TEXAS 1040-41.

cate of qualification from the board. No definition of public free school is given anywhere in the statute.

Sections 29 through 42 are the heart of this voucher system,<sup>402</sup> creating something entirely new called "school communities." Any group of parents or guardians could organize their own school, embracing any children that wanted to attend that community. The community could apply for their pro rata share of the "available school fund" (also called the "available public free school fund") depending on the number of children enrolled.<sup>403</sup> Clearly, more than one community per county is envisioned, since the county judge had the power to assign unenrolled children among the various communities.<sup>404</sup> The county judge acted as the "Choice Office" that John Chubb of the Brookings Institution advocates to assign hard-to-place children.<sup>405</sup> Parents may organize a school wherever they wish, and attendance is without regard to geographical boundaries.<sup>406</sup>

Minimal state control is established in section 32 which required the county judge to appoint three trustees for each school community.<sup>407</sup> Even though the parents organized the school community, trustees were not elected by them. Section 34 allowed the school community trustees who desired to "avail themselves of the benefits of a public free school," to hire a board certified teacher to teach whenever convenient to the community.<sup>408</sup> This clearly shows that the school community models were establishing public free schools.

Section 35 and 36 allowed the school community to set the length of school and tuition rates, but, interestingly, as in many of the fairest choice proposals today, a cap on tuition was imposed as a condition of receiving state money.<sup>409</sup> Similarly, students outside the scholastic ages could be taught, and the schools were not restricted to the public school curriculum. Class size, however, was limited to forty students without consent of the trustees.

Sections 37 and 38 dictated the manner of funding which was to be in the form of a direct reimbursement by the County to the teacher. Again, many voucher plans today advocate direct payment to the school rather than to the parent to reduce the risk of misallocation by parents. Section 39 is interesting because it appears to shift to calling the community schools "public schools." This section prohibited a student's transfer within public schools

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402. §§ 29-42, 1876 Tex. Gen. Laws 205-07, 8 H. GAMMEL, LAWS OF TEXAS 1041-43. See Appendix K-1 for the text of § 29.

403. See Appendix K-2 for the text of § 30.

404. See also § 24, 1876 Tex. Gen. Laws 203, 8 H. GAMMEL, LAWS OF TEXAS 1039.

405. J. CHUBB & T. MOE, *supra* note 3.

406. §§ 14, 29, 1876 Tex. Gen. Laws 201, 205, 8 H. GAMMEL, LAWS OF TEXAS 1037, 1041. See Appendix K-3 for the text of § 31.

407. § 32, 1876 Tex. Gen. Laws 205, 8 H. GAMMEL, LAWS OF TEXAS 1041. See Appendix K-4 for the text of § 32.

408. § 34, 1876 Tex. Gen. Laws 206, 8 H. GAMMEL, LAWS OF TEXAS 1042. See Appendix K-5 for the text of § 34.

409. §§ 35, 36, 1876 Tex. Gen. Laws 206, 8 H. GAMMEL, LAWS OF TEXAS 1042. See Appendix K-6 for the text of §§ 35 and 36.

within the same school year, at least at public expense.<sup>410</sup> It also uses a new term again, "school fund," apparently to refer to the available fund.

Section 40 allows cancellation of a teacher's certificate by the board of trustees for immorality or misconduct.<sup>411</sup> Section 41 allows the county judge to be paid for his services.<sup>412</sup> Section 42 even allows a child to choose an out-of-county school community, which will receive the child's pro rata share of the available fund.<sup>413</sup>

Sections 43 through 48 deal with the qualification of teachers of a "public free school."<sup>414</sup> Teachers had to be of "good moral character and of correct, exemplary habits,"<sup>415</sup> and competent in "orthography, reading, writing, English grammar, composition, geography and arithmetic."<sup>416</sup> The school year was to be set in accordance with the convenience or interests of parents to obtain the greatest attendance with "the least injury to home interests."<sup>417</sup> Obviously, city schools might have longer school years than rural communities, where children were needed more at home. Thus no state mandated rule was used.<sup>418</sup> The holidays for these public free schools were established by the school community contracting with the teacher.<sup>419</sup> In what many teachers would welcome today, the teacher was given autonomy to select textbooks, subject to community trustee approval, "having due regard to the convenience of the parents with regard to the books already purchased."<sup>420</sup> No state controlled mandatory curriculum was envisioned here. Sections 49 through 53 concern the funding of the building of school houses, which was to be accomplished by the school communities donating one half the cost, in money or labor, with the available fund providing the rest.<sup>421</sup>

Another important compromise between advocates of parent-controlled education and state-controlled, tuition-free education is seen in section 55. Cities could choose to establish state-operated schools. Section 55 also shows the hybrid nature of the 1876 Constitution as to public versus private control. If a majority of the property taxpayers in any incorporated town or city voted to do so, the city could have exclusive control of "the public schools within its limits," with exclusive power to maintain, regulate, con-

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410. § 39, 1876 Tex. Gen. Laws 206, 8 H. GAMMEL, LAWS OF TEXAS 1042. See Appendix K-7 for the text of § 39.

411. § 40, 1876 Tex. Gen. Laws 206, 8 H. GAMMEL, LAWS OF TEXAS 1042. See Appendix K-8 for the text of § 40.

412. § 41, 1876 Tex. Gen. Laws 206, 8 H. GAMMEL, LAWS OF TEXAS 1042. See Appendix K-9 for the text of § 41.

413. § 42, 1876 Tex. Gen. Laws 206-07, 8 H. GAMMEL, LAWS OF TEXAS 1042-43. See Appendix K-10 for the text of § 42.

414. §§ 43-48, 1876 Tex. Gen. Laws 207, 8 H. GAMMEL, LAWS OF TEXAS 1043. See Appendix K-11 for the text of §§ 43-48.

415. § 43, 1876 Tex. Gen. Laws 207, 8 H. GAMMEL, LAWS OF TEXAS 1043.

416. *Id.*

417. § 45, 1876 Tex. Gen. Laws 207, 8 H. GAMMEL, LAWS OF TEXAS 1043.

418. *Id.*

419. § 44, 1876 Tex. Gen. Laws 207, 8 H. GAMMEL, LAWS OF TEXAS 1043.

420. § 48, 1876 Tex. Gen. Laws 208, 8 H. GAMMEL, LAWS OF TEXAS 1044.

421. §§ 49-53, 1876 Tex. Gen. Laws 208-09, 8 H. GAMMEL, LAWS OF TEXAS 1044-45. See Appendix K-12 for text of §§ 49-53.

trol, and govern all the public free schools existing or later established.<sup>422</sup> Further, the city council could pass all rules necessary "to establish and maintain free schools . . . and generally to promote free public education."<sup>423</sup> Does the use of the four terms in section 55 mean they are all synonymous, i.e., that "public schools," "public free schools," "free schools," and "free public education" are equivalent? Assuming the different terms are used intentionally with different meanings, the most natural interpretation is that the city could do whatever necessary to turn its "public free schools" (i.e., essentially private schools paid for by tuition with state reimbursement) into "free schools" (i.e., state-controlled, free-tuition education for all). "Public schools" would then refer to both "public free schools" and "free schools." Section 56 supports this interpretation by referring to the time when the "public free schools" are controlled by the city, and allowing local taxation for school purposes upon a two thirds vote.<sup>424</sup> Section 57 makes it even clearer that these city schools were also to be considered "public free schools," as well as the parent controlled and initiated community schools.<sup>425</sup>

These statutory provisions acutely reveal the deep dissonance between public education as we know it today and parent-controlled choice in education with tuition reimbursement so prominently discussed in the convention and embodied in this statute. Both the community model and the government-control model are called public free schools. The terms are deeply intertwined, as what superficially appears to be poor drafting really represents a complex political reality. Significant sections of the public wanted both kinds of education, so both were allowed to exist under the statute. Clearly, if a significant section of the public today convinced the legislature that parent-controlled educational choice was the best way to educate children, it would certainly be consistent with the Fifteenth Legislature's understanding of its duty to provide an efficient system of public free schools.

Our current educational system has clearly lost this balanced approach between parent control and state control. If an efficient system of public free schools in 1876 meant a mix of public and private education models, then clearly we have lost the mix. All we have today supported by public funds is a system of state-controlled, state-mandated, state-operated schools, allowing for no exercise of private choice. This is antipodal to the model established by the 1876 School Law, and absolutely contrary to the intent of the majority of the Constitutional Convention delegates and ratifiers. The 1876 School Law, with its balance between public, government-operated schools and publicly-funded private education with minimal state supervi-

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422. § 55, 1876 Tex. Gen. Laws 209, 8 H. GAMMEL, LAWS OF TEXAS 1045. See Appendix K-13 for the text of § 55.

423. *Id.*

424. § 56, 1876 Tex. Gen. Laws 209-10, H. GAMMEL, LAWS OF TEXAS 1046. See Appendix K-14 for the text of § 56.

425. § 57, 1876 Tex. Gen. Laws 210, 8 H. GAMMEL, LAWS OF TEXAS 1046. Cf. § 61. See Appendix K-15 for the text of § 57. Sections 58 to 62 then proceed to set the dates of operation and method of fund calculation for the first year of operation.

sion, accurately embodies the intent of the 1876 Constitution, certainly much more accurately than our state educational monopoly system of 1991, with no tuition reimbursement and no choice.

Clearly, the Texas Constitution envisioned a wide latitude of suitability in which the legislature could mix the types of public and private education, delivery systems, curriculum control, etc. The current system, however, rides in the extreme edge of unconstitutionality when it provides for no private choice at all and no method for parents organizing private schools to obtain a share of state tax dollars for education. In managing the details of the school system, the legislature has some latitude, expressed, for example, in the 1876 school law providing that a child's share of the school fund is cut off after one transfer. Just as obviously, however, the absence of private choice is a total abdication of the legislature's constitutional responsibility to provide an efficient system of public free schools.

The advocates of free public schools lost the constitutional battle when the people chose public free schools, a mix of public-controlled and private-controlled education, both publicly funded by the state. Both are public education because they are available to all and are publicly financed. Perhaps the legislature has acquiesced to the triumph of state-operated free public education, but has the constitutional mandate changed? The community school system lasted many years, and if the people choose to assert their rights to it again, the courts must be as zealously ready as they were in *Edgewood* to defend these important constitutional rights. The courts in fact could require the legislature to provide some method of choice if it will not do so voluntarily.

### *B. Later Amendments*

In 1879, the Sixteenth Legislature authorized any city or town to acquire exclusive control of the public free schools within its city limits, and to govern these public free schools by either a separate board of trustees or the regular city government.<sup>426</sup> While that statute uses the term public free schools apparently in the broad inclusive sense to cover both public and free schools, i.e., community schools, that same legislature also passed an act to ascertain and pay all sums due for services rendered by public school teachers from September 1, 1873 to August 31, 1876.<sup>427</sup> This would have been the old public school system in effect prior to the 1875 Constitution. Again, this indicates that public free schools were not the same as public schools.

The Sixteenth Legislature also made a number of technical changes in the 1876 School Law.<sup>428</sup> The State Board of Education was given new power to issue regulations interpreting state law which were binding on "public

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426. Act approved July 24, 1879, 16th Leg., R.S., ch. 67, 1879 Tex. Gen. Laws 76-77, 8 H. GAMMEL, LAWS OF TEXAS 1376-77 (1898).

427. Act approved April 22, 1879, 16th Leg., R.S., ch. 128, 1879 Tex. Gen. Laws 135-36, 8 H. GAMMEL, LAWS OF TEXAS 1435-37 (1898).

428. Act approved April 29, 1879, 16th Leg., R.S., ch. 154, 1879 Tex. Gen. Laws 169-75, 8 H. GAMMEL, LAWS OF TEXAS 1469-75 (1898).



schools."<sup>429</sup> Did this interpretive power exclude community schools? No definition of public schools was given, but free schools were defined in article 3747 as the schools established by the free school community.<sup>430</sup> Thus free schools and public schools operated at the same time, but free schools were generally unregulated. Bona fide residents of the community who wanted to organize a free school could do so by filing an application prior to August 1. This allowed anyone to form a free school, not only parents and guardians as under the 1876 statute. Thus, teachers or community leaders could form the school and invite students to attend, a prominent feature of many modern choice plans.

Even more control was given to the parents or residents forming the school under the new statute because they were given the authority to select three trustees to run the school, unless the county judge knew personally that the trustees were unfit,<sup>431</sup> whereas the 1876 statute had the county judge appoint trustees. The free school was forbidden to demand extra tuition as a condition of admittance.<sup>432</sup> Children could choose the nearest out-of-county community school and get a voucher for their pro rata share of the state fund.<sup>433</sup>

Despite the use of the terms free school and public school in this statute, the Seventeenth Legislature gave all towns and villages the right to incorporate for free school purposes only, if they so desired.<sup>434</sup> It is not clear why this term was chosen, or if these free schools were different from public schools or public free schools.

### C. Community Schools—A True Voucher System

The constitutional phrase "public free schools" was clearly defined by the School Law of 1876 to be a combined voucher system and city school system at local citizen option rather than solely state-operated education. Governor Roberts, in 1883, extolled the virtues of the 1876 School Law, even as he called for the 1883 amendment to allow local option taxation. He specifically stated that the Law of 1876 was designed to implement and be in harmony with the constitution. He listed the key elements of the plan which made it conform to the constitution as:

by making school communities to depend upon the mutual association of citizens, . . . and not by territorial divisions into school districts, by placing schools under the control of trustees, chosen from the patrons . . . .<sup>435</sup>

429. § 1, art. 3747, 1879 Tex. Gen. Laws 171, 8 H. GAMMEL, LAWS OF TEXAS 1471.

430. *Id.*

431. § 1, art. 3759, 1879 Tex. Gen. Laws 173-74, 8 H. GAMMEL, LAWS OF TEXAS 1473-74. See also Chubb, *A Blueprint for Public Education*, Wall St. J., June 6, 1990, at 16, col. 3.

432. § 1, art. 3759, 1879 Tex. Gen. Laws 173-74, 8 H. GAMMEL, LAWS OF TEXAS 1473-74.

433. § 1, art. 3763, 1879 Tex. Gen. Laws 174, 8 H. GAMMEL, LAWS OF TEXAS 1474.

434. Act approved Apr. 6, 1881, 17th Leg., R.S., ch. 102, 1881 Tex. Gen. Laws 114-15, 9 H. GAMMEL, LAWS OF TEXAS 206-07 (1898).

435. Message of Gov. Roberts, S.J. OF TEX., 18th Leg., R.S. 11 (1883) reprinted in Eby, *Sourcebook*, *supra* note 17, at 767.

Governor Roberts, while supporting the 1883 Amendment to allow local property taxes, warned strongly against those who would overturn the system of 1876 and return to the highly-centralized, state-operated system of the 1869 Constitution.<sup>436</sup> He opposed the creation of a separate department of education with power to control the schools, special taxes, and an office of state superintendent. He clearly did not envision a state operated model as the result of the 1883 amendment. In fact, the constitution was designed to thwart this type of system, since Radical Republicanism was so repugnant to the citizens of Texas. "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."<sup>437</sup>

Because of perceived defects in the community school system, primarily low funding, Secretary of Education Hollingsworth and others were eventually successful in changing popular opinion, but the constitutional definition was never changed by the people. In 1874, 1875, and 1876 the people abhorred the Republican system of education.

The Legislature in 1876 enacted the community school voucher system because this was the popular understanding of public free schools. From 1869 to 1872, the "attempt to establish a centralized system ended in bitterness and failure."<sup>438</sup> The community system governed the whole state for eight years, and all rural areas for twenty-three years.

The Constitution of 1876, article XI, section 10 provides that the legislature may constitute any city or town an independent school district, under exclusive municipal control. The cities could levy a tax for "the support and maintenance of a public institution of learning," a very broad term. The School Law of 1876 implemented these provisions, which were supplemented in detail in the law approved on April 3, 1879.<sup>439</sup>

#### *D. Defects in the Community Schools*

The essential problem with the community school concept was not with the delivery system, not with parental control, but with a scarcity of financial resources. The system was simply underfunded, though it was operating efficiently with the resources it had. Community schools could not tax for their support.<sup>440</sup> Governor Oran Robert's veto of the state appropriation for education in 1879 was premised on the ground that the state could not pay its own debt if one fourth of the State's general revenues were devoted to

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436. Message of Gov. Roberts, S.J. OF TEX. 18th Leg., R.S. 15 (1883), *reprinted in* Eby, *Sourcebook*, *supra* note 17, at 768-70.

437. Watts & Rockwell, *supra* note 19, at 790.

438. C. EVANS, *supra* note 45, at 52.

439. TEX. CONST. art XI, § 10.

440. Edgewood Indep. School Dist. v. Kirby, 777 S.W.2d 391, 396 (Tex. 1989). *See also* Eby, *Sourcebook*, *supra* note 17, at 831 (citing O. COOPER, SIXTH BIENNIAL REPORT OF THE SUPERINTENDENT OF PUBLIC INSTRUCTION 27 (1888)).

education.<sup>441</sup> In the midst of severe post war depression and staggering state debt, state resources for education were simply inadequate. Educational spending per pupil by the state became so low that many parents did not trouble themselves to collect it.<sup>442</sup>

After a speedy decline in the schools caused by this extremely low level of funding, the need for new taxes became very clear. But in 1881 a large body still opposed the notion of taxation to educate another's child.<sup>443</sup> Because Governor Roberts opposed increasing state taxes, in January 1883 he proposed a constitutional amendment to section 3 of the education article to allow local property taxation to supplement state funds.<sup>444</sup> Governor Roberts praised the 1876 school system, claiming it had "worked well and continued to improve from year to year."<sup>445</sup> He proposed to preserve the leading features of the plan. The proposed and subsequently ratified amendment was intended by Roberts to implement the efficiency standard of section 1 by enabling local supplemental aid to education raised by ad valorem taxation.<sup>446</sup> To create a taxing entity, the legislature was allowed to create local school districts to levy local ad valorem taxes for the support of public free schools.

Besides the lack of local taxing authority, which limited the community or free schools to the meager state resources, another alleged defect was the requirement of annual reorganization, which disturbed the continuity of the schools.<sup>447</sup> Of course, choice proposals today do not require such a feature, since private enterprise educational charters would be of unlimited duration. The only element of instability would be that a school could fail if it did not satisfy its patrons. However, as long as the school competed effectively, it could continue just as many private schools do today. The possibility that a bad school can fail is inherent in choice proposals; indeed, that is one of its strengths. Of course, children will not suffer because by creating effective demand (desire plus money) new schools will reopen to meet the need. A neighborhood with 300 children which received \$4000 per year per child would have effective demand of 1.2 million dollars per year, and someone would serve the need.

## V. THE 1883 CONSTITUTIONAL AMENDMENT

It has been amply demonstrated that the 1876 Constitution clearly in-

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441. Watts & Rockwell, *supra* note 19, at 810 n.205 (citing EBY, DEVELOPMENT, *supra* note 31, at 175).

442. EBY, DEVELOPMENT, *supra* note 31, at 176.

443. EXECUTIVE OFFICE OF THE STATE OF TEXAS, GENERAL MESSAGE TO THE 17TH LEGIS. ON THE JUDICIARY, EDUCATION, INSURANCE, STATISTICS AND HISTORY, AND RAILROADS 9-15 (Jan. 26, 1881).

444. Watts & Rockwell, *supra* note 19, at 812.

445. Message of Gov. Roberts, H.J. OF TEX., 18th Leg., R.S. 9-16 (1883); S.J. OF TEX., 18th Leg., R.S. 8-15, reprinted in Eby, *Sourcebook*, *supra* note 17, at 769-70.

446. Message of Gov. Roberts, S.J. OF TEX., 18th Leg., R.S. 15 (1883); Watts & Rockwell, *supra* note 19, at 813, n.224.

447. B. BAKER, FIFTH BIENNIAL REPORT OF THE SUPERINTENDENT OF PUBLIC INSTRUCTION 6-7 (1886), reprinted in Eby, *Sourcebook*, *supra* note 17, at 820.

tended for public free schools to include private controlled education subsidized by state reimbursement, or some mix of publicly and privately controlled education. Did the 1883 constitutional amendment change this mandate?

### A. The Amendment

The real focus of the 1883 amendment was taxation to assure adequate funding, not the manner of delivering school services. In *Edgewood* the supreme court interpreted the 1883 amendment as "intended not to preclude an efficient system, but to serve as a vehicle for injecting more money into an efficient system."<sup>448</sup> The problem was not who controlled education, but rather the pitifully low levels of funding for any system of education, whether it was provided by government-controlled schools or private enterprise. The proposal was introduced on the ballot to the people as "the amendment to Section 3, Article 7 of the Constitution, School Tax."<sup>449</sup> It was viewed as a taxation proposal, not a control issue.

The ballot language used section 1's term "public free schools" throughout. This shows that no change was intended to the meaning of the term "public free schools." As we have seen in the past, when the legislature or the constitutional convention wanted to change the method of control, they changed the names for schools. This further evidences the intent to change taxation only, not control or supply of schools. Just as Governor O.M. Roberts had praised the 1876 community system, so too the next governor, John Ireland, "found that the system of school communities and local control is at least the most satisfactory."<sup>450</sup>

Section 3 as passed in 1876 allowed the state to spend up to one-fourth of the general revenues and a one dollar poll tax for education, but left the appropriation amount to the legislature, with uneven results. The primary thrust of the 1883 constitutional amendment was to add a state-wide local property tax and a local property tax option. In addition, one quarter of the revenue derived from state occupation taxes and the poll tax were required to be appropriated annually.<sup>451</sup> Rural districts were allowed to levy a maximum tax of "twenty cents on the hundred dollars valuation," but cities and towns were not so limited.<sup>452</sup>

448. *Edgewood Indep. School Dist. v. Kirby*, 777 S.W.2d 391, 396 (Tex. 1989) (emphasis omitted).

449. Tex. H.R.J. Res. 5, 18th Leg., R.S. 1883 Tex. Gen. Laws 134, 9 H. GAMMEL, LAWS OF TEXAS 440 (1898).

450. Message of Gov. Ireland, H.J. OF TEX., 18th Leg., R.S. 87-89 (1883), *reprinted in* Eby, *Sourcebook*, *supra* note 17, at 797.

451. TEX. CONST. art. VII, § 3, interp. commentary (1955).

452. Tex. H.R.J. Res. 5, 18th Leg., R.S. 1883 Tex. Gen. Laws 134, 9 H. GAMMEL, LAWS OF TEXAS 440 (1898). The joint resolution states:

Section 1. Be it resolved by the Legislature of the State of Texas: That Section 3, of Article 7, of the Constitution of the State of Texas be so amended as to hereafter read as follows:

"Section 3. One-fourth of the revenue derived from the State occupation taxes, and a poll tax of one dollar on every male inhabitant of this State between the ages of twenty-one and sixty years, shall be set apart annually for the benefit

As a by-product of allowing a local option tax, some unit of local government was necessary to conduct required elections and to collect the tax. As a by-product of the taxing power, the amendment stated "the legislature *may* also provide for the formation of school districts within all or any of the counties of this State."<sup>453</sup> The power to district is not mandatory. The purpose was to allow these districts to raise local taxes for the "further maintenance of public free schools and the erection of school buildings therein."<sup>454</sup>

The people were being asked to support state and local property taxes for public free schools. The issue was taxation. Would an approving voter think the amendment was changing the "public free school" system, or just funding it more generously? Districting was only an administrative tool to raise the tax. No one reading the amendment would think that public free schools would become government-controlled, state-operated schools with compulsory attendance. The amendment passed 30,553 votes to 20,237.<sup>455</sup> The people were willing to increase funding for education, but only with the expectancy that they would retain substantial local control over the funds. In fact, extreme commitment to family values in the rural areas made it almost impossible to raise local taxes.<sup>456</sup> The community school system was also continued until 1909,<sup>457</sup> showing further that the 1883 Amendment was

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of the *public free schools*, and, in addition thereto, there shall be levied and collected an annual ad valorem State tax of such an amount, not to exceed twenty cents on the one hundred dollars valuation, as, with the available school fund arising from all other sources, will be sufficient to maintain and support the *public free schools* of this State for a period of not less than six months in each year; and the Legislature may also provide for the formation of school districts within all or any of the counties of this State, by general or special law, without the local notice required in other cases of special legislation, and may authorize an additional annual ad valorem tax to be levied and collected within such school districts for the further maintenance of *public free schools* and the erection of school buildings therein; provided, that two-thirds of the qualified property tax paying voters of the district, voting at an election to be held for that purpose, shall vote such tax, not to exceed in any one year twenty cents on the one hundred dollars valuation of the property subject to taxation in such district, but the limitation upon the amount of district tax herein authorized shall not apply to incorporated cities or towns constituting separate and independent school districts."

Sec. 2. That the Governor of this State shall issue his proclamation ordering an election to be held on the second Tuesday in August A. D. 1883, at which time the foregoing amendment shall be submitted for adoption by the qualified electors of this State.

Sec. 3. That those voting for the adoption of the amendment to Section 3, shall have written or printed on their ballots the words "For amendment to Section 3, Article 7, of the Constitution, school tax," and those voting against the adoption of said amendment shall have written or printed on their ballots the words "Against the amendment to Section 3, Article 7 of the Constitution, school tax."

*Id.* (emphasis added).

453. Tex. H.R.J. Res. 5, 18th Leg., R.S. 1883 Tex. Gen. Laws 134, 9 H. GAMMEL, LAWS OF TEXAS 440 (emphasis added).

454. *Id.*

455. Proclamation of Gov. Ireland of Sept. 25, 1883, 18th Leg., C.S., 1884 Tex. Gen. Laws iii, v, 9 H. GAMMEL, LAWS OF TEXAS 535, 537 (1898).

456. TEX. CONST. art. VII, § 3, interp. commentary (Vernon 1955).

457. See C. EVANS, *supra* note 45, at 116.

not designed to prohibit community schools. Of course, many of the advocates of free public education supported higher taxation, just as they had in 1875.

Sections 4 and 5 of the constitution were also changed in a minor respect to allow investment of school funds in county bonds as well as state and federal bonds.<sup>458</sup> That the 1883 amendments to section 3 were primarily a taxation and funding proposal is also borne out by the fact that section 9 of article 8 was amended at the same time to reduce the maximum state property tax from 50 cents to 35 cents.<sup>459</sup> Thus, overall state taxes were lowered at the same time local property taxes were allowed. The creation of new county education districts (CED) by the legislature in its most recent *Edgewood Independent School District v. Kirby*<sup>460</sup> driven response,<sup>461</sup> is further evidence that districting is merely an administrative tool for raising money, not necessarily an education control mechanism. The new CED's only function is to raise taxes to a uniform level. The money raised is then distributed to school districts, but it could just as easily be distributed directly to parents or parent organized schools. The CED has no educational policy control over the public school districts, and it need have none over private free schools.

### B. 1884 School Law

Even after the 1883 constitutional amendment, the hybrid system of state-operated and parent-controlled systems continued. In the wake of the constitutional amendment's passage, Governor Ireland called a special session of the Eighteenth Legislature:

1. To provide for the levy and collection of a tax to maintain a system of *free schools*, under the amended Constitution.
2. To adjust the *free school* law to the requirements of the amended Constitution.

...

9. To determine whether or not the *common school funds* shall be invested in any other securities than those named in the Constitution; and, if so, to provide therefor.

...

13. To amend the law passed at the regular session of the Eighteenth Legislature, approved April 12, 1883, entitled "An act to provide for the classification, sale and lease of lands heretofore or hereafter surveyed and set apart for the benefit of the *Common School*, University, Lunatic, Blind, Deaf and Dumb, and Orphan Asylum *funds*."<sup>462</sup>

The special session passed the School Law of 1884<sup>463</sup> which became law

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458. J. SAYLES, THE CONSTITUTIONS OF TEXAS, ANNOTATED 553-55 (1888).

459. See *id.* at 560.

460. 777 S.W.2d 391 (Tex. 1989).

461. Act approved Apr. 15, 1991, 72nd Leg., R.S., ch. 20, 1991 Tex. Sess. Law Serv. 381 (Vernon).

462. Proclamation of Gov. Ireland of Oct. 15, 1883, 18th Leg., C.S., 1884 Tex. Gen. Laws vi, 9 H. GAMMEL, LAWS OF TEXAS 538 (1898) (emphasis added).

463. The law was described as: An Act to establish and maintain a system of *public free*

without Governor Ireland's signature.<sup>464</sup> This statute was the longest to date dealing with education. It began by simply incorporating all of amended article VII into the school law.<sup>465</sup>

Interestingly, section 1 used the term "public schools" but then incorporates the constitution's language of "public free schools."<sup>466</sup> Section 2 created the permanent fund and the available fund for "public free schools." Sections 4 and 5 provided for equal per pupil allocation of the "public school fund" "without regard to color" for children over eight and under sixteen.<sup>467</sup> The statute carefully distinguished and used the term "public schools" and "public free schools" throughout, but each has a different meaning. An elected office of *State Superintendent of Public Instruction* was created.<sup>468</sup> The Superintendent of Public Instruction was not given a general superintendency over all "public free schools," supported by state funding in Section 2, but only over "public schools."<sup>469</sup> By July 15 of each year, the State Board of Education was to notify the counties or school districts of the among of their pro rata distribution of the available school fund.

Section 29 is important because it required all non-exempt counties to divide themselves into convenient school districts by October 1884.<sup>470</sup> Exempt counties continued the community system. Upon the petition of twenty property owners, the districts could hold an election to adopt a local property tax.<sup>471</sup>

While the act speaks often of "public schools" and goes into great detail as to their organization, a clear dichotomy between "public schools" in the modern sense and private education through the community schools continued. The available fund in section 2 is for all schools, both public and private community schools, which together constitute the "public free school" system. The continuation of both systems is clearly evident in section 42, which allows transfers between district and community schools, with the funding following the child, not the district.<sup>472</sup> Even though the counties

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*schools* for the State of Texas, and to repeal so much of chapter 3, of title 78 of the Revised Civil Statutes of Texas, as refer to public free schools outside of incorporated cities and towns, assuming or having assumed control of their public free schools, and all laws and parts of laws in conflict with this act. Act of Feb. 4, 1884, 18th Leg., C.S., ch. 25, 1884 Tex. Gen. Laws 38, 9 H. GAMMEL, LAWS OF TEXAS 570 (1898) (emphasis added).

464. 1884 Tex. Gen. Laws 56-57, 9 H. GAMMEL, LAWS OF TEXAS 588-89.

465. § 1, 1884 Tex. Gen. Laws 38-40, 9 H. GAMMEL, LAWS OF TEXAS 570-72.

466. Section 1 states: "That the constitutional provisions for public schools are hereby appended as part of the school law of this State." *Id.*

467. §§ 4, 5, 1884 Tex. Gen. Laws 40, 9 H. GAMMEL, LAWS OF TEXAS 572.

468. § 12, 1884 Tex. Gen. Laws 41, 9 H. GAMMEL, LAWS OF TEXAS 573.

469. § 13, 1884 Tex. Gen. Laws 41, 9 H. GAMMEL, LAWS OF TEXAS 573.

470. § 29, 1884 Tex. Gen. Laws 43-44, 9 H. GAMMEL, LAWS OF TEXAS 575-76.

471. § 31, 1884 Tex. Gen. Laws 44, 9 H. GAMMEL, LAWS OF TEXAS 576.

472. Section 42 states:

The county Judge may, at any time before or after he apportions the school fund among the several districts or communities, and before the school opens, transfer a child from one district or community to another in the same county, and in every such case, if the transfer is made after the apportionment, he shall transfer the pro rata share of such child in the school fund to the proper district.

§ 42, 1884 Tex. Gen. Laws 46, 9 H. GAMMEL, LAWS OF TEXAS 578.

were divided into districts, this section seems to envision communities and districts in the same county with parental choice dictating enrollment. Sections 46 and 47 also require the county judge and treasurer to apportion the money between the districts and communities in their county.

Section 43 also clearly shows the dual nature of the combination of public and private schools into a unitary system of public education. Contrasted with the Superintendent of Public Instruction's supervision only of "public schools,"<sup>473</sup> the county judge was given, "under the direction of the State Superintendent, the immediate supervision of all matters pertaining to public education in his county."<sup>474</sup> He was to visit and examine schools, not just "public schools."<sup>475</sup> The county judge was to deliver lectures "calculated to excite an interest in public education, or secure someone to do so."<sup>476</sup> Public education is used in the broad sense of both public and community schools. The judge was to conduct teacher training and was to approve all vouchers against the school fund of his county.<sup>477</sup> He was to distribute all school blanks and books to the officers and teachers of the public schools.<sup>478</sup>

Section 47 makes the county treasurer the "treasurer of the available public free school fund" for his county.<sup>479</sup> Here the term correctly refers to all public education, both public schools run by the government and the private education model community schools, since it allocates funds to districts or communities in the county.

Section 48 requires anyone desiring to teach a "public free school" to be certified by the County Board of Examiners. The more general term "public free school" is used here apparently to require any teacher, whether public or private, to be minimally qualified before receiving governmental funds.<sup>480</sup>

Section 50 reintroduces a term which had not been seen in the education statutes for a while, but which reveals an important clue to the operation of the system. After setting teacher salaries, section 50 states:

Teachers shall admit all children over and under scholastic age into the *public schools*. All tuition paid for students attending a *free school*, under and over the scholastic age, shall be paid to the trustees for the benefit of the community or district in which the school is taught.<sup>481</sup>

What does "free school" mean here? Does it mean a school that charges tuition as opposed to a public school that doesn't charge tuition? Or does it mean the same as public school in the prior sentence and it just means children over or under the scholastic age could attend if they paid their own tuition? If a free school means a tuition-charging institution, then it is clear

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473. §§ 13-18, 1884 Tex. Gen. Laws 41-42, 9 H. GAMMEL, LAWS OF TEXAS 573-74.

474. § 43, 1884 Tex. Gen. Laws 46, 9 H. GAMMEL, LAWS OF TEXAS 578.

475. *Id.*

476. *Id.*

477. *Id.*

478. *Id.*

479. § 47, 1884 Tex. Gen. Laws 48, 9 H. GAMMEL, LAWS OF TEXAS 580.

480. § 48, 1884 Tex. Gen. Laws 48, 9 H. GAMMEL, LAWS OF TEXAS 580.

481. § 50, 1884 Tex. Gen. Laws 49, 9 H. GAMMEL, LAWS OF TEXAS 581 (emphasis added).



parents were able to choose where to send their child, either a public no-tuition school or a free school subject to tuition reimbursement.

Section 52 required teachers in "public schools" to attend summer school training sessions.<sup>482</sup> Section 53 gave school trustees of districts of communities the power to locate schools, determine the length of the school year, and employ teachers "subject to the rules and regulations of the county Judge and State Superintendent."<sup>483</sup> The curriculum of "public schools" is set in section 56, with the state superintendent given power to direct curriculum also.<sup>484</sup>

Section 57 concerning governance states: "[T]he trustees of school districts or communities shall have the management and control of the public schools . . . ."<sup>485</sup> This seems to imply that community schools are public schools as well as the district schools. Fifty three counties were exempted from the district system.<sup>486</sup> These exempted counties continued the community system.

Section 72 stated:

It shall be lawful for the parents, guardians or other person having control of any children residing in any county residing in the foregoing section, who may be within the scholastic age, to unite and organize themselves into *free school communities*, entitled to share in the benefits of the available school fund belonging to such county, upon complying with the conditions hereinafter prescribed.<sup>487</sup>

Under sections 73 and 74 any number of residents who wanted to organize a "free school community" could apply to the county judge prior to August 1, stating their "desire in good faith, to organize a free school," and asking for their pro rata share of the available school fund.<sup>488</sup> The parents selected three or more of their own trustees to "have control of the public school house,"<sup>489</sup> subject to a county judge veto.

The number of school communities in towns of less than fifteen hundred was limited to two for white children and two for colored children.<sup>490</sup> Parents could obviously sign up for only one school community. The county judge acted as the local choice office, and could assign any excluded child to an appropriate community.<sup>491</sup> Funding followed the child, not the governmental entity. The trustees were to perform duties prescribed by the state

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482. § 52, 1884 Tex. Gen. Laws 49-50, 9 H. GAMMEL, LAWS OF TEXAS 581-82.

483. § 53, 1884 Tex. Gen. Laws 50, 9 H. GAMMEL, LAWS OF TEXAS 582.

484. Section 55 states: "All the public schools in this State shall be required to have taught in them orthography, reading in English, penmanship, arithmetic, English Grammar, modern geography, and composition and other branches as may be agreed on by the trustees or directed by the State Superintendent." § 55, 1884 Tex. Gen. Laws 50, 9 H. GAMMEL, LAWS OF TEXAS 582.

485. § 57, 1884 Tex. Gen. Laws 50, 9 H. GAMMEL, LAWS OF TEXAS 582.

486. § 71, 1884 Tex. Gen. Laws 52-53, 9 H. GAMMEL, LAWS OF TEXAS 584-85.

487. § 72, 1884 Tex. Gen. Laws 52-53, 9 H. GAMMEL, LAWS OF TEXAS 584-85 (emphasis added).

488. §§ 73, 74, 1884 Tex. Gen. Laws 53, 9 H. GAMMEL, LAWS OF TEXAS 585.

489. §§ 74, 78, 1884 Tex. Gen. Laws 53-54, 9 H. GAMMEL, LAWS OF TEXAS 585-86.

490. § 76, 1884 Tex. Gen. Laws 54, 9 H. GAMMEL, LAWS OF TEXAS 586.

491. § 77, 1884 Tex. Gen. Laws 54, 9 H. GAMMEL, LAWS OF TEXAS 586.

superintendent,<sup>492</sup> and the trustees were removable by a majority of the school patrons. As in the prior community system, trustees hired the teachers, who had to be certified by the local board of examiners.<sup>493</sup> Tuition maximums were set depending on the teacher's qualifications, and the free school could not charge more than the legal maximum as a condition of admittance.<sup>494</sup> Only a completely private school could charge unlimited tuition.

The free school could hire an assistant teacher if it had more than thirty-five students, but if the necessity for an assistant arose from the attendance of private pupils, the teacher had to bear the expense of the assistant.<sup>495</sup> Clearly, this shows that even private students over the scholastic age were allowed to attend these free schools. Again, these were primarily private schools with tuition reimbursement for those within the scholastic age. The teacher was paid directly by the county treasurer.<sup>496</sup>

The then-current school laws for cities and towns, which gave the cities exclusive control of public schools in their areas, remained in effect; all other school laws were repealed.<sup>497</sup> Clearly, the legislature in creating districting in some counties had gone far towards creating state-operated public schools in those counties, but, as a whole, the system still contained a large number of free schools, so that the combination of public schools and free schools created a system of public free schools.

Apparently, the public school districting system set up in the Act of 1884 was not popular, as the very next regular session of the legislature increased the number of exempt counties from fifty-three (53) to one hundred (100).<sup>498</sup> On the other hand, the preamble to the act indicates that some counties simply couldn't pay for the scholastic census.<sup>499</sup> The legislature also added compensation for conducting the scholastic census in those counties that were districted.<sup>500</sup> Citing failure of school officials to file the required school reports, such failure was made a misdemeanor in 1889.<sup>501</sup>

From the governor's speech and newspaper accounts of the times, the evil that was intended to be remedied by the 1884 amendment was inadequate funding, not parental control over the scope of education. Watts and Rockwell argue that the purpose of the amendment was "to bring about more equality and lessen the disparity between communities' ability to tax themselves to provide education."<sup>502</sup> No argument is advanced by either

492. § 78, 1884 Tex. Gen. Laws 59, 9 H. GAMMEL, LAWS OF TEXAS 536.

493. § 79, 1884 Tex. Gen. Laws 59, 9 H. GAMMEL, LAWS OF TEXAS 591.

494. § 79b, 1884 Tex. Gen. Laws 54-55, 9 H. GAMMEL, LAWS OF TEXAS 586-87.

495. § 79c, 1884 Tex. Gen. Laws 55, 9 H. GAMMEL, LAWS OF TEXAS 587.

496. § 79d, 1884 Tex. Gen. Laws 55, 9 H. GAMMEL, LAWS OF TEXAS 587.

497. §§ 88, 89, 1884 Tex. Gen. Laws 56, 9 H. GAMMEL, LAWS OF TEXAS 588.

498. Act approved Mar. 12, 1885, 19th Leg., R.S., ch. 28, 1885 Tex. Gen. Laws 28, 9 H. GAMMEL, LAWS OF TEXAS 648 (1889).

499. § 2, 1885 Tex. Gen. Laws 29, 9 H. GAMMEL, LAWS OF TEXAS 649.

500. Act approved Mar. 24, 1885, 19th Leg., R.S., ch. 38, 1885 Tex. Gen. Laws 37, 9 H. GAMMEL, LAWS OF TEXAS 657 (1889).

501. Act approved Apr. 8, 1889, 21st Leg., R.S., 1889 Tex. Gen. Laws 15, 9 H. GAMMEL, LAWS OF TEXAS 1043 (1889).

502. Watts & Rockwell, *supra* note 19, at 814 (citing EBY, DEVELOPMENT, *supra* note 31, at 196-97).

Watts and Rockwell or Eby that the 1883 amendment was intended to do anything other than raise local taxes to fund education adequately. Even Eby, a strong proponent of state-controlled and centralized education (characterized by Watts and Rockwell as "a progressive who was sharply critical of the populist framers"),<sup>503</sup> admits that the community school voucher system established immediately after the 1876 Constitution "appeared to give rather satisfactory results for several years. The number of children enrolled in the schools increased remarkably . . ."<sup>504</sup>

Eby's historical work on Texas education is an excellent compilation in standard treatise form.<sup>505</sup> Watts and Rockwell criticize Eby on the grounds that his work is "distorted by his intense antipathy to the Texas framers," but they do not hesitate to rely on his history to reach conclusions with which he would disagree.<sup>506</sup> However, the conclusions of Watts and Rockwell could just as easily be faulted for their strong populist ideology. Reading their article and noting that they were Briefing Attorneys for Chief Justice Thomas R. Phillips and Justice Nathan L. Hecht yields interesting speculations into the process that led to a unanimous decision in *Edgewood*,<sup>507</sup> particularly in gaining the support of conservative judges who might favor an originalist jurisprudence.

The basic argument of Watts and Rockwell is that in the 1883 amendment, framers and ratifiers never foresaw or intended the wide disparities in local wealth which the authors allege were a product of later industrial development. Thus, even though the 1884 framers and ratifiers created a system which clearly envisioned inherently different levels of spending, depending on local commitment to education, they at least intended approximately equal educational spending for equal taxation effort. This is the alleged intent adopted by the court in *Edgewood* which rejected an equal protection analysis which reached the same result.<sup>508</sup> To conservative jurists, reliance on the education article would limit the effect of the decision to education, rather than destabilizing all local government services as an equal protection argument based on unequal local property wealth would do. This approach also more closely casts the judge in the role of interpreting the constitution and implementing the will of the people rather than legislating correct social philosophy under the guise of deciding cases.

This conservative approach of implementing the will of the people as expressed in their constitution has traditionally enjoyed the greater degree of

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503. *Id.* at 809.

504. EBY, DEVELOPMENT, *supra* note 31, at 173. Any history of Texas education will invariably rely on Eby to a great extent. He compiled a useful source book for any legal scholar or historian conducting research in this area. Eby, *Sourcebook*, *supra* note 17 (includes annotated reproductions of historical documents from 1690 to 1890).

505. EBY, DEVELOPMENT, *supra* note 31.

506. Watts and Rockwell, *supra* note 19, at 809.

507. 777 S.W.2d 391 (Tex. 1989).

508. The trial court in *Edgewood* struck down the educational financing system as violative of article 1, § 3 (equal rights guarantee), article 1, § 19 (due course of law), and article VII, § 1 of the Texas Constitution, whereas the Texas Supreme Court based its decision of unconstitutionality solely on article VII, § 1. *Edgewood*, 777 S.W.2d at 393.

political and jurisprudential legitimacy over an activist implementation of desirable social policy. In the area of educational choice and parental control of education, the court should be just as eager to implement the true intent and meaning of the 1876 Constitution. As the history of the 1876 Constitution and the immediate implementation of a choice plan demonstrate, the people clearly envisioned a substantial measure of state funding of private education, with the predominant emphasis on state payment of tuition for the poor, supplemented by the remaining funds for the rest. The constitution's emphasis towards educating the poor as the State's first obligation is noted by Watts and Rockwell who stated:

They [the framers] sought to address inequalities in education 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.<sup>509</sup>

Because the 1883 amendment allowed, but did not require, the legislature to create school districts for the purpose of raising taxes, the legislature promptly did so in some, but not all, counties. The key seems to have been local desire for more money through taxation, not a desire for centralized governmental control. However, with the power to tax came the power and desire to control spending, and thus the School Law of 1884 set up local trustee control in districts that did not follow the community free school model.

## VI. CONSTITUTIONAL AMENDMENTS SINCE 1883

If the intent of the 1876 Constitution and 1883 amendment was to provide a well-funded but decentralized educational system under parental control, rather than the Radical Reconstruction model of centralized, rigid state control, how did we arrive at our system today, a state educational monopoly rigidly controlled from Austin? The process has been a gradual one, with state control slowly eroding parental rights through piecemeal legislation, but with no other significant constitutional amendment after 1884. The early system has been transformed into today's monstrosity without any corresponding constitutional change. The basic constitutional right to parental control is still intact in the constitution. It was not until much later that the legislature provided for compulsory attendance, well after the revulsion to the compulsory attendance established in the 1869 Reconstruction Constitution had evaporated. Prior to this threat of compulsion, parents had four educational options: public operated education, private education of their choice with state reimbursement, home school, or no education. When the state adopted compulsory education, the poor's only options were state-operated or home school education.

As analysis of the foundations of the Texas system of public free schools shows, the people in 1876 desired to establish a system that is directly the opposite of the one we have today. The majority opposed a state-dominated,

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509. Watts and Rockwell, *supra* note 19, at 819 (emphasis added).

state-operated, centralized bureaucratic system divorced from local parental control. Did constitutional amendments allow or require the growth of the current system, or was the change a legislative abrogation of the constitution's original intent, without constitutional amendments?

Through 1989, the people of Texas had voted on forty-three amendments to the constitution's article VII on education, of which thirty-two amendments have passed.<sup>510</sup> A great many of these amendments were technical financing changes dealing with the University of Texas, taxation, sale of school lands, managing funds or bonds, intended to generate more money for education, but making no change in the method of providing education.<sup>511</sup>

The 1907 amendment increased the local tax maximum and reduced from two-thirds to a majority the number of voters required to pass a local property tax.<sup>512</sup> The 1909 amendments to sections 3 and 3a permitted school districts to cross county lines, but, more importantly, gave the legislature power "to pass laws for the assessment and collection of taxes in all said districts and for the management and control of the public school or schools of such districts, whether such districts are composed of territory wholly within a county or in parts of two or more counties."<sup>513</sup> This is the provision which justifies the newly created county education district, some of which include more than one county. Section 3 as amended, while using the term public free schools, also uses public schools for the first time, and the term has remained to this day, even though the rest of the section refers to public free schools. Is there a reason why the term "public schools" was chosen, or is it simply poor drafting? If the terms are not synonymous, the legislature may have the power only to regulate public schools, but not free schools, with the two types of schools together constituting the public free school system? Passage by the House and Senate was unanimous, and the people voted 48,000 for the amendment, 19,076 against.<sup>514</sup> The remaining community school systems were formed into school districts by the next legislature.<sup>515</sup> Previous amendments were consolidated into the present Section 3 which speaks of "public free schools" in 1926.<sup>516</sup>

The 1918 amendment increased the state school tax and provided for free textbooks.<sup>517</sup> In 1920, the limit on local taxation was abolished to allow a greater local share of educational funding.<sup>518</sup> The 1928 amendment allowed

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510. Votes on Proposed Amendments to the Texas Constitution, 1875-1988, 71st Leg., 1st C.S., 1989 Tex. Gen. Laws 167.

511. TEX. STATE TEACHERS ASS'N, *supra* note 34, at 12. Professor Eby was a member of the TSTA Committee on the Centennial Celebration. The 1908 Amendment reduced the two-thirds vote. TEX. CONST. art. VII, § 3, interp. commentary (Vernon 1955).

512. Tex. H.R.J. Res. 5, 31st Leg., R.S., 1909 Tex. Gen. Laws 253-54; Tex. H.R.J. Res. 7, 30th Leg., R.S., 1907 Tex. Gen. Laws 413.

513. Tex. H.R.J. Res. 6, 31st Leg., R.S., 1909 Tex. Gen. Laws 250-51.

514. Votes on Proposed Amendments to the Texas Constitution, 1875-1988, 71st Leg., 1st C.S., 1989 Tex. Gen. Laws 167.

515. Act approved Feb. 18, 1909, 31st Leg., R.S., ch 12, 1909 Tex. Gen. Laws 17-23.

516. TEX. CONST. art. VII, § 3, interp. commentary (Vernon 1955).

517. *Id.*

518. *Id.*

the legislature to control by law the terms and duties of the State Board, leading to a nine-member State School Board that was recommended by a 1923 survey of Texas educational needs performed by out-of-state professional educators.<sup>519</sup> The old board composed of the governor, comptroller, and secretary of state certainly did not have the time or expertise required to regulate the public schools, which the legislature now had the power to do. The increased regulations required a regulatory body.

Section 3 was amended in 1926 to eliminate the provision allowing the legislature to create special districts.<sup>520</sup> This may present an obstacle to any choice legislation that is implemented through a special district procedure, but should present no problems if current districts are used.

Very interestingly, though unmentioned in *Edgewood*, the people of Texas overwhelmingly rejected proposed constitutional amendments which would have required equitable support and equal educational opportunity.<sup>521</sup> The proposed amendment would have also changed "public free schools" to "free public schools," which the voters rejected, choosing to keep public free schools.

The greatest transfer of power from local control to state control occurred statutorily, rather than by constitutional amendment, in the Gilmer Aiken laws of 1949. These laws created the Texas Education Agency and made its regulations binding on schools. The State Board of Education was expanded to twenty-one elected members from the previous nine appointed members. The members remained elected officials until the 1984 school reform act, known popularly as House Bill 72, changed to an appointive system because the educational bureaucracy had become so bloated. With student achievement scores plummeting, an appointed board was implemented to produce accountability and enforce unpopular but allegedly necessary reforms such as "no pass, no play" rules. The Texas penchant for electing every possible official soon reasserted itself and the legislature has since reverted to an elected board.<sup>522</sup>

The Gilmer Aiken laws also replaced the per student allocation of funds which had been present since 1845, and shifted to a plan based on a formula called an economic index. Many choice plans, for example, the Oregon initiative to give every student \$2500, advocate a return to pre-Gilmer Aiken per student allocations. Other choice plans recognize that the costs of educating children varies with the need of the child and the community (e.g., rural v. urban). These plans usually provide different scholarship amounts for different categories of students. For example, handicapped students could receive more money based on their handicapping conditions. Students with english as a second language might need more money. Since the legislature changed

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519. Tex. H.R.J. Res. 14, 40th Leg., R.S., 1927 Tex. Gen. Laws 499.

520. Tex. H.R.J. Res. 9, 39th Leg., R.S., 1925 Tex. Gen. Laws 682.

521. On November 4, 1975, Proposition No. 4 failed to gain approval by a vote of 844,927 votes against, 327,876 for. For the text of Proposition No. 4, see Tex. S.J. Res. 11, 64th Leg., R.S., 1975 Tex. Gen. Laws 3153.

522. F. KEMERER & J. HAIRSTON, *THE EDUCATOR'S GUIDE TO TEXAS SCHOOL LAW* 9 (1990).

from per student allocations to formula allocations, it appears that the legislature could voluntarily return to per student allocations if it so chooses, especially since that was the method of allocation when the key constitutional amendments were adopted.

## VII. THE CONSTITUTIONAL PROHIBITION OF AID TO SECTARIAN SCHOOLS

This article has assumed that Texas would adopt a public/private choice plan which allows parents to choose a private non-sectarian school, as the Milwaukee plan does. However, from a purely economic standpoint, the concept of choice followed to its logical conclusion would dictate that religious schools also be allowed to participate. After all, the problem with the current system is a limited supply of good schools, and including religious schools automatically increases the supply of good schools (assuming that at least some of the sectarian schools are good). If competition is the spur toward efficiency then allowing the greatest number of education providers to compete would produce the greatest efficiency.

Despite the economic rationale for doing so, the issue of whether to allow religious schools to compete on an equal basis with public schools is not solely an economic one. Important constitutional issues of church-state relationships are deeply implicated. Though the resolution of such issues is beyond the scope of this article, others have written eloquently on the subject. It is interesting to note that many commentators, and the Oregon Office of Legislative Counsel construing the failed ballot initiative which would have included religious schools, have determined that a voucher system would not violate the United States Constitution's religion clause.<sup>523</sup> The theory is that denying a general public benefit to a child or the parents would be a denial of free exercise rights, i.e., unconstitutional discrimination against religion, while providing only an indirect benefit to the religious school is not an unconstitutional establishment of religion. This is the theory by which the United States Supreme Court upheld the payment of tuition reimbursement, or vouchers in effect, to a blind seminar student under a state education for the blind program.<sup>524</sup>

Assuming for the sake of argument that including religious schools did not violate the United States Constitution, would it violate the Texas Consti-

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523. Memorandum from Kathleen Beaufait, Chief Deputy Legislative Counsel, and Mike Autio, Law Clerk, to Lee Penny, Joint Committee on Education (Jan. 29, 1990) (copy on file with author). No less an authority than Professor Michael W. McConnell, Chicago Law School, also opined that the Oregon panel was constitutional. Letter dated August 2, 1990 to Steve Buckstein, Oregonians For Educational Choice (copy on file with author). See Anthony, *Conservative Judicial Activism and Parochial Schools: An Open Door Policy Toward Funding Religious Schools?*, 57 WEST EDUC. L. RPTR. 13 (Jan. 18, 1990); Monaghan and Ariens, *A Fairer Approach to the Establishment Clause*, 29 ST. LOUIS L.J. 115, 116 (1984); Note, *The Constitutionality of Louisiana Aid to Private Education*, 44 LA. L. REV. 865, 868 (1984); Note, *The Increasing Judicial Rationale for Educational Choice*, Mueller, Witters and Vouchers, 66 WASH. U.L.Q. 363 (1988).

524. *Witters v. Washington Dep't of Servs. for the Blind*, 474 U.S. 481 (1986).

tution? The relevant constitutional provisions strongly inhibit *direct* state aid to sectarian institutions as follows:

Texas Constitution article VII, section 5a reads:

The available school fund shall be approved annually to the support of the public free schools. Except as provided by this Section, no law shall ever be enacted appropriating any part of the permanent or available school fund to any other purpose whatever; nor shall the same, or any part thereof ever be appropriated to or used for the support of any sectarian school; and the available school fund herein provided shall be distributed to the several counties according to their scholastic population and applied in such manner as may be provided by law.<sup>525</sup>

More broadly, the Texas Bill of Rights, article I, section 7 states:

No money shall be appropriated, or drawn from the Treasury for the benefit of any sect, or religious society, theological or religious seminary; nor shall property belonging to the state be appropriated for any such purpose.<sup>526</sup>

Under these provisions, Texas courts could still adopt the child benefit theory and uphold a voucher program, construing the religion clauses to be identical to the United States Constitution. On the other hand, the free exercise provision of the Texas Constitution could be construed more stringently than the federal provisions to insure even more strongly the right to direct one's educational benefits as one wishes, even in the free exercise of religion. Texas courts have indicated some inclination to interpret the state constitution to protect individual rights more liberally than does the federal constitution,<sup>527</sup> so the free exercise right might be even greater under the Texas Constitution.

Some of the problems with this more explicit Texas establishment clause will be briefly discussed. The obvious evil that the constitutional prohibitions were designed to prevent was the direct grant of public lands and monies to sectarian institutions.<sup>528</sup> Vast acreage of public land had been given directly to religious institutions from 1845 to 1876. Once these grants were made, the benefit went directly to the school itself. The voucher system is an entirely different proposition since the school gets no direct grant, no long term control over assets, but merely benefits indirectly from the parents' decision. If the parent changes his mind, the benefit leaves with the child. The prohibition on diversion of the permanent and available fund passed in the convention by a vote of 44 to 27.<sup>529</sup> At first blush, it would seem to be a strong obstacle to the constitutional implementation of any choice plan such as Oregon's, which allows students to choose religiously-affiliated schools. However, several factors militate against an overly restrictive interpretation of this provision.

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525. TEX. CONST. art. VII, § 5a.

526. TEX. CONST. art. I, § 7.

527. See *Texas State Employees Union v. Department of Mental Health*, 746 S.W.2d 203 (Tex. 1987).

528. See *supra* note 38 and accompanying text.

529. TEX. CONST. art. VII, § 5, interp. commentary (Vernon's 1955).



First, the prohibition by its terms applies only to the permanent and available school fund, which funds only a small proportion of the actual public expenditures on education. The prohibition does not apply at all to local tax expenditures. The rationale for this limitation is that the use of public lands should be reserved for the public schools, not particular religious institutions, since the land comes from the public as a whole. In 1876 the people were less reluctant to expend tax money taken from private individuals' pockets on private enterprise. However, this distinction is overshadowed by the fact that article 1, section 19 includes a general prohibition against expenditure of any state funds for support of private schools. If this general prohibition applies to education expenditures, as it clearly does, then the distinction in article VII, section 5 is superfluous. Consequently, the intent of both clauses must be studied together. As I have pointed out, the evil to be remedied was direct grants of public lands to private sectarian schools. No choice plan advocates direct land or financial grants to schools because the state would lose all control of the land and future benefits to students. The constitution prohibits direct aid to sectarian schools.

Finally, only sectarian schools are prohibited from receiving aid, not schools with a generalized religious content. In 1881, Governor Roberts stated that the no sectarian school prohibition had unfortunately been construed to exclude schools under the "control of any denomination or organized interests."<sup>530</sup> He stated that the intent of this clause had not been to avoid teaching religion in school, "the duty of man to man, and the duty of man to his Maker, but that these things should never be excluded by law from schools. All that had been intended to be prohibited was narrow sectarianism or denominationalism, but that anything common to all forms of Christianity, such as the Lord's Prayer, the Ten Commandments, and the Sermon on the Mount, could and surely must be taught in the schools, if they were to have any civilizing influence."<sup>531</sup> This has also been the approach of the Texas Supreme Court which has allowed recitation of the Lord's prayer in public schools.<sup>532</sup>

In 1877, O.N. Hollingworth, Superintendent of Education under Governor Coke, Hubbard, and Roberts, also felt that a public school should be non-sectarian in religious matters, but not irreligious completely.<sup>533</sup> The national sentiment that schools should be established to promote religion, but not sectarianism, is further embodied in the Ordinance of 1787 by the Congress of the Confederation: "Religion, morality and knowledge being necessary to good government and the happiness of mankind, schools and the means of education shall be forever encouraged."<sup>534</sup>

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530. EXECUTIVE OFFICE OF THE STATE OF TEXAS, GENERAL MESSAGE TO THE 17TH LEGIS. ON THE JUDICIARY, EDUCATION, INSURANCE, STATISTICS AND HISTORY, AND RAILROADS 14-15 (Jan. 26, 1881), *reprinted in* Eby, *Sourcebook*, *supra* note 17, at 763-65. *See also* C. EVANS, *supra* note 45, at 109.

531. *Id.*

532. *Church v. Bullock*, 109 S.W. 115 (Tex. 1908).

533. REPORT OF THE COMMISSIONER OF EDUCATION 245 (1877), *reprinted in* C. EVANS, *supra* note 45, at 101.

534. C. EVANS, *supra* note 45, at 1.

## VIII. SOCIAL POLICY ANALYSIS

In 1954 the Texas State Teachers Association and Professor Eby were confident that the new centralized bureaucracy in place as a result of the Gilmer Aiken laws would usher in a new era of educational progress. Celebrating the triumph of the modern state educational bureaucracy on the 100th anniversary of the 1854 voucher school laws, which had so persistently ministered to parental rather than professional concerns, they stated:

The Texas Public School System [sic] enters its second century equipped with the most efficient, up-to-date organization in its history. It has moreover, a spirit of progress and of inner unity it has never before possessed. Problems are still numerous, to be sure, but the methods of handling them and the determination to forge ahead have never been so well coordinated.<sup>535</sup>

Within ten years of the professionals' complete triumph over parental control, student achievement scores began a precipitous decline from which they have never recovered. The actual "Century of Progress" (1854-1954) was dominated by parental control, with a slow, constant struggle for governmental control. The second century may well be called the "Century of Decline" unless parental control is reestablished. The educational bureaucracy has produced large numbers of functional illiterates today, but in 1860, under the private choice system and parental responsibility, illiteracy was a little less than four per cent for white males and a little more than five per cent for white females.<sup>536</sup> As the government supplanted the family, the family broke down as a social unit. Today, the crucial decision in education is whether the family will be weakened even further with the benevolent but incompetent state taking over even more social functions such as sex-education, after school care, and counseling. The record of government in education since 1954 is pathetic, yet despite the evidence of decline, the call is for more money and more control.

The overwrought charge often levelled at a voucher system is that it will destroy the public school system.<sup>537</sup> While this is an exaggerated claim, for competition will invigorate public education rather than destroy it, let us assume for a moment that the charge is true. If true, is it not really an admission that we need a voucher system? After all, the assumption behind the charge is that vast numbers of parents would leave the system if they had a true choice. The assumption must also be that more attractive schools would become more available so people would choose these schools if they had the economic power to do so. If the current system is so bad that the only way it can be sustained is through compulsion, why bother to save it?

In *Edgewood* the supreme court stated that the constitution's mandate to provide a suitable and efficient system for the "purpose of a 'general diffusion

535. TEX. STATE TEACHERS ASS'N, *supra* note 34, at 13. Professor Eby was on the TSTA Centennial Committee.

536. R. RICHARDSON, *supra* note 38, at 233. Slave illiteracy would have obviously been much higher.

537. See Rose-Ackerman, *Social Services and the Market*, 83 COLUM. L. REV. 1405, 1405 (1983).

of knowledge,' while admittedly not precise, [does] provide a standard by which this court may, when called upon to do so, measure the constitutionality of the legislature's actions."<sup>538</sup> As the crisis in education deepens, a voucher system may be the best constitutional method of practically ensuring the "general diffusion of knowledge." Unfortunately, an overwhelming body of scientific research demonstrates that more money is not the answer.<sup>539</sup> *Edgewood* did not cite any educational achievement statistics, but the shocking evidence compels the conclusion that the current system does not diffuse knowledge generally.<sup>540</sup> Minorities are particularly hurt by the current system.<sup>541</sup>

The most damning indictment of the current system of public monopoly education is that it does not meet the only constitutional test of sufficiency. It does not create the general diffusion of knowledge essential to the preservation of the liberties and rights of the people. When children fail miserably, the system fails miserably; it is not suitable and efficient. Rather than focusing on educational inputs (dollars) as *Edgewood* does, choice focuses on educational outputs (student achievement), the true measure of a suitable and efficient system. The current system of education, in many districts, is failing *miserably*.

Teachers have been crying for years for greater autonomy. Teachers themselves rate the public schools as either failing or receiving a "D" grade in the area of teacher autonomy.<sup>542</sup> Their oft-stated desire is to be treated as professionals. If teachers want real autonomy, they should dismantle the educational bureaucracy.<sup>543</sup> Educational research strongly supports the teachers' position that schools which give teachers autonomy and discretion are better schools.<sup>544</sup> Chubb and Moe have also shown that centralized educational monopolies are the poorest possible mechanisms for providing teacher autonomy.<sup>545</sup>

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538. 777 S.W.2d 391, 394 (Tex. 1989).

539. An overwhelming body of empirical research demonstrates little positive correlation exists between spending and student achievement. See, e.g., Hanushek, *The Impact of Differential Expenditures on School Performance*, 45 EDUC. RES. (May 1989) (summary of hundreds of studies over the last two decades produced "startlingly consistent results; variations in school expenditures are not systematically related to variations in student performance." See also Clark, *The Future Civil Rights Agenda: Speculation on Litigation, Legislation, and Organization*, 38 CATH. U.L. REV. 795, 805 (1989) (observing that some research shows no correlation between financial resources expended and improvement in student performance).

540. Only 62 percent of Texas ninth graders passed the Teams Test of minimum skills in 1988-89, thus four out of ten ninth graders fail to obtain minimum skill levels. NATIONAL CENTER FOR POLICY ANALYSIS, REPORT CARD ON TEXAS SCHOOLS 1 (Jan. 17, 1990) (citing 1 TEXAS EDUC. ASS'N, TEXAS EDUCATIONAL ASSESSMENT OF MINIMUM SKILLS: STUDENT PERFORMANCE RESULTS, 1988-1989).

541. *Id.* at 3. Less than one half (49%) of Hispanics and 46% of Blacks were able to pass the minimum skills test, so more than half the minority population is not getting a general diffusion of knowledge.

542. Phelan, *Teachers Give Local Schools Rating of "C" on Reforms*, San Antonio Light, Aug. 16, 1990, at E1.

543. Domancio, N. Y. *Newsday*, Oct. 23, 1989, at 52, col. 1 (former policy analyst and evaluator for the New York City Board of Education from 1979 to 1987).

544. J. CHUBB & T. MOE, *supra* note 3.

545. *Id.*

The Texas Bill of Rights states that “[p]erpetuities and monopolies are contrary to the genius of a free government and shall never be allowed,”<sup>546</sup> but an educational monopoly is what we have created. Educational choice responds to parents’ desires, providing accountability, and allows the local school free rein to respond to parents’ desires. Conceptually, choice for parents must be coupled with choice for teachers to innovate. To allow parents to send their child to any public school, or even a private school, but then to regulate in such detail that all schools, public and private, are essentially identical is an effective denial of any real choice. To limit the available supply of schools is to deny choice. To allow students to attend any school in town when there is only one school, or one school type, is not choice. Regulations are much more necessary in a centralized monopoly like the current educational system than in a voucher system. In a monopoly, the monopolist (the teachers and administrators) have no incentive to respond to the demands of the consumer; therefore, regulation is needed. In a free market, however, the provider’s and consumer’s self interests will regulate the market.

Is educational choice the answer to our current pluralistic dilemma, i.e., the shattering of consensus? What the opponents of parent-controlled education really want is government socialization of children. At one point in our history we were able to move from private education to public education because a consensus existed as to what schools should teach. From 1840 to 1890 the great debate was over who should pay for education, not over the content of education or educational philosophy. The social consensus which existed in the late 19th century explains why prominent religious leaders were in the forefront of the public education movement. These leaders fully expected public education to be Christian education, even though it was to be nonsectarian. The Bible was to be taught, of course, though sectarian doctrines were to be avoided. Thus, in reality, the public education system was really the same as the private system; it was just publicly funded. This was how it gained public acceptance: by upholding and teaching widely-held private values. All important sectors of public opinion could agree on the socialization content. Public schools were simply better-financed private schools, with the cost distributed throughout society rather than borne solely on the backs of parents. Today, of course, our society is divided into highly vocal, highly politicized separate value groups and communities of interest, who differ vastly on desired educational content and theory. Must they all be forced into the same mold?

The opponents of parent-controlled education basically fear that parents will not make the right choices, that is, choices with which they agree. Some desperately fear that parents will choose religious education over secular education. This is why the Milwaukee plan excludes sectarian schools despite their excellent track record. Some fear that parents will not choose sex education, bilingual education, AIDS education, and suicide prevention programs, but will rather stick to the basics. Some fear that some parents would

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546. TEX. CONST. art. I, § 26.

choose reading assignments that show women as homemakers rather than as doctors, lawyers, police persons, and fire persons. They fear parents might choose Mark Twain's *Huckleberry Finn* over J.D. Salinger's *Catcher in the Rye*. They fear that parents will choose sports, strict discipline, back to the basics, convenience, cosmetology, black history, or some other choice with which they disagree. They have concluded that only they or their experts know what is best for students and that parents are incapable of making intelligent choices. One disadvantage of this emphasis upon conformity in an age of pluralistic values is that our textbooks have been dumbed down and homogenized.<sup>547</sup>

Another criticism leveled at public/private choice systems by educational bureaucrats is that the competition is unfair because private schools are basically unregulated. Herbert J. Grover, Wisconsin Superintendent of Public Instruction, stated in opposition to the Milwaukee Parental Choice Program:

For all practical purposes, the private schools that are targeted to receive funds authorized by this legislation are subject to no effective controls or standards related to pupils whose education is funded by the state. As private schools in Wisconsin, they are not subject to the educational standards that apply to public schools. There is nothing in the legislation that directly requires the schools to be certified or the teachers employed to have any training in the education process itself or in particular disciplines or subject areas. Thus, there is no way of assuring that state funds earmarked for the education of our children will be accomplishing the intended purpose.<sup>548</sup>

Three glaring flaws render this attack ineffective. Before proceeding to the errors in this reasoning, Superintendent Grover is correct that private schools must be free of excessive regulation for choice to work. If private schools must be exact replicas of public schools, no true choice will exist. Legislatures and courts must be constantly vigilant to protect the private schools from interference by the educational bureaucracy or choice will fail.

However, conceding that the state cannot regulate the method of operation of private schools under a choice plan does not mean that they are subject to no effective controls. It is as if Superintendent Grover assumes that parents do not exist and that markets have no discipline. The reason that parents with the financial ability to choose are leaving the public schools, or choosing neighborhoods with good schools, is because they know bad education when they see it, and they want better for their children. The philosophy of educational choice trusts parents, even minority parents, to control the education of their children and gives them power through choice to implement their decisions.

Superintendent Grover also irrationally fears the competition between unregulated and regulated schools. If the regulations are designed to achieve

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547. Hammond, *Dull, Duller, Dullest*, 8 TEX. LONE STAR 39 (July 1990) (publication of the Texas Association of School Boards).

548. H. Grover, Statement on the Milwaukee Parental Choice Program (June 1990) (copy on file at *Southwestern Law Journal* office).

better schools and they achieve that purpose, the public schools will win the competition for students who choose to remain in good public schools. If no regulation does a better job of producing good schools, the state can happily follow the market lead and abolish its self-imposed regulations. The whole thrust of Chubb and Moe's research is that it is the regulatory process itself which stifles education.<sup>549</sup> Choice allows the free flow of consumers, and if Chubb and Moe are wrong and public schools are better, parents will stay with public schools.

As the history of public school development in Texas shows, public schools eventually became dominant because they were significantly better funded. School taxation became quite high, thereby depriving parents of dollars for education. Public schools also convinced parents that they could do a better job. The spur of competition challenges public schools to do a better job and they would probably win again, but only by producing more results. Almost all public/private choice plans remain heavily weighed toward public schools; for example, both Milwaukee and Oregon proposals only give \$2500 per student, whereas the public schools spend thousands more per student, a measure of the public schools inefficiency. If private schools can do more with less, why not let them?

One of the most significant advantages of markets over monopolies is the rapidity of response to need. We have struggled with reform of the public schools for years as mounting evidence shows their horrible failure, but we have little to show for it. Choice produces change, and it can produce it within one academic year for some students, but it is also incremental in that markets respond to marginal demand.

Because morally no child should be forced to attend a school so bad that no parent would voluntarily send him there, many public/private choice plans are advocated and sometimes limited as responses to the failure of the public schools. The Milwaukee Parental Choice Plan is implicitly a reflection of the terrible job done by Milwaukee public schools in educating minority students. But some choice plans are expressly failure related, again giving preference to the public model, but providing an escape mechanism when the public schools fail. For example, Kentucky has adopted public school choice for those districts which fall into an "at risk" category.<sup>550</sup> If the legislature allowed students who were in failing districts to choose public or private schools, the legislature would be merely fulfilling its constitutional duty to seek the general diffusion of knowledge.

One of the probable side effects of any true educational choice plan will be a greater variety of types of schools than presently exist. A characteristic of markets is that when consumers are given a choice, wide variety exists. Today, if one group wants a return to the basics and another group wants higher-order creative thinking skills, we have a political fight for control of the school bureaucracy. Those competing groups may be parents or teachers competing against other parents or teachers, but political control and

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549. J. CHUBB & T. MOE, *supra* note 3.

550. Kentucky Education Reform Act of 1990, ch. 476, R.S., 1990 Ky. Acts 940.

institutionalization of programs occurs. Under a choice plan any group of back-to-basic teachers or higher-order types would be free to start such a school, but it would have to persuade parents to send their children rather than coerce them. Some parents would choose strict discipline and structure, others would choose a Montessori approach. Decisions would be quick and efficient rather than political.

As with any market system, the advantage of choice would be amazing rapidity of response to bad situations and the marvelous flexibility of individual responses to a specific child's needs. The Montessori idea may be a great one, and the Montessori school may be capable of convincing a parent of the soundness of its approach. After two months in such a program, however, it may be glaringly obvious to a parent and even the teacher that Montessori is not the right approach for a child. With choice a parent could easily move, but in a traditional public school, after a long battle to get Montessori in place, it would be another long battle to get it changed. It might even be impossible to change or unwise to do so if the majority are better off under Montessori.

The current monopoly takes a monolithic view of education, whereas a market system will usually provide whatever services a sufficient number of customers desire. If home schooling is included in a choice plan, then complete custom design is possible, and education could be truly designed for the unique individual needs of each student. While true choice in education will probably result in a broader variety of schools, this does not mean that public education will be destroyed unless public education means a "one size fits all" mentality that has shackled public education for too long.

Choice alone will not educate anyone. Choice is not an educational technique; rather, its proponents claim that it is a catalyst to goad an entrenched bureaucracy. The rule is harsh: respond to needs of the students and parents or die.

Critics of choice frequently claim that not all parents are intelligent and well educated enough to make wise choices for their children. Besides underestimating the intelligence of parents, and perhaps being racist when claims are made that minorities do not know good schools from bad ones, this argument ignores the fact that markets benefit all consumers by responding to the most informed consumers. If the top ten percent of parents (most concerned and perceptive) start to leave a school because of problems, administrators will respond and the situation improves for the remaining students, even though ninety percent were unaware of the problem. For example, Minnesota began a limited choice experiment in 1985 to allow high school seniors and juniors to go outside the district for college or high school courses not available in their district. Local school districts, faced with competition, have greatly expanded the number of foreign language and advanced placement courses because students could go elsewhere to get those courses.<sup>551</sup> All have benefitted, and more take advantage of the programs.

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551. Meyers & Schwartz, *School Reform: Minnesota's Educational Choice Program Earns High Marks*, *The Enterprise*, Oct. 29, 1990, at 5-B, col. 2.

Even some public schools have begun to recognize that because of the diversity of their populations and the current lack of consensus a good school system is one that gives students a choice among many options. The Richmond Unified School District was the first in California to implement this approach to learning in all of the schools in its district. Richmond allows parents to choose which school their child will attend rather than compelling attendance based on residence. While there is a basic core curriculum composed of reading and language arts, mathematics, science, history, and social studies, each individual campus emphasizes a different specialty. At the elementary level, specialty programs include classical studies, future studies, gifted and talented programs, international studies, Montessori, university laboratory, and whole language studies. At the secondary level, specialty programs take the form of applied arts and sciences; classical studies; math, science and technology; university laboratory; visual/performing arts; and humanities. Rather than forcing children to attend those local schools which may have adopted any one of these programs, "parents may enroll their children in any of the specialty schools offering the program they have selected, depending on what best suits the family's needs and schedules."<sup>552</sup> Where a school has more applicants than positions, priorities have been established with nearby residents in most cases heading the list of priorities.

The East Harlem Independent School District in New York was also a pioneer in this area of introducing specialty schools and parental choice in the early 1980s.<sup>553</sup> East Harlem has risen from the bottom to 16th out of 32 school districts in test scores.<sup>554</sup> In 1973, only 15% of its students were reading at grade level, whereas now 64% of its students are doing so.<sup>555</sup> In 1973, only 7% of the students at one high school graduated; that same school was renamed the Manhattan Center for Science and Math and now sends 96% of its students to college.<sup>556</sup>

Because its school districts were so bad in 1989, Chicago radically restructured its school districts in the most comprehensive reform in this century. While not actually a choice plan, the principle of local autonomy was rigorously introduced because now parents and community leaders actually run the schools. Each school is under the direct control of local councils composed of the principal, parents, neighborhood representatives, and teachers. De facto choice already exists in Chicago in that it has a greater proportion of students in private schools than any other major city (32%).<sup>557</sup>

One of the deepest concerns about voucher plans is the fear that they

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552. A SYSTEM FOR CHOICE, RICHMOND UNIFIED SCHOOL DISTRICT (copy on file with the author).

553. See CHOICE IN EDUCATION: OPPORTUNITIES FOR TEXAS 29 (March 1990) (Education Task Force Report co-sponsored by Texas Public Policy Foundation and National Center for Policy Analysis).

554. *Id.*

555. Hood, *Miracle on 109th Street*, REASON (May 1989).

556. *Id.*

557. TASK FORCE ON EDUCATION OF THE CITY CLUB OF CHICAGO, AN EDUCATIONAL CHOICE: AGENDA FOR SCHOOL REFORM, at 22-23 (Aug. 1989).



would lessen minority educational opportunity in this country rather than enhance it. Certainly, the success of the state rests in part on the education that its citizens receive, though this does not require that the state force its citizens to receive a particular education provided by the state. But obviously, the state has a legitimate interest in seeing that all students, either through empowerment of their parents or through state provision, have access to a reasonable educational opportunity. Unfortunately for many minority students, the current system of state compulsion provides only equal opportunity for mediocrity or shameful failure rather than equal opportunity for excellence. Minority students are the most tragic victims of the current educational monopoly.<sup>558</sup> The minority fear of vouchers is that if parents are allowed to supplement the state voucher with their own funds for education, unequal educational opportunity will result and there will be inflation in the cost of education so that the poor will still receive the worst education. A number of flaws characterize this approach, the most fundamental perhaps being the idea that more money equals better education. However, because of egalitarian principles, most systems of choice which have been proposed respond to these concerns in either one of two ways. One solution is simply to make the vouchers available on a sliding scale basis with the amount of the voucher varying inversely with one's income. Thus, the poor would receive larger vouchers than the well-to-do, with the goal being to provide rough equalization at some average cost of education.<sup>559</sup> Thus, variations in the education provided would vary only by the parents' desire to devote family resources to education, rather than on the availability of resources. The alternative is to require any school accepting state money to agree it will not charge its students more than the amount of the state aid.<sup>560</sup>

The Milwaukee plan satisfies egalitarian concerns by going to the extreme of making the voucher available only to the poor, i.e., those whose incomes are below 175% of the federal poverty level. An emphasis on serving the needs of the poor first is consistent with the historical meaning of "public free schools" in Texas. As pointed out earlier, the earliest constitutional understanding of the state function of education was to provide primarily for the children of poor parents. The free schools were first those private schools to which the state would pay the tuition of the poor. Thus, this charitable impulse in olden days, which is considered wise social policy today, led to public financing of education in Texas, first for the poor, then for

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558. See Chambers, *Adequate Education for All: An Achievable Goal*, 22 HARV. C.R.-C.L. L. REV. 55 (1987); Yudof, *Effective Schools and Federal and State Constitutions: A Variety of Opinion*, 63 TEX. L. REV. 865, 867-868 (1985); Yudof & Morgan, *Rodriguez v. San Antonio I.S.D.: Gathering the Ayes of Texas—The Politics of School Finance Reform*, 38 LAW & CONTEMP. PROBS. 383, 401 (1974).

559. See Note, *Educational Vouchers—Challenge to the Wall of Separation*, 5 VAL. U.L. REV. 569, 572-73 (1971); Rebell, *Educational Voucher Reform: Empirical Insights from the Experience of New York's Schools for the Handicapped*, 14 URB. LAW. 441, 444-45 (1982).

560. Areen, *Education Vouchers*, 6 HARV. C.R.-C.L. L. REV. 466, 470-75 (1971); Note, *supra* note 559, at 572-73 (no extra general tuition, but supplemental vouchers for disadvantaged kids); Rebell, *supra* note 559, at 466-67; Solet, *Educational Vouchers: An Inquiry and Analysis*, 1 J. LAW & EDUC. 303, 303 (1972).

all students. In the same way, of course, proponents of educational choice hope that by introducing the choice program's provisions for the poor, the results will be so beneficial and widely applauded that well-to-do parents would also push for the same benefits. Obviously, it is this fear of success by educational choice that leads the teachers unions to oppose even a pilot project such as the Milwaukee plan. But the importance for Texas of a plan such as the Milwaukee plan is that it would be quite consistent with the understanding of the framers of the constitution as to "public free schools." Since the new Texas educational reform statute requires report cards on all of the public schools, parents may soon become even more disenchanted with their local schools.

The essential attack by teachers unions and others against the voucher plan on constitutional grounds is that it is taking public money for private purposes. In other words, the argument is that private education is not public education and therefore cannot be supported by public funds. Can public education only be provided by the government? Is not the government's only interest in seeing that everyone is educated, not that it does the educating? It is ironic that the reformist Moscow City Council has abolished its government-run school programs, and has instead given vouchers to parents to use as they see fit, including church schools if desired. Valery Borschov, a member of the Council, has suggested that Americans might be interested in this free-market choice system.<sup>561</sup> The only requirements for education to be truly public are that it be publicly financed, available to all, and that schools not exclude students on grounds that would constitute invidious discrimination. The state's only legitimate interest is in a minimal core curriculum essential to preserve the rights and liberties of the people and that truthful results are published and available widely so that parents can monitor performance.

Additional compelling constitutional arguments for choice can be made on grounds of efficiency. *Edgewood* defines efficiency as "the use of resources to produce results with little waste."<sup>562</sup> As one would expect with a monopoly, waste in our educational system is rampant.<sup>563</sup> What rational person, if seeking to provide diverse services to millions of people, would say that a government monopoly would be the most efficient means of doing so? Free markets are the engine of capitalism, the most efficient machine for distributing goods and services ever devised, as Eastern Europe and the world have all begun to recognize.

## IX. CONCLUSION

Despite its protestations that the scope of the Texas Constitution's educa-

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561. Davis & Novak, *Inside Report*, San Antonio Express News, Aug. 6, 1990, at 8 col. A.

562. *Edgewood Indep. School Dist. v. Kirby*, 777 S.W.2d 391, 39 (Tex. 1989).

563. See Davis and Hayes, *Efficiency and Inefficiency in the Texas Public Schools*, 20 (1990) (co-sponsored by Texas Public Policy Foundation and National Center for Policy Analysis). See also Parker & Weiss, *Litigating Edgewood: Constitutional Standards and Application to Educational Choice* (to be published in TEX. REV. LITIG 1991)

tional article is not a political question,<sup>564</sup> *Edgewood* is probably one of the most political decisions in the history of the Texas Supreme Court. If the matter is not a political question, and capable of a judicial remedy, why has the case been thrown back repeatedly to the Texas Legislature to draft a remedy? The Court decided the case on social policy grounds, deciding that the time for inequality had passed. In the same way, informed opinion may decide that the monolithic educational bureaucracy must go. If such a social policy is desirable, there is far more historical and constitutional authority to support educational choice than supports the *Edgewood* decision.

By their insistence on an efficient system, the framers of the Texas Constitution hoped to forever prohibit the growth of a centralized, compulsory, state-operated educational monopoly. The constitution prohibits monopolies and perpetuities, but we have created one in education. The 1876 community school system was a classic parental choice voucher system similar in many respects to those proposed today. It failed, however, because of completely inadequate funding, not because of educational deficiencies. Funding would be no problem today.

From the early voucher system of 1854 on, Texas had a strong desire for parent-controlled education. The proponents of state-operated centralized education were soundly defeated in the 1875 Constitutional Convention. They urged the defeat of the 1876 Constitution because it destroyed public schools as we know them today and substituted parental choice schools. The 1869 Constitution's requirement of uniformity in the schools was dropped because parents wanted a choice of schools they would control locally.

The Texas Constitution does not call for public schools, free public schools, or uniform public education. These concepts were foreign to Texas soil, and were only legislatively engrafted after years of opposition. It is ironic that the teachers' associations celebrated the complete and total victory of the central bureaucracy in 1954 in a book entitled "100 years of Progress." They commended the establishment of the modern system and looked forward to the progress "equipped with the most efficient up-to-date organization in its history."<sup>565</sup> Instead of progress, within ten years of its achievement of control, standardized test scores began a steady decline. Instead of progress, government monopoly produced regression. Student achievement has declined, perhaps free choice and free markets can unleash the full human potential of our students and teachers.

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564. *Edgewood*, 777 S.W.2d at 393-94.

565. TEX. STATE TEACHERS ASS'N, *supra* note 34, at 13.

## X. APPENDICES

*Appendix A. Education Article from the 1869 Constitution of the Radical Republican Reconstruction*

Section 1. 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.

Section 2. There shall be a Superintendent of Public Instruction, who after the first term of office, shall be elected by the people; the first term of office shall be filled by appointment of the Governor, by and with the advice and consent of the Senate. The Superintendent shall hold his office for the term of four years. He shall receive an annual salary of two thousand five hundred dollars, until otherwise provided by law. In case of vacancy in the office of the Superintendent, it shall be filled by appointment of the Governor, until the next general election.

Section 3. The Superintendent shall have the supervision of the public free schools of the State, and shall perform such other duties concerning public instruction as the Legislature may direct. The Legislature may lay off the State into convenient school districts, and provide for the formation of a board of school directors in each district. It may give the district boards such legislative powers, in regard to the schools, school houses, and school fund of the district, as may be deemed necessary and proper. It shall be the duty of the Superintendent of Public Instruction to recommend to the Legislature, such provisions of law as may be found necessary, in the progress of time, to the establishment and perfection of a complete system of education, adapted to the circumstances and wants of the people of this State. He shall, at each session of the Legislature, furnish that body with a complete report of all the free schools in the State, giving an account of the condition of the same, and the progress of education within the State. Whenever required by either House of the Legislature, it shall be his duty to furnish all information called for, in relation to public schools.

Section 4. The Legislature shall establish a uniform system of public free schools throughout the State.

Section 5. The Legislature, at its first session, (or as soon thereafter as may be possible,) shall pass such laws as will require the attendance on the public free schools of the State of all the scholastic population thereof, for the period of at least four months of each and every year: *Provided*, that when any of the scholastic inhabitants may be shown to have received regular instruction, for said period of time in each and every year, from any private teacher having a proper certificate of competency, this shall exempt them from the operation of the laws contemplated by this section.

Section 6. As a basis for the establishment and endowment of said public free schools, all the funds, lands, and other property heretofore set apart and appropriated, or that may hereafter be set apart and appropriated, for the support and maintenance of public schools shall constitute the public school

fund. And all sums of money that may come to this State hereafter from the sale of any portion of the public domain of the State of Texas, shall also constitute a part of the public school fund. And the Legislature shall appropriate all the proceeds resulting from sales of public lands of this State to such public school fund. And the Legislature shall appropriate all the proceeds resulting from sales of public lands of this State to such public school fund. And the Legislature shall set apart, for the benefit of public schools, one-fourth of the annual revenue derivable from general taxation; and shall also cause to be levied and collected, an annual poll tax of one dollar, on all male persons in this State, between the ages of twenty-one and sixty years, for the benefit of public schools. And said fund and the income derived therefrom, and the taxes herein provided for school purposes, shall be a perpetual fund, to be applied, as needed, exclusively for the education of all the scholastic inhabitants of this State; and no law shall ever be made appropriating such fund for any other use or purpose whatever.

Section 7. The Legislature shall, if necessary, in addition to the income derived from the public school fund, and from the taxes for school purposes provided for in the foregoing section, provide for the raising of such amount by taxation, in the several school districts in the State, as will be necessary to provide the necessary school houses in each district, and insure the education of all the scholastic inhabitants of the several districts.

Section 8. The public lands heretofore given to counties shall be under the control of the Legislature, and may be sole under such regulations as the Legislature may prescribe; and in such case the proceeds of the same shall be added to the public school fund.

Section 9. The Legislature shall, at its first session, (and from time to time thereafter, as may be found necessary,) provide all needful rules and regulations for the purpose of carrying into effect the provisions of this article. It is made the imperative duty of the Legislature to see to it, that all the children in the State, within the scholastic age, are, without delay, provided with ample means of education. The Legislature shall annually appropriate for school purposes and to be equally distributed among all the scholastic population of the State, the interest accruing on the school fund, and the income derived from taxation for school purposes; and shall, from time to time, as may be necessary, invest the principal of the school fund in the bonds of the United States government, and in no other security.

*Appendix B. Educational Resolutions from the 1875 Convention**B-1. Demorse's Resolution*

Public education being the most reliable safeguard of republican government, it is provided that all grants of land heretofore made for that purpose by the Congress of the Republic and the Legislature of the State shall be preserved for their pre-destined uses, and that one-tenth of the annual revenue of the State shall be divided between the several counties of the State in proportion to population, to be subdivided among the several school districts according to the number of scholars reported within the ages of eight and fourteen years, and that provision shall be made by law for the division of the several counties into school districts, which through trustees may tax themselves for educational purposes to such an extent as two-thirds of the free-holders of each school district may authorize by annual vote not exceeding one-half of one per cent.; and it is enjoined upon the several Legislatures of the State to carefully consider all practicable schemes for providing a permanent and extended system of public education for as great a portion of each year as may be practicable with reference to population and property, and as a part thereof a special annual poll tax of not less than two dollars *per capita* for educational purposes shall be levied by act of the State Legislature to be added to the annual reservation of one-tenth of the general revenue assigned to school purposes.

*B-2. Arnim's Resolution*

*Resolved*, That in order to establish a uniform system of public free schools throughout the State, the Committee on Education be instructed to inquire into the expediency of the State reassuming the control of all lands granted to counties for educational purposes; but if such re-assumption of control be deemed injudicious and impracticable, then the amount derived from such counties, from the utilization of their school funds as a yearly revenue, subject to be used for educational purposes, shall be deducted out of the sum apportioned to such counties in the distribution of the revenues derived from the perpetual State school fund.

*Resolved further*, That no taxes shall be levied or collected in this State for educational purposes, except as a poll-tax.

*B-3. Wade's Resolution*

*Resolved*, That a system of free public schools is essential to the prosperity of a State, and that the lands heretofore set apart for school purposes be utilized under a proper system of lease which will raise a distributive fund for the support of free public schools, and that the title to said land never be permitted to pass from the State.

*B-4. Whitfield's Resolution*

*Resolved*, That the Superintendent of Public Instruction be requested to furnish to this Convention the scholastic population of the State, the amount

of money distributed *per capita* for the year 1875, and the amount of money required to maintain public free schools in this State for four months each year, and the amount due teachers for services already performed.

*B-5. Hollingsworth's Report in Response to Whitfield's Resolution Request*

1. The census of the scholastic population of the State was taken between the dates July 4, 1874, and November 20, 1874, in almost every county. The total scholastic population of counties from which reports were received, and estimates from the best data in this Department for counties from which reports were not received, give in the aggregate three hundred and thirteen thousand and sixty-one children (313,061).

The law requires the census of scholastic population be taken annually, on the first Saturday in July. The census returns, due for 1875, have not all been received at this Department. The number is largely increased over the reports of 1874; and we estimate the present scholastic population at three hundred and fifty thousand (350,000).

2. The amount appropriated from the State School Fund for the year ending August 31, 1875, was five hundred thousand dollars, (\$500,000), but for convenience in distributing, the sum of \$499,959.05 only was apportioned, which gave, *per capita*, one dollar and fifty-nine cents (\$1.59), to the scholastic population.

3. In response to the third inquiry of the honorable Convention, I beg to suggest that we find some difficulty in answering. Under the law as it now stands the salaries of teachers vary to an extent that renders it impossible to determine what might be the actual expenses of public schools for four months.

The returns in this department for the year ending August 31, 1874, show the cost per pupil in the public free schools, as averaged throughout the State, was \$1.56 per month, or \$6.24 for four months. The returns in the aggregate for the scholastic year ending August 31, 1875, show a great variation in the price of tuition *per capita* in the several counties of the State. In counties where there has been proper administration by the local officers, the rate per month for each pupil has not exceeded seventy-eight cents; while in other counties where there was a neglect of public interests and a total disregard to economy, the cost *per capita* has been reported as high as two dollars per month. We are satisfied, however, that throughout the State the cost per pupil for each month in the public free schools, during the scholastic year ending August 31, 1875, has not exceeded one dollar and fifty cents, (\$1.50), or six dollars for four months, *per capita*.

The annual report from the county officers were not due to this department until the close of the scholastic year, August 31, 1875; I am, therefore, unable to give the total cost of that year from actual reports. We may, however, safely estimate that under a proper administration, which can be secured by a wise law, the rate of tuition per month, *per capita*, need not, nor should it exceed in the aggregate \$1.50, giving as the total expense for four

months tuition of 350,000 children the sum of two million and sixty thousand dollars, (\$2,060,000).

4. I regret my inability to answer, at present, the amount due teachers for services already performed. As heretofore stated, the annual reports from county officers, which contain the data from which the amount will be ascertained, were not due until after the 31st ultimo; I trust, however, that said reports will reach the department in time to furnish the information requested at an early day.

*B-6. Lockett's Resolution*

*Resolved*, That the public free schools of this State shall be taught at least four months during the scholastic year, and that the Legislature shall pass laws to enforce and carry out this provision. *Provided, further*, that the school officers of towns, cities and districts may continue them for a longer period; and that the Directors may levy a tax for the continuance of the same.

*B-7. Morris's Resolution (emphasis added)*

Sec. —. 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 eight and sixteen years.

Sec. —. There shall be a Superintendent of Public Instruction, who shall be elected by the people. The Superintendent shall hold his office for the term of four years. He shall receive an annual salary of three thousand dollars. In case of vacancy in the office of Superintendent, is shall be filled by appointment of the Governor, until the next general election.

Sec. —. The Superintendent shall have supervision and control of the *public free schools* of the State, and shall perform such other duties concerning public instruction as the Legislature may direct. The Legislature shall lay off the State into convenient school districts, and shall provide for the formation of a board of school directors in each district. It may give the district boards such legislative powers, in regard to the schools, school-houses and school fund of the district, as may be deemed necessary and proper. It shall be the duty of the Superintendent of Public Instruction to recommend to the Legislature such provisions of law as may be found necessary, in the progress of time, to the establishment and perfection of a complete system of education, adapted to the circumstances and wants of the people of this State. He shall at each session of the Legislature furnish that body with a complete report of all the *free schools* in the State, giving an account of the condition of the same, and the progress of education within the State. Whenever required by either house of the Legislature, it shall be his duty to furnish all information called for in relation to public schools.

Sec. —. The Legislature shall establish a uniform system of *public free schools* throughout the State.

Sec. —. As a basis for the establishment and endowment of said *free*



*schools*, all the funds, lands, and other property heretofore set apart and appropriated, or that may hereafter be set apart and appropriated, for the support and maintenance of *public schools* shall constitute the public school fund; and all sums of money that may come to this State hereafter from the sale of any portion of the public domain of the State of Texas, shall also constitute a part of the *public school fund*; and the Legislature shall appropriate all the proceeds resulting from sales of public lands of said State to such *public school fund*; and the Legislature shall set apart for the benefit of public schools one-fourth of the annual revenue derivable from general taxation, and shall also cause to be levied and collected an annual poll tax of one dollar on all male persons in the State between the ages of twenty-one and sixty years; also, a tax of two per cent on the gross earnings of all railroads, steamship lines and insurance companies of this State; also, all the fines collected for carrying concealed weapons and disturbances of the peace; also, all moneys collected for license for selling malt and spirituous liquors, for the benefit of *public schools*; and said fund and the income derived therefrom and the taxes and other moneys herein provided for school purposes shall be a perpetual fund, to be applied as needed, exclusively for the education of all the scholastic inhabitants of this State, and no law shall ever be made borrowing or appropriating such fund for any other purpose or use whatever.

Sec. —. The Legislature shall, if necessary, in addition to the income derived from the *public school fund* and from taxes for school purposes provided for in the foregoing section, provide for the raising of such amount by taxation in the several school districts in the State as will be necessary to provide the necessary school houses in each district and insure the education of all the scholastic inhabitants of the several districts.

Sec. —. The public lands heretofore given to counties shall be under the control of the board of school directors of their respective counties, and shall never be sold except by act of Legislature, four-fifths of the members elected to such Legislature voting in favor of granting such authority; in such case, the proceeds shall become a permanent school fund of the county to which said lands belonged, and to be invested in the bonds of the State of Texas, and the interest shall be used each year toward maintaining the *free schools* of such county. The board of school directors shall have authority to rent or lease the school lands of their counties, under such regulations as the Legislature may prescribe, and the proceeds to be used as directed in this section; *provided*, that no lease shall run for a longer period than ten years.

Sec. —. The Governor, Attorney General, and Superintendent of Public Instruction shall constitute a board, to be styled the Board of Education, and shall have the general management and control of the perpetual school fund; they shall define the course of studies in the *public schools*, and direct the class and kind of apparatus and books to be used therein; to prescribe the duties of the boards of school directors, having authority to remove them and appoint others to fill vacancies, and generally do all things to establish and maintain a system of *public free schools* for at least four months in each

and every year, not inconsistent with the provisions of this constitution, under such regulations as the Legislature may hereafter prescribe.

Sec. —. The Superintendent of Public Instruction, the Comptroller of Public Accounts, and the Commissioner of the General Land Office, shall constitute a board to be styled the Board of Commissioners, they shall have control of all the public lands known as the alternate sections, and such other lands, (except the four leagues belonging to each county in the State,) heretofore set apart, or that may hereafter be set apart for the use and benefit of the *common* schools; they shall be authorized to sell these lands at not less than fifty cents per acre, under such regulations as the Legislature may prescribe, and the title to such lands shall be made in the name of the State of Texas. The Commissioner of the General Land Office shall keep a correct and separate record of all such sales. The Board of Commissioners will on the accumulation of every ten thousand dollars invest the same in the bonds of the State of Texas, and deposit the same with the State Treasurer.

Sec. —. The Legislature shall at its first session, and from time to time thereafter as may be necessary, provide all needful rules and regulations for the purpose of carrying into effect the provisions of this article. It is made the imperative duty of the Legislature to see to it that all the children in the State, within the scholastic age are, without delay, provided with ample means of education. The Legislature shall annually appropriate for school purposes, and to be equally distributed among all the scholastic inhabitants of the State, the interest accruing on the school fund and the income derived from taxation for school purposes; and shall from time to time, as may be necessary, invest the principal of the school fund in the bonds of the State of Texas, and the bonds already belonging to the school fund, and those to be hereafter purchased as provided for in this article, are declared not to be of doubtful obligation.

#### *B-8. Cline's Resolution*

1. A general diffusion of knowledge being essential to the preservation of the liberties of the people, the Legislature shall establish a system of public instruction, and maintain *public schools* during not less than six months in each year, for the *free education of all minor children* in this State between the ages of six and eighteen years.

2. The supervision of public instruction shall be vested in a board, composed of the Superintendent of Public Instruction as President, with the Governor, Secretary of State and Attorney General *ex-officio*—whose powers and duties shall be defined by law.

3. Every county shall constitute a district, and shall have a district superintendent and board of directors, whose selection, qualifications, powers and duties shall be prescribed by law; *provided*, that a city may become a district, and that several districts may have the same district superintendent.

4. The Board of Public Instruction may remove any district superintendent or director for cause, and fill a vacancy by appointment for the unexpired term.

5. The State *free school fund* shall consist of all escheats, lands and land certificates and bonds heretofore set apart for *public schools*, and the income from said fund, together with not less than one-fourth of the revenue of the State, shall be annually appropriated and distributed among the districts and expended for schools.

6. The county school fund shall consist of four leagues of land—granted and to be granted in trust for public schools—and any other vested property in the several counties, and the income from such fund, together with the proceeds from sale of estrays, fines and forfeitures, all tax on dogs, polls and occupations, and not less than one-fourth of the ad valorem taxes on property, shall be annually expended for its schools.

7. The State and county permanent school fund shall be invested in bonds of the United States and bonds of the State of Texas; the county fund may also be invested in first mortgages on unincumbered real estate in the county—paying taxes on double the value of the loan—together with personal security.

8. No grant shall be made from any public fund to any institution, church or school controlled by any ecclesiastical body, nor in aid of any particular opinions of conscience, creed or church.

*B-9. Johnson's Resolution*

*Resolved*, That the Committee on Education be instructed to embody the substance of the following propositions in the educational part of the constitution, to wit:

That the school law should be revised so that fewer officers and commissions will have to be paid out of the school fund; that the district trustees should have power to appoint and remove teachers in their districts; that the Board of School Directors be abolished and their duties performed by a county superintendent. That the office of State Superintendent be abolished, and his duties be transferred to the State Treasurer, and that all grants of land heretofore or hereafter to be made by the State Legislature for public school purposes be so guarded by constitutional provision that they can not [sic], under any circumstances, be diverted from their intended objects and purposes.

*B-10. Nunn's Resolution (emphasis added)*

*Resolved*, That the Committee on Public Education be instructed to inquire into the expediency of establishing by law *a system of public instruction or of aid to general education*, and of fixing the same on a basis of all the present available school fund and resources of the State, with an addition of an ad valorem tax of not less than one-tenth or more than one-eighth of one per cent on the taxable property of the State, and of a poll tax of not less than two dollars or more than five dollars, and the requirement of the payment by each voter of said poll tax at least four months next before the election as a condition of the exercise of the elective franchise; and to make provision for the sale of the school lands belonging to counties, to be used for

the benefit of the counties respectively, and also to dedicate all the unappropriated public lands of this State to the school fund, to be sold as early as possible and proceeds applied to the benefit of the general school fund of the State.

*Appendix C. Sansom's Libertarian Philosophy on Educational Taxation*

*C-1. Questions Posed (emphasis in original)*

How dare a government professing to be free ruthlessly invade the sacred domain of private duty and private right. What right has it to lay violent hands upon these American citizens who have not attained their majority to force them to attend particular schools, study particular books under a particular teacher? Again, sir, by assuming control of the children for educational purposes it deprives the father of the sacred rights of parentage. It not only interferes with, but assumes, the holiest duties man owes to God. The thoughtful and conscientious father would never willingly commit to the State the religious instruction of his children.

Whence does the State derive the *right* to take charge of my children and say when, where, what, and by whom they shall be taught? Whence does it derive the right to take another man's money and devote it to the education of my child? That it has exercised the power to do these things history attests—that it *has* the power judicial construction has settled. But whence, I repeat, does it derive the *right*?

*C-2. Questions Answered*

But we are told again, sir, by the advocates of public education, that education can be made cheaper when controlled by the State than when controlled by private enterprise; that if we will turn over to the State the money we expend upon education of our children, the State can manage it so as to pay for its assessment, collection, and disbursement, and take out of it also a sum sufficient to pay the salaries of the host of officers necessary to the proper administration of a system of schools and educate all the children of the State, and still have a surplus left; and strange as this statement may appear, I will not undertake to refute it, for I can very well see, sir, how, if Smith, who is sending his son to college, where he is being taught the languages and sciences, and his daughter to the academy of Madame Destamovile, where she is being instructed in French, music, dancing, and fancy work, at an average expense of \$15 a month, will turn over to the State the money he has provided to educate them, the State can, with the amount, hire a teacher who will teach spelling, reading, writing, geography, and arithmetic, after the most approved common school method, not only to the son and daughter of Smith, but to the children of Brown as well, at 10 cents per day or \$2 a month, and still have left money enough to pay for running the machine. And I can see as clearly, sir, that, if Smith will turn over to the State the money he spends annually for sugar, tea, canned fruits, jellies, lawns, muslins, silks, laces, flowers, flounces, furbelows, broadcloth, box-toed boots, fancy neckties, and plug hats, the State can, with the amount, feed and clothe the families of both Smith and Brown on cornbread, jerked beef, coffee straight, brown domestice, calico, wool hats, and brogans, and still have enough left to pay for the trouble. And I can also see how, if all the Smiths in the State will turn over to the State all the money they spend on pew rent, spittoons, footstools, cushions for pews, and other incidental

expenses they pay for their churches, the State can, with the amount, build less costly houses of worship, hire \$250 preachers, and furnish facilities to all the Smiths and Browns in the State, though the article of divinity might not be altogether palatable. And I can see as palpably how a sack of flour is cheaper to a man when the State takes \$5 out of his neighbor's pocket to pay for it, and sends it home to him, than it is when he has to work for the money to buy it and has to pack it home on his shoulder, and I think I can see as clearly as that, if the State has the right to do one of these things it has the right to do all of them. If the State may upon the plea of "necessary to the general welfare" take under its control the education of the people, it may, upon the same plea, with the same propriety take charge of their religion, for if education be necessary to the maintenance of good government, the observation of the precepts of religion is more so, and if the State has the right to enforce agrarianism for one purpose, it has for another, and if it may do so to any extent or upon any pretext, it may do it for any purpose, and to any extent.

For one, I am unwilling to meet my constituents and say to them, I deem you wise enough to frame and administer a government for the protection of life, liberty, and property, but altogether incompetent to exercise guardianship over your own children or incompetent to use the money which you propose to use for their education.

It is proposed that the State shall provide out of the public means, now at its disposal, more liberally than any government on earth has ever done for the encouragement of general education. We propose to set apart the 60,000,000 acres of land theretofore devoted to educational purposes, over two and a half millions in bonds and money, and one-half of the unappropriated domain now subject to disposal by the State. It is proposed to make this donation the basis of a permanent fund, the interest to be applied annually to the payment of the tuition of all the indigent orphan children of the State, for four months in each year, and the remainder to be applied to the payment, *pro rata*, of the tuition of all other children in the State. What more can be asked?

The State has no power to evoke those burning thoughts which, like newly risen suns, light up the fires of enthusiasm on the altar of human souls. Or to call forth from the secret chambers of being, in which they have been embedded by the hand of omnipotence, those staid grey bearded thoughts which in the fullness of time come forth, almost without disturbing the consciousness of their authors, and with stately steppings walk down the aisles of time, overstepping the feeble barriers of centuries and cycles, eras and epochs, and, like the divine benediction, blessing the generations of men to the later syllable of recorded time.' "

*Appendix D. Reports on Education from the 1875 Convention*

*D-1. Majority Report (emphasis added unless otherwise noted in text)*

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

Sec. 2. All funds, lands and other property heretofore set apart and appropriated, or that may hereafter be set apart and appropriated for the support of public schools, all the alternate sections of land reserved by the State out of grants heretofore made or that may hereafter be made to railroads or other corporations of any nature whatever, one-half of the public domain of the State, and all sums of money that may come to the State from the sale of any portion of the same, shall constitute a perpetual *public school fund*.

Sec. 3. And there shall be set apart annually not more than one-tenth of the annual revenue derivable from taxation for general purposes, and such poll tax as may by law be levied under the provisions of this constitution, which shall also constitute a part of the *public school fund*.

Sec. 4. The lands herein set apart to the perpetual school fund shall be sold under such regulations, at such time, and upon such terms as may be prescribed by law, and the Legislature shall not have power to grant any relief to the purchasers thereof. The Comptroller shall invest the proceeds of such sale, and of those heretofore made, in the bonds of this State, if the same can be obtained, otherwise in the United States bonds, and the United States bonds now belonging to said fund shall likewise be invested in State bonds, if the same can be obtained.

Sec. 5. The principal of all bonds, or other funds, and the principal arising from the sales of lands hereinbefore set apart to said school fund, shall be the permanent school fund, and all the interest derivable therefrom, and the taxes herein provided, shall be the available school fund, which shall be applied annually to the support of *public schools*, and no law shall ever be made appropriating any part of the permanent or available school fund to any other purpose whatever, except as hereinafter provided.

Sec. 6. All public lands which have been heretofore, or may be hereafter, granted to the various counties of this State for *public schools*, are of right the property of said counties respectively, to which they are granted, and entitled thereto, and is hereby vested in said counties, subject to the trust created in the grant.

Sec. 7. So soon as the available school fund may be sufficient, the Legislature shall establish and maintain *free public schools* throughout the State for a period of not less than four months in each year, and may authorize any county to establish public schools in such county whenever the available fund apportioned to such county as herein provided, together with the fund realized from the sale of the lands of the county, shall be sufficient to maintain *public schools* in such county for not less than four months in each year. But until such time the available school fund hereinbefore provided shall be

distributed to the several counties of the State according to the scholastic population. The distribution to be made by the Governor, the Comptroller and the Treasurer, who for this duty shall constitute a school board. The fund shall be distributed to the counties and applied in aid of *private schools* in such mode as the Legislature may provide.

*D-2. Minority Report* (emphasis added unless otherwise noted in text)

*To the Hon. E.B. Pickett, President of the Convention:*

The undersigned, members of your committee on Public Education, beg leave to state that they are unable to concur in the report submitted by the majority of said committee, for the following reasons, viz:

They believe the education of children to be a private duty devolved upon the parent by God, as is manifest both from the laws of nature and revelation—and to the end that the parent may be enabled to discharge this great duty, the same laws confer on him the right to control his children; and they do not believe that a democratic government can, without violating the great principles of personal freedom and individual right upon which it is founded, either relieve the parent of this duty by laying it upon the shoulders of another, or deprive him of this right by assuming it.

They are unable to see how a government established for the protection of private property can, without subverting the purposes of its creation, take by taxation the private property of a portion of its citizens and apply it to the use of another portion of its citizens, unless it be given in compensation for services rendered the State or for the preservation of life.

They are satisfied that no system of *public free schools*, which does not enforce the regular attendance at the schools of all the children within the scholastic age, will or can secure the object sought to be attained. And they find it very difficult to discover the right of a free government to impose PUBLIC [emphasis in original] duties upon those of its citizens who have not attained their majority which it does not even claim the right to impose on older citizens.

They believe that a system of *public education*, by passing the control of the children into the hands of the State, and empowering the State to prescribe the qualifications of teachers and the course of instruction, endangers religious liberty—as, in their view, religious liberty implies not only the right of the parent to worship God according to the dictates of his own conscience, but as well his right to direct the religious instruction of his children.

They believe that a system of *public education* designed to embrace the entire scholastic population of the State, and to be supported by taxation, is not adapted to the condition of the people of this State, and that they do not desire such a system.

They believe that the benefits to be derived from any system of *public education*, even the most perfect, if not altogether valueless, are certainly a very poor compensation for the sacrifice of principle necessary to its adoption by a free people.



They are so far, however, from undervaluing the importance of education, that they deem it the duty of the Convention to make out of the public means at the disposal of the State, the most ample provision for the *free tuition* of all the indigent orphan children in the State, and prospectively for, at least, the partial instruction of all the children of the State; and this they believe may be accomplished without the violation of any valuable principle by the adoption of the articles herewith respectfully submitted. [R. SANSOM, ASA HOLT, A.J.C. DUNHAM, G.B. COOKE].

"Article—.

"Section 1. To promote the general diffusion of knowledge, the lands heretofore set apart by the Republic or State of Texas, and the moneys, bonds and other property now owned by the State, which have been devoted to the use or support of public free schools, and in addition thereto one-half of the public domain now subject to disposal by the State, shall constitute the basis of a permanent fund, to be called *the general educational fund*; *provided*, that the title to lands given to the State for the use and benefit of public free schools, shall be surrendered to the donors at their option; but the right of the State to improvements put upon said lands by the State shall not be thereby affected.

"Sec. 2. The Legislature shall provide for the sale of all the lands set apart in section one of this article, which have been located, or which may hereafter be located, by railroad or other corporations, and for the sale of all other property therein set apart. And all moneys derived from the sale of the same shall be invested in bonds of the State or of the United States.

"Sec. 3. The interest accruing on the general educational fund shall be distributed annually by the Comptroller of Public Accounts between the respective counties of the State, according to their scholastic population, and shall be distributed as follows: First, to the payment of tuition for four months in each year of all the indigent orphan children of the State, between the ages of eight and sixteen years. The remainder to be applied, *pro rata*, to the payment of tuition of all the children of the State within said ages. But the State shall not levy a tax to support a system of public free schools."

#### D-3. Cline's Minority Report

Sec. 1. A general diffusion of knowledge and intelligence being essential to the preservation of the rights and liberties of the people, the Legislature shall establish a thorough and efficient system of public instruction, and shall maintain public schools during not less than four months in every year, for the free education of all children in this State between the ages of nine and fifteen years, and other children may attend said schools upon conditions prescribed by law.

Sec. 2. The supervision of said system and schools shall be vested in the Superintendent of Public Instruction, the Board of Education, County and City Superintendents, and such other officers as may be provided by law.

Sec. 3. The Superintendent of Public Instruction shall be elected for . . . years, and shall receive an annual salary of \$ . . . , until otherwise provided

by law, and shall perform all duties that may be prescribed by law. A vacancy may be filled by appointment for the unexpired term by the Board of Education.

Sec. 4. The Board of Education shall consist of the Superintendent of Public Instruction, the Governor, Attorney General and Secretary of State, who shall prescribe rules and regulations for the organization and government of the schools, and perform all other duties prescribed by law.

Sec. 5. County and City Superintendents, and other officers may be elected or appointed, with such term of office, compensation, powers and duties as may be prescribed by law. The Board of Education may remove any of such officers for cause, and fill any vacancy by appointment for the unexpired term.

Sec. 6. All lands, bonds and other property heretofore set apart for schools by the Republic and State of Texas, or that may hereafter be so set apart, and the proceeds from sales of public lands, and the proceeds of escheats, shall constitute the permanent State school fund, and the income from said fund, together with not less than one-fourth of one per cent. tax upon all subjects of general taxation, shall annually be distributed among the several counties and cities, according to their scholastic population.

Sec. 7. All lands granted or to be granted to the several counties and cities for educational purposes, proceeds from sales of estrays, also other requisitions for such purposes, shall constitute the permanent county or city school fund; and the income from such fund, and all taxes on dogs, polls and occupations, and the annual receipts from the permanent State school fund, together with such tax on other subjects of county or city taxation as may be authorized by law, shall be annually expended for the support and maintenance of free public schools.

Sec. 8. The moneys that may at any time belong to the permanent fund of the State and of the several counties and cities, shall be invested in the bonds of the United States and of the State of Texas.

Sec. 9. The State and county school lands, also the university and asylum lands, shall be sub-divided into 80 or 160 acre tracts, whereof the alternate tracts may be sold at public auction, under such regulations as may be prescribed by law, and the proceeds invested in United States and Texas State bonds, and the incomes severally applied to the support of said funds and asylums.

Sec. 10. No grant shall be made from any public fund for the benefit of any institution, church or school controlled by any ecclesiastical body, nor in aid of any particular opinions of conscience, creed or church.

#### *D-4. Whitfield's Defense of Majority Report*

These premises being conceded, the grand problem to be solved by this Convention is, how can we best obtain the desired end? The answer involves the whole question and demands the scrutiny of every member of this body. There are two extreme views on the question, each advocated by able and conscientious gentlemen, to neither of which can I subscribe. The one view

would substantially refuse to do anything to promote through State agencies the education of the children of the State. The other would go too far in the opposite direction, by imposing upon the people of today burthens [sic] which would be not only unjust but also unwise. There is, I am assured, a medium ground upon which all can unite and accomplish the greatest good possible within our reach.

The great difficulty is the want of a sufficient available fund for the time being, from the interest of which to sustain common schools, until the interest on the proceeds of these bonds shall be sufficient to sustain such schools without any direct taxation of the people. We all look forward to the early day, possibly within five or six years, when this land fund will be sufficient to meet this cherished desire, and taxation for schools will be no more.

*D-5. Dohoney's Defense of Majority Report*

But if we admit any proposition already laid down, and we refer to the statistics of crime, we find that the virtue of people depends upon their intelligence, that the great mass of crime is owing to ignorance, and where most crime and most ignorance prevail there you will find the most expensive systems of criminal law. It therefore becomes a practical question of economy whether it is not better to encourage general intelligence in the interest of safety and economy, whether it is not better for the State to educate the children for their own good and for the welfare of the State. Carefully prepared statistics show that the large mass of inmates of prisons are uneducated.

I concede it would be better to have the children educated and rendered virtuous by a system of private education; but when we look abroad in the land and find the large number of orphans, and large number of children of the poor people, and the large per cent uneducated, the large number which private education can never reach or benefit, and ignorance growing up with crime and vice and intemperance, we know well that nothing short of public education will reach the case. We have waited a long time for private charitable institutions, but with little result, and with these long lists of statistics still presenting themselves. It then becomes a plain, practical question, whether it is cheaper to educate them and render them industrious, virtuous citizens and intelligent voters, or to go to the expense of trying them, putting them in prison, and punishing them.

We are still waiting for education to resolve crime, yet we hear the same arguments today. Since we have now solved the funding problem for education with billions available today, why not allow private markets to deliver the services more efficiently to the poor who will be empowered with the money. Actually, it is an utopian illusion to think any system, even choice, will educate all the children adequately, but choice probably offers the best hope for most at the least cost.

*Appendix E. Voting Results on the Educational Resolutions from the  
1875 Convention*

*E-1. Tabling of the Dohoney Amendment*

YEAS—Allison, Abernathy, Arnim, Brown, Blake, Blassingame, Barnett, Burleson, Bruce, Chambers, Cooke of San Saba, Cardis, Douglas, Dillard, DeMorse, Darnell, Davis of Brazos, Fournoy, Fleming, Ferris, German, Gaither, Graves, Holt, Henry of Limestone, Holmes, Johnson of Franklin, Johnson of Collin, Kilgore, Killough, Lacy, Lynch, McLean, Martin of Navarro, Martin of Hunt, McKinney, Murphy, Norvell, Nugent, Reagan, Ramey, Robeson of Fayette, Ross, Russell of Wood, Spikes, Scott, Sessions, Stockdale, Stayton, Sansom, Wade, Weaver, Whitfield—53.

NAYS—Ballinger, Brady, Crawford, Cline, Dohoney, Davis of Wharton, Erhard, Ford, Flanagan, Henry of Smith, King, Lockett, Mitchell, Moore, Nunn, Pauli, Reynolds, Rentfro, Robertson of Bell, Smith, Waelder—21.

*E-2. Motion to Substitute Sansom's Minority Report*

YEAS—Arnim, Blassingame, Barnett, Burleson, Bruce, Cooke of San Saba, Douglas, Flanagan, German, Holt, Henry of Limestone, Holmes, Killough, Norvell, Robertson of Bell, Russell of Wood, Spikes, Scott, Sansom—19.

NAYS—Allison, Abernathy, Ballinger, Brady, Chambers, Cook of Gonzales, Cooley, DeMorse, Dohoney, Darnell, Davis of Brazos, Davis of Wharton, Ford, Fournoy, Fleming, Ferris, Gaither, Graves, Johnson of Franklin, Johnson of Collin, Kilgore, Lockett, Lacy, Lynch, McLean, Martin of Navarro, Martin of Hunt, Morris, Mitchell, McKinney of Denton, McCormick, Murphy, Nugent, Pauli, Reagan, Ramey, Rentfro, Ross, Sessions, Smith, Stayton, Wade, Whitehead, Weaver, Whitfield, Waelder—46.

When Mr. Henry's (of Smith) name was called, he stated that he had paired off with Mr. Dunham, who would vote yea, if present.

*E-3. Tabling of Sansom's Pro Rata of Tuition Proposal*

YEAS—Abernathy, Arnim, Brown, Blake, Ballinger, Blassingame, Barnett, Burleson, Brady, Bruce, Chambers, Cook of Gonzales, Cooke of San Saba, Cline, Cooley, Cardis, Dillard, DeMorse, Darnell, Davis of Brazos, Ford, Fournoy, Ferris, Flanagan, German, Gaither, Henry of Limestone, Johnson of Franklin, Johnson of Collin, Killough, Lockett, Lacy, McLean, Martin of Navarro, Martin of Hunt, Morris, Mitchell, McKinney of Denton, Norvell, Pauli, Ramey, Rentfro, Ross, Russell of Harrison, Russell of Wood, Spikes, Scott, Sessions, Smith, Whitehead, Weaver, Waelder—52.

NAYS—Allison, Crawford, Douglas, Dohoney, Erhard, Fleming, Graves, Holt, Henry of Smith, Holmes, King, Kilgore, Lynch, McCormick, Moore, Murphy, Nunn, Nugent, Reagan, Robertson of Bell, Stockdale, Stayton, Sansom, Wade, Whitfield, West—26.

*E-4. Johnson's Amendment*

YEAS—Allison, Brown, Blake, Ballinger, Blassingame, Barnett, Crawford, Cline, Cooley, DeMorse, Dohoney, Darnell, Davis of Brazos, Fleming, Ferris, German, Henry of Smith, Johnson of Franklin, Johnson of Collin, King, McLean, Martin of Navarro, Martin of Hunt, Morris, McCormick, Moore, Norvell, Nunn, Reagan, Ramey, Spikes, Sessions, Smith, Sansom, Whitehead, West—36.

NAYS—Abernathy, Arnim, Brady, Bruce, Chambers, Cook of Gonzales, Cooke of San Saba, Cardis, Douglas, Dillard, Davis of Wharton, Erhard, Ford, Flournoy, Flanagan, Gaither, Graves, Holt, Henry of Limestone, Holmes, Kilgore, Killough, Lockett, Lacy, Lynch, Mitchell, McKinney, Murphy, Nugent, Pauli, Rentfro, Robertson of Bell, Ross, Russell of Harrison, Russell of Wood, Scott, Stockdale, Stayton, Wade, Weaver, Whitfield, Waelder—42.

*E-5. DeMorse's Substitute Proposal*

YEA—Ballinger, Crawford, Cooke of Gonzales, Cline, Cooley, Dillard, DeMorse, Davis of Brazos, Ford, Fleming, Ferris, Flanagan, Henry of Smith, Holmes, Johnson of Franklin, King, Kilgore, Lockett, McLean, Martin of Navarro, Martin of Hunt, Morris, Mitchell, McCormick, Nugent, Ross, Russell of Harrison, Sessions, Smith, Wade, Weaver, West, Waelder—33.

NAYS—Allison, Abernathy, Arnim, Brown, Blake, Blassingame, Barnett, Brady, Bruce, Chambers, Cooke of San Saba, Cardis, Douglas, Dohoney, Darnell, Erhard, Flournoy, German, Gaither, Graves, Holt, Henry of Limestone, Johnson of Collin, Killough, Lacy, Lynch, McKinney, Moore, Murphy, Norvell, Nunn, Panci, Reagan, Ramey, Rentfro, Robertson of Bell, Russell of Wood, Spikes, Scott, Sansom, Stockdale, Whitehead, Whitfield—42.

*E-6. Dohoney's Substitute Proposal*

YEAS—Ballinger, Brady, Crawford, Cline, Cooley, Dohoney, Ford, Ferris, Flanagan, Henry of Smith, Johnson of Franklin, King, Kilgore, Lockett, McLean, Morris, Mitchell, McCormick, Nunn, Pauli, Rentfro, Ross, Russell of Harrison, Smith, Sansom, Wade, West, Waelder—28

NAYS—Allison, Abernathy, Arnim, Brown, Blake, Blassingame, Barnett, Bruce, Chambers, Cook of Gonzales, Cooke of San Saba, Cardis, Douglas, Dillard, DeMorse, Darnell, Davis of Brazos, Erhard, Flournoy, Fleming, German, Gaither, Graves, Holt, Henry of Limestone, Holmes, Johnson of Collin, Killough, Lacy, Lynch, Martin of Navarro, Martin of Hunt, McKinney, Moore, Murphy, Norvell, Nugent, Reagan, Ramey, Robertson of Bell, Russell of Wood, Spikes, Scott, Sessions, Stockdale, Stayton, Whitehead, Whitfield—48.

*Appendix F. County Land Report*

SIR—Your Committee on Counties and County Lands, to whom were referred certain resolutions and memorials on the subject of county school lands, have had the same under consideration, and instruct me to report the following provision, which they recommend for adoption as a part of the constitution.

[Respectfully, Henry C. King, Chairman].

All lands heretofore, or hereafter, granted to the several counties of this State, for education or schools, are of right the property of said counties, respectively, to which they were granted, and title thereto is vested in said counties, and no adverse possession or limitation shall ever be available against the title of any county. Each county may sell and dispose of its lands, in whole or in part, in manner to be provided by the police court of the county. Actual settlers, now residing on said lands, shall be protected in the prior right of purchasing the same to the extent of their settlements, not to exceed one hundred and sixty acres, at the price fixed by said court, which price shall not include the value of existing improvements made thereon by such settlers. Said lands, and the proceeds thereof when sold, shall be held by said counties alone, as a trust for the benefit of public schools therein, said proceeds to be invested in bonds of the State of Texas, or of the United States, and only the interest thereof to be used and expended annually.

*Appendix G. Opinions on the Educational Resolutions  
from the 1875 Convention*

*G-1. Whitfield Supporting "Common Free Schools"*

General Whitfield said delegates had come to Austin with their minds made up in advance upon the subject of common free schools. They had ever been the idol of this heart. He had wished to see the great State of Texas enjoying a system of public education perfect and liberal. But finding in the Convention a great disparity of views, he had been willing to compromise upon the majority report as giving the best system that could be attained for a time. The committee, containing members of various views, had been content to agree upon the majority report. The majority had become convinced that one-tenth of 1 per cent was as far as the Convention was willing to go. The question was, he thought, the greatest that had come before the Convention. He thought the poverty of the people was too great for them to build up an adequate system of free schools just then. He wanted schools as much as any one, and had had one last year on his farm, to which others had subscribed \$55, while he paid the remainder of \$125.

*G-2. Cline Supporting His Proposed System*

Mr. President, I consider this the most vital, the most important question to be disposed of by this Convention. I think it is a great mistake to say the people do not want a public school system. That objections to it exist on account of local abuses cannot be denied. But from all parts of the State the cry comes up, "give us public schools." I have just received a letter from one of the most distinguished ladies of my county on the subject, and the latter is a wail of despair at the vote the other day against the school poll tax. It is very seldom I ask the attention of the Convention, but I hope I may be indulged today. As to the question of the right to impose taxes, I hold, with Daniel Webster, that it is a police question; that the State should expend money for the support of public schools for the same reason that it does to build penitentiaries. For the same reason that it builds jails it should have school houses. It is a complaint all over the country that the expenses of trying criminals are enormous. Then look to the character of those who are caught in the meshes of criminal law. They are all ignorant. Nine-tenths of them can't read. This system of public education proposes to carry enlightenment and morality to every child. It is part of the history of the Anglo-Saxon race. Alfred the Great established the first great seat of learning. Lord Bacon says that the Saxons adopted a system of public instruction in 1646, and in Scotland public schools were established in 1696, one school in every kirk; and from that time to this the Scotch people have been an intelligent people in every country, and from low estates have always risen to responsible positions. One-sixteenth of the public lands were donated by the State of Virginia for public schools. Here in Texas munificent landed donations have been made for the schools. The history of the Anglo-Saxon race everywhere is that they mean to provide for their children a system of public education. But here we are met with a great argument that we are too poor.

But all the land and property are still here. The land is the basis of our great wealth, and the very fact that we are poor is one of the best arguments in favor of a public school system. If we are poor we cannot pay for private tuition, but we must educate the children of Texas. 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. There are private schools in Houston in which they charge for a single pupil \$15 a month, and here in Austin I find they are paying \$40 to \$45 for a session of forty-five weeks. I see that we gentlemen are educating our children, but the people are not. Well, sir, we are expending money in that direction selfishly. We send our children abroad everywhere to school in the Northern or Eastern states, or in Europe; and what are they when they come back? Have they got the true spirit of Texas children in them? Do they not turn up their noses at Texas? They grow up with a foreign spirit which is an injury to our country, and when we lie down at last, in our stead the children who have come from other states, educated in free schools, will take the Government in their hands, to the exclusion of ours, educated in a foreign state or country.

The fact is, Mr. President, we have a great many children not going to school whose parents cannot pay any amount of tuition; but the amount of tuition paid at private schools, the traveling expenses, costly board and other heavy expenses of children schooled abroad, would be sufficient to establish a system of public schools and to educate your children—and mine—to extend even the priceless boon of education to all the children. All parties have pledged themselves to common schools. In the last State convention of the Democratic party, by a two-thirds vote of 800 delegates, it became pledged to public education. The Republican party is likewise pledged. But, sir, I think it is outside the domain of politics. We cannot deny that all parties have pledged themselves. They cannot deny to the orphan and indigent children this free education. I want to ask, shall we go on under the proposition made, and build up out of the common school fund the private schools of the country? It will not be distributed in the districts where the poor reside; the money will go where least needed, and those most needing will get nothing. It is a great argument that we are poor. That is the very reason why we need in Texas to educate our children. We ought to husband our money within our own borders and build up a great system for all. I feel a pride in every bright-eyed Texas boy and girl. I want my children to be men and women of intelligence. A system of education will be the greatest argument with intelligent men of other states and countries why they should come to this State, and these kinds of men add to the aggregate of wealth, add to the aggregate of best educated labor talent. It will be the system best calculated to bring them here that can be devised. We want a system not subject to the control and the whims of its patrons.

Where is the private school, however pretentious, that is satisfactory to its patrons? We should establish graded schools in which all grades of children may be appropriately classed and the more efficiently and cheaply taught.



Now, I am willing to concede anything for the public schools. Last year there were 313,000 children within the scholastic ages, this year 339,000. The number is increasing more rapidly than any possible increase of the fund. If we don't want to pay out of this fund, which none of us want, then I want some other way provided. I want a poll tax. San Antonio, New Braunfels, and Brenham all have their public schools at an expense of about one dollar per month for each pupil. Gentlemen, where can you find the same economy in private schools? Are we as a state and a whole people to remain unprogressive? It is a question whether the cities of Texas will go ahead. All the other states go ahead and we remain standing still. The money, sir, does not go out from us in the support of public schools, it circles around among the people, from them to the State, then to the teachers, and back where it came from. It does not go beyond our borders, nor after spending it abroad do we have our children coming back to us with foreign proclivities. For a session of four months we have to raise \$600,000, or for six months, \$800,000. The argument that we cannot stand the tax is an argument in favor of it, for we all have to educate our children, and to do that at private schools costs more than to educate our own and all the orphans and indigent children in the State. If parents will not send their children to school, but in their tender years keep them in the field and draw by hard labor their very life blood out, the State out to interfere and compel them to do justice. It is not the claim of the poor man or the drunken parent, but it is the cry of the children we should listen to. It is the demand of the child, not the parent. We have nothing to do with the parent, but everything with the child. While I am in favor of the administration of the law, civil and criminal, yet I hold it is the duty of the State also to fit all the children of the State for their proper position in the country. I am for contributing enough for the education of the poor children so that we may cheapen the administration of the laws. Sir, let us appeal in behalf of the children of Texas to the feeling of fatherhood in our breasts. Let us be charitable to those around us. Let us contribute our means if we have to stint ourselves for the benefit of the poor children who have to battle some day for the support of the Government. Let us at once—for one time—rise above a feeling of self and self-interest. Let us confer this boon upon them and educate not only our own children but all those around us and make them better than they are now.

### *G-3. Sansom Opposing Taxation for Education*

Mr. Sansom said he desired simply to say that the people wanted no taxes levied for the maintenance of *public schools*. He said he knew not one taxpayer in his entire county when he canvassed the county who expressed a wish to continue the public schools by taxation. He did not believe the people of Texas wanted to go one step in that direction. It was this school tax that the people had complained so much about. It was the main tax, the main expense and burden, that induced them to call this Convention. They could have borne the other taxes. They wanted the power of the State to tax

for such purposes limited by this body. There was hardly a gentleman there but knew that his people complained more of this school tax than anything else. Then should they say to them that they would again put it in the power of the Legislature to impose that odious tax? By that they should say they dared not do what they wanted, but they would throw the responsibility upon the Legislature. The gentleman from Harris had spoken as though they were discussing the English system. Now the English system was that which they should provide, for when they said that the Legislature should pass a sufficient law, that became the English system. 'Mark you,' he said, 'the Government of England gave some one a lease of the service of the child, and did not levy a tax, but simply gave the child under the control of another, under control of somebody to work for and serve for its maintenance and education.' The gentleman from Harris had said, as they all had said, that where they did not have *public schools* they had ignorance and vice. He said the statistics did not show it. He made this statement that the gentleman would find in Massachusetts, where they spent over \$2,000,000 annually, that crime was increasing as rapidly as it was anywhere in the country.

#### *G-4. Robertson in Opposition of New Taxes*

Mr. Robertson, of Bell said that all the amendments which had been presented had been for the purpose of increasing taxation. He said he had not come to Austin to increase, but to lighten the burdens of the people. They had complained of the enormous taxes and of two classes of taxes, the road and school tax. They had complained that they were enormous and unequal. He wanted to get rid of those taxes. He readily admitted the force of the argument of the great propriety of educating the masses of the children of the State. The objections urged to these taxes drew from the people the general cry for a convention that they might be relieved of those burdens. He said he wanted to call attention to the fact that the great increase in the population not yet contributing any means toward the support of the Government, and to ask was it right for the people of Texas to contribute to educate their children? He said he wanted to tell them it was all they could do to educate and take care of their own households. He wanted to build a wall so high no one could come into the State if they were going to have a regular educational government supported by the taxes of the people. Gentlemen came up there and claimed to have cut down the salaries of officers, saving annually a few thousand dollars, yet when it came to levying taxes to the amount of millions, they became all at once very liberal. Relief was not in cutting down salaries, but in extending even-handed justice to the people of Texas who had stood by Texas.

#### *G-5. McCormick's Support of Taxes for Education*

Mr. McCormick said he came to Texas a small boy, when the great war of secession was in progress. He said he was proud to say that he had crossed the Mississippi River under the Lone Star Flag of Texas, and was proud to

say he was there when the war was ended, and was broken in body but not dispirited, and then again sought peaceful pursuits. He said he was not proud to know that the rich men were opposed to a small, pitiful tax to educate the children of the heroes who carried their flags during the war. He knew that his children were to grow up in ignorance unless the State of Texas should educate them. How many thousand were like him, looking to the State for that boon? They had also followed the banner of true democracy, had supported its principles through years of trial, and he, for one, would support its principles under the platform of 1873, that induced the people of Texas to put the incumbent State Government into power. He said he would read to the gentlemen who were opposed to public schools, who objected to a tax of one-quarter of 1 per cent to educate the children of the poor and the unfortunate of the worn, crippled, and maimed Confederate soldier; he wished to read to them the Democratic platform that brought into existence the incumbent Democratic Government and that very Convention.

He stood there as a Democrat, under the platform of the Democratic party of 1873. He said he saw in the list of delegates prominent men who were there in the constitutional convention. But what did they see and hear, now that the Democratic party had come into power? The prominent men told them that their constituents were grumbling at the taxes.

#### *G-6. Waelder Supporting DeMorse's "Free School" Substitute Proposal*

Mr. Waelder said he favored Mr. DeMorse's substitute. It did not meet all his views, but he preferred it to the majority report, and hoped that the friends of *free schools* would support it so as to get it before the Convention and perfect it. If they were forty years behind the age they had better get abreast of it as soon as possible. The majority report itself said that 'a general diffusion of knowledge is essential to the preservation of the liberties of the people.' He believed in the truth of that declaration, and if it were true, as the committee declared, it was essential that they should commence at once and not put it off for years and perhaps forever. He understood the gentleman from Wood to say that education led to monarchy.

Mr. Russell, of Wood, interrupted to say that he was referring to the Prussian system, the adoption of which system might lead to monarchy.

Mr. Waelder denied that any system of education could lead to monarchy or despotism of any kind. The gentleman of Wood talked very glibly in denunciation of that system, but he could thank God if Texas had the same educational system that Prussia had. It was admitted to be one of the best educational systems ever devised by the wisdom of man, and when men made their exits from their public school they were fitted to make good citizens of that or any other country.

#### *G-7. Murphy's Response to Waelder*

Mr. Murphy said that he looked at the question from an independent standpoint. Gentlemen who opposed the poll tax as a condition precedent to

voting as oppression to the poor man were now arguing in opposition to their former convictions. He read statistics to show that in nine years of crime in Massachusetts the number had increased from 26,184 to 88,637. He did not want them to throw money away upon any foreign system. He cited this to show that civilization did not lessen crime. Show him a good system of education and he would support it, but the present machinery was inadequate to the support of a good system (emphasis added).

*G-8. Ford Supporting DeMorse's "Free School" Substitute Proposal*

Colonel Ford said he was not willing to vote for any measure that would force a man to pay his way to the ballot box. He had always been opposed to disfranchisement in any form. It was proposed, not that they should adopt the Prussian or any other system, but should put machinery in operation that would lead to a *public free school education*. It was no argument to say that civilization was not a barrier to crime, because crime had increased in Massachusetts. It had increased perhaps in proportion to population or from the hordes of paupers and criminals thrown upon her shores. It was as much an argument to say that a man ought not to be compelled to pay taxes to punish crime in the children of the poor man as to say that a man ought not to be taxed to educate all children in which those of the poor man were included. He said he favored the DeMorse substitute.

*G-9. Russell Opposing Taxation*

Mr. Russell, of Wood, said that he did not believe that education led to monarchy. He was as great an advocate of education as anyone on that floor, only he favored individual instead of national education. He had said that the features of the Prussian system led to the baptism of the child by the state at seven days, to his education by the state at seven years, and a few years later they were taken from their homes and placed in the army of the king. He denied the right of the government to take possession of the children, and to become their proprietors and masters; he denied the right of the State to lay its unhallowed hands on the property of the citizen, except for the maintenance of the legitimate purposes of government, and denied that their view of the question was maintained by all of the political economists of eminence.

*G-10. Lockett Supporting DeMorse's "Free School" Proposal*

Mr. Lockett said that the argument of those who quoted statistics did not carry any force against the school system. If they did they had better go back to savage life and each man hunt his particular buffalo for the wool that was on him. It was ridiculous that in this advanced age, they should go back on the experience and the light of the past in all people and all countries; that it was not right to educate and elevate the people. Take the natives of Massachusetts, and none would deny that they were not educated in morals, so the pauper and criminal class thrown upon it had occasioned the increase of crime. He was a Southern man so could not be accused of partiality. He

testified to the usefulness of the Bonham public schools. The Chairman of the Executive Committee had openly pledged himself to vote against the ratification of the Constitution if they did not provide a system of *public education*. Some of the gentlemen's arguments would seem more fitted for an asylum than for a constitutional convention (emphasis added).

*G-11. Waelder Supporting the Moore Amendment*

Mr. Waelder said he favored the amendment of Mr. Moore, because it was a question in his district and he was in favor of direct taxation for *free schools*. He believed that the Prussian system originated in Saxony, the birthplace of Protestantism and liberty. Prussia had only carried the system out to its full perfection. Some people condemned the school system because of its connection with radicalism. Some believed that radicalism and diabolism meant the same. The dying thief on the cross uttered something worthy of the Redeemer's attention.

He did not regard a tax for school purposes as direct taxation. It was taken from the general revenue. The \$2 poll tax would go to educate the children and when a man thought of that he would not be apt to grumble much. He had heard the Constitution of 1845 advocated so much that he was surprised that members should be adverse to the one question of taxation.

*G-12. Moore Supporting "Common Free Schools"*

Mr. Moore spoke in favor of *common free schools*. The gentleman from Wood (Mr. Russell) had talked eloquently and feelingly of the poverty of his people, and said they were not able to sustain public schools. *Did not our fathers before us, in 1845, when the whole country was stricken with poverty, inaugurate public free schools?* We must educate our children and not allow them to be straggling all about over the country. It was to their interests in every conceivable manner to build up schools throughout the whole State. Education was a great bulwark of their liberties, and should be encouraged by every legitimate means. His idea was to leave the whole matter subject to the people in the future, to be treated as they desired. He did not think the Constitution should have a word to say in the matter; but let the people control it. For one he was not afraid to trust them with their own affairs.

*Appendix H. Further Debate on the Education Article,  
Substitutions, and Amendments*

*H-1. Martin of Navarro's Substitute*

Sec. 1 The principal of the funds arising from the sale or other disposition of lands and other property, granted or intrusted to the State for educational purposes, shall forever be preserved inviolate; and the income therefrom shall be faithfully applied to specific objects of the original grants and trusts.

Sec. 2 The Legislature shall make such provision, whenever deemed practicable, by taxation or otherwise, as, with the income arising from the school trust-fund, will secure a thorough and efficient system of common schools throughout the State; and no religious, or other sect, shall ever have exclusive right to, or control of, any part of the school funds of the State.

Sec. 3 All public lands which have been heretofore, or may hereafter be granted, to the various counties of this State, for public schools, are, of right, the property of said counties respectively to which they are granted and entitled thereto, is hereby vested in said counties; subject to the trust created in the grant.

Sec. 4 The Legislature shall have power, whenever deemed advisable, to provide for the sale in part, or in whole, of all lands heretofore granted for the benefit of the Lunatic Asylum, the Blind Asylum, the Deaf and Dumb Asylum, and the Orphan Asylum, together with such donations as may have been, or may hereafter be made, to either, or hereby set apart to provide a permanent school fund for the support and maintenance and improvements of said asylums. . . .

*H-2. Nunn Supporting Public Education*

Mr. Nunn said that a reinauguration of the system of 1845 would perhaps not be acceptable. The hostility to the school system under the Constitution of 1869 was hostility to extravagance and to unnecessary offices, rather than to education itself. But the people did require a school system, and his people had instructed him to press the question. He believed in living up to the declaration of the Democratic platform. The utility of public education had been settled by a policy of twenty-five years. He read an estimate from the Superintendent of Public Instruction to show that the 150,000 scholastic population between 9 and 15 would cost about one million of dollars annually. This would be raised by adding to the present school fund of \$125,000, a poll tax of \$3, which would be reasonable enough when made a provision precedent to voting, and a tax of one-eighth of 1 per cent on taxable property.

*H-3. Robertson's Opposition on Taxation for Public Education*

Mr. Robertson, of Bell, said he could not consent to such a proposition as one-eighth of 1 per cent. He was not opposed to free schools when they were

in a condition to establish a good system. The tax of one-eighth of 1 per cent on taxable property, not one-tenth of the annual revenue, would materially increase the present taxation and he and his constituency were opposed to it.

#### *H-4. McLean Supporting a Local Option of Tax Support*

Hence I support the substitute of my colleague, because it does give the people of the State an opportunity of establishing a system of public schools at their own expense where it is practical, that shall not be a burden on other portions of the State impracticable. There is not a county in the State in which there are not communities where the scholastic population is insufficient to establish private or public schools of respectable size, and yet gentlemen propose to adopt a general system of education for the whole State of Texas, where the benefits must fall upon the few, and the burdens upon the whole State alike. The people have tried it and cannot stand it. We have spent millions of dollars in one or two years trying to establish a general system of education, and the schools were so few in number, so partial in their benefits that no adequate return was made for the outlay. We have seen a public education tax of 1 per cent levied, collected and consumed in this way and not one-fourth of the children at the schools, and hence I say that the fund will do no more than provide for the indigents and orphans of the State. But the substitute of my colleague will give to the populous districts an opportunity to establishing free schools at their own expense, for they are without doubt, the best and cheapest schools in the world when placed on a proper basis.

This much I have said, Mr. President, to define my position upon this important, and I must confess, embarrassing question. The people of this State are not able to support a complete and general system of education, but the fund already provided is sufficient to provide for the unfortunate indigents, and these must be taken care of; charity demands it, society is interested in the mental and moral culture of these children, and the State has a direct interest in seeing to it that these future citizens shall be prepared for usefulness.

#### *H-5. Flournoy Supporting "Free Schools"*

Mr. Flournoy spoke as one of the young Democrats who was in favor of *free schools*. He had voted for every amendment looking to their establishment on that floor. If they wanted the assistance of the young members of the Democratic party and the new Constitution not to be voted down they must give them a system of *free schools*. He said the people of his county were not opposed to free schools, but only to the manner in which they were maintained, to the dangerous and unrestricted delegation of power to irresponsible boards of school directors. All they asked was that the question should be left to the Legislature under reasonable restrictions. He characterized the nineteen delegates who opposed *free schools*, and who had been lauded so highly, as a band of old fogies. He regarded the majority report of the committee—without intending to be personal in either case—as a fraud on

the people. If they would not give them *free schools* the committee had no right to waste the fund. He would have preferred the minority report of Mr. Cline, if he had stricken out the office of Superintendent of Public Instruction. Under the old system it took \$68,000 out of \$100,000 to pay the school officials. Under the DeGress system, the school officials received nearly as much as the teachers received. This was what his people opposed, not *free schools*; they wanted them and would not rest satisfied until they had them.

#### *H-6. Nugent's Opposition to the Amendment*

Mr. Nugent said he had confidence in the people. He would scorn to stand in the sunshine of the nineteenth century and assert that the people should not be trusted to the extent of taxing themselves to the amount of one-fourth of 1 per cent. He never had such a degraded view of his constituency, much less of the people of the entire State. He had never been opposed to a system of public education on the fund raised from the school lands. He didn't believe that a system could be funded on the funds as they then stood, and considered the majority report a sham, and a subterfuge. It would never accomplish it. He would not vote for the amendment because it was a special tax.

#### *H-7. Crawford's Opposition*

Colonel Crawford said he thought the minority report was much kinder to the children of the State than was the majority report. He referred the Convention to the various Constitutions of the State, to all the laws ever made on the subject of schools, to show that even when steeped in poverty the statesmen of Texas had always made ample provision for the education of the children of the State. From the days when the noble Texans had declared their independence education had been one of their chief objects. Even in 1866, when the people were broken in fortune, both public and private, their firesides cheerless, their farms laid waste, and all lost save honor, even then the Convention of 1866 had made ample provision for the education of the bright-eyed children of their loved State. The Democratic platform of 1866 had reaffirmed the doctrine. He was compelled to look upon the majority report as a sugar-coated, stupendous fraud. If he were compelled to choose between the two he would take the minority report submitted by Messrs. Sansom, Holt, Dunham, and Cooke, of San Saba. It was kinder by far to the orphans of the land. If delegates did not believe that the State had the right to tax for the support of free schools they ought to say so boldly, like Mr. Sansom had done, and they ought not to try to hoodwink the Convention and the country with such an abortion as the majority report.

#### *H-8. Judge Ballinger's Opposition*

According to McKay, Ballinger believed: [T]he report of the majority, many of whom professed to be the friends of free schools, involved the abandonment of the system power.[sic] They called it a compromise, but it was a complete surrender. Free schools were to be established only when the



means provided would do it throughout the whole State for a period of four months every year. But not one cent of taxation was made imperative, and taxation was limited to one-tenth of the State revenue. It was notorious. Both sides, or rather he would say all sides, admitted that that amount would never establish a system of free schools. One-tenth was the minimum, and it was imperative in 1845. It was now proposed as the maximum, and might be entirely ignored, according to the majority report. Why should the people of Texas be so restricted? In the North and Northwest, wherever American people went, they first laid the foundations of a free school system and then built upon it. Was Texas alone unable to do that? If they were too poor just then to levy taxes, they should not do it. But was it their destiny to be forever too poor to establish free schools? With the funds already in hand, with the munificent domain their fathers had transmitted for the purpose, was it true that Texas, with her boundless territory, her genial sun, her immense capacity for production, with population teeming into her soil, forever and forever would be unable to establish free schools? He said he did not believe it to be true, and would never consent to such action. He had referred several days before to the conditions of the readmission of Texas to representation in Congress, that the provision for free schools in the Constitution of 1869 should never be impaired. He knew there was no judicious judge to enforce this. He hoped there would never be any political power to enforce it. But they were answerable for it to public opinion, which, North and South, Democratic as well as Republican, favored free schools; and he believed that to pass the majority report they would do much to prevent the development of the State and to retard its growth, as well as to produce the belief that the policy of the Democratic party in Texas was reactionary and directed toward ignorance. If the friends of free schools could not preserve those principles which would result in the establishment of a free school system throughout the State, they should be made to understand the fact, and then he would make no farce of the system. He would then, on the contrary, support the views of the delegate from Williamson, and those who acted with him, and confine the bounty of the State to the orphan and indigent children of the State.

*Appendix I. The Mills Plan*

Sec. —. There shall be a Superintendent of Public Instruction, who shall be elected by the people. The Superintendent shall hold his office for the term of two years. He shall receive an annual salary of three thousand dollars.

Sec. —. The Superintendent shall have supervision and control of the public free schools of the State. The Legislature shall lay off the State into convenient school districts, and shall provide for the formation of a Board of School Directors in each county, and for the purpose of taxation each county shall be a school district. It shall be the duty of the Superintendent of Public Instruction to recommend to the Legislature such provisions of law as may be found necessary, in the progress of time, to the establishment and perfection of a complete system of education adapted to the circumstances and wants of the people of the State. He shall, at each session of the Legislature, furnish that body with a complete report of all free schools in the State.

Sec. —. The Legislature shall establish a uniform system of public free schools throughout the State.

Sec. —. As a basis for the establishment and endowment of said public free school, all the funds, lands and other property heretofore set apart and appropriated, or that may hereafter be set apart and appropriated, for the support and maintenance of public schools, shall constitute the public school fund; and all sums of money that may come to this State hereafter from the sale of any portion of the public domain of Texas shall also constitute a part of the public school fund; and the Legislature shall appropriate all the proceeds resulting from sales of public lands of this State to such public school fund. And the Legislature shall set apart, for the benefit of public schools, not less than one-sixth of the annual revenue derivable from general taxation, and shall also cause to be levied and collected an annual poll tax of one dollar on all male persons in this State between the ages of twenty-one and sixty years, also a tax of one and one-half per cent. on the gross earnings of all railroads, steamship lines and insurance companies of this State, also all the fines collected for carrying concealed weapons and disturbances of the peace, also all money collected for license for selling malt and spirituous liquors, for the benefit of public schools. And said fund and the income derived therefrom, and the taxes and other moneys herein provided for school purposes, shall be a perpetual fund, to be applied as needed, exclusively for the education of all the scholastic inhabitants of this State, and no law shall ever be made appropriating such fund for any other use or purpose whatever.

Sec. —. The public lands heretofore given to counties shall be under the control of the board of school directors of their respective counties, and may be leased or sold by them under such rules and regulations as the Legislature shall prescribe.

Sec. —. The Legislature shall, at its first session, and from time to time thereafter, as may be necessary, provide all needful rules and regulations for the purpose of carrying into effect the provisions of this article. It is made

the imperative duty of the Legislature to see to it that all the children in the State between the ages of (8) eight to (15) fifteen are, without delay, provided with ample means of education. The Legislature shall annually appropriate for school purposes, and to be equally distributed among all the scholastic inhabitants of the State, the interest accruing on the school fund and the income derived from taxation for school purposes; and shall, from time to time, as may be necessary, invest the principal of the school fund in the bonds of the State of Texas or of the United States; and all school moneys invested in the bonds of the State of Texas are hereby declared NOT to be of doubtful validity." (emphasis in original)

*Appendix J. Amendments, Opinions, and Voting Results During Debate  
over the Select Committee's Proposal for an "Efficient System of  
Public Free Schools"*

*J-1. Voting Results on Reagan's Poll Tax Reduction*

YEAS—Abner, Allison, Arnim, Barnett, Blake, Blassingame, Brown, Bruce, Cardis, Chambers, Cooke of San Saba, Cooley, Darnell, Fleming, Flournoy, German, Graves, Henry of Limestone, Holt, Johnson of Collin, Johnson of Franklin, Killough, Lynch, McKinney of Denton, McLean, Mills, Murphy, Nugent, Ramey, Reagan, Robertson of Bell, Robison of Fayette, Russell of Harrison, Russell of Wood, Sansom, Scott, Spikes, Stockdale, Weaver, West, Whitehead, Whitfield, Wright—43.

NAYS—Abernathy, Ballinger, Brady, Burleson, Cline, Cook of Gonzales, Crawford, Davis of Brazos, Davis of Wharton, DeMorse, Dillard, Dohoney, Ferris, Ford, Gaither, Haynes, Henry of Smith, Kilgore, King, Lacy, Lockett, Martin of Navarro, McKinney of Walker, Micthell, Moore, Morris, Norvell, Nunn, Pauli, Rentfro, Reynolds, Ross, Smith, Stayton, Wade, Waelder—36.

*J-2. West Supporting "Public Free Schools"*

Mr. President, none of the measures before this Convention suit me, and I suppose it would be impossible for every one of us to be suited on this subject, as there is an infinite variety of opinion as to what should be done. I belong in that class who believe firmly in the immense benefits to be derived from the general diffusion of knowledge throughout the country. I am one of those who believe that under every government, under every republican government at least, under every government where the people control, that there should be the widest diffusion of intelligence among the people. I am not, however, one of those who believe in taxing the people beyond all limit for this purpose. We have not sufficient means to bear at present very heavy taxation for this object. I would not therefore favor a proposition such as was offered by the member from Harris (Mr. Cline), which would create at once an enormous revenue to be expended 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—not able to stand it.

I propose, however, to put nothing in the Constitution which will forever tie the hands of the Legislature, so that when the time does come—if it ever does come—when we shall have ample means from the direct school funds and other sources, and coming in annually from general taxation, to establish a good system of free primary schools for the people of Texas, there will be nothing to prevent their establishment here. We all agree with my friend from Titus (Mr. McLean) that at present it is impossible to establish schools all over the State, because of our sparse and scattered settlements, but there are, nevertheless, many thickly settled parts of the State, where it can be done now, and my idea is to leave it with the Legislature, so that a system can be put in operation whenever it may be needed and can be usefully done.

That being my view of the case, I have serious objections to the article now under consideration. I may have to swallow it at last in default of something better, and I should not be at all surprised if I do, but I shall make a wry face when I do so. I have also serious objections to the first clause of the article. It says: "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."

This is too general in its terms. It sounds very well indeed, and it doubtless announces a correct principle, but it is entirely too vague and indefinite to answer any practical purpose. "It shall be the *duty of the Legislature to establish and maintain* a system of public free schools," but it doesn't say when or for how many months. It may be that one, two, five, ten, twenty, forty, or fifty years may elapse before anything is done. It shall be the duty of the Legislature to establish free schools whenever the Legislature, in its wisdom, sees fit to do so. This is much too indefinite for me, unless we intend to depart from the faith of the fathers and say, "we do not intend to make it incumbent on the Legislature to establish free schools at all." This clause is too general. Whatever we do, let us do it boldly like men. I believe the gentleman from Galveston (Mr. Flournoy) frankly and truly stated the object of a large part of this Convention—I hope not of a majority of it—when in his speech he said that this "general clause was put there because it was vague and indefinite, the object being to postpone action in the hope of creating in time a public sentiment in the State hostile to public education, and thus at last destroy the whole system." It is hoped in time to imbue the people with the sentiment of my esteemed friends from Galveston and Calhoun (Mr. Stockdale) that it is unwise, immoral, and almost a crime in the Government to advance further in *the matter of public free schools*. I utterly deny it. Such an indefinite and vague clause will not satisfy the people, for they want something substantial. Don't put them off with generalities. If they ask for bread don't give them a stone; if they ask for fish don't give them a serpent; either let there be a system of *public free schools* established, or provided for at the first session of the Legislature, or if not at the second, or at least at the third session, or abandon it altogether. But do not leave it indefinite; do not dodge or avoid the issue.

I am opposed to the report of the select committee for several other reasons. Amongst them I disapprove of the eighth clause. I was one of the minority who voted to retain the office of Superintendent of Public Instruction in the Constitution, for I believe that if we do intend to establish any system at all it is essential to leave the Legislature with the power at the proper time to place a suitable head over that department; but having first determined it shall not be kept up, you next provide for a Board of Education, consisting of the Governor, the Comptroller, and the Secretary of State, who have other important duties to perform, and cannot attend to this subject. I pronounce it a farce to say that these or any other State officers,

burdened with other duties, shall, in connection with those other duties, attend to it. It is in effect to say that the duties are so unimportant that the Governor, Comptroller, and Secretary of State, can, in their idle moments—after dinner, while smoking their cigars, perhaps when the other business of their offices is finished—can attend to this, one of the highest and most important duties in the State of Texas. We had better march up to this question like men and accept the proposition of my colleague from Williamson (Mr. Sansom), and have no schools at all, but the people don't want to be trifled with at this hour on this or any other question. Let it be said that there shall or shall not be schools.

We have made great promises to the people, and when we leave these halls they will look at our work to see if we have redeemed our high sounding pledges. They may find that after all our stump speeches and our declaration here, that we have been just as faithless in carrying out our promises to them as the witches were to Macbeth. They promised him many things, and in one sense, performed their promises, but he finally said to them, in the end, "be these juggling friends no more believed, who palter in a double sense and keep the word of promise to the ear, but break it to the hope." The people may say the same of us. *Here we are asserting in good set phrase that we are in favor of free public schools*, and a general diffusion of knowledge, and yet refuse to provide a tax for it, and refuse to put the system in operation. Do you believe that you can practice successfully such an imposition on the people of Texas? Leave it out altogether. Be silent on the subject; or if you will not do that, then put in the Constitution something that will work, for I do not see how this article can work. Say at least, that at some period, however distant it may be in the lives of men now living, we can hope that the State will take upon itself to assist in the education of her citizens.

I desire to say one or two things more. I agree with my friend from Titus (Mr. McLean) that life is too short, and the age progressed too far for any man now to get up in an enlightened assembly and say that public education is not a public duty. Yet, to my astonishment, he had hardly taken his seat when my friend from Galveston, Mr. Flournoy, and the honorable gentleman from Calhoun, assailed his position, as if he had announced some monstrous heresy, and proceeded to argue that is not part of the duty of the State whatever to assist in the education of her children. I desire on that point to call the attention of this body to one or two authorities, not because I believe them important, but because of their particular application. One authority I propose to read from is Adam Smith; the other is Mr. Say. They are constantly being cited as authority here. And for the especial benefit of my friend from Williamson, Mr. Sansom, I will quote from the late Dr. Thornwell, one of the presidents of the South Carolina College, who stood during his life as the head of the Presbyterian Church in the South, a church that is in its organization republican, and relies for the spread of its doctrines upon the intelligence of the people.

I call the attention of the House to these quotations; they are brief and

remarkable, not only the language is remarkable, but they are the opinions of very remarkable men. . . .

These, sir, and hundreds more, might be cited to show the importance of public education. So much importance did the fathers of the Republic of Texas attach to the care of public education that it was one of their chief complaints against Mexico that she had failed to provide a system of public education, and for the diffusion of knowledge. Saying in their Declaration of Independence: "It is an axiom in political science that unless the people are enlightened it is idle to expect the continuance of civil liberty or the capacity for self-government." The fathers believed the refusal of Mexico to establish a system of public education was a sufficient cause for war, and they set this complaint side by side with the denial of the right of trial by jury, and everywhere in the State of Texas the principles of that Declaration of Independence have been honored and respected. I mean no disrespect to the committee in the remarks I have made about their report. I have the highest respect for them individually and collectively, and I believe they have done honest and good work—the best that could have been done under the circumstances—but their work can be improved materially.

I have one remark to make regarding Section 3, and desire to say why I believe the substitute of my friend from Franklin should be adopted. The report of the special committee says in this section "that there shall be set apart annually *not more* than one-fourth of the general revenue of the State." Under that section this tax may be as low as one-fiftieth or one-hundredth, or as high as one fourth. I can conceive of a time—and it may seem amusing to some of the members here—when all our places will be filled in this hall with intelligent men demanding public education, and they may demand that all taxes be made higher so the one-fourth may be larger. Let it be increased or diminished to such an extent as the people deem necessary, and let the desire to have such taxes come from the people, and be regulated by the people.

Just one single word more. There is a way of regaining the confidence of the people; and of placing before them an organic law they will adopt. It is by fairly and bravely marching up to this and other questions, and responding to the public sentiment. Let us draft a Constitution which will have emblazoned on its front page, "low taxes and economical administration of the Government, free lands, free schools, free suffrage, and free speech," and you will make a Constitution that will be adopted; but if you propose to drive off immigrants, cry down immigration, and shut the doors against public education, take my word for it, the people will tell you that they will have none of your work, and rightfully too. They will reject your Constitution, and turn their backs upon you and your work.

### *J-3. Reagan's Justification for His Amendment*

JUDGE REAGAN said he would, in his remarks, represent his constituency, and not his own views, which he did not propose to discuss at all. He said he would support the report of the committee; believing that the people

were too poor to bear a greater tax than one-tenth of 1 per cent. That had been the sentiment as expressed during the canvass in his district.

MR. MOORE asked why Judge Reagan had proposed to reduce the poll tax from \$2 to \$1, which would reduce the school fund to the extent of \$200,000.

JUDGE REAGAN replied because it was an unusual tax, and the people were opposed to unusual taxes.

JUDGE BALLINGER said that in Mississippi the poll tax was as high as \$3 and that the citizens of Nevada paid a poll tax of \$2.

JUDGE REAGAN replied that there were gold and silver mines in that state, and the people had not had their property destroyed and confiscated as the Texas people had.

MR. McCormick said he wanted to know what property had been destroyed and confiscated in Texas.

JUDGE REAGAN said he referred to the loss of negro property, and to the general suffering occasioned by the Civil War.

#### *J-4. McCormick Supporting Free Public Education*

He might tell his people the truth that he and they were too poor to favor the establishment of a system of free schools, but what could he say when they asked him if the gentleman from Anderson, and his people were too poor? Were they too poor in point of fact? Was the State of Texas too poor to educate her children in morals and a common school education? He argued that if that were so, there should be a provision in the Bill of Rights that immigration should never be prohibited from the State. Texas was richer than when she went into the war, and if the gentleman from Anderson and others would only keep a stiff upper lip and stand like men and give the people a good system of education they would make Texas an empire—not in government, but in wealth and intelligence, such as their children would be glad to look back to with pride, and say that their fathers inhabited the land. Should it go out to the people of Europe and the old states that they could not afford 25 cents on the \$100 for free schools? He could tell them that it would do more to injure the prosperity of Texas than would all besides. It would injure them more than the defeat of the Constitution, which he considered would be one of the greatest calamities of all.

#### *J-5. Johnson Substitute for Public Free Schools*

JOHNSON of Franklin, spoke further on schools as follows:

Mr. President, we have now come to the most important yet the most difficult question that has or will come before us. The value of public free schools is no longer an unsettled question, as the right to tax the citizen for educating the children of the State is no longer an open question. The one has been settled by the experience of the civilized world; the other was closed by a clause in the Declaration of Texas Independence. But whilst this is all true yet the object of the free school was so perverted for a term of years, and the taxes to support them have been so excessively burdensome, that the



public mind has become, in some places, prejudiced against this system of education, and some good citizens made to question the propriety, yea, even the right, to tax the property of the State for this purpose. The tax created by the organic law of 1869 would have been oppressive in any probable condition of the country, but this, coupled as it has been for the last few years with the universal shrinking of all values, especially that of our principal staple commodities, has made a burden too heavy to be borne, even though attended with the most beneficent results; but unfortunately there have been no such following, for after a quiet submission to these hard exactions the people, at one period at least, were forced to the bitter humiliation of seeing their hard earnings squandered by the mismanagement of incompetent, or what may be worse, dishonest officials. With this condition of things, and this state of the public mind, what is the wise course to be pursued? The gentleman from Harrison, Mr. Russell, and some others, would persuade us to adopt and perpetuate the provision of 1869, promising that time will develop the most happy result, but we cannot forget that its operation has been so oppressive as in many instances to defeat its own ends, the parents not being able to spare the children for the school room, being compelled to keep them in the field to meet the enormous tax levied for this purpose. Shall we not prove equal to the great work of making the follies and errors of the past minister to the wisdom of the present in giving to the country some provision for free schools that will not be and continue to be acceptable to the people? Further, this would indicate in us a want of the knowledge of adaptation, a culpable ignorance of all the surroundings. For, after all, the greatest evil resultant from the education article of 1869 was not the hardships and inconveniences imposed upon the citizens without commensurate returns, but in the alienation of the public mind from the whole system of public free schools; it is easy to outlive its past evil, but how hard to outlive its future evil.

Sir, in offering this substitute for the third section of the article of education, I hoped to meet the wants of the country, to bring together the discordant materials here, preserve a great principle, and secure the approbation of our various constituents for being taken literally from the Constitution of 1845; with a small addition it will go before the country with all the prestige of that deservedly popular instrument. It simply provides, for setting apart one-tenth of the annual revenue derivable from taxation with an additional \$1 poll tax levied on all male inhabitants between the ages of 21 and 60 years, for educational purposes. The object of including this last sum is not so much the amount of money it brings, but the higher object of identifying every non-property holder with the school system, and as far as possible to give every child a home feeling in the school room. Now, sir, I confess this looks like a poor apology for a great system of free schools, yet it will bring a sum sufficient to meet the pressing necessities of the present, keep the whole thing in operation, while our institutions, laws, and customs are being gradually conformed to it, until all our resources can be husbanded and made available in building up the grandest system of public free schools the world

ever saw, all left to future legislation to develop and perfect as future wisdom may dictate.

The objection to the original section is, that it sets aside no specific sum; it does not positively commit the State to the principle of taxation for education purposes, but leaves it optional with the Legislature to do or not to do. I would not say as some have said that this section is a fraud, for I think it not improbable that the first Legislature would make it conform to the substitute; but I will say that the speeches of some of its friends show plainly that the hope of its being operative secures their support, its chief virtue to them being its non-committal character. Sir, we must not forget that the right and duty of the Government to make some provision for the education of the children has ever been the settled policy of Texas. It was asserted as a principle in the Declaration of Independence; it was reasserted in the organic law by the patriots of 1845, and is it not more imperative now to vindicate that principle at a time when the gross abuses of the preceding administration have estranged the hearts of the people and made even the advantages of a free school a debatable question, when four years' incubation of corrupt officials on the school fraud has hatched the foul, pernicious dogma, 'no right to tax property for educating the children. . . .

#### *J-6. Whitfield Opposing the Select Committee's Proposal*

General Whitfield said he believed that it was the duty of the State to assist in the education of every poor child in the State, but that to do so would cost a vast amount of money. He thought the gentleman dealt in generalities too much. He said no one would go further in aid to education than he. He would go to any extent they were able to bear. The original majority report would be offered as a substitute. With all due respect to the special committee, he had to say that their report was but a return to the old system of education which had proven to be such a failure. Let them do something. If they could not make it better, let them make it worse. It was useless to talk about keeping up the schools four months in the year, when under the existing system they could not be kept up for more than one month. He was speaking for himself and not for the committee of which he was chairman. He preferred to refer the question to the Legislature entirely, believing that coming fresh from the people it would be better able to determine what should be done. To keep up the schools four months in the year would require a tax of \$1 on the \$100. Unless they could come to that it was useless to talk about an adequate system of public free schools. It would require \$2,100,000 to keep them running one year. Taking the total available school fund of \$150,000, and adding thereto one-fourth of 1 per cent would make a grand total of \$850,000, leaving a deficit of \$1,300,000 to be raised to bring it up to the sum required. He did not think that his constituency should be prevented from taxing itself to bring up this deficiency if it desired to do so, and he would work for as high a school tax as any man in the country. He wanted it left to the Legislature. He wanted gentlemen not to generalize on the subject, but to come up squarely and toe the mark. At

the proper time he said he would move to refer the entire matter to the Legislature.

*J-7. Whitfield's First Amendment*

Section 1. A general diffusion of knowledge being essential to the preservation of liberties of the people, it shall be the duty of the Legislature of this State to make suitable provisions for the support and maintenance of public schools. [no change from majority report].

Sec. 2. All funds, lands and other property heretofore set apart and appropriated, or that may hereafter be set apart and appropriated for the support of public schools, all the alternate sections of land reserved by the State out of grants heretofore made or that may hereafter be made to railroads or other corporations of any nature whatever, one-half of the public domain of the State, and all sums of money that may come to the State from the sale of any portion of the same, shall constitute a perpetual public school fund.

Sec. 3. And there shall be set apart, annually, not more than one-tenth of the annual revenue derivable from taxation for general purposes, and such poll tax as may be by law levied under the provisions of this constitution, which shall also constitute a perpetual public school fund.

Sec. 4. The lands herein set apart to the *public school fund* [changed from perpetual school fund in earlier majority report] shall be sold under such regulation, at such time, and upon such terms as may be prescribed by law, and the Legislature shall not have power to grant any relief to the purchasers thereof. The Comptroller shall invest the proceeds of such sale, and of those heretofore made, in the bonds of this State, if the same can be obtained, otherwise in United States bonds, and the United States bonds now belonging to said fund shall likewise be invested in State bonds, if the same can be obtained.

Sec. 5. The principal of all bonds or other funds, and the principal arising from the sales of lands herein before set apart to said school fund, shall be the permanent school fund, and all the interest derivable therefrom, and the taxes herein provided shall be the available school fund, which shall be applied annually to the support of public schools, and no law shall ever be made appropriating any part of the permanent or available school fund to any other purpose whatever, except as hereinafter provided. [no change].

Sec. 6. All public lands which have been heretofore, or may be hereafter granted to the various counties of this State for public schools, are of right the property of said counties respectively to which they are granted and entitled thereto, is hereby vested in said counties, subject to the trust created in the grant. [no change].

Sec. 7. So soon as the available school fund may be sufficient, the Legislature shall establish and maintain "*Free Public Schools*" throughout the State for a period of not less than four months in each year, and may authorize any county to establish public schools in such county whenever the available fund apportioned to such county, as herein provided, together with the fund realized from the sale of the lands of the county, shall be sufficient to

maintain public schools in such county for not less than four months in each year. But until such time the available school fund hereinbefore provided shall be distributed to the several counties of the State, according to the scholastic population, the distribution to be made by the Governor, the Comptroller and the Treasurer, who, for this duty, shall constitute a "*School Board*." The fund shall be distributed to the counties and applied in aid of private schools in such mode as the Legislature may provide. [no change].

*J-8. Voting Results of Johnson's Substitute for Section 3*

YEAS—Ballinger, Brown, Cooley, Crawford, Darnell, Davis of Brazos, Dillard, Dohoney, Ferris, Fleming, Henry of Limestone, Johnson of Franklin, Kilgore, Killough, Lacy, Martin of Navarro, McCormick, McKinney of Walker, Mitchell, Moore, Nunn, Ross, Smith, Stayton, Waelder, West, Whitfield—27.

NAYS—Abernathy, Abner, Allison, Arnim, Barnett, Blassingame, Brady, Bruce, Burleson, Chambers, Cook of Gonzales, Cooke of San Saba, Davis of Wharton, DeMorse, Flournoy, Ford, Gaither, German, Graves, Haynes, Holt, Johnson of Collin, Lockett, Martin of Hunt, McCabe, McKinney of Denton, McLean, Morris, Murphy, Norvell, Nugent, Pauli, Ramey, Reagan, Rentfro, Reynolds, Robertson of Bell, Robison of Fayette, Russell of Harrison, Russell of Wood, Sansom, Scott, Spikes, Stockdale, Wade, Whitehead, Wright—47.

*J-9. Whitfield's Second Amendment*

Section 1. A general diffusion of knowledge being essential to the preservation of liberties of the people, it shall be the duty of the Legislature of this State to make suitable provisions for the support and maintenance of public schools. [no change].

Sec. 2. All funds, lands and other property heretofore set apart and appropriated, or that may hereafter be set apart and appropriated for the support of public schools, all the alternate sections of land reserved by the State out of grants heretofore made or that may hereafter be made to railroads or other corporations of any nature whatever, one-half of the public domain of the State, and all sums of money that may come to the State from the sale of any portion of the same, shall constitute a perpetual public school fund. [no change].

Sec. 3. And there shall be set apart, annually, not more than one-tenth of the annual revenue derivable from taxation for general purposes, and such poll-tax as may be by law levied under the provisions of this constitution, which shall also constitute a part of the *public school fund*. [changed from perpetual school fund].

Sec. 4. The lands herein set apart to the public school fund shall be sold under such regulation, at such time and upon such terms as may be prescribed by law, and the Legislature shall not have power to grant any relief to the purchasers thereof. The Comptroller shall invest the proceeds of such sale, and of those heretofore made, in the bonds of this State, if the same can

be obtained, otherwise in United States bonds, and the United States bonds now belonging to said fund shall likewise be invested in State bonds, if the same can be obtained. [no change].

Sec. 5. The principal of all bonds or other funds, and the principal arising from the sales of lands hereinbefore set apart to said school fund, shall be the permanent school fund, and all the interest derivable therefrom, and the taxes herein provided shall be the available school fund, which shall be applied annually to the support of public schools, and no law shall ever be made appropriating any part of the permanent or available school fund to any other purpose whatever, except as hereinafter provided. [no change].

Sec. 6. All public lands which have been heretofore, or may be hereafter granted to the various counties of this State for public schools, are of right the property of said counties respectively to which they are granted and entitled hereto, is hereby vested in said counties, subject to the trust created in the grant. [no change].

Sec. 7. The Legislature, as soon as practicable, shall establish public free schools throughout the State, and shall provide by law, that the available public free school fund herein provided, shall be distributed among all the scholastic population of the State. But, until otherwise provided, the available school fund hereinbefore provided shall be distributed to the several counties of the State, according to the scholastic population—the distribution to be made by the Governor, the Comptroller, and the Treasurer, who, for this duty shall constitute a "School Board." The fund shall be distributed to the counties and applied in aid of common schools in such mode as the Legislature may provide. [changed from free public schools, dropped four months requirement, in aid of common schools—not private schools].

*J-10. Voting Results of Russell's Amendment of Whitfield's Second Proposal*

YEAS—Abner, Brady, Cline, Davis of Wharton, Erhard, Lockett, McCormick, Mills, Mitchell, Morris, Pauli, Rentfro, Reynolds, Russell of Harrison—14

NAYS—Abernathy, Allison, Arnim, Ballinger, Barnett, Blassingame, Brown, Bruce, Burleson, Chambers, Cook of Gonzales, Cooke of San Saba, Darnell, Davis of Brazos, DeMorse, Dillard, Dohoney, Ferris, Fleming, Flournoy, Gaither, German, Graves, Haynes, Henry of Limestone, Henry of Smith, Holt, Johnson of Collin, Johnson of Franklin, Kilgore, Killough, Lacy, Martin of Hunt, Martin of Navarro, McCabe, McKinney of Denton, McKinney of Walker, McLean, Moore, Norvell, Nugent, Nunn, Ramey, Reagan, Robertson of Bell, Robison of Fayette, Ross, Russell of Wood, Sansom, Scott, Spikes, Stayton, Stockdale, Wade, West, Whitehead, Whitfield, Wright—59.

*J-11. Voting Results of Whitfield's General Unspecified Tax*

YEAS—Abernathy, Allison, Arnim, Barnett, Blake, Blassingame, Bruce, Cardis, Chambers, Cook of Gonzales, Cooke of San Saba, Darnell,

Flournoy, Gaither, German, Graves, Henry of Limestone, Holt, Johnson of Collin, Johnson of Franklin, Killough, Lacy, Lynch, Martin of Hunt, McKinney of Denton, Nugent, Reagan, Robertson of Bell, Robison of Fayette, Russell of Wood, Sansom, Scott, Spikes, Whitehead, Whitfield, Wright—36.

NAYS—Abner, Ballinger, Brady, Burleson, Cline, Cooley, Crawford, Davis of Brazos, Davis of Wharton, DeMorse, Dohoney, Ferris, Fleming, Ford, Haynes, Henry of Smith, Lockett, Martin of Navarro, McCabe, McCormick, McKinney of Walker, McLean, Mills, Mitchell, Moore, Murphy, Norvell, Nunn, Pauli, Ramey, Rentfro, Reynolds, Ross, Russell of Harrison, Smith, Stayton, Wade, Waelder, West—40.

#### *J-12. Waelder's Tax Bill Amendment*

Mr. Waelder spoke to his amendment, and denied that Texans were in that abject poverty which would send them out to the world as beggars. It was not the present system, he said, that the people objected to, but the way it had been administered under a former administration. He had never heard any objection to the apportionment of one-fourth of 1 per cent, but the people had objected to the 1 per cent tax to build school houses which were never constructed, and the money for which went no one knew where. If the people wanted public schools why should the Convention hesitate to give them assistance as was within easy reach, and such as the people were willing to contribute to? One-tenth of the revenues would be \$300,000; a poll tax of \$1.50 would be \$300,000; there would come from the bonds of the school fund, \$150,000; or a total of \$750,000, which would keep up the public free schools four months in the year, according to the scholastic population, at \$5 a head for that period.

The first form of government he had reference to was the family, established by nature and, except so far as the state had the power to aid it, it had no authority to interfere in management of the family. Apply that principle to the subject of education, and he asserted that while education was a question of which the state must take cognizance, its duties originated in the necessity of the case and its powers were measured by its duties. Its duties were to give an opportunity for an education to every child whose parents were unable to do it, and when this was done the state had performed every duty and accomplished all the functions rightfully possessed by it.

The State of Texas might, as others had done before and continued to do, educate her indigent children out of the fund it had created for school purposes; but he denied that they could go further than that and educate all the children in the State. This being the logic of his argument, he deemed it fortunate that they had not had the means to establish an iron-bound system of education that would educate all the children of the State in one mold and make a unit of the people. He neither wanted to allow his children—if he had them—to be taught to despise the views of Confederate history, nor to teach the children of other people to admire them. He thought it was fortunate for Texas that she did not have the means to establish such a system as the Prussian. He would prefer to take the boy off the prairies with the moral

education his mother would instill, for he was just as likely to make a good man and citizen as one educated under the boasted system of Prussia or Massachusetts. Massachusetts had a reputation for every vice repudiated by every principle of the decalogue, and, as was shown by statistics, there was less regard for those things held sacred by husbands and wives, who should be the parents of children, than anywhere else on the continent. It might be said that this was not the result of education. Perhaps not, but it was contemporaneous and must be remembered in connection with it when Massachusetts was held up for admiration as a model state. As regarded Virginia's support of free schools, it was the act of Judge Underwood, whose name stunk in the nostrils of the people, and not the acts of the people themselves, which established public education in that state.

*J-13. West's Response to Waelder's Tax Bill Amendment*

Either let them have an apology for free schools or something tangible. They did not want something that was neither pig nor puppy; but if it was fish, flesh, or fowl, let them say so in the Constitution, so the people might know what they really meant. He did propose to put his hand in the rich man's pocket to educate the poor man's children, but what sort of a government was it that required the services of the poor man to protect the rich man's property from invasion, but formed a gulf between them when it came to asking to contribute to the support of free schools, that his children might be put on the same level as his own? He wanted no uncertain sound on that question, and hoped the Convention would let it be one thing or the other.

*J-14. Brady's Support for Waelder's Tax Bill Amendment*

Mr. President, so far I have been content to sit here and cast a silent vote, but on this question I cannot obtain my own consent to longer remain silent, and especially since the declarations of gentlemen on this floor with reference to a system of education are so astounding. It has been asserted here—and I believe by men who were honestly convinced of the truth of the statements they made—that the public free school system is immoral in its tendency, and two of the honorable delegates to this assembly have cited Massachusetts, which has the most perfect system of free schools in this country, and have attempted to prove it by her criminal statistics, since that declaration was made—and I was so astonished at it that I could scarcely credit my ears when I listened to it—I have attempted to collect the criminal statistics of Massachusetts, to analyze them and to find where the crime comes from, for all of which gentlemen seem to hold the free schools responsible. . . . [He cites crime and education statistics.]

As there can be but two systems in education in existence, the one where the state assumes control of the education of its citizens, and the other where education is left to private enterprise, I will compare the statistics of Massachusetts in regard to illiteracy. . . .

Go to any state where the public free school system exists and compare the native white illiteracy of that state with that of any Southern state where

the private system has always prevailed, and you will find the same proportion in favor of the free school system. You will find that wherever the private system has predominated there is the same vast army of ignorance to be overcome, while in those where the public free school system is in force the proportion of illiterates is so small that it may almost be overlooked. . . .

I will reply to the gentlemen from Gregg that I stated that this was the result of the private school system which has been in existence not only in Texas but in every state south of Mason and Dixon line, and that it is the system of private schools I am attacking. I hold that system responsible and I make this proposition since I find that the United States census is in the House, that you may take any state where the public free schools have been in force and compare it with any state which adopted the private system and you will find the same proportion in favor of free schools. Take for instance Ohio and South Carolina, Indiana and Georgia, and you will find the statistics in favor of the states where they have free schools. . . .

It has been argued by honorable gentlemen—the gentleman from Titus, Mr. McLean, I believe was the first—that Texas is too sparsely settled and the people too poor to keep up a system of public free schools. In answer to that argument, I propose to submit a few statistics from three states, Indiana, Iowa, and Kansas.

Indiana has an area of about 34,000 square miles. In 1820 her population was 147,178, or between four and five to the square mile. In 1830 her population was 343,531, or between nine and ten to the square mile. In 1824 her *public free school* system went into operation and has never ceased from that day to this. Iowa has an area of 55,445 square miles. In 1840 her population was 43,112, or less than one to the square mile. In 1850 her population was 192,214, or between four and five to the square mile. Her *public free school* system went into operation in 1846.

Kansas has an area of 81,318 square miles. In 1860 her population was 107,206, or between one and two to the square mile. Her *public free school* system went into operation in 1859.

Now Texas has an area of 274,356 square miles, but the Commissioner of the General Land Office says there are over 107,000 square miles of our lands unlocated and unpatented. Deducting these lands, we have an area of 164,000 square miles left. Our population in 1870 was over 800,000, which would make our average between four and five to the square mile; while our population today is about 1,200,000 which would make our density of population between seven and eight to the square mile, and either is equal or superior to the densities of these three states I have mentioned at the time they put their systems into operation. It is objected to that the people of Texas cannot bear taxation, because they are an agricultural people. What in God's name, I ask, are the people of Indiana, Iowa, and Kansas, letting alone what they were in 1824, 1846, and 1859? But it is said that our population on the frontier is so sparse. Then, I say, make your system so flexible that it will work equally well in Galveston, Houston, and Comanche, or any other frontier county. It is easy to do this because it has been done in every



state north of Mason and Dixon's line that has been admitted into the Union.

The gentlemen say further, in reference to a system of public free schools, that a few years ago we had one and it taxed our people to death to sustain it. I admit that they were taxed too much for the benefits they derived from it, but I tell you, gentlemen of the Convention, that it was the cheapest system that has ever been in operation in this State, and that it was cheaper and better than the system of today. Go to the report of the Superintendent of Public Instruction and you will find that in the year ending August 31, 1872, the cost for the year for each pupil enrolled was \$9.23, while the cost for the year for each pupil in regular attendance was \$14.30, or \$1.43 per month for each pupil in regular daily attendance. Well, the mistake of that system was in attempting to keep up schools in every neighborhood throughout the State for a period of ten months. This deprived that system of flexibility. If gentlemen will turn to reports of different superintendents of education they will find that the average school term varies in each state, the highest being Maryland, with nine months and two days and the lowest Tennessee, with one month, Massachusetts having an average term of five months and six days; this shows that her system is elastic, adapting itself equally well to the crowded cities and the most thinly settled rural districts.

Another objection gentlemen make to a public free school system is that it resembles the Prussian system.

I am compelled to say here that I have been surprised to find that no one who has attacked the Prussian system had any real knowledge of that system or of its workings, but seemed to think it some huge machine intended to crush out the liberties of the people. It is true that it is a state system, that the state has full control of it. General Hazen, in his work entitled "The School and the Army in Germany and France," says: "Here (in the public schools) are taught the elementary branches including reading, writing, and the ground rules of arithmetic, and the history and geography of Germany. Religious instruction is also given."

This does away with the morality objection to that system.

Mr. Kay, an English writer, says: 'There is nothing more untrue than that the central authority has all to do with the schools, that there is no local liberty of action, and that there is no union between church and school. The generally supposed oppression of the government in school matters has not the slightest foundation in fact. It is this simple parochial system which has been abused and vilified in every possible way. It has been called tyrannical, illiberal, irreligious, and has been stigmatized by every opprobrious epithet that ignorance and bigotry could invent. But the truth in the end will conquer, and Germany will one day be lauded by all Europe as the inventor of the system, securing in the best possible manner her education, guided by the best intelligence, fostered by local activity, local sympathy and the cordial sympathy of the Christian religion. . .

Another objection that has been made by the gentleman from Galveston,

Mr. Flournoy, and by the gentleman from Williamson, Mr. Sansom, is that the system of public free schools will do away with private schools.

*Public Free Schools no Injury to Private Schools*

I deny the proposition that public free schools are any injury to private schools. The history of every state where the public free schools have been established disproves the assertion. In these states the primary schools are free to all, as they should be, but the higher schools, colleges, and universities, are controlled by private parties. It would be better, I admit, if they were managed by the state, but this is not the case. Now, these institutions, so far from being injured by the free schools, receive fresh accessions from them every year. Indeed, it may be truthfully said that these institutions of higher education are fed and supported almost wholly by the free schools. And now when a great war is going on in other states over the public free schools, we appear to be of the same opinion as the Governor of Virginia in 1670. In that year the Royal Colonial Commissioners addressed to the Governors of the various English colonies a series of questions, among which was one concerning education in the colonies. The Governor of Connecticut answered that there was one-fourth of the annual revenue of the colony set aside for the support of free schools. Thus, over two hundred years ago, Connecticut laid the foundation of that admirable system of free education, which has had such a happy influence over her citizens that she has been called from time immemorial the "land of steady habits." The reply of the Governor of Virginia was: "I thank God there is neither free schools nor printing here; I hope there will be neither these hundred of years." And his hope was well nigh fulfilled, for over two hundred years passed by before a free school existed anywhere within the borders of the commonwealth. And if this Convention does it work on this matter as well as it seems to be trying to do, it will be two hundred years before Texas will have free schools. . . .

Mr. McCormick: "May I ask the gentleman where he hails from?"

Mr. Brady: "I hail from Indiana and am like the gentleman from Colorado in this, that I am not ashamed of my birthplace. I know that it is a common boast that nearly all of the great men come from south of the Mason and Dixon line. I know and admit the fact frankly and gladly that the South has, in spite of her private system of education, produced some of the most eminent statesmen, soldiers, and divines, that this or any other country can boast of, but there she stops. Never has she produced a great poet or historian, and only one man of science. Outside of him and the other walks of life I have mentioned, she has never produced a single, solitary great man. Why is this? It is the fault of the system of education adopted by the South. The public free school system of the North has produced as great statesman, as illustrious soldiers, as eminent divines as the South, and in addition to all these, all the poets, all the historians, and all the men of science, save one, who have a national or European reputation; and we are told by writers on mental science and philosophy that the commonest forms in which the human mind develops itself are of war and statesmanship, of politics, or whatever name you chose to call it, and that the higher branches of mental

labor are those branches in which the private school system has utterly failed to produce one worthy of the name."

Mr. McCormick: "Was that the reason why the gentleman himself went into politics?"

Mr. Brady: "Certainly it was. The same reason brought me here that brought the gentleman from Colorado—because I got votes enough, and I don't know any other good reason why either one of us is here."

Mr. Graves moved to close the debate on the pending question, which carried.

Mr. Waelder's amendment was lost by a vote of 33 to 43.

General Whitfield's substitute was lost by a vote of 34 to 42.

#### *J-15. Voting Results of Waelder's Tax Bill Amendment*

YEAS—Abner, Ballinger, Brady, Cline, Crawford, Davis of Brazos, Davis of Wharton, Dohoney, Erhard, Ferris, Fleming, Ford, Haynes, Henry of Smith, Lockett, Martin of Hunt, Martin of Navarro, McCabe, McCormick, Mills, Mitchell, Moore, Morris, Nunn, Pauli, Rentfro, Reynolds, Ross, Russell of Harrison, Smith, Wade, Waelder, West—33.

NAYS—Abernathy, Allison, Arnim, Barnett, Blake, Blassingame, Bruce, Burleson, Chambers, Cook of Gonzales, Cooke of San Saba, Darnell, DeMorse, Dillard, Flournoy, Gaither, German, Graves, Henry of Limestone, Holt, Johnson of Collin, Johnson of Franklin, Kilgore, Killough, Lacy, Lynch, McKinney of Denton, McLean, Murphy, Norvell, Nugent, Ramey, Reagan, Robertson of Bell, Robison of Fayette, Russell of Wood, Sansom, Scott, Spikes, Stayton, Stockdale, Whitehead, Whitfield—43.

#### *J-16. Voting Results of Whitfield's Plan*

YEAS—Abner, Ballinger, Brady, Cline, Cook of Gonzales, Crawford, Davis of Brazos, Dillard, Erhard, Fleming, Ford, Henry of Smith, Kilgore, Lockett, Martin of Hunt, Martin of Navarro, McCabe, McCormick, Mills, Mitchell, Moore, Morris, Norvell, Pauli, Rentfro, Reynolds, Ross, Russell of Harrison, Smith, Wade, Waelder, West, Whitehead, Whitfield—34.

NAYS—Abernathy, Allison, Arnim, Barnett, Blake, Blassingame, Bruce, Burleson, Cardis, Chambers, Cooke of San Saba, Darnell, Davis of Wharton, DeMorse, Dohoney, Ferris, Flournoy, Gaither, German, Graves, Haynes, Henry of Limestone, Holt, Johnson of Collin, Johnson of Franklin, Killough, Lacy, Lynch, McLean, Murphy, Nugent, Nunn, Ramey, Reagan, Robertson of Bell, Robison of Fayette, Russell of Wood, Sansom, Scott, Spikes, Stayton, Stockdale—42.

#### *J-17. The Ferris Amendment*

Sec. —. Until the available school fund, including the fund derivable from taxation, shall appear sufficient for the maintenance of a system of free schools, such fund may be used for the encouragement or support of public schools, which shall afford free tuition to pupils whose parents or guardians

are unable to pay for tuition, in such manner and under such regulations as may be provided by law.

Mr. Ferris also offered the following amendment to section 7:

"And in the counties where such schools exist, the available school fund to which each county is entitled shall be apportioned to such separate schools, according to the relative scholastic population of white and colored children in the county."

According to McKay: Mr. Ferris spoke briefly in favor of his amendment. He said he had been in Texas twenty-seven years. His children had been born in Texas, but had to be educated elsewhere. It had been promised him when he came to the State that education would be provided for the children, but twenty-seven years had elapsed and they were as far from obtaining education in Texas as ever before. It was true that they had private schools in the State, but he had never seen any worth a hill of beans.

Mr. Robertson asked if he had ever seen that of Bell County.

Mr. Ferris said he knew of that school by reputation, but if it was all that was claimed for it why did it not place its merits before the people and get the thousands of dollars annually expended out of the State? He was in favor of utilizing the fund they already had, which was ample to make a beginning. They had a school fund of \$2,587,756. The interest on that would be not less than \$150,000. One-tenth of the annual revenue would be \$75,000. A poll tax of \$1, as had been agreed to, would raise \$200,000. That would make a total sum of \$425,000 to be appropriated among the counties for public school purposes. On the basis of representation, Ellis County having one representative, her proportion would be \$4,733, which would give her twenty schools in the county, and other counties of larger population would get more in proportion. The seventh clause provided for separate schools for whites and blacks, and both would get their just proportion. He said he was arguing for public schools and not free schools. Those who could pay would still pay, and it would be only the children of those who could not pay who would receive education free. Such a plan would be the beginning, at least of a system, and it would do more for immigration than a bureau.

His objection to the report before them was that it proposed to establish "free" schools, which it was utterly impossible to accomplish at that time. The system he had suggested had prevailed in New York, Indiana, and other states. He thought it would work out in a very practical way in Texas. His people objected to unjust taxation, but not to reasonable taxation. He had letters in his pockets from his constituents, stating that they did want public schools, and that they were willing to stand as high taxation as one-sixth of 1 per cent. If the Convention would establish a public school system, whatever defects the Constitution might have, that would outweigh them all, and they would receive the plaudits of the people.

#### *J-18. Voting Results on the Select Committee's Main Education Article*

YEAS—Abernathy, Allison, Ballinger, Barnett, Blake, Brown, Burleson,

Chambers, Cline, Cook of Gonzales, Cooke of San Saba, Crawford, Davis of Brazos, Dillard, Dohoney, Erhard, Ferris, Fleming, Flourney, Gaither, German, Graves, Haynes, Henry of Limestone, Henry of Smith, Johnson of Collin, Johnson of Franklin, Killough, King, Lacy, Martin of Hunt, Martin of Navarro, McCormick, McKinney of Denton, McKinney of Walker, Moore, Norvell, Nugent, Nunn, Ramey, Reagan, Rentfro, Robertson of Bell, Robison of Fayette, Ross, Russell of Wood, Sansom, Scott, Smith, Spikes, Stewart, Waelder, West, Whitehead, Wright—55.

NAYS—Abner, Arnim, Blassingame, Brady, Bruce, Cardis, Cooley, Darnell, Davis of Wharton, DeMorse, Ford, Holt, Kilgore, Lockett, Lynch, McLean, Mills, Mitchell, Murphy, Pauli, Reynolds, Russell of Harrison, Stockdale, Wade, Whitfield—25.

*J-19. Reconsideration*

YEAS—Abernathy, Allison, Ballinger, Barnett, Blake, Brown, Burleson, Chambers, Cook of Gonzales, Cooke of San Saba, Davis of Brazos, Dillard, Ferris, Flourney, Gaither, German, Graves, Henry of Limestone, Johnson of Collin, Johnson of Franklin, Killough, Lacy, Martin of Hunt, Martin of Navarro, McCormick, McKinney of Denton, Moore, Norvell, Nugent, Nunn, Ramey, Reagan, Robertson of Bell, Robison of Fayette, Ross, Russell of Wood, Sansom, Scott, Spikes, Stewart, Whitehead, Wright—42.

NAYS—Abner, Arnim, Blassingame, Brady, Bruce, Cardis, Cline, Cooley, Crawford, Darnell, Davis of Wharton, DeMorse, Dohoney, Erhard, Fleming, Ford, Haynes, Holt, Kilgore, King, Lockett, Lynch, McKinney of Walker, McLean, Mills, Mitchell, Murphy, Pauli, Rentfro, Reynolds, Russell of Harrison, Smith, Stayton, Stockdale, Wade, Waelder, West, Whitfield—38.

*J-20. Voting Results of Scotts Proposed to Lay the First Amendment*

YEAS—Allison, Barnett, Blassingame, Brown, Bruce, Chambers, Cooke of San Saba, DeMorse, Dillard, Dohoney, Douglas, Ferris, Flourney, Gaither, German, Graves, Henry of Limestone, Holt, Kilgore, Killough, Lacy, Lynch, McKinney of Denton, McLean, Moore, Murphy, Martin of Navarro, Norvell, Nugent, Ramey, Reagan, Robertson of Bell, Robison of Fayette, Russell of Wood, Sansom, Scott, Sessions, Spikes, Stayton, Stockdale, Whitehead—41.

NAYS—Abner, Ballinger, Brady, Cline, Cooley, Crawford, Darnell, Davis of Brazos, Davis of Wharton, Flanagan, Fleming, Ford, Haynes, Johnson of Franklin, Lockett, McCormick, McKinney of Walker, Mills, Mitchell, Morris, Martin of Hunt, Nunn, Pauli, Rentfro, Reynolds, Ross, Smith, Stewart, Wade, Waelder, Whitfield—31.

*J-21. Voting Results Tabling Kilgore's Proposed Two Dollar Tax Limit*

YEAS—Abernathy, Allison, Barnett, Blassingame, Brown, Bruce, Chambers, Cooley, Darnell, Ferris, Fleming, Flourney, Gaither, German, Graves, Henry of Limestone, Holt, Johnson of Franklin, Killough, Lacy, Lynch,

McCormick, McKinney of Denton, McLean, Murphy, Martin of Navarro, Nugent, Ramey, Reagan, Robertson of Bell, Robison of Fayette, Ross, Russell of Wood, Sansom, Scott, Sessions, Spikes, Stockdale, Whitehead, Whitfield—40.

NAYS—Abner, Ballinger, Brady, Cline, Cooke of San Saba, Crawford, Davis of Brazos, Davis of Wharton, DeMorse, Dohoney, Douglas, Flanagan, Ford, Haynes, Kilgore, Lockett, McKinney of Walker, Mills, Mitchell, Moore, Morris, Martin of Hunt, Norvell, Nunn, Pauli, Rentfro, Reynolds, Smith, Stayton, Stewart, Wade, Waelder—32.

*J-22. Voting Results of the First Kilgore Amendment*

YEAS—Abernathy, Allison, Barnett, Blassingame, Brown, Bruce, Chambers, Cooke of San Saba, Darnell, Dillard, Dohoney, Douglas, Fleming, Flournoy, Gaither, German, Graves, Haynes, Henry of Limestone, Holt, Kilgore, Killough, Lacy, Lynch, McCormick, McKinney of Denton, McKinney of Walker, Murphy, Martin of Navarro, Martin of Hunt, Reagan, Robertson of Bell, Robison of Fayette, Ross, Russell of Wood, Sansom, Scott, Sessions, Spikes, Stewart, Stockdale, Whitehead, Whitfield—43.

NAYS—Ballinger, Brady, Cline, Cooley, Crawford, Davis of Brazos, Davis of Wharton, DeMorse, Ferris, Flanagan, Ford, Lockett, McLean, Mills, Mitchell, Moore, Morris, Norvell, Nugent, Nunn, Pauli, Ramey, Rentfro, Smith, Stayton, Wade, Waelder—27.

According to McKay, Mr. Kilgore moved to amend Section 5, after the word schools, as follows: 'But the Legislature may provide for the instruction of the scholastic population in private schools, not sectarian, in communities where public schools cannot be organized.'

Mr. Cline opposed the Kilgore amendment. He said it would virtually prevent the establishment of public schools in the State. The amendment was lost by a vote of 43 to 27.

*J-23. Voting Results on the Second Kilgore Amendment*

YEAS—Abernathy, Allison, Barnett, Blassingame, Brown, Bruce, Chambers, Cooke of San Saba, Dohoney, Douglas, Flournoy, Gaither, German, Graves, Haynes, Henry of Limestone, Holt, Kilgore, Killough, Lacy, Lynch, McKinney of Denton, McKinney of Walker, Murphy, Martin of Navarro, Martin of Hunt, Nugent, Reagan, Robertson of Bell, Robison of Fayette, Russell of Wood, Scott, Sessions, Spikes, Stayton, Stockdale, Whitehead—37.

NAYS—Abner, Ballinger, Brady, Cline, Cooley, Crawford, Darnell, Davis of Brazos, Davis of Wharton, DeMorse, Dillard, Ferris, Flanagan, Fleming, Ford, Lockett, McCormick, McLean, Mills, Mitchell, Moore, Morris, Norvell, Nunn, Pauli, Ramey, Rentfro, Reynolds, Ross, Smith, Stewart, Wade, Waelder—33.

*J-24. Voting on the Article on Public Free Schools*

YEAS—Abernathy, Allison, Ballinger, Barnett, Brown, Bruce, Chambers, Cooke of San Saba, Crawford, Darnell, Davis of Brazos, Dillard, Dohoney, Douglas, Ferris, Fleming, Flournoy, Gaither, German, Graves, Haynes, Henry of Limestone, Killough, Lacy, McKinney of Denton, McLean, Moore, Martin of Navarro, Martin of Hunt, Norvell, Nugent, Nunn, Ramey, Reagan, Robertson of Bell, Robison of Fayette, Ross, Russell of Wood, Scott, Sessions, Spikes, Stewart, Waelder, Whitehead—44.

NAYS—Abner, Blassingame, Brady, Cline, Cooley, Davis of Wharton, DeMorse, Flanagan, Ford, Holt, Kilgore, Lockett, Lynch, McCormick, McKinney of Walker, Mills, Mitchell, Morris, Murphy, Pauli, Rentfro, Reynolds, Smith, Stayton, Stockdale, Wade, Whitfield—27.

*J-25. Voting Results on the Final Constitution*

YEAS—Abernathy, Allison, Arnim, Barnett, Blassingame, Brown, Bruce, Burleson, Chambers, Cook of Gonzales, Cooke of San Saba, Darnell, Davis of Brazos, DeMorse, Dillard, Dohoney, Ferris, Fleming, Flournoy, Ford, German, Graves, Haynes, Henry of Limestone, Henry of Smith, Holmes, Holt, Johnson of Collin, Johnson of Franklin, Kilgore, Killough, King, Lacy, McCormick, McKinney of Denton, McKinney of Walker, Martin of Hunt, Moore, Norvell, Nugent, Nunn, Ramey, Robertson of Bell, Robison of Fayette, Ross, Scott, Sessions, Spikes, Stockdale, Wade, Weaver, Whitehead, Wright—53.

NAYS—Ballinger, Brady, Cline, Cooley, Lockett, Mitchell, Murphy, Rentfro, Reynolds, Smith, West, Whitfield—11.

*Appendix K. New Voucher System**K-1. Section 29 of the School Law of 1876*

Parents and guardians, or next friend, of any minor residents of any county of this State, on or after the first Monday of January, and up to the beginning of the next scholastic year, in order to avail themselves of the benefits of the available school fund for their county, for the scholastic year, beginning the next succeeding September, may organize themselves into school communities, embracing such population as may agree to avail themselves of the benefits of the available public free school fund, on the following terms, viz: They shall make out a list to be signed in person by such parents and guardians as desire to avail themselves of the available school fund; which list shall include the names and ages of children to be instructed, who may be within the scholastic age, on the first day of the next September, which names of children shall be made in alphabetical order, which list shall also include all minors within scholastic age in said community, who have no legal guardians; said list, together with an application to the County Judge, stating that they desire, in good faith, to organize a school at such place as they may designate, shall be filed with the County Judge; said application shall also show the capacity of the school houses, and school conveniences, if any. The Assessor, when taking the scholastic census, shall also ascertain to what community each child belongs; and if it appears that any child is not included in any community list, the County Judge shall assign such child to the most convenient and appropriate community, and set apart to said community such a child's pro rata of the fund.

*K-2. Section 30 of the School Law of 1876*

The application to establish a school, in case there be a school house reported, shall ask that the pro rata of the available school fund, properly due to the number of children reported, be credited to said school community.

*K-3. Section 31 of the School Law of 1876*

On receipt of such a petition from a school community, the County Judge shall compare the list of pupils presented in such application with the census made out by the County Assessor, and if the names of the children within scholastic age appear on said list, or if proof be made that they should have been placed on said list, and the County Judge be satisfied that the petition is in good faith, he shall enter an order, in a book kept for that purpose, sanctioning the establishing of said school community, and shall designate it by its name and number.

*K-4. Section 32 of the School Law of 1876*

School communities may be organized, when population will permit, for separate male and female schools, or for mixed schools, male and female, as the necessities and condition of each community may require. Three trustees shall be appointed by the County Judge for each community, who shall



discharge such duties as are herein prescribed, or which may be prescribed by the Board of Education, and who shall see that the school for which they are trustees shall be conducted in accordance with the provisions and limitations of this act.

*K-5. Section 34 of the School Law of 1876*

The trustees of any school community, already provided with a school-house, desiring to avail themselves of the benefits of a public free school, shall employ a teacher holding a certificate of competency, issued by the Board of Examiners herein provided for, to teach school for such community at such time during the scholastic year as they may designate, having due regard for the convenience of the community: provided, however, that every school shall be taught, as nearly as practicable without intermission for the period contracted for with the teacher.

*K-6. Sections 35 and 36 of the School Law of 1876*

Sec. 35. The trustees of each school community shall contract with the teacher to continue the school for the longest time they may be able to agree, for the benefit of the pupils within the scholastic age, for the pro rata of the school fund to which such community may be entitled, permitting said teacher to instruct, in said school, pupils over or under the scholastic age, and to teach branches not herein prescribed as the public school course of study, at such rates as he and the patrons may agree upon; provided, that no school with one teacher shall exceed forty pupils, except by the consent of the trustees.

Sec. 36. The contract between the trustees and the teacher shall be in writing, and shall specify the number of months the school is to be taught, and the wages per month. After being signed by the trustees and teacher, it shall be filed with the Clerk of the County Court, who shall safely keep the same; provided, teachers shall not receive more than one dollar and fifty cents per month for each pupil within the scholastic age in any school community.

*K-7. Section 39 of the School Law of 1876*

A child within scholastic age entered at one public school shall afterwards receive no benefit of the school fund by attending another public school during the scholastic year.

*K-8. Section 40 of the School Law of 1876*

A teacher's certificate shall be canceled on account of such misconduct or immorality as the Board of Trustees shall report to the County Judge disqualifying him, in their opinion, for the instruction of children.

*K-9. Section 41 of the School Law of 1876*

County Judges shall be paid for the services required of them under this

act such amount as may be allowed by the Board of Education, not to exceed one hundred dollars for any scholastic year, to be paid out of the available school fund.

*K-10. Section 42 of the School Law of 1876*

When the nearest school community for children within scholastic age residing near a county line is situated in an adjoining county, such school community may receive such children, for whose tuition the teacher shall be paid by the County Treasurer of the county in which said children reside, on presentation of the account of the teacher, certified to by the Board of Trustees of the community school, and approved by the County Judge of the county in which the children reside. Such payment shall be made according to the pro rata of the school fund for distribution in the county where such children reside; and in all such cases, notice that said children are attending school out of the county of their residence shall be given, in writing, to the County Judge of the county in which they reside during the first four weeks of the session. Such notice, after being received by him, shall be filed with the Treasurer of the county in which said children reside.

*K-11. Sections 43 through 48 of the School Law of 1876*

Sec. 43. Any one desiring to teach a public free school shall, unless known to the County Judge, present a certificate from the Justice of the peace of the precinct in which he or she desires to teach, or in which he or she may reside; or, in case the applicant has acquired no residence in this State, then some other certificate satisfactory to the County Judge, that he or she is a person of good moral character and of correct, exemplary habits. The County Judge shall thereupon, unless satisfied that some good cause exists for refusing such certificate, convene the County School Board of Examiners, and direct an examination of the applicant on the following branches, viz: Orthography, reading, writing, English grammar, composition, geography and arithmetic.

Sec. 44. On report by the Board that the applicant is competent to teach, the County Judge shall cause the same to be filed by the Clerk, and shall issue a certificate of competency to the teacher, authorizing him to contract with trustees of any school community to teach a school as contemplated by this act; which certificate shall be valid in the county where issued for the current scholastic year, and may be renewed by the County Judge for any subsequent year without examination, if the Judge be satisfied of the propriety of such renewal.

Sec. 45. The time for teaching public free schools shall be at such seasons of the year as may be fixed by the Trustees of each community, who, in determining the same, shall be guided by the convenience or interests of the parents and guardians, so as to secure the largest attendance of scholars with the least injury to home interests.

Sec. 46. Public free schools shall be closed on every Saturday, on Christmas and New Year's Day, on national or on State Thanksgiving Day, on the

twenty-first day of April (the anniversary of the battle of San Jacinto), and on every national holiday. The session shall continue seven hours each day, and may continue longer by agreement with teacher and trustees.

Sec. 47. It shall be the duty of teachers to keep an accurate record of daily attendance of each pupil, and all other statistics required by the Board of Education necessary to make a complete report at the end of the term, which shall be filed with duplicate abstracts thereof with the Clerk of the County Court, one of which shall be forwarded by the County Judge to the Board of Education.

Sec. 48. Teachers, on the organization of their schools, shall determine the books of instruction to be used, subject to the approval of their community trustees, having due regard to the convenience of the parents with regard to books already purchased.

*K-12. Sections 49 through 53 of the School Law of 1876*

Sec. 49. When a school community, organized on the application of parents and guardians as herein provided, has no school-house, and a majority of its members are willing to assist, with their private means or labor, in building one, and shall donate a school-site for neighborhood public free school purposes, and deliver a deed therefor to the County Judge, executed to him and his successors in office in trust for public free school purposes, and shall pay for the registry of the same, they shall state the amount they propose to invest of their private means, and the value of the labor and material they propose to furnish free of charge for the erection of said house, and ask that the pro rata of the school fund to which the children in such community would be entitled may be set aside to assist in building said school-house. And the trustees of school communities, upon the order of the County Court, or the municipal authorities of any city or town constituting a separate school district, are hereby authorized and empowered, when deemed advisable, to sell any property belonging to said school community to the highest bidder, for cash or on time, as they may see proper; and apply the proceeds to the purchase of necessary grounds, or to the building, repairing or renting of school-houses.

Sec. 50. Upon receiving the application described in the foregoing section, the County Judge may enter an order granting said application; and notify the County Treasurer to credit such school community with the fund that may be apportioned thereto for building as school-house; provided, that the amount of money, labor, and material subscribed, together with the pro rata of the available school funds for one year to which said community would be entitled, would be sufficient to erect a comfortable school-house, with a capacity adequate to accommodate the children that may belong to said school community; provided, also, the community shall furnish one-half the amount necessary to build the house.

Sec. 51. Every school-house erected under the provisions of this act shall be erected under a contract for building, made with the school trustees of the school community who shall have control and direction of the work; and all

accounts for labor and material furnished for said school-house shall be approved by them, and paid out of the fund apportioned to the school community for building purposes, on warrant of County Judge; but no such account shall be paid until the house is completed, unless the County Judge be fully satisfied, from securities deposited with the County Clerk for the use of the public school fund of the county, that the money, work, and material subscribed will be forthcoming when required in the progress of the work; provided, that nothing contained in this act shall be so construed as to prevent any school community from using the funds indicated in this section for being used in the purchase as well as the building of a school-house when the provisions of this section are complied with in reference to the title to the same.

Sec. 52. When the trustees of any school community not having a public school-house shall determine it to be to the interests of the community they represent to rent or lease a house for school purposes instead of building one, they are authorized to rent or lease the same for the scholastic year; the rent so contracted to be paid by the County Treasurer out of the school fund to which the children in such community would be entitled, upon the warrant of said trustees, approved by the County Judge; provided, the amount of rent so contracted shall not exceed six dollars per month for a suitable house, to be adjudged of by said trustees; which house so rented, for the time, shall be, as shall also each and every other community school-house, under the control of the trustees of the school community for school purposes, and for such other uses for the convenience of the neighborhood as may not interfere with school interests, but subject to the discretion of the school trustees. All school-houses erected under the provisions of this act shall be subject to the control of the trustees of the school community for whose benefit the same was erected; and, when deemed advisable, may be disposed of as provided for in section 49 of this act.

Sec. 53. A school-house, constructed in part by voluntary subscription by colored parents and guardians and for a colored school community, shall not be used, without the consent of the colored school community assisting in its erection, for the education of white children; and a like rule shall protect the use of school-houses erected in part by voluntary subscription of white parents or guardians for the benefit of white children.

*K-13. Section 55 of the School Law of 1876*

Any incorporated city or town in this State may have exclusive control of the *public schools* within its limits; provided, they determine so to do by a majority vote of the property tax-payers of said city or town; and the Council or Board of Aldermen thereof are invested with exclusive power to maintain, regulate, control and govern all the *public free schools* now established or hereafter to be established within the limits of said city or town; and they are furthermore authorized to pass such ordinances, rules and regulations not inconsistent with the Constitution and laws of this State, as may be necessary to establish and maintain *free schools*, purchase building sites, con-

struct school-houses, and generally to promote *free public education*, within the limits of their respective cities or towns.

*K-14. Section 56 of the School Law of 1876*

When any such city or town shall, in good faith, elect to assume control and management of the *public free schools* within its limits, and shall have notified the State Board of Education, and the County Judge of the county in which it is situated, it shall receive from the Collector of Taxes in the county, on the certificate of the Board of Education, such a proportion of the public revenue in his hands as its scholastic population may entitle it to, which certificate shall be a voucher in the hands of the Collector of Taxes for so much money in his settlement with the State Comptroller. Such an additional amount as a city or town having control of *public free schools* may desire to raise by taxation for school purposes, shall be levied upon the taxable property in the limits of said town or city, in accordance with the usual assessment of taxes for municipal purposes; but such additional tax shall not exceed one per cent. on the city assessment of taxable property within its limits, and shall not be levied unless at an election, held for that purpose, two-thirds of those paying a tax on property in said city or incorporated town, to be determined by the last assessment rolls of said city or town, shall vote therefor. Schools thus organized and provided for by incorporated cities or towns shall be subject to the general laws of the State, so far as the same are applicable; but each city or town having control of *schools* within its limits shall constitute a separate school district, and may, by ordinance, provide for the organization of schools, and the appropriation of its school fund in such manner as may be best suited to a dense school population.

*K-15. Section 57 of the School Law of 1876*

The title to all houses, lands and other property, now owned or which may hereafter be purchased or acquired by a city or town for the benefit of *public free schools*, and all houses, lands or other property, purchased for the benefit of *public free schools* in the county, and lying within the limits of any town or city, which may have assumed control and management of the *public free schools* within its limits and conformity with law, shall be vested in the City or Town Council or Board of Aldermen, in trust for the sole use of *public free schools* established under this act; but no houses or lands so held in trust, or that may hereafter be acquired for the benefit of *public education*, shall be sold or otherwise diverted from the use herein indicated, without the consent of the State Board of Education.