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THURGOOD MARSHALL LAW REVIEW

ARTICLES

FIRST THEY CAME FOR THE TEACHERS . . . : COMPETENCY TESTING AND THE DECERTIFICATION OF TEXAS TEACHERS ISSUED CERTIFICATES VALID FOR LIFE.

BEVERLY M.M. CHARLES*

In Germany they came first for the Communists, and I didn't speak up because I wasn't a Communist. Then they came for the Jews, and I didn't speak up because I wasn't a Jew. Then they came for the trade unionists, and I didn't speak up, because I wasn't a trade unionist. Then they came for the Catholics, and I didn't speak up because I was a Protestant. Then they came for me, and by that time no one was left to speak up.¹

Introduction

In response to the widely held perception that a significant number of grossly incompetent teachers were staffing the classrooms of Texas schools, the Texas Legislature, beginning in 1979² and culminating in

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The author thanks Dr. Roland M. Smith, Associate Vice President of The University of Houston for reading an earlier draft of this article and offering comments and suggestions.

1. The statement is attributed to Martin Niemöller. See J. BARTLETT, *FAMILIAR QUOTATIONS*, 824 (E.M. Beck ed. 1980).

2. In 1979, the Texas Legislature repealed the statutory provision which made all teaching certificates "permanent and valid for life." TEX. EDUC. CODE ANN. § 13.038 (Vernon Supp. 1987) (repealed by Acts 1979, 66th Leg., p. 1542, ch. 663, § 5, eff. Aug. 27, 1979).

1984 with the passage of House Bill 72,³ passed legislation aimed at removing incompetent teachers from Texas classrooms.

Excepting iconoclasts, few would oppose this effort. Incompetent teachers have no place in the classroom. Society invests teachers with a sacred trust⁴—that of preparing our youth to reach their full potential as human beings.⁵ Consequently, this writer supports the ouster of incompetent teachers from the classroom, but questions the legality of the vehicle the Texas Legislature chose to accomplish this worthy goal.⁶

The article argues that under House Bill 72, the State of Texas impermissibly authorized the decertification of teachers who, under prior state law, were issued certificates valid for life. More specifically, the article contends that the provisions of House Bill 72⁷ requiring teachers and administrators previously issued certificates valid for life⁸ to pass an examination to retain their certificates infringe (a) their rights guaranteed by Titles VI⁹ and VII¹⁰ of the Civil Rights Act of 1964

3. H.B. 72, 68th Leg., 2d Called Sess. (1984).

4. Thomas M. Benton, *Legal Aspects of Compulsory School Attendance*, in *LEGAL ISSUES IN EDUCATION*, 13 (abr.: Duke Doctoral Dissertations E.C. Bolmeier ed. 1970). "Education is looked upon by the courts as a necessary purpose, vital not only to the well-being of the child but to the welfare of society in general, and to the preservation of the democratic way of life." (citing *Commonwealth v. Feigenbaum*, 166 Pa. Super. 136, 70 A.2d 389 (1950)).

5. See generally Bell, Foreword: *Renaissance in American Education: The New Role of the Federal Government*, 4 ST. MARY'S L.J. 771 (19) in which T. H. Bell, the former U.S. Secretary of Education says:

Throughout history, education has played a critical role in shaping American society. Our children's dreams and aspirations depend largely on the educational opportunities we provide for them. A quality educational system will ensure a well-informed and enlightened electorate, an essential ingredient in today's richly diverse, democratic society. Additionally, American success in the international marketplace requires the constant development of our technological and managerial skills. This development can only be achieved through a nationwide effort to provide progressive academic programs of the highest quality. *Id.*

Bell also says that "[t]he Texas education reform package, passed in the summer of 1984, is one of the best enacted in memory." To the extent that former Secretary Bell also by that statement lauds the teacher competency testing provisions of that legislation, the author of this article respectfully disagrees. *Id.* at 772.

6. TEX. EDUC. CODE ANN. § 13.047 (Vernon Supp. 1987) establishes that passing the Texas competency examination is a prerequisite for continued certification. Failure to take or pass the examination by June 30, 1986, results in the loss of a teacher or administrator's certificate. TEX. EDUC. CODE ANN. § 21.203 (Vernon Supp. 1987).

7. H.B. 72, 68th Leg., 2d Called Sess. (1984).

8. TEX. EDUC. CODE ANN. § 13.047 (Vernon Supp. 1987).

9. 42 U.S.C. §§ 2000d - 2000d-6 (1976).

"No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance."

Id. at § 2000d. See *infra* text accompanying notes 170-210.

10. 42 U.S.C. § 2000e-2(a)(2) (1982). Title VII provides in relevant part that:

(b) their property¹¹ and liberty interests¹² granted by prior law; and (c) their substantive¹³ and procedural due process rights guaranteed by the fourteenth amendment to the U.S. Constitution.¹⁴

The article is organized into three parts. Part One reviews the genesis of the state's power to regulate education¹⁵ and examines the impact of the development of comprehensive standards for teacher education.¹⁶ It also summarizes past and current statutes which establish the nature and scope of teachers' property rights in their teaching certificates.¹⁷ Part Two analyzes the *Texas State Teachers Association v. State of Texas*¹⁸ case in which the teacher's association unsuccessfully challenged in state court the constitutionality of the competency testing provisions of House Bill 72¹⁹ and evaluates other arguments teachers could proffer in an action based on federal laws to support their contentions that the law is unconstitutional.

Finally, the article suggests that if allowed to stand, the Texas teacher decertification law can have a potentially deleterious effect on members of other professions who are certified or licensed under Texas Law.²⁰

Part One

A. Genesis of the States' Power to Regulate Education

The power to regulate is the power to destroy.²¹ The states' power

It shall be an unlawful employment practice for an employer . . . [to] classify his employees or applicants for employment in anyway which would deprive or tend to deprive any individual of employment opportunities . . . because of such individual's race, color, religion, sex or national origin.

Id. See *infra* text accompanying notes 133-169.

11. Nothing in earlier versions of the law prevented teachers from characterizing their rights in their certificates as a property right. See *infra* text accompanying notes 211-247.

12. See *infra* text accompanying notes 248-266.

13. See *infra* text accompanying notes 267-68.

14. See *infra* text accompanying notes 262-266.

15. See *infra* text accompanying notes 21-34.

16. See *infra* text accompanying notes 35-51.

17. See *infra* text accompanying notes 52-119.

18. 711 S.W.2d 421 (Tex. Ct. App. 1986), *writ ref'd n.r.e.*, 30 Tex. Sup. Ct. J. 19 (1987), See *infra* text accompanying notes 120-132.

19. H.B. 72, 68th Leg., 2d Called Sess. (1984) The teacher competency testing provision is codified at TEX. EDUC. CODE ANN. § 13.047 (Vernon Supp. 1987).

20. See *infra* text accompanying notes 269-273.

21. See generally B. SCHWARTZ, CONSTITUTIONAL LAW: A TEXTBOOK (1972) [hereinafter SCHWARTZ]. Throughout chapter 6 of his text, Professor Schwartz describes property rights under the United States Constitution, and the nature of the police power which allows a diminishment

to regulate stems from the police powers²² granted to the states in the tenth amendment to the federal Constitution²³ which provides that those powers not given to the federal government are reserved to the states.

The police power of the states is very broad;²⁴ it encompasses the power of internal sovereignty.²⁵ However, the exercise of their police power is not unfettered.²⁶ A state is barred from exercising its police

of those interests. "The power to protect public health includes power to quarantine, inspect, and embargo. Such measures bear a direct relationship to public health and have their foundation in the sacred law of self-defense. The police power in this area is more than the power to regulate; it is also the power to destroy." *Id.* at 169. "As in the health and safety field, the police power in the area of public morals includes the power to destroy." *Id.* at 175.

22. The first use of the term appears in *Brown v. Maryland*, 25 U.S. (12 Wheat.) 419, 443 (1827).

23. U. S. CONST. amend. X provides: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

24. The police power was not always construed broadly.

As it first developed in American law, the police power was anchored in the limitations that the courts had imposed upon individual rights . . . concerned only with preservation of public health, safety and morals. But that was the case only because those were the primary social interests to be vindicated under the essentially negative theory of government that then prevailed.

SCHWARTZ, *supra* note 21, at 43 (citations omitted). . . .

The Constitution itself has articulated a wider notion of the social interest that government should further. In stating the purposes to be served by government it included, in addition to the traditional ends of security and justice, "to promote the general welfare." (quoting, U.S. CONST. preamble).

Toward the end of the nineteenth century, the judges returned to the conception of the general welfare as the basic social interest that could be vindicated by the police power. They did this by expanding the traditional formula defining the objects of the police power—"public health, safety and morals"—by interpolating the words 'Public welfare.' The broader meaning thus given to the police power has never been departed from.

In a leading case, the Supreme Court has said that, while public health, safety, and morals may be the traditional test, they merely illustrate the scope of the police power and do not delimit it. (citing *Berman v. Parker*, 348 U.S. 26, 32 (1954)). The police power is no longer confined to any narrow category. (citing *Day-Brite Lighting v. Missouri*, 342 U.S. 421, 424, (1952)). Instead, it may be exerted to further the public welfare—a concept as vast as the good of society itself. (citing *Noble State Bank v. Haskell*, 219 U.S. 104, 111 (1911)).

Under the expanded conception, the police power means the general power to preserve and promote the public welfare, even at the expense of private rights. (citing *Geneva v. Geneva Telephone Co.*, 62 N.Y. Supp. 172, 175 (N.Y. 1899)). It may be exerted for the general well-being, apart from any questions of health, safety, or morals. (citing *Nashville, C. & St. L. Ry. v. Walters*, 294 U.S. 405, 429 (1935); *Chicago, B. & Q. R. Co. v. Illinois*, 200 U.S. 561, 592 (1906). *Id.* at 44. The police power today is but another name for the governmental authority to further the welfare of society that is the basic end of all government (citing *People v. Willi*, 179 N.Y. Supp. 542, 548 (N.Y. 1919). *Id.* at 45.

25. See *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 208 (1824).

26. Substantive due process is the basic limitation imposed by the Constitution upon exercise of the police power. Due process insures that there is a rational relation-

powers in an arbitrary and capricious manner.²⁷ Indeed, in the proper exercise of its powers, the state often weighs the state's interest in vindicating the public health, safety, morals and welfare of its citizens against the private rights of individuals in a given case.²⁸

By tradition and law, education is properly a state function. Under the tenth amendment to the Constitution,²⁹ the power to regulate education is implicitly reserved to the states.³⁰ In *Brown v. Board of Educa-*

ship between challenged legislation and the social ends that may be served by the police power (citing *Mugler v. Kansas*, 123 U.S. 623, 661 (1887)). The police power must be used only to secure the public purposes for which it exists—those of the general security, the general morals, and the general welfare. (citing *Field, J.*, concurring in *Butcher's Union Co. v. Crescent City Co.*, 111 U.S. 746, 755 (1884)). The Due Process Clause ensures that such is, in fact, the end of police-power legislation. It does so by guaranteeing that there is at least a reasonable relationship between governmental action taken under the police power and the furtherance of public health, safety, morals, or welfare. Substantive due process subjects the police power to the standard of reason.

Schwartz, *supra* note 21 at 166.

As it has evolved the appropriate test for determining the reasonableness of a statute challenged under the Due Process Clause is based on the Holmesian view found in *Lochner v. New York*, 198 U.S. 45 (1905). Justice Holmes' dissent in *Lochner* revealed a conviction that it is an awesome thing to strike down an act of the elected representatives of the people, and that the power to do so should not be exercised save where the occasion is clear beyond fair debate. *Id.* at 76. "In the Holmesian view, the test to be applied is whether a reasonable legislator—the legislative version of the 'reasonable man'—could have adopted a law like that at issue."

See generally Schwartz, *supra* note 21 at 167-168.

27. While the major limitations on the federal government find their source in the Bill of Rights and in Art. I, § 9 of the original Constitution, the major limitations on the state governments find their source in the thirteenth, fourteenth, and fifteenth amendments and in Art. I, § 10 of the original Constitution. The provisions of major significance are the first amendment, the due process clauses of the fifth and fourteenth amendments, and the equal protection clause of the fourteenth amendment. Additionally, individual state constitutions impose limitations on state governments. See W. LOCKHART, Y. KAMISAR, J.H. CHOPER, *CONSTITUTIONAL LAW-CASES-COMMENTS-QUESTIONS* (1970).

28. *Charles River Bridge v. Warren Bridge Co.*, 36 U.S. (11 Pet.) 420 (1837).

29. *Supra* note 23.

30. The United States Constitution is silent on the issue of the federal government's authority to regulate education. However, its authority to directly participate in educational programs is implied from several federal prerogatives. Congress has thereby established military academies, provided training for servicemen, and authorized overseas schools for dependents of military and civilian personnel in the necessary and proper means of executing its war and defense powers under Art. I, § 8 of the Federal Constitution. See generally EDUCATION LAW § 3.01 (J.A. Rapp, ed. 1986) [hereinafter Rapp].

Congress has also established libraries, such as the Library of Congress, provided training for federal employees, authorized the establishment of schools for Indian children on reservations, and established school systems in United States' territories and the District of Columbia as necessary and proper means of executing other express constitutional powers of the federal government. *Id.* at § 3.01[2] (citing SORGEN, KAPLAN, DUFFY & MARGOLIN, *STATE SCHOOL AND FAMILY* § 14.01 (1979)). Notwithstanding the federal government's lack of express authority to regulate education, it exercises considerable practical control over education through its spending power.

tion,³¹ the Supreme Court stated that education is one of the most important functions of state and local governments, and in *Wisconsin v. Yoder*,³² the Supreme Court suggested that perhaps education is at the very apex of the functions of a state. Because of the importance of education in a free society, most state constitutions dictate that education is a state government priority. And so, too, it is in Texas. Article VII of the Texas Constitution sets forth various education provisions and establishes a system of public free schools.³³ Other sections of Article VII establish funding mechanisms to support public free schools.³⁴

B. The Impact of The Development of Comprehensive Standards for Teacher Education

Texas, like many states, developed comprehensive standards for teacher education in 1955.³⁵ The standards allowed prospective teachers to qualify for teaching certificates which were valid for life by successfully completing a course of study in accredited colleges and universities throughout the nation.³⁶ The process was simple and basically reasonable. By following a prescribed program and by having the faculty and administrators of their respective colleges and universities certify that they had fulfilled the statutory requirements, a host of graduates received teaching certificates which, when issued, stated that they were

31. 347 U.S. 483, (1954).

32. 406 U.S. 205, (1972).

33. TEX CONST. art. VII § 1 provides:

Public Schools to be established.—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.

34. Notable, if not unique, among these is TEX. CONST. art. VII § 2 which states:

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 of grants heretofore made or that may hereafter be made to railroads, 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.

In fact, according to the records of General Land Office of Texas, 52,284,678 acres of public domain were set aside for school purposes.

35. See generally S. Con. Res. 22, 68th Leg., 1982 Tex.

The teaching of educational personnel in Texas is done by colleges and universities in approved teacher training programs.

A nationwide movement, under which colleges and universities recommend their graduates for certificates on the basis of completion of an approved program of study rather than a transcript analysis by the state agency, evolved with the creation in 1954 of the National Council for Accreditation of Teacher Education (NCATE), The National Accrediting Association for Teacher Preparation.

36. *Id.*

valid for life.³⁷ The applicable statutory provisions also delineated the grounds for suspension or revocation of the certificates.³⁸ Over the years, as a condition for promotion, salary increases, or for tenure, state regulatory agencies, including local school boards which hired the teachers, imposed additional requirements like, inservice training,³⁹ continuing education,⁴⁰ and in some cases, the acquisition of an additional degree or degrees.⁴¹

The mere possession of a teaching certificate did not and still, does not insure its holders of a job,⁴² but its absence most assuredly serves as a bar to continued secure employment in school districts throughout the country.⁴³ Once teachers obtained the certificates, they

37. TEX. EDUC. CODE ANN. § 13.038 (Vernon 1972).
provided:

Duration of Certificate

Either a provisional or professional certificate shall be permanent and valid for life, unless cancelled by lawful authority. (Acts 1969), 61st Leg., p. 2790, ch. 889 § 1, eff. Sept. 1, 1969, Acts 1971, 62nd Leg., p. 1470, ch. 405, § 2, eff. May 26, 1971.

38. See generally M. MCCARTHY & N. CAMBRON, *PUBLIC SCHOOL LAW: TEACHERS' AND STUDENTS' RIGHTS* (1981) which states:

"Revocation of a certificate is an extreme action. In most states, it must be based on statutory cause, with full protected rights provided to the teacher." (citing *Greenwald v. Community School Bd. No. 27*, 327 N.Y.S.2d 203 (Sup.Ct. Queens County, 1972); *Stone v. Fritts*, 82 N.E. 792 (Ind. 1907)). *Id.* at 24. TEX. EDUC. CODE ANN. § 13.046 (Vernon Supp. 1987) spells out the circumstances under which a teacher's certificate can be suspended or revoked. See also TEX. ADMIN. CODE tit. 19 § 61.145 (1985) and TEX. ADMIN. CODE tit. 19 §§ 141.321-141.324 (1985).

39. TEX. EDUC. CODE ANN. § 13.032(a) (Vernon Supp. 1987) authorizes:

The State Board of Education, with the advice and assistance of the state commissioner of education, to establish such rules and regulations as are not inconsistent with the provisions of this chapter and which may be necessary to administer the responsibilities vested under the terms of this chapter concerning the issuance of certificates and the standards and procedures for the approval or disapproval of colleges and universities offering programs of teacher education.

Hence, specific rules and regulations are found in TEX. ADMIN. CODE tit. 19 §§ 29.1-185.7 (1985).

40. Under current law if teachers want to obtain Master Teacher Certificates which are the only certificates valid for life, they must, among other things, possess a valid level three certificate, which they can obtain by completing eight years of teaching experience coupled with a bachelor's degree; or by having five years of teaching experience and a master's degree; or by having three years of teaching experience and a doctorate. TEX. EDUC. CODE ANN. § 13.305 (Vernon Supp. 1987). There is, of course, some inducement then to obtain an advanced degree as quickly as possible. TEX. EDUC. CODE ANN. §§ 13.307-13.312 (Vernon Supp. 1987) set forth the requirements for entry into each career ladder level. But, more importantly, the provisions establish the performance standards which result in demotion. Laxity is discouraged by requiring teachers to obtain outstanding performance appraisals most of the time.

41. *Id.*

42. See generally M. MCCARTHY & N. CAMBRON, *supra* note 38, at 23, (citing *Richards v. Board of Educ. of Township High School Dist. No. 201*, 171 N.E.2d 37 (Ill. 1960)).

43. TEX. EDUC. CODE ANN. § 13.504 (Vernon Supp. 1987) provides in pertinent part:

Limitation on Employment of Noncertified Instructors.

... A school district may not employ a noncertified instructor beyond the end of a semester to teach any course for which a qualified and certified teacher is available and has a current application for employment filed with the district.

could freely move from one state to another and seek employment. Sister jurisdictions recognized the validity of Texas certificates and even though additional requirements, in some instances, had to be fulfilled, the transient teacher was given a reasonable time in which to meet the requirements without their absence operating as a bar to employment.⁴⁴ In short, the possession of a valid teaching certificate was the "open sesame" to seeking and obtaining teaching posts throughout the nation.⁴⁵ It was a condition precedent to acquiring a permanent teaching position. Indeed, if a teacher never violated any of the grounds which could result in cancellation or revocation of the certificate, the teaching certificate virtually assured the teacher of lifetime employment in a secure, intrinsically rewarding, profession.⁴⁶ Texas teachers certified between 1955 and 1979 were, in effect, granted a property interest through their certificates which were valid for life.

In 1979, the state of Texas began to erode the employment rights of teachers.⁴⁷ And in 1984, with the passage of the competency and literacy testing provisions of House Bill 72 mandating that *all* teachers and administrators take and pass the examination on or before June 30, 1986, as a condition of continued certification,⁴⁸ Texas took a quantum leap into a constitutionally sacrosanct domain. No other state, not even Arkansas, which also requires certified teachers and administrators to take competency tests, summarily revokes the certificates of teachers who fail the test.⁴⁹

44. TEX. EDUC. CODE ANN. § 13.314 (Vernon Supp. 1987) governs teachers who hold teaching certificates from another state. While the teacher may enter the career ladder program under a probationary contract, the teacher must "at the end of the first year teaching in the state, . . . meet the requirements as established for that level, other than the requirement for the prior certificate held. . . ." [and] failure to achieve satisfactory requirements after the end of the second year of teaching shall result in termination of contract."

45. Telephone interview with Ms. Terri Ivey, of the U.S. Department of Education, Information Branch (March 20, 1987). The number of teachers who leave teaching posts to go to other jurisdictions is so numerous that no reliable data is kept.

46. Ms. Ivey also indicated that there are 2,177,851 certified elementary and secondary school teachers throughout the United States. There is nationwide, however, 2,470,478 people who make up the total instructional staff which includes principals, vice principals, supervisors and non-supervisory personnel. Although no precise data is available, about 6% of the teachers leave teaching each year. It is unclear what the reasons are in all instances. Some percentage of these teachers is retiring. Telephone interview with Ms. Terri Ivey, the U.S. Department of Education, Information Branch (March 20, 1987).

47. Prior to 1979, Texas law provided that either a provisional or professional certificate was permanent and valid for life. TEX. EDUC. CODE ANN. § 13.038 (Vernon 1972). The provision was repealed by Acts 1979, 66th Leg., p. 1542, ch. 663 § 5, eff. Aug. 27, 1979.

48. TEX. EDUC. CODE ANN. § 13.047 (Vernon Supp. 1987).

49. Texas' requirement that all teachers and administrators, regardless of their experience, take and pass a basic skills test is unique. Arkansas is the only other state which tests its teachers after they have achieved certification. ARK. STAT. ANN. § 80-1270.1 (Supp. 1985) (Arkansas' teaching certificates, unlike those of Texas, were not valid for life at the time of issuance). The

The ramifications of the state of Texas' decision are significant.⁵⁰ Because most school districts require that a job applicant possess a valid teaching certificate as a condition for employment or continued employment, the decertified teachers no longer qualify.⁵¹ Even those who had the equivalent of tenure, or continuing employment contracts no longer qualify. Moreover, teachers failing the tests are stigmatized in their communities and in other states to which they might have considered fleeing in search of employment because they have been decertified. In sum, Texas has created a new class of the unemployed: decertified teachers who were educated as teachers, and who now must turn to another trade or profession.

C. The Establishment of the Teachers' Property Rights: Summary of the Applicable Law-Past and Present

Two salient differences and one similarity exist between the current Texas laws governing teacher certification⁵² and the law in Texas

Arkansas statute provides for the testing of functional and academic skills. *Id.* § 80-1270.1(a). Failure to pass the test results in a one year grace period. *Id.* § 80-1270.1(c), followed by no recertification. *Id.* § 80-1270.1(d).

50. In fact, at a time when Texas is ousting certified teachers who fail the TECAT from the classroom, most states in the nation are having a shortage of teachers (the teacher shortage is acute in California, Florida and Texas). The shortage has, in some cases, prompted aggressive national and international recruitment efforts. In addition, alternative certification programs are proliferating. Some could argue that Texas' imposition of more stringent entry and retention standards will discourage would-be prospects from joining in the fray. *See generally* Francis C. Brown III, *Recruiting Drive: Shortage of Teachers Prompts Talent Hunt by Education Officials*, Wall St. J., January 15, 1987, at 1, col. 1.

51. TEX. EDUC. CODE ANN. § 13.047 (Vernon Supp. 1987) states that satisfactory performance on the TECAT is a condition to continued certification, and TEX. EDUC. CODE ANN. § 21.203(b) (Vernon Supp. 1987) mandates that reasons for nonrenewal must include the failure of a person required to take the TECAT to perform satisfactorily on the examination on or before June 30, 1986.

One of the problems with the teacher competency testing provisions and its implementation is that the Texas Legislature authorized two types of tests in § 13.047(b). One test was supposed to test the examinees' ability to read and write (TECAT), and the other test was supposed to test the examinees in their areas of certification or, what is often termed, the subject-matter knowledge tests. The Texas Legislature appropriated no money to administer either test in 1984. Rather, in 1985, the Texas Legislature appropriated money to allow for the administration of examinations to test reading and writing skills only (the TECAT).

TEX. EDUC. CODE ANN. § 13.110 (Vernon Supp. 1987) allows for teachers under a continuing contract to be released at the end of any school year if they failed to take an examination required under Section 13.047 and to perform satisfactorily on at least one examination under that section on or before June 30, 1986. Thus because the Texas Legislature only appropriated money for the administration of the TECAT, teachers were discharged immediately. *See* JorJanna Price and Bill Hensel, Jr., *HISD to Fire Teachers Who Fail Skills Test Twice*, Houston Post, August 1, 1986 A1, Col.2.

52. The current law is found in TEX. EDUC. CODE ANN. §§ 13.031-13.048 (Vernon Supp. 1987).

prior to 1979. Prior to 1979, Texas law provided that both provisional and professional certificates were permanent and valid for life, unless cancelled by lawful authority.⁵³ Moreover, there was no statutory prohibition on teaching certificates being characterized as a property right. However, then as now, Texas provided, by statute, for the cancellation of certificates⁵⁴ and delineated the procedural safeguards which had to be invoked prior to cancellation of the certificates.⁵⁵

The current law⁵⁶ erodes the property interests of teachers in their teaching certificates in several ways. Under the new statutory provisions,⁵⁷ the only certificate which is valid for life is the master teachers

53. TEX. EDUC. CODE ANN. § 13.038 (Vernon 1972). (Repealed by Acts 1979, 66th leg., p. 1542, ch. 663, § 5, eff. Aug. 27, 1979).

54. TEX. EDUC. CODE ANN. § 13.046 (Vernon 1972 and Vernon Supp. 1987). Prior law did not allow for suspension of the certificates. That language was added by Acts 1979, 66th Leg., p. 666, ch. 294, § 1 eff. Aug. 27, 1979. The amendments of 1984 substituted in the second sentences of both subsections (b) and (c) "may" for "shall have the right of" and "a district court in Travis County" for "the State Board of Education"; also in subsection (c) in the first sentence substituted "has" for "shall have". Acts 1984, 68th Leg., 2nd Called Sess., ch. 28, art. I, part D, § 4, eff. Sept. 1, 1984.

55. TEX. EDUC. CODE ANN. § 13.046(b)-(c) (Vernon 1972), provided:

(b) Before any certificate shall be cancelled the holder shall be notified and shall have an opportunity to be heard. Any person whose certificate is cancelled by the state commissioner of education shall have the right of appeal to the State Board of Education.

(c) The state commission of education shall have the authority, upon presentation of satisfactory evidence to reinstate any teacher's certificate cancelled under the provisions of this section. On a refusal of the commissioner so to reinstate a certificate, the applicant shall have the right of appeal to the State Board of Education.

56. TEX. EDUC. CODE ANN. §§ 13.031-13.048 (Vernon Supp. 1987).

57. TEX. EDUC. CODE ANN. § 13.305 (Vernon Supp. 1987) which evidences as follows:

Classes of Teaching Certificates

(a) **LEVEL ONE.** A teacher who successfully completes the requirements of the probationary year as provided in Section 13.306 of this subchapter shall be granted a level one certificate. A level one certificate shall be valid for three full years from the date of recommendation by a school district and shall be renewable once for three additional years upon recommendation of the current or last employing school district and with completion of six semester hours at an institution of higher education in an approved program in the area of certification or teaching assignment, or with completion of 90 hours of advanced academic training as approved by the district, or an equivalent combination so that one semester hour of higher education course work is equivalent to 15 hours of academic training.

(b) **LEVEL TWO.** A level two certificate shall be valid for five years from the date of recommendation by a school district and shall be renewable. Requirements for the initial level two certificate shall be as follows:

- (1) possession of a valid level one certificate;
- (2) completion of three years of teaching experience and a bachelor's degree, or two years of teaching experience and a master's degree, or one year of teaching experience with a doctorate; and
- (3) recommendation by the current or last employing school district. The level two certificate shall be renewable upon compliance with the following requirements:

certificate.⁵⁸ All others are issued for a term of years.⁵⁹ The current law also specifically argues that

[a] teacher who has earned a level one, level two, level three, or master teacher certificate . . . has a right to retain that certificate until it has expired or is duly suspended, revoked, or otherwise removed in accordance with law. *However, assignment to career ladder level one, level two, level three, or level four is neither a property right nor the equivalent of tenure*⁶⁰ (emphasis supplied).

Therefore, although a significant amount of controversy accompanies the 1984 legislation which mandates that all current administrators and

(1) possession of a valid level two certificate;

(2) completion of six semester hours of upper division or graduate studies course work beyond the bachelor's degree in an approved program in the area of certification or teaching assignment, or completion of 90 hours of advanced academic training as approved by the school district, or an equivalent combination; and

(3) recommendation by the current or last employing school district.

(c) LEVEL THREE. A level three certificate shall be valid for five years from the date of recommendation by a school district and shall be renewable. Requirements for the initial level three certificate shall be as follows:

(1) possession of a valid level two certificate;

(2) completion of eight years of teaching experience and a bachelor's degree, or five years of teaching experience and a master's degree, or three years of teaching experience and a doctorate; and

(3) recommendations by the current or last employing school district.

The level three certificate shall be renewable upon compliance with the following requirements:

(1) possession of a valid level three certificate;

(2) completion of six semester hours of upper division or graduate studies course work beyond the current certificate requirements in an approved program in the area of certification or teaching assignment, or completion of 90 hours of advance academic training as approved by the school district, or an equivalent combination; and

(3) recommendation by the current or last employing school district.

(d) MASTER TEACHER CERTIFICATE. A master teacher certificate shall be valid for life. Requirements for the master teacher certificate shall be as follows:

(1) possession of a valid level three certificate;

(2) eleven years of teaching experience and a bachelor's degree, or eight years of teaching experience and a master's degree, or five years of teaching experience with a doctoral degree in an approved program of study; and

(3) recommendation by the current or last employing school district.

(e) A school district shall recommend a teacher for appropriate certificate level if the teacher is evaluated satisfactory, exceeding expectation, or clearly outstanding and meets the other requirements specified in this section.

Added by Acts 1984, 68th Leg., 2nd Called Sess., ch. 28, art. III, part A, § 4, eff. September 1, 1984.

58. *Id.* § 13.305 (d).

59. TEX. EDUC. CODE ANN. § 13.305 (a)-(c) (Vernon Supp. 1987).

60. TEX. EDUC. CODE ANN. § 13.320 (Vernon Supp. 1987).

teachers pass a competency examination,⁶¹ by June 30, 1986, the first major encroachment of the teachers's employment rights occurred in 1979 with the repeal of the statutory provision which made all certificates permanent and valid for life.⁶²

Then, as now, even certificates which are valid for life could be cancelled in appropriate circumstances. But cancellation of a teacher's certificate is a harsh sanction.⁶³ Therefore, Texas law, like that of most jurisdictions establishes the basis for any cancellation. The law prior to 1979 provided that a teacher's certificate may be cancelled⁶⁴ on

61. TEX. EDUC. CODE ANN. § 13.047 (Vernon Supp. 1987).

**Examination for Teachers and Administrators not Taking
Certification Examinations**

(a) The board shall require satisfactory performance on an examination prescribed by the board as a condition to continued certification for each teacher and administrator who has not taken a certification examination under Section 13.032(e) of this code.

(b) The board shall prescribe an examination designed to test knowledge appropriate to teach primary grades and an examination designed to test knowledge appropriate to teach secondary grades. The secondary teacher examinations must test the knowledge of each examinee in the subject areas listed in Section 21.101 of this code in which the examinee is certified to teach and is teaching. If a teacher is not tested in an area of certification, the teacher must take the examination for that area within three years after beginning to teach that subject. The administrator examinations must test administrative skills, knowledge in subject areas, and other matters that the board considers appropriate. The examinations must also test the ability of the examinee to read and write with sufficient skill and understanding to perform satisfactorily as a professional teacher or administrator.

(c) In developing the examinations, the board shall solicit and consider the advice of classroom teachers and administrators.

(d) Each teacher must perform satisfactorily on the applicable examination on or before June 30, 1986, to teach the subject at a particular level unless a school district establishes to the satisfaction of the commissioner of education that there is emergency need. A teacher may not teach under a determination of emergency need for more than one school year.

(e) The board, in conjunction with school districts, shall provide teachers and administrators with an opportunity for board-developed preparation for the examinations, including an opportunity for remedial aid.

(f) The board may limit the number of times a teacher or administrator who fails to perform satisfactorily on an examination may retake it, but each teacher must be given more than one opportunity to perform satisfactorily. The board shall determine the level of performance that is satisfactory.

(g) The board may exempt from the examination required by this section any person who, before the examination adopted under this section is prescribed, performed satisfactorily on an examination administered by an employing district if the board finds the examination to be substantially the same or at least as difficult as the examination prescribed by the board.

Added by Acts 1984, 68th Leg., 2nd Called Sess., ch. 28, art. III, part C, § 3, eff. Sept. 1, 1984.

62. TEX. EDUC. CODE ANN. § 13.038 was repealed by Acts 1979, 66th Leg., p. 1542, ch. 663, § 5., eff. Aug. 27, 1979.

63. See M. MCCARTHY & N. CAMBRON, *supra* note 38, at 24.

64. TEX. EDUC. CODE ANN. § 13.036 (Vernon 1972).

satisfactory evidence that the holder is conducting his school or his teaching activities in violation of Texas law;⁶⁵ on satisfactory evidence that the holder is a person unworthy to instruct the youth of this state;⁶⁶ or on complaint made by the board of trustees that the holder of a certificate after entering into a written contract with the board of trustees of the district has without good cause and without the consent of the trustees abandoned the contract.⁶⁷ In addition to providing for cancellation of teaching certificates, current law also allows for suspension of the certificates on the same grounds.⁶⁸

Once certified, under the law prior to 1979, teachers could be fired only in certain limited instances. A teacher employed by a school district pursuant to a probationary contract⁶⁹ had an employment contract which was terminable at the end of that contract period if the board of trustees of that school district decided that it was in the best interest of that district to do so.⁷⁰ The law further provided that the board of trustees

65. *Id.* § 13.036(1).

66. *Id.* § 13.036(2).

67. *Id.* § 13.036(3).

68. TEX. EDUC. CODE ANN. § 13.036 (Vernon Supp. 1987).

69. TEX. EDUC. CODE ANN. § 13.102 (Vernon 1972) provides:

Probationary Contract

Any person who is employed as a teacher by any school district for the first time, or who has not been employed by such district for three consecutive school years subsequent to August 28, 1967, shall be employed under a "probationary contract," which shall be for a fixed term as therein stated; provided, that no such contract shall be for a term exceeding three school years beginning on September 1 next ensuing from the making of such contract; and provided further that no such contract shall be made which extends the probationary contract period beyond the end of the third consecutive school year of such teacher's employment by the school district, unless the board of trustees determines and recites that it is in doubt whether the particular teacher should be given a continuing contract, in which event a probationary contract may be made with such teacher for a term ending with the fourth consecutive school year of such teacher's employment with the school district, at which time the employment of such teacher by such school district shall be terminated, or such teacher shall be employed under a continuing contract as hereinafter provided.

70. TEX. EDUC. CODE ANN. § 13.103 (Vernon 1972) says:

Probationary Contract: Termination

The board of trustees of any school district may terminate the employment of any teacher holding a probationary contract at the end of the contract period, if in their judgment the best interests of the school district will be served thereby; provided, that notice of intention to terminate the employment shall be given by the board of trustees to the teacher on or before April 1, preceding the end of the employment term fixed in the contract. In event of failure to give such notice of intention to terminate within the time above specified, the board of trustees shall thereby elect to employ such probationary teacher in the same capacity, and under probationary contract status for the succeeding school year if the teacher has been employed by such district for less than three successive school years, or in a continuing contract position if such teacher has been employed during three consecutive school years.

had to provide the teacher with notice of intention to terminate the employment on or before April 1, preceding the end of the employment term fixed in the contract.⁷¹ A teacher employed under either a probationary or a continuing contract⁷² can be discharged for lawful cause during the school year as specified under Texas law. Lawful cause for discharge includes:

immorality;⁷³ conviction of any felony or other crime involving moral turpitude;⁷⁴ drunkenness;⁷⁵ repeated failure to comply with official directives and established school board policy;⁷⁶ physical or mental incapacity preventing performance of the contract of employment;⁷⁷ and repeated and continuing neglect of duties.⁷⁸

Pursuant to Section 13.110⁷⁹ of the Texas Education Code, a teacher employed under a continuing contract could be released at the end of a school year for any of the reasons enumerated above or for any of the following additional reasons:⁸⁰

inefficiency or incompetency in performance of duties;⁸¹ failure to comply with such reasonable requirements as the board of trustees of the employing school district may prescribe for achieving professional improvement and growth;⁸² willful failure to pay debts;⁸³ habitual use of addictive drugs or hallucinogens;⁸⁴ excessive

71. *Id.*

72. TEX. EDUC. CODE ANN. § 13.106 (Vernon 1972) states:

Continuing Contract

Any teacher employed by a school district who is performing his third, or where permitted fourth, consecutive year of service with the district under probationary contract, and who is elected to employment by the board of trustees of such district for the succeeding years, shall be notified in writing of his election to continuing contract status with such district, and such teacher shall within 30 days after such notification file with the board of trustees of the employing school district notification in writing of his acceptance of the continuing contract, beginning with the school year following the conclusion of his period of probationary contract employment. Failure of the teacher to accept the contract within such 30 day period shall be considered a refusal on the part of the teacher to accept the contract.

73. TEX. EDUC. CODE ANN. § 13.109(1) (Vernon 1972).

74. *Id.* § 13.109(2).

75. *Id.* § 13.109(3).

76. *Id.* § 13.109(4).

77. *Id.* § 13.109(5).

78. *Id.* § 13.109(6).

79. TEX. EDUC. CODE ANN. § 13.110 (Vernon Supp. 1987).

80. *Id.*

81. *Id.* § 13.110(1).

82. *Id.* § 13.110(2).

83. *Id.* § 13.110(3).

84. *Id.* § 13.110(4).

use of alcoholic beverages;⁸⁵ necessary reduction of personnel by the school district (such reductions shall be made in the reverse order of seniority in the specific teaching field;⁸⁶ or for good cause as determined by the local school board, good cause being the failure of a teacher to meet the accepted standards of conduct for the profession as generally recognized and applied in similarly situated school districts throughout Texas.⁸⁷

The major substantive change found in Section 13.110 of the Texas Education Code after the enactment of House Bill 72 in 1984 is the addition of a new section, Section 8, which provides that "failure by a person required to take an examination under Section 13.047 of this code to perform satisfactorily on at least one examination under that section on or before June 30, 1986," operates as another basis for discharge of any teachers employed under continuing contracts.⁸⁸

Apart from establishing the criteria by which a teacher gained or lost certification, or was terminated from a position in a school district, Texas law also sets forth the procedures by which a teacher may challenge one of these adverse employment decisions. Prior law established that before any certificate was cancelled, the holder must be notified and given an opportunity to be heard, and the person whose certificate was cancelled by the state commissioner of education had a right of appeal to the State Board of Education.⁸⁹ Moreover, discharged teachers were also entitled to notice,⁹⁰

85. *Id.* § 13.110(5).

86. *Id.* § 13.110(6).

87. *Id.* § 13.110(7).

88. TEX. EDUC. CODE ANN. § 13.110(8) (Vernon Supp. 1987).

89. TEX. EDUC. CODE ANN. § 13.046(b) (Vernon 1972).

90. TEX. EDUC. CODE ANN. § 13.111 (Vernon 1972), which provides:

Notice

(a) Before any teacher shall be discharged during the year for any of the causes mentioned in Section 13.109 of this code, or before any probationary contract teacher shall be dismissed at the end of a school year before the end of the term fixed in his contract, or before any teacher holding a continuing contract shall be dismissed or returned to probationary contract status at the end of a school year for any of the reasons mentioned in Section 13.110 of this code, he shall be notified in writing by the board of trustees or under its direction of the proposed action and of the grounds assigned therefore.

(b) In the event the grounds for the proposed action relate to the inability or failure of the teacher to perform his assigned duties, the action shall be based upon the written recommendation by the superintendent of schools, filed with the board of trustees. Any teacher so discharged or dismissed or returned to probationary contract status shall be entitled, as a matter of right, to a copy of each and every evaluation report, or any other memorandum in writing which has been made touching or concerning the fitness or conduct of such teacher, by requesting in writing a copy of the same.

hearing,⁹¹ and a right of appeal.⁹²

Now, even though there are a few changes, the law still provides the same basic, procedural safeguards. Section 13.046(b) of the Texas

91. TEX. EDUC. CODE ANN. § 13.112 (Vernon 1972), states:

Hearing

(a) If, upon written notification of the proposed action, the teacher desires to contest the same, he shall notify the board of trustees in writing within 10 days after the date of receipt by him of the official notice above prescribed, of his desire to be heard, and he shall be given a public hearing if he wishes or if the board of trustees determines that a public hearing is necessary in the public interest.

(b) Upon any charges based upon grounds of inefficiency, or inability or failure of the teacher to perform his assigned duties, the board of trustees may in its discretion establish a committee of classroom teachers and administrators, and the teacher may request a hearing before this committee prior to hearing of the matter by the board of trustees.

(c) Within 10 days after request for hearing made by the teacher, the board of trustees shall fix a time and place of hearing, which shall be held before the proposed action shall be effective. Such hearing shall be public unless the teacher requests in writing that it be private.

(d) At such hearing, the teacher may employ counsel, if desired, and shall have the right to hear the evidence upon which the charges are based, to cross-examine all adverse witnesses, and to present evidence in opposition thereto, or in extenuation.

92. TEX. EDUC. CODE ANN. § 13.115 (Vernon 1972), which says:

Appeals

(a) If the board of trustees shall order the teacher discharged during the school year under Section 13.109 of this code, the teacher shall have the right to appeal such action to the commissioner of education, for review by him, provided notice of such appeal is filed with the board of trustees and a copy thereof mailed to the commissioner within 15 days after written notice of the action taken by the board of trustees shall be given to the teacher; or, the teacher may challenge the legality of such action by suit brought in the district court of any county in which such school district lies within 30 days after such notice of the action taken by the board of trustees has been given to the teacher.

(b) If the board of trustees shall order the continuing contract status of any teacher holding such a contract abrogated at the end of any school year and such teacher returned to probationary contract status, or if the board of trustees shall order that any teacher holding a continuing contract be dismissed at the end of the school year, or that any teacher holding a probationary contract shall be dismissed at the end of a school year before the end of the employment period covered by such probationary contract, the teacher affected by such order, after filing notice of appeal with the board of trustees, may appeal to the commissioner of education by mailing a copy of the notice of appeal to the commissioner within 15 days after written notice of the action taken by the board of trustees has been given to the teacher.

(c) Either party to an appeal to the commissioner shall have the right to appeal from his decision to the State Board of Education, according to the procedures prescribed by the State Board of Education. The decision of the State Board of Education shall be final on all questions of fact, but shall be subject to appeal to the district court of any county in which such school district or portion thereof lies, if the decision of the state board:

- (1) is not supported in the record by substantial evidence;
- (2) is arbitrary or capricious; or
- (3) is in error in the application of existing law to the facts of the case.

Education Code establishes that if a teacher's certificate is suspended⁹³ or cancelled⁹⁴ by the state commissioner of education, the teacher may appeal to the district court in Travis County⁹⁵ instead of to the State Board of Education.⁹⁶ Discharged teachers, in addition to all of the due process rights set forth under the prior law, are currently entitled to receive written notice reflecting the Board of Trustees action from the board of trustees within 15 days following the conclusion of the discharge hearings.⁹⁷

Taken together, the statutory changes since 1979 did several things. First, they changed the character of teaching certificates from permanent certificates which are valid for life to three classes of teaching certificates which are valid for a term of years, and one other certificate, the master teacher certificate, which is valid for life. Second, they established a new basis for discharge—the failure to take and pass a competency test on or before June 30, 1986. Thus the stage was set for the decertification of teachers who prior to 1979 had been granted certificates valid for life. When the curtain rose, it precipitated the ejection of formerly certified Texas teachers from the classroom.

On some level, the Texas legislative scheme is brilliant—it is a scheme which whittled away the teachers's employment rights. When the full impact of the legislative changes was discerned, necessarily, it culminated in a flurry of newspaper articles,⁹⁸ news commentaries, editorials and law suits.⁹⁹

(d) Trial procedure in the district court shall be the same as that accorded other civil cases on the docket of said court, with the decision of the trial court to be subject to the same rights of appeal under the Texas Rules of Civil Procedure as is accorded other civil cases so tried.

93. In 1979, the section was amended to allow for "suspension" of certificates. TEX. EDUC. CODE ANN. § 13.046 (Vernon Supp. 1987), *amended by* Acts 1979, 66th Leg., p. 666, ch. 294, § 1 eff. Aug. 27, 1979.

94. TEX. EDUC. CODE ANN. § 13.046 (Vernon Supp. 1987).

95. *Id.* § 13.046(b).

96. TEX. EDUC. CODE ANN. § 13.046(b) (Vernon Supp. 1987). In 1984, as part of House Bill 72, the provision was amended to allow teachers to appeal to "a district Court in Travis County." Acts 1984, 68th Leg. 2nd Called Sess., p. 302, ch. 28, art. I, part D, § 4, eff. Sept. 1, 1984.

97. TEX. EDUC. CODE ANN. § 13.112(e) (Vernon Supp. 1987) *amended by* Acts 1984, 68th Leg., 2nd Called Sess., p. 353, ch. 28, art. III, part A, § 2, eff. Sept. 1, 1984.

98. Kreps, *Questions on Education Answered*, Waco Tribune Herald Feb. 22, 1985, at 1b, col.5 (1 star ed.); Bryan-College Station Eagle, June 11, 1985, at 12a, col.1; Brenna, *Effectiveness of Skills Test for Educators Questioned*, Dallas Times Herald, Apr. 7, 1985; Lee Jones, *Officials Call Jargon Test Silly.*, Ft. Worth Star Telegram, June 8, 1985, at 28a, col.1; Stutz, *Teachers Get Date for Test*, Dallas Morning News, June 9, 1985, at 37a, col.a (home final ed.); Copelin, *Arkansas Results Color Texas Teacher Battle on Literacy Testing*, Austin-American Statesman, July 30, 1985, at D1, col.1; Mika Sharp, *Texas in Forefront of States in Enacting Competency Tests*, El Paso Times, July 7, 1985, at 3e, col.1; Bill Kidd, *Legislators Seeking Teacher Test Alternative*, Lubbock Avalanche, Mar. 12, 1985.

99. Texas State Teachers Association v. State, 711 S.W. 2d 421 (Tex. Ct. App. 1986),

What necessitated these drastic changes in the employment rights of teachers? One simple answer is that the Texas legislature, like many other jurisdictions, sought to stop, what it perceived to be, the proliferation of illiteracy in the state.¹⁰⁰ Another answer focuses on the work of the Select Committee on Public Education (SCOPE) which sparked the passage of House Bill 72. As one noted, the recommendations of SCOPE, chaired by H. Ross Perot, the well-known Texas businessman, were consistent with those of the nationwide movement for excellence. But their genesis in Texas was more idiosyncratic.¹⁰¹

Governor Mark White, elected in 1982 with the support of teachers, had pledged to increase teachers' salaries. But the 1983 Legislature, faced with declining revenues, could not pass such an increase without a much-dreaded tax increase. The legislature instead authorized SCOPE to study the system used to finance the public schools in Texas and make recommendations for its improvement.¹⁰² In the course of discussing teacher salaries, SCOPE also considered the issue of teacher quality because of the belief of H. Ross Perot, the chair, and others that some improvement in teaching was necessary to justify additional state spending.¹⁰³ The final SCOPE report therefore included a large number of the recommendations from *A Nation at Risk* and the national movement for excellence—recommendations that went far beyond the Legislature's charge to SCOPE to make recommendations concerning the improvement of the finance system of the public school.¹⁰⁴ The Legislature decided to consider the SCOPE recommendations in 1984 at a special session of the Legislature.¹⁰⁵

The controversial teacher competency testing provision was one

writ ref'd n.r.e. 30 Tex. Sup. Ct. J. 19 (1987); Texas State Bd. of Education, et al v. Guffy, 718 S.W. 2d 48 (Tex. Ct. App. 1986) (overturning a lower court's grant of a temporary injunction on the grounds that the teacher failed to show that, without the temporary injunction, he would suffer irreparable harm pendente lite).

100. See generally Lyndon B. Johnson School of Public Affairs: Policy Research Project Report, No. 70, THE INITIAL EFFECTS OF HOUSE BILL 72 ON TEXAS PUBLIC SCHOOLS: THE CHALLENGES OF EQUITY AND EFFECTIVENESS (1985) [hereinafter INITIAL EFFECTS OF HOUSE BILL 72] (citing the 1983 report of the National Commission on Excellence in Education, *A Nation at Risk: The Imperative for Educational Reform* at xvi.) Speculation regarding why students can not read is rampant, and so, many commentators point to *A Nation at Risk* as the authoritative source which answers why students' performance on tests is worsening. That report can not be the impetus behind the educational reform movement in Texas because, the issuance of *A Nation at Risk* came four years after the state of Texas began destroying teachers's employment rights by repealing Section 13.038 which provided that teaching certificates were permanent and valid for life.

101. INITIAL EFFECTS OF HOUSE BILL 72, *supra* note 100 at xvi.

102. INITIAL EFFECTS OF HOUSE BILL 72, *supra* note 100 at xvii-xviii.

103. *Id.*

104. *Id.* (citing Select Committee on Public Education, *Recommendations*, April 19, 1984).

105. *Id.* at xviii.

of SCOPE's key recommendations.¹⁰⁶ Indeed, SCOPE refused to endorse any aspect of the education reform package if the competency examination provision were deleted.¹⁰⁷ Partly because of the intense lobbying of H. Ross Perot, the Texas Legislature adopted the controversial provision¹⁰⁸ requiring all teachers to pass an examination proving their ability to read and write,¹⁰⁹ their knowledge of the subject taught,¹¹⁰ and their ability to perform the job.¹¹¹ The law also mandated that the tests must be passed during the 1985-1986 school year.¹¹²

In the final analysis the teacher competency testing provisions were spawned from a committee that exceeded its charge,¹¹³ and passed by the Texas Legislature during a special legislative session that lasted a scant month from—June 4 to July 3, 1984.¹¹⁴ During that month, the process of bargaining and compromise over specific provisions of House Bill 72 was "complex and hurried."¹¹⁵ In contrast to educational reform movements in other states, the changes in Texas took place with relatively little consultation with educators and almost no participation by parents and other interested citizens.¹¹⁶ To build a consensus on reform, the education reform movement in other states involved the educational community and interested citizens.¹¹⁷ The result of this highly centralized or "top-down" reform movement in Texas is that the content of the bill itself was generally not known by educators until its final passage.¹¹⁸

If one believes that Texas citizens would be more willing to pay teachers higher salaries if Texas students performed better on standardized tests and that one way of improving the performance of students is to oust incompetent teachers from the classroom, then denying continued certification to teachers who fail to take or fail to pass the Texas

106. INITIAL EFFECTS OF HOUSE BILL 72, *supra* note 100 at 39.

107. *Id.*

108. *Id.*; see also H.B.72, 68 Leg., 2nd Called Sess., p. 150, Ch. 28, art. III, part A, § 3, eff. Sept. 1, 1984.

109. INITIAL EFFECTS OF HOUSE BILL 72, *supra* note 100 at 39; see also H.B.72, 68 Leg., 2nd Called Sess. p. 155, Ch. 28, art. III, part c, § 3(b), eff. Sept., 1, 1984.

110. *Id.*

111. *Id.*

112. *Id.*

113. INITIAL EFFECTS OF HOUSE BILL 72, *supra* note 100 at xviii (citing Select Committee on Public Education, *Recommendations*, April 19, 1984).

114. INITIAL EFFECTS OF HOUSE BILL 72, *supra* note 100 at xviii.

115. *Id.* (citing Texas Association of School Boards, "Legislative Report," for June 8, June 15, June 22, June 29, and July 6, 1984).

116. INITIAL EFFECTS OF HOUSE BILL 72, *supra* note 100 at xviii.

117. *Id.*

118. *Id.*

Examination of Current Administrators and Teachers (TECAT)¹¹⁹ has a kind of intuitive appeal. Logically and legally, however, the Texas solution is plagued with difficulties. First, it makes no provision for people who are excellent and effective teachers, but poor test takers. Second, it makes no provision for people who are excellent test takers, but poor teachers. Third, it fails to establish a positive correlation between how a particular teacher's performance on the TECAT, will translate into a better classroom performance which results in that teacher's students performing better on standardized tests. Thus, the gist of the arguments which inspired the Perot Committee is unsupported.

Part Two

A. Texas State Teachers Association v. State of Texas

The furor over the legality of imposing competency testing requirements on certified school teachers and administrators resounded in courthouses throughout the state. The leading case is *Texas State Teachers Association v. State of Texas*.¹²⁰ In that case, the Texas State Teachers Association (Teachers Association) sued the Central Education Agency, the State Board of Education and others, in the district court of Travis County seeking a declaratory judgment that Section 13.047 of the Texas Education Code¹²¹ which imposes competency testing requirements on certified school teachers and administrators is unconstitutional. The Teachers Association also sought an injunction prohibiting the defendants from implementing the testing law. After a hearing, the district court denied the Teachers Association's motion for summary judgment and granted the defendant's summary judgment motion, declaring Section 13.047 constitutional and denying the plaintiff's request for injunctive relief. The Court of Appeals of Texas at Austin affirmed.¹²² Recently, the Texas Supreme Court declined to review this case.¹²³

119. TECAT is the acronym for the examination the state regulatory authorities developed pursuant to TEX. EDUC. CODE ANN. § 13.047 (Vernon Supp. 1987).

120. 711 S.W.2d 421 (Tex. Ct. App. 1986), *writ ref'd n.r.e.* 30 Tex. Sup. Ct. J. 19 (1987).

121. *Id.* at 422 and TEX. EDUC. CODE ANN. § 13.047 (Vernon Supp. 1987).

122. 711 S.W.2d 421, 426 (Tex. Ct. App. 1986), *writ ref'd n.r.e.* 30 Tex. Sup. Ct. J. 19 (1987).

123. On February 18, 1987, the Texas Supreme Court refused a writ determining that there was no reversible error. That is tantamount to the United States Supreme Court denying certiorari.

Based on the arguments proffered by the Teachers Association, the court found the statutory provision constitutional.¹²⁴ The Teachers Association attacked the constitutionality of the law by alleging that Section 13.047 impairs the obligation of contracts and that it is a retroactive law in violation of the Texas Constitution.¹²⁵ The court rejected the Teachers Association's arguments by balancing them against the state's police power to regulate occupations and professions.¹²⁶ The Teachers Association failed to make some of the stronger, and perhaps more persuasive arguments, that could have lead the court to conclude that Section 13.047, as enacted and as implemented, is unconstitutional. Nonetheless, because of the Texas Supreme Court's ruling, teachers may consider seeking recourse in federal court to attack the constitutionality of Section 13.047 of the Texas Education Code.

B. Other Arguments for Attacking the Constitutionality of Section 13.047 of the Texas Education Code

First, plaintiffs who can show that a disproportionately high number of minority teachers failed the test may challenge the law as being violative of Title VII of the Civil Rights Act of 1964.¹²⁷ Second, to the extent Texas public schools also receive federal funds, the unconstitutionally discharged teachers can allege violations of Title VI of the Civil Rights Act of 1964.¹²⁸ Third, all teachers who were certified prior to 1979 could argue that Section 13.047 unconstitutionally destroyed the property interest they had in their teaching certificates.¹²⁹ Fourth, all teachers who failed the test can argue that the State of Texas impermissibly infringed their constitutionally protected liberty interests.¹³⁰ Thus, all teachers who as a result of failing the test were

124. *Id.* at 425.

125. *Id.* at 423.

126. *Id.* at 425.

127. 42 U.S.C. §§ 2000e to 2000e-15 (1982).

128. 42 U.S.C. §§ 2000d to 2000d-6 (1976).

129. Both the Federal and Texas constitution provide that no person shall be deprived of property without due process of law. U.S. CONST. amend.V; Tex. Const. 1 § 19.

The argument is that if a teacher's expectation in continued employment is a constitutionally protected property interest, *see*, Board of Regents v. Roth, 408 U.S. 563, (1972), Perry v. Sinderman, 408 U.S. 593, (1972) and Hostrap v. Board of Jr. College Dist. No. 515, 523 2d 569 (7th Cir. 1975) then certainly, the teaching certificate which is the prerequisite to gaining and retaining a teaching position is a constitutionally protected property interest.

130. *Id.*

summarily decertified and fired from their jobs can allege a violation of their procedural¹³¹ and substantive due process rights.¹³²

1. Violation of the Teachers' Rights Under Title VII

Title VII of the Civil Rights Act of 1964 (Title VII) prohibits employment discrimination based on race, color, religion, sex, or national origin.¹³³ Because Blacks and Hispanics failed the TECAT in disproportionately high numbers, prospective plaintiffs could challenge the use of the TECAT under Title VII. One account revealed that about two-thirds of the 6,579 teachers and administrators who failed the TECAT administered in March, 1986, were minorities. It further stated that about 18 percent of the Blacks and about 6 percent of the Hispanics failed one or more portions of the test, whereas only about one percent of the Whites failed the test.¹³⁴ Indeed, a later article indicated that in the predominantly Black North Forest Independent School District about 23 percent of the educators failed the March 1986 TECAT.¹³⁵ The June results were only slightly more encouraging. An ethnic breakdown of composite results showed 99.9 percent of Whites passed, as did 98.9 percent of Hispanics and 95.4 percent of Blacks.

131. U.S. CONST. amend.XIV. provides:

. . . No state shall . . . deprive any person of life, liberty, or property without due process of law; . . . As noted earlier, the due process provisions of the constitution are designed to safeguard the rights of all persons from arbitrary and capricious governmental action.

132. In Houston, for example, the school board for the Houston Independent School District [HISD] voted to fire all teachers who failed the skills test [TECAT] twice. See Price and Hensel, *HISD To Fire Teachers Who Failed Skills Test Twice*, Houston Post, Aug. 1, 1986, A1, col. 2. The school board failed to provide procedural due process as required under the statute. In fact, its failure to do so was later criticized in a subsequent editorial. Houston Post, Aug. 7, 1986, B1, col.1.

133. Title VII provides that:

It shall be an unlawful employment practice for an employer . . . [to] classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities . . . because of such individual's race, color, religion, sex, or national origin.

42 U.S.C. § 2000e-2(a)(2) 1982.

134. Price, *Minority Teachers Hardest Hit by Literacy Test Failures*, Houston Post, May 9, 1986, at A1, col. 1. See also, Bagdon, *Teacher Competency Testing and Merit Pay Proposals Under the Equal Protection Clause and Title VII*, 28 J. OF URB. & CONTEMP. L. 251, 267 wherein the author says, "Standardized tests often have a disproportionate impact upon minorities." (citing See generally White, *Culturally Biased Testing and Predictive Invalidity: Putting Them on the Record*, 14 HARV. C.R.-C.L.L. REV. 89 (1979)).

135. Price and Hensel, *HISD To Fire Teachers Who Fail Skills Test Twice*, Houston Post, August 1, 1986, at 1A, col. 2.

The composite figures are skewed because approximately 6000 people did not indicate ethnicity on the test form.¹³⁶

To challenge successfully the TECAT on Title VII grounds, a litigant must satisfy a three-prong test set out in *Griggs v. Duke Power*¹³⁷ and *Albemarle Paper v. Moody*.¹³⁸ In those cases, the Supreme Court established the tripartite inquiry to be applied in Title VII discriminatory impact cases which challenge the use of a particular employee selection standard.¹³⁹ Part one of the test requires plaintiffs to make out a *prima facie* case by showing the applicability of Title VII and by proving the selection standard has a substantial disparate impact.¹⁴⁰ Part two of the test requires the defendants, provided that plaintiffs meet their burden, to demonstrate that the selection standard is job-related or a business necessity.¹⁴¹

Finally, in part three, if defendants establish their defense, then the plaintiffs must prove that the defendants could use other selection standards that would be just as suitable to the defendants' needs but would be less discriminatory in their impact on minority applicants.¹⁴²

136. *Id.*

137. 401 U.S. 424 (1971).

138. 422 U.S. 405 (1975).

139. In *Griggs v. Duke Power*, 401 U.S. 424 (1971), the Supreme Court rejected an employer's hiring scheme which mandated that employees or prospective employees either have a high school education or pass a standardized general intelligence test as a condition of employment in or transfer to jobs when (a) neither standard is shown to be significantly related to job performance, (b) both requirements operate to disqualify Negroes at a substantially higher rate than White applicants, and (c) the jobs in question formerly had been filled only by White employees as part of a long standing practice of giving preference to Whites. *Id.* at 425-426. In *Albemarle Paper Co. v. Moody*, 422 U.S. 405 (1975) the Supreme Court again struck down an employer's preemployment tests as discriminatory under Title VII. The Court said these tests could be held to be merely a pretext for discrimination, and thus in violation of the law, if another test could serve the employer's ends just as well. *Id.* at 425.

140. 401 U.S. 424, 426 (1971).

141. *Id.* Some questions still remain about when to allow rebuttal of defendants's evidence of the job-relatedness/business necessity defense. See *New York City Transit Authority v. Beazer*, 440 U.S. 568 (1979) wherein the Supreme Court stated that plaintiffs need not be given an opportunity to rebut defendants' showing of job-relatedness/business necessity when discriminatory intent or racial animus on the part of the defendants has not been proven. *Id.* at 587. Yet, in *Furnco Construction Corp. v. Walters*, 437 U.S. 567 (1978) the Supreme Court intimated that no showing by defendants of legitimate purpose can bar plaintiff's opportunity to offer evidence of pretext. *Id.* at 578.

142. *Albemarle Paper Co. v. Moody*, 422, U.S. 405, 425 (quoting *McDonnell Douglas v. Green*, 411 U.S. 792, 801 (1973)). See *Connecticut v. Teal*, 457 U.S. 440, 447 (1982) (suggesting that plaintiff may even prevail if he shows that the "employer was using the practice as a mere pretext for discrimination"). Which party has the burden of establishing the existence or nonexistence of suitable alternatives can depend on the jurisdiction in which one is litigating the case. Under *Albemarle Paper Co. v. Moody*, the plaintiffs have the burden once the defendants establish that the selection device or procedure is job-related. Whereas several other lower courts require

For plaintiffs to meet their initial burden of showing a disproportionate impact on members of any race, sex, religion or ethnic groups, they can rely exclusively on statistical evidence¹⁴³ like that mentioned briefly above, to indicate that the discriminatory impact is not merely coincidental.

Defendants can rebut plaintiffs' prima facie case of discrimination by demonstrating that the TECAT is valid¹⁴⁴ and reliable¹⁴⁵ which is the standard that courts throughout the country use to determine if the employer used a proper test. In *Washington v. Davis*¹⁴⁶ the Supreme Court relied upon the Guidelines on Employment Selection Procedures (Federal Guidelines)¹⁴⁷ developed by the Equal Employment Opportunity Commission, and upon the Standards for Educational and Psychological Tests (APA Standards),¹⁴⁸ developed by a joint committee of the American Psychological Association (APA), and the American Educational Research Association (AERA), and the National Council for Measurement in Education (NCME). And in *Debra P. v. Turlington*¹⁴⁹ the court relied on the APA Standards.¹⁵⁰ Basically, *reliability* refers to whether the instrument produces consistent results if applicants repeatedly take it or similar tests,¹⁵¹ and *validity* refers

defendants to establish the nonexistence of suitable alternatives as part of their burden of proof in test validation. See Federal Guidelines, 29 C.F.R. § 1607 (1986) and its earlier versions; Kirby v. Colony Furniture Co., 613 F.2d 696, 703-04 (8th Cir. 1980); Blake v. City of Los Angeles, 595 F.2d 1367 (9th Cir. 1979), *cert. denied*, 446 U.S. 928 (1980); Pettway v. American Cast Iron Pipe Co., 494 F.2d 211, 244 N. 87 (5th Cir. 1974).

143. See *Dothard v. Rawlinson*, 433 U.S. 321, 329-31 (1977); *cf.* *Hazelwood School Dist. v. United States*, 433 U.S. 299, 307 (1977) (gross statistical disparities can constitute prima facie proof of a "pattern or practice" of discrimination).

144. See generally McClung, *Competency Testing Programs: Legal and Educational Issues*, 47 FORDHAM LAW REVIEW 651 at 666 (1979) [McClung]; See also Swiger and Zehr, *The Search for Excellence: Legal Issues in Teacher Competency Testing*, 16 THE URB. LAWYER 745 (1984) [Swiger & Zehr].

145. *Id.*

146. 426 U.S. 229 (1976) (American Psychological Association's (APA) Standards for Educational and Psychological Tests applied to testing practices of the Washington, D.C. Police Department in selecting individuals for its training academy.) In *Davis*, an equal employment case, the Washington, D.C. police department validated a preemployment test by showing that test results were accurate predictors of training course performance. The Court accepted that evidence even though the city established no link between training course performance and job performance.

147. 29 C.F.R. §§ 1607.1-18 (1986).

148. American Psychological Association, *Standards for Educational and Psychological Tests* (1974) [APA STANDARDS].

149. *Debra P. v. Turlington*, 474 F. Supp. 244 (M.D. Fla. 1979), *aff'd in part, vacated in part*, 644 F.2d 397 (5th Cir. 1981), *reh'g denied* (per curiam) 654 F.2d 1079 (1981), *on remand* 564 F. Supp. 177 (M.D. Fla. 1983), *aff'd* 730 F.2d 1405 (11th Cir. 1984).

150. APA STANDARDS, *supra* note 148.

151. See generally McClung, *supra* note 144 at 666 (quoting the APA STANDARDS); and Swiger and Zehr, *supra* note 144 at 757 (same).

to whether the instrument measures what it purports to measure.¹⁵² Validity is tied to several ancillary concepts: The *criterion-related* validities (*predictive* and *concurrent*); *content* validity; and *construct* validity.¹⁵³ Merle Steven McClung writes:

Predictive validity is a measure of how well test items predict the future performance of test takers. This type of assessment requires an analysis comparing the predictions about each test taker based on the test results with the actual functioning of the test taker at a later point in time. . . .

Concurrent validity is a measure of how well test results correlate with other criteria which might provide the same type of information about test takers. This type of assessment provides a measure of a test's immediate predictive validity, or how well determinations based upon test results correlate with other currently available information about test takers.

Construct validity is a measure of how well test items correlate to the theory or constructs behind the tests. This assessment indicates the relationship between the test and actual test performance. This assessment is probably the most difficult to conduct since it may be difficult to identify the constructs upon which a test is built and because a statistical analysis of the interrelationship of test items may be required.

Content validity is a measure of how well test items represent the knowledge that the test purports to measure. A test with a high degree of content validity is a test for which high test performance serves as an index of a high degree of skills or knowledge in the area which the test purports to measure.¹⁵⁴

In *Griggs v. Duke Power Co.*¹⁵⁵ the Supreme court ruled unconstitutional under Title VII of the Civil Rights Act of 1964¹⁵⁶ a test an

152. See generally McClung, *supra* note 144 at 666 (quoting the APA STANDARDS).

153. *Id.*; see also Citron, *An Overview of Legal Issues in Teacher Quality*, 14 J. LAW & EDUC. 277 at 283 (1985)

First, tests should have face validity. They should also have content validity; that is, the material tested and the abilities actually needed on a job should match. Sometimes tests are required to have a more abstract kind of 'construct' validity, which refers to how well the test measures the construct or theory for which it was designed. The more a test looks like a test of pure intelligence, the more important it is to establish construct validity as well as content validity. If a test purports to measure 'aptitude' for teaching, a construct validation study must show that 'aptitude' is closely related to teaching skills, not merely an aspect of general intelligence." (citing See generally G.F. MADAUS, *THE COURTS, VALIDITY AND MINIMUM COMPETENCY TESTING* (1983)).

154. McClung, *supra* note 144 at 666-667.

155. 401 U.S. 424, 426 (1971).

156. *Id.* See also 42 U.S.C. § 2000e-2.

employer attempted to impose on employees or prospective employees, because the test was not significantly related to successful job performance.¹⁵⁷

Courts tend to refer to this notion of a match between a test and its purpose as "content validity."¹⁵⁸ Given implicit judicial recognition in *Guardian Association of New York City Police Department, Inc. v. Civil Service Commission of the City of New York*,¹⁵⁹ the content validity test has the following characteristics:

- (1) The test makers must have conducted a suitable job analysis.
- (2) The test makers must have shown reasonable competence, thoroughness and care in constructing the test itself.
- (3) The content of the test must relate to the content of the job.
- (4) The content of the test must be representative of the content of the job.
- (5) The system for scoring the test must usefully select applicants who can perform the job.¹⁶⁰

Plaintiffs who object to the TECAT on content validity grounds should anticipate rebuttal arguments that the TECAT satisfies the job-relatedness test or that it meets another legitimate employment objective as articulated in *Griggs v. Duke Power*.¹⁶¹

Support for the suitability of the TECAT as a proper test to measure teachers' competence is divided. For example Betty Von Maszewski, the dean of instruction at Lee High School in Houston, said she found "spelling and punctuation errors in the test," and she said "[t]he state should have spent more time in its development."¹⁶² State Rep. Bill Hammond, R-Dallas, a member of the House Public Education Committee slammed the TECAT as "too simple," as evidenced by the low number of failures. "We blew it," he said, "We've now validated some teachers who shouldn't have been. It's the worst possible outcome." He further stated that "the state should have spent the money to test teachers in individual subject areas for a valid assessment of knowledge and literacy."¹⁶³ The President of the Texas Federation of Teachers, John Cole, commenting on the results of the March

157. 401 U.S. 424, 426, 436 (1971).

158. Swiger and Zehr, *supra* note 144 at 755.

159. 630 F.2d 79 (2nd Cir. 1980).

160. 630 F.2d at 95. See also Swiger and Zehr, *supra* note 144 at 756-757.

161. 401 U.S. 424, 431 (1971).

162. Price, *Teacher Tests: Exam Not Such a Monster Most Educators Discover*, Houston Post, March 11, 1986 at 1A, col. 1.

163. Price, *Minority Teachers Hardest Hit by Literacy Test Failures*, Houston Post, May 9, 1986, at 1A, col. 1.

1986 TECAT said, teachers have been "proven innocent of the charge of incompetency."¹⁶⁴ Floyd Thomas, a general construction and trades teacher at the Contemporary Occupational Training Center in (Houston Independent School District), said he should not have been forced to take the test because he does not teach English or math. In fact, citing his evaluations, Mr. Thomas further indicated that he does an excellent job teaching skills to youngsters who desperately need them.¹⁶⁵

Further evidence which supports the contention that failing the test is unrelated to a teacher's competency comes from the fact that ten teachers who did so received career ladder supplements during the year before they were fired. Quoting from a lawsuit, two reporters wrote, "[t]he career ladder appraisal process is designed to evaluate the skills and competency of the teachers as TECAT purports to do, but does not rely solely on any isolated skills evaluation. Instead, career ladder appraisals take into consideration a variety of factors which comprise the total teacher competency picture. Any decision to terminate the teachers without considering the valid career ladder appraisals, or other competency evaluations is unreasonable, arbitrary and capricious."¹⁶⁶ The debate, therefore, over whether the TECAT truly fulfilled its promise of eliminating incompetent teachers from the classroom still rages.¹⁶⁷

Taken *in toto* it is unclear whether Texas officials will be able to meet their burden that the test is valid. But even if they do, the plaintiffs could still prevail if they can show that other less onerous means could achieve the same end—of ousting incompetent teachers from the classroom. Two solutions alluded to above are: one, State Rep. Bill Hammond's suggestion that the state employ tests which measure teachers' mastery in individual subject areas, which were authorized by the statute but no funds were appropriated to administer them;¹⁶⁸ and two, the use of the career ladder or performance appraisal

164. *Id.*

165. Hensel, *Voc-ed Teachers Failing Skills Test: HISD Fears Shortage*, Houston Post, August 9, 1986 at 21A, col. 8. Many vocational education teachers lack degrees, which means they were hired out of industry based on their experience rather than a college degree. *Id.*

166. Hensel and Pasch, *48 Teachers Sue HISD Over Firings: Claim TECAT Violated Rights*, Houston Post, August 21, 1986, at 9A col. 1.

167. Education Commissioner Bill Kirby said, "[O]nly time will tell whether this was worth all the money that was spent, the anguish that was felt and the stress placed on teachers[.]" Price, *Minority Teachers Hardest Hit by Literacy Test Failures*, Houston Post, May 9, 1986, 1A, col. 1.

168. In fact, the Texas Legislature's Senate Education Committee recently approved a bill by a 8-0 vote that would abolish the subject-matter test after witnesses from teacher organizations testified that getting rid of the test would be a great morale booster. Sen. Carl Parker, committee chairman and bill sponsor, offered two reasons for abolishing the test—it is costly, and it fails

process as authorized under Texas law.¹⁶⁹ Thus, given that about 18% of the Blacks, about 6% of the Hispanics, and only 1% of the Whites failed the TECAT administered in March 1986, teachers who seek to challenge the TECAT under Title VII should be able to establish a disparate impact. Next, it is unclear whether the Texas state officials will be able to meet their evidentiary burden that the test is valid or reliable under the job-relatedness or business necessity test. But even if they can, plaintiffs should be able to show that Texas law also provides for a subjected matter test (provided that that test is not abolished) and an appraisal process, both of which are, arguably, better ways of assessing a particular teacher's competence or effectiveness in the classroom.

2. Violation of the Teachers' Rights Under Title VI

Pursuant to Title VI of the Civil Rights Act of 1964 (Title VI) recipients of federal funds are barred from discriminating against persons on the ground of race, color, or national origin.¹⁷⁰ Therefore, to the extent that prospective plaintiffs can show discrimination under Title VII and also show that local school districts received federal monies they should be able to meet the evidentiary burdens of Title VI.

In the Houston Independent School District (HISD), for example, the school district had an estimated budget for 1985-1986 of \$637,486,298 out of which some \$57,059,742¹⁷¹ was revenue generated from federal sources. The HISD was one of the school districts in the state which refused, as a general rule, to grant waivers to Houston teachers who failed the TECAT twice and instead decided to fire them.¹⁷²

Basically, to establish discrimination under the so-called "effects test" theory of Title VI, one could argue that a showing that the TECAT

to ensure quality education. Saying that he was satisfied the test is not a practical way to guarantee quality in the classroom, Sen. Parker is quoted as declaring, "We'd do better to stick with evaluators." *Houston Chronicle*, February 20, 1987, § 1, at 14, col. 1.

169. TEX. EDUC. CODE ANN. § 13.302 (Vernon Supp. 1987) (Added by Acts 1984, 68th Leg., 2nd Called Sess., ch. 28, art. III, part A, § 4, eff. September 1, 1984).

170. 42 U.S.C. §§ 2000d to 2000d-6 (1976). "No person in the United States shall on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving federal financial assistance." *Id.* at § 2000d.

171. Houston Independent School District, *1985-1986 Budget* (Proposed and transmitted by Dr. Billy R. Reagan, General Superintendent, August 1985). See *Id.* Schedule B at p. 3.

172. For an editorial criticizing the Board's decision and urging appellate hearings, see *Houston Post*, August 7, 1986 at 1B, col. 1.

results in disproportionate impact is sufficient.¹⁷³ In *Lau v. Nichols*,¹⁷⁴ the Supreme Court explicitly held that Title VI incorporates an effects standard and that a *prima facie* case of discrimination in violation of Title VI could in fact rest solely on disproportionate effect.

The court relied on a statement made during the Senate debates on the Civil Rights Act by Senator Hubert Humphrey, floor manager for the Act. Senator Humphrey had quoted the following presidential message to Congress: 'Simple justice requires that public funds, to which all taxpayers contribute, not be spent in any fashion which encourages, entrenches, subsidizes, or *results in discrimination*.' (emphasis in original).¹⁷⁵

Moreover, federal agencies have promulgated Title VI regulations¹⁷⁶ which have consistently interpreted Title VI to embody an effects standard.¹⁷⁷

Since *Regents of the University of California v. Bakke*¹⁷⁸ however,

173. For a particularly well-done article about how to challenge under Title VI of the Civil Rights Act minimum competency tests (MCT's) that are used to deny high school diplomas to disproportionately high numbers of minority students, see Benjes, Heubert, and O'Brien, *The Legality of Minimum Competency Test Programs Under Title VI of the Civil Rights Act of 1964*, 15 HARV. C.R.-C.L.L. REV. 537 (1980) [hereinafter Benjes, Heubert and O'Brien].

Although Benjes, Heubert and O'Brien admit that

[i]n *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978) the Supreme Court cast some doubt on the viability of the Title VI effects standard at least in cases involving explicit racial classifications. In the course of deciding that race-conscious preferences may be used by an educational institution attempting to achieve diversity in its student body, Justice Powell (announcing the decision of the Court) (footnotes omitted) and Justice Brennan (writing for four members of the Court) (footnotes omitted) suggested that the Title VI standard was congruent with that of the equal protection clause in cases like *Bakke*.

Though Justice Brennan's opinion in *Bakke* indicated that *Lau's* effects test [*Lau v. Nichols*, 414 U.S. 563 (1974)] was no longer viable, *Bakke* can be reconciled with *Lau*. *Bakke* did not involve the question of whether an effects test applied under Title VI. *Bakke* involved an analysis of intentional racial discrimination under Title VI and the Constitution. Thus, the view of five justices in *Bakke* that Title VI and the constitution are coextensive with regard to intentional racial discrimination does not overrule *Lau*, which held that Title VI and the Constitution are not coextensive with regard to practices that have discriminatory effects (emphasis supplied). (citing Brief for the United States as *Amicus Curiae* at 10, *Debra P. v. Turlington*, 474 F. Supp. 244 (M.D. Fla. 1979), *aff'd in part, vacated in part*, 644 F. 2d 397 (5th Cir. 1981), *reh'g denied* (per curiam) 654 F. 2d 1079 (1981), *on remand* 564 F. Supp. 177 (M.D. Fla. 1983), *aff'd* 730 F.2d 1405 (11th Cir. 1984).

174. 414 U.S. 563 (1974).

175. Benjes, Heubert and O'Brien, *supra* note 173, at 546.

176. *Id.* (footnotes omitted).

177. *Id.* at 547, n. 41 stating that the exception is the Small Business Administration. 13 C.F.R. § 112 (1980).

178. *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978).

courts have not uniformly applied the *Lau* effects test.¹⁷⁹ In fact, in *Board of Education of New York v. Harris*¹⁸⁰ the Supreme Court again suggested that *Lau* is no longer viable. Three commenters, Benjes, Heubert and O'Brien challenged any interpretation of the *Harris* case which would preclude applying the effects standard in cases challenging minimum competency tests (MCT's) on Title VI grounds. MCT's are standardized examinations that purport to measure knowledge and skills. Benjes, Heubert and O'Brien argue that the broad language used in *Harris* is dicta,¹⁸¹ and they also listed several other reasons to support their conclusion.¹⁸² One of the reasons is found in dicta in the Supreme Court's decision in *Fullilove v. Klutznick*.¹⁸³ There, because Chief Justice Burger announced the opinion of the Court and relied heavily on *Lau*, Benjes, Heubert and O'Brien conclude that he was certain of the strength of the *Lau* holding.¹⁸⁴

Both case law and public policy suggest that the three-part Title VII procedure is also appropriate in Title VI cases to establish a *prima facie* case that the objectionable employment practice has a "disparate impact" on members of a protected class.¹⁸⁵ In addition to the *Larry P. v. Riles*¹⁸⁶ case, the policy reasons for using Title VII's judicially created three-part test are: one, the test is designed to insure fair and equal treatment of all job applicants; two, it guarantees the fairness and accuracy of tests that form the basis of decisions in the employment context; and three, it also minimizes intentional discrimination by requiring that defendants justify actions that have an adverse impact on disproportionate numbers of minority persons.¹⁸⁷ Even though Benjes, Heubert and O'Brien use this reasoning to support the Title

179. *Larry P. v. Riles*, 495 F. Supp. 926 (N.D. Col. 1979), (highly disproportionate numbers of Black students were assigned to classes for the educable mentally retarded); *Guadalupe Organization v. Tempe Elem. School Dist. No. 3*, 587 F.2d. 1022 (9th Cir. 1978) (remedial language program); *Jackson v. Conway*, 476, F. Supp. 896 (E.D. Mo. 1979) (access to medical facilities); *Rios v. Read*, 480 F. Supp. 14 (E.D.N.Y. 1978) (bilingual education).

180. 444 U.S. 130 (1979).

181. Benjes, Heubert and O'Brien, *supra* note 173, at 553. See also n. 75 "The court explicitly recognized this: 'There is thus no need here for the court to be concerned with the issue whether Title VI of the Civil Rights Act of 1964 incorporates the constitutional [intent] standard.' " (quoting *Harris*, at 149).

182. Benjes, Heubert and O'Brien, *supra* note 173, at 553-554.

183. 448 U.S. 448 (1980) (involving the constitutionality of the Minority Business Enterprise (MBE) program).

184. Benjes, Heubert and O'Brien, *supra* note 173, at 554-555.

185. E.g. *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971); *Albemarle Paper Co. v. Moody*, 422 U.S. 405 (1975). In the Title VI context see *Larry P. v. Riles*, 495 F. Supp. 926 (N.D. Col. 1979), *appeal docketed*, No. 80-4027 (9th Cir. January 17, 1980).

186. 495 F. Supp. 926 (N.D. Col. 1979), (*appeal docketed*) No. 80-4027 (9th Cir. January 17, 1980)).

187. Benjes, Heubert, and O'Brien, *supra* note 173, at 557-558.

VII three-part test in the context of MCT's as a tool to deny students high school diplomas, it is equally compelling in the TECAT instance. Here, the TECAT is used to deny teachers their certificates to teach and their jobs. Teachers are thereby stripped of two things they had prior to failing the TECAT: one, a teaching certificate which was permanent and valid for life; and two, an income to meet their basic needs.

Plaintiffs can still establish violations under Title VI even if courts refuse to apply the effects test by establishing one of two things. First, Texas' requirement that certified teachers pass the TECAT preserves the effects of past *de jure* segregation; or second, Texas' decision to administer the TECAT and to fire all teachers who failed is the product of a present invidious intent to discriminate against minority teachers.¹⁸⁸

The federal Constitution bars practices that preserve the effects of prior intentional discrimination. Therefore, because minority teachers attended illegally segregated schools in Texas,¹⁸⁹ Title VI forbids the use of the TECAT to decertify and fire minority teachers when the TECAT failures are the result of educational deficiencies found in illegally segregated schools. In the *Debra P. v. Turlington* case¹⁹⁰ the courts struck down the state's use of MCT's to deny high school diplomas to a disproportionately high number of minority students on several grounds. First, the plaintiffs had been denied equal educational opportunity both before and after¹⁹¹ physical desegregation of the Florida schools in 1971; and second, the disproportionately high failure rate for minorities on the 1979 MCT was a result of this prior educa-

188. See also *id.* at 582-613.

189. See generally SCHWARTZ, *supra* note 21, 313-317 and L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 16-15 (1978). Both discuss the constraints placed on the enforcement of the Equal Protection Clause because of the "separate but equal" doctrine enunciated in *Plessy v. Ferguson*, 163 U.S. 537 (1896). Indeed, prior to the Supreme Court's decision in *Brown v. Board of Education*, 347 U.S. 483 (1954), the Supreme Court had struck down racially segregated graduate school education without explicitly examining the "separate but equal" doctrine. Notable among these was the Texas case of *Sweatt v. Painter*, 339 U.S. 629 (1950) (overturning state ban on admission of Blacks to state law school where state's alternative law school for Blacks offered inferior opportunity for law study). The Supreme Court had basically found in this case as well as others that specific benefits available to White students were unavailable to Black students.

The *Brown* decision failed to end the debate about the equality of educational opportunity in Texas schools. See *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1 (1973). See also *United States v. Texas*, 508 F.2d 98 (5th Cir. 1975) (upholding a district court's issuance of a preliminary injunction to prevent splintering of school district by disannexation on showing that the proposed action would increase minority population of school district in violation of an outstanding court order).

190. *Debra P. v. Turlington*, 474 F. Supp. 244 (M.D. Fla. 1979), *aff'd in part, vacated in part*, 644 F.2d 397 (5th Cir. 1981), *reh'g denied* (per curiam) 654 F.2d 1079 (1981), *on remand* 564 F. Supp. 177 (M.D. Fla. 1983), *aff'd* 730 F.2d 1405 (11th Cir. 1984).

191. *Id.* at 250, 252.

tional deprivation. Plaintiffs in *Debra P.* successfully argued that denying diplomas on the basis of MCT scores illegally preserved the effects of past discrimination.¹⁹²

Likewise, in Texas at least one member of State Board of Education, Volly Bastine, noted the impact of the double school system on minority teachers' performances on the TECAT. He reportedly testified in a law suit filed by fired Houston teachers that the remedial aid mandated by state law "simply has not been done" and, "[a] lot of those who failed are still suffering from a double school system[;] [t]hey definitely need specific remediation. . . ."¹⁹³ Hence, minority teachers who failed the TECAT and who can establish that they attended racially segregated schools should be able to prevail on the ground that decertifying them and firing them preserves the effects of the deficiencies of the dual school system.

Plaintiffs can also challenge the TECAT under Title VI as being the result of a present intent to discriminate. One generally accepted proposition is that minorities tend to score lower on standardized tests than their White counterparts.¹⁹⁴ Texas plaintiffs can therefore allege that the TECAT program had a disproportionate impact that was foreseeable by state officials when they adopted the test. Plaintiffs in the *Debra P.* case urged such an argument on the court, but the court, noting the legitimate interest advanced by the state, said it could not find that school officials had used the test because it would harm minority students.

Admittedly Texas plaintiffs would likewise have difficulty establishing invidious intentional discrimination; however, in practice, courts often allow parties to use indirect evidence to prove a desire to harm.¹⁹⁵ Proof that a challenged action results in disproportionate impact may be "an important point" in the intent inquiry.¹⁹⁶ The greater the degree of disparate impact the stronger the claim of discriminatory intent.¹⁹⁷ "[I]nevitability or foreseeability of consequences" may, in

192. *Id.* at 251.

193. Paasch, *More Teachers Joining Law Suit: 248 Failed TECAT Twice*, Houston Post, August 26, 1986, 4A, col. 1.

194. Bagdon, *Teacher Competency Testing and Merit Pay Proposals Under the Equal Protection Clause and Title VII*, 28 J. URB. & CONTEMP. L. 251, 267 (1985) (citing White, *Culturally Biased Testing and Predictive Invalidity: Putting Them on the Record*, 14 HARV. C.R.-C.L.L. REV. 89 (1979)). See also Beckham, *Legally Sound Criteria, Process and Procedures for the Evaluation of Public School Professional Employees*, 14 J. LAW & EDUC. 529 (1985) wherein he says: "While there is little empirical evidence to support the view that nationally standardized tests can predict success in teaching, some school districts and state education agencies have emphasized the teacher's knowledge of subject matter as a factor in determining competence." *Id.* 533.

195. *Arlington Heights v. Metropolitan Hous. Div. Corp.*, 429 U.S. 252, 266-68 (1977).

196. 429 U.S. 252, at 266 (1979).

197. *Costaneda v. Partida*, 430 U.S. 482 (1977).

certain cases, make it reasonable to draw "a strong inference that the adverse effects were desired."¹⁹⁸ If, however, Texas plaintiffs fail to establish intent on the basis of foreseeability and disproportionate impact, then they can use the partial list found in the *Arlington Heights v. Metropolitan Housing Division Corp.*¹⁹⁹ case. The list included actions or patterns explainable only by an intent to discriminate, the historical background of the challenged decision, irregularities in the procedures by which the challenged decision was reached, actions that contradicted policies generally endorsed by the decision-maker, and direct statements either made by the decision maker or appearing in legislative or administrative histories,²⁰⁰ and evidence of actions with foreseeable discriminatory effects lacking a basis in nondiscriminatory social policy.²⁰¹

A court may find evidence of racial animus if the state officials administered the TECAT, and knew it was of dubious validity, reliability or objectivity because state officials can have no legitimate interest in administering an invalid, unreliable or biased test.²⁰² A literacy examination, like the TECAT, if it is proven to be of dubious validity, or if, as here, it is enacted haphazardly, in great haste and without involvement of educators and interested community members, lacks a firm basis in "well accepted and historically sound non-discriminatory social policy."²⁰³ Next, evidence that particular state regulatory agencies or school districts have been found guilty of *de jure* segregation may render suspect a decision to adopt a TECAT which has a disparate impact.²⁰⁴ When, as here, the decision to fire certified teachers who failed the TECAT is made so as to deny them procedural due process as required under Texas law, it gives rise to a conclusion that there is a discriminatory intent or racial animus.²⁰⁵ To the extent, that state or local policies generally preclude the use of standardized testing as conditions of continued employment, the state's use of the TECAT could

198. *Personnel Adm'r of Mass. v. Feeney*, 442 U.S. 256, at 279 n. 25.

199. *Arlington Heights v. Metropolitan Hous. Div. Corp.*, 429 U.S. 252, (1977).

200. 429 U.S. at 266-68.

201. *United States v. Texas Education Agency (Lubbock)* 600 F.2d 518 (5th Cir. 1979).

202. *See United States v. State of South Carolina*, 445 F. Supp. 1094 (D.S.C. 1977), *aff'd per curiam sub. nom. National Educ. Ass'n v. South Carolina*, 434 U.S. 1026 (1978); and *Larry P. v. Riles*, 495 F. Supp. 926 (N.D. Cal. 1979), (*appeal docketed*) No. 80-4027 (9th Cir. January 17, 1980).

203. *See supra* text accompanying notes 133-169.

204. *Casteneda v. Partida*, 430 U.S. 482 (1977).

205. *See supra* text accompanying notes 52-119 and 262-266. *See also Larry P. v. Riles*, 495 F. Supp. 926 (N.D. Cal. 1979), (*appeal docketed*) No. 80-4027 (9th Cir. January 17, 1980)).

Specifically, in the *Larry P.* case the adoption of an I.Q. test requirement for educable mentally retarded (EMR) placement was found to be "riddled with procedural and substantive irregularities." *Id.* at 981.

suggest improper motive.²⁰⁶ Finally, if direct evidence of discriminatory intent is available the courts find it highly probative.²⁰⁷

If plaintiffs prove that the TECAT was partly the result of defendant's unconstitutional discrimination, defendants must meet a heavy burden of justification. Under *Arlington Heights*, defendants must prove "that the same decision would have resulted even if the impermissible purpose had not been considered."²⁰⁸ If defendants are unsuccessful, strict scrutiny will be imposed.²⁰⁹ Strict scrutiny requires defendants to establish that their discriminatory act was necessary to serve a compelling state interest.²¹⁰ Defendants in TECAT cases will be unable to prove this because even if defendants prove that they were pursuing a compelling state interest, they must also demonstrate that less restrictive, nondiscriminatory alternatives will not serve the summarily interest. Virtually all legitimate interests can be served without firing certified teachers who failed the TECAT in violation of the teachers' statutory and constitutional rights. All legitimate state interests in improving the quality of education in Texas schools can be served without racial animus or intentional discrimination.

3. Destruction of the Teachers' Property Interest

One fundamental proposition of this article is that Texas teachers had, and still have, a constitutionally protected property interest in their teaching certificates.²¹¹ It is well-established that state law defines

206. See generally Benjes, Heubert and O'Brien *supra* note 173.

207. See *Morgan v. Hennigan*, 379 F. Supp. 410 (E.D. Mass. 1974) (Boston desegregation case wherein plaintiff discovered and introduced verbatim transcripts of school committee meetings during which committee members said they opposed measures that would reduce racial imbalance in the schools); *Larry P. v. Riles*, 495 F. Supp. 926 (N.D. Cal. 1979) (key officials of the State Department of Education testified that they believed the over-enrollment of Black and Chicano children in the educable mentally retarded (EMR) classes accurately reflected the incidence of mental retardation among the children).

208. 429 U.S. at 270-71 n. 21.

209. 495 F. Supp. at 984.

210. See e.g., *McLaughlin v. Florida*, 379 U.S. 184, 192-93 (1964).

211. See generally SCHWARTZ *supra* note 21, at 165 where he says:

Under both the fifth and the fourteenth amendments, no person may be deprived of 'life, liberty, or property, without the process of law.' Taken literally, the term *due process* relates to the mode of proceeding, that must be pursued by governmental agencies. Due process of law, in this sense, denotes *proper procedure*, and it was the meaning primarily intended by the men who drafted the Bill of Rights. (citing Story, *Commentaries on the Constitution of the United States* § 1783 (1833).

From the beginning, however, a broader conception has been urged. Under it, the Due Process Clause imposes requirements of *substance* as well as *procedure*.

That due process would be interpreted to impose limitations of substance in addition to procedure was well-nigh inevitable if the Constitution was to serve as

the nature and scope of most property interests.²¹² Thus, the sufficiency of a claim of entitlement is typically decided by reference to such law.²¹³ If a teacher has no claim to continued employment under state law, no property interest is at stake when that teacher is dismissed.²¹⁴ The teacher's abstract need or desire for a unilateral subjective expectation of reemployment is not alone sufficient to invoke due process protection.²¹⁵

a substantial safeguard for property rights. If the Due Process Clause requires only fair procedure, it is an illusory protection. If the sole question that may be asked is whether the proper procedures were followed, it would—provided merely that the required forms were observed—make any law, however arbitrary, valid and proceedings under it done by 'due process of law.' (citing Douglas, J. dissenting, in *Poe v. Ullman*, 367 U.S. 497, 518 (1961)).

If this result is to be avoided, due process must be interpreted as a substantive, as well as a procedural, guaranty. (citing *Allgeyer v. Louisiana*, 165 U.S. 578 (1897)). As such, it bars governmental action deemed arbitrary. Substantive due process has been erected by the Supreme Court as the essential bullwark against arbitrary governmental action (citing *Hurtado v. California*, 110 U.S. 516, 532 (1884)). Arbitrary action, in the due process sense, means action that is willful and unreasonable—depending on the will alone and not done according to reason or judgment (citing *Monachino v. Rohan*, 178 N.Y.S. 2d 246, 248 (1958)).

212. L. TRIBE, *supra* note 189, at § 10-7, at 501-502.

These procedural safeguards [afforded by the fifth and fourteenth amendments] have their historical origins in the notion that conditions of personal freedom can be preserved only when there is some institutional check on arbitrary governmental actions (footnote omitted). The Supreme Court has analogized due process to the Magna Carta's 'guaranties against the oppressions and usurpations' (citing *Hurtado v. California*, 110 U.S. 516, 531 (1884)) of the royal prerogative, in support of the basic conclusion that due process is a restraint on the legislative as well as on the executive and judicial powers of the government, and cannot be so construed as to leave congress [or the states] free to make any process 'due process of law,' by its mere will. (footnote omitted).

The element of due process analysis characterized as 'procedural due process' delineates the constitutional limits on judicial, executive, and administrative *enforcement* of the legislative dictates (citations omitted). This has traditionally involved the elaboration of procedural safeguards designed to accord to the individual 'the right to be heard before being condemned to suffer grievous loss of any kind' and as a result of governmental choices—which can take the form of acts or, less commonly, of omissions. (footnote omitted).

213. Teachers certified prior to the 1979 repeal of § 13.038 which provided that the certificates were valid for life can certainly make the stronger case for a constitutionally protected property interest in their teaching certificates. Also, teachers who qualified for Master Teacher certificates after the 1984 amendments to the Education Code which added § 13.305 can make a persuasive argument concerning their property interest in their certificates. Teachers who theoretically have the least protection for asserting a property interest in their teaching certificates are those teachers who were certified after 1979 and who had not yet earned a Master Teacher Certificate at the time that they failed the TECAT. Nonetheless, even these teachers may have had an expectation that no new additional requirements would be imposed as conditions to continuing certification.

214. Rapp, *supra* note 30 at, § 6.15 [2][b][iii].

215. *Id.*

Texas teachers certified prior to 1979 have a constitutionally protected property interest in their teaching certificates. The law at that time provided that their certificates were permanent and valid for life.²¹⁶ Also, no statute barred the teachers from characterizing the certificate as a property right.²¹⁷ Likewise, continuing contract teachers have a constitutionally protected property interest in their employment contracts.²¹⁸ In the *Heins v. Beaumont Independent School District*²¹⁹ case, the court said that "a continuing contract teacher under Texas law has a property interest in employment and is entitled to a due process hearing prior to termination of employment." In contrast, 'probationary contract' teachers' have fewer assurances about their continued employment.²²⁰ To establish a constitutionally protected property interest, a probationary contract teacher must demonstrate an expectation of continued employment. A probationary contract teacher may find it impossible to show such a property interest because in *White v. South Park Independent School District*,²²¹ the court held that under Texas law, a teacher and coach who had previously been hired under three two-year contracts by a school district which had not adopted the continuing contract provisions . . . did not demonstrate that he had any property interest in renewal of his contract.

Governmental restriction of the teachers' constitutionally protected property interest is subject to attack based upon the due process clause of the fourteenth amendment.²²² The leading United States Supreme Court case dealing with a violation of a person's due process rights in *Board of Regents v. Roth*²²³ decided in 1972. In *Roth*, the Supreme Court said that a constitutionally protected liberty or property interest under the due process clause amounted to "a legitimate claim of entitlement" which is "created and [its] dimensions defined by existing rules or understandings that stem from an independent source such as state law. . . ."²²⁴ Texas teachers whose certificates were valid for

216. TEX. EDUC. CODE ANN. § 13.038 (Vernon 1972).

217. The statutory provision which states that the teachers' interest in attaining a particular level on the career ladder is neither a property right nor the equivalent of tenure was added in 1984. TEX. EDUC. CODE ANN. § 13.320 (Vernon Supp. 1987). (Added by Acts 1984, 68th Leg., 2d Called Sess. ch. 28, Art. III, part A, § A, eff. Sept. 1, 1984).

218. TEX. EDUC. CODE ANN. § 13.106 (Vernon 1972).

219. 525 F. Supp. 367 (E.D. Tex. 1981), *aff'd*, 690 F.2d 903.

220. TEX. EDUC. CODE ANN. § 13.102 (Vernon 1972).

221. 693 F.2d 1163 (C.A. 1982).

222. U.S. CONST. amend. XIV. See *Board of Regents v. Roth*, 408 U.S. 564 (1972).

223. 408 U.S. 564 (1972).

224. *Id.* at 577. The Texas Supreme Court recognized this principle when it stated that, "[a] property of liberty interest must find its origin in some aspect of state law." *Spring Branch Indep. School Dist. v. Stamos*, 695 S.W.2d 556, 561 (Tex. 1985) (citing *Board of Regents v. Roth*, 408 U.S. 564, 577-78 (1972)).

life pursuant to Section 13.038 of the Texas Education Code can satisfy the *Roth* test.²²⁵ They are, therefore, entitled to constitutional due process protection of their property rights in their teaching certificates. Moreover, because of the harshness of the decertification sanction, the teachers should have been guaranteed the requisite hearing and notice to prevent a due process violation. While this argument is similar to the breach of contract argument proffered by the plaintiffs in the *Texas State Teachers Association v. State*²²⁶ case, it embraces rights which subsume contractual rights.

Support for the proposition that teachers are entitled to a predeprivation hearing before their property rights can be infringed is found in *Findeisen v. North East Independent School District*.²²⁷ In *Findeisen* the Fifth Circuit stated that, "if the deprivation of the property interest is authorized by established state procedures, a predeprivation hearing is essential to ensure conformity with those procedures, [and that] 'the requirement of a predeprivation hearing [must be] directly related to the impact of the deprivation on the party's livelihood.'"²²⁸ Texas teachers also meet this test because in many instances the teachers are educated solely to teach. Decertification deprives them of their occupation and leaves the teachers in a difficult career situation and without resources to meet their ongoing obligations. Due process is the very least the teachers are entitled to on these facts.

The *Findeisen* court also indicated that one must recognize the state's desire to take quick action to reach the governmental interest or purpose which supports its action;²²⁹ however, the state's interest in academic excellence could just as easily be satisfied by suspending the teachers or even terminating their employment contracts rather than terminating their careers.

In fact according to the standard articulated in *Cleveland Board of Education v. Loudermill*,²³⁰ Texas teachers are entitled to a hearing whether or not they can succeed on the merits.²³¹ In its most recent discussion of what process is due, the Supreme Court in *Loudermill*²³² reemphasized that "an essential principle of due process is that a deprivation of life, liberty, or property, be preceded by notice and oppor-

225. TEX. EDUC. CODE ANN. § 13.038 (Vernon Supp. 1987) (repealed by Acts 1979, 66th Leg., p. 1542, ch. 663, § 5, eff. Aug. 27, 1979).

226. 711 S.W.2d 421 (Tex. Ct. App. 1986), writ *ref'd n.r.e.* 30 Tex. Sup. Ct. J. 19 (1987).

227. *Findeisen v. North East Indep. School Dist.*, 749 F.2d 234, 238 (5th Cir. 1984).

228. *Id.*

229. *Id.*

230. 105 S. Ct. 1487 (1985).

231. *Id.* "[T]he right to a hearing does not depend on demonstration of certain success."

See also *Carey v. Piphus*, 435 U.S. 247, 266 (1978).

232. 105 S. Ct. 1487 (1985).

tunity for hearing appropriate to the nature of the case ' . . . [t]he root requirement of the Due Process Clause [is] that an individual be given an opportunity for a hearing *before* he is deprived of any significant property interest.' ''²³³

Contrary to what the law requires, Texas teachers' property interest in their certificates was vitiated without due process. Texas law provides two things. One, before a teacher's employment contract can be terminated, the teacher is afforded notice,²³⁴ hearing²³⁵ and if the teacher is employed under a continuing contract, an appeal.²³⁶ Two, before a teacher's certificate can be suspended or revoked Texas law, again, provides the teacher with a right to notice,²³⁷ hearing,²³⁸ and appeal.²³⁹ However, House Bill 72²⁴⁰ failed to ensure that teachers who failed the teacher competency tests which they had to pass on or before June 30, 1986, could avail themselves of administrative review. Rather, the unsuccessful teachers lost their teaching certificates²⁴¹ and their jobs.²⁴² The Texas Legislature's failure to provide the teachers with adequate procedural due process safeguards before terminating their employment contracts and decertifying them thereby destroyed the teacher's constitutionally protected property interests as defined under Texas law.

Decertifying teachers by revoking their certificates is a harsh remedy.²⁴³ Certificate revocation deprives the teacher of employment in schools throughout the state and casts a stigma which may preclude teaching opportunities in other jurisdictions.²⁴⁴ Consequently, courts will carefully scrutinize the due process procedures applied in making revocation decisions and place the burden on state officials to establish cause for revocation after reasonable notice and a proper hearing.²⁴⁵

233. *Id.* at 1493 (quoting *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950) and *Boddie v. Connecticut*, 401 U.S. 371, 379 (1971) (emphasis in original)).

234. TEX. EDUC. CODE ANN. § 13.111 (Vernon 1972).

235. TEX. EDUC. CODE ANN. § 13.112 (Vernon 1972).

236. TEX. EDUC. CODE ANN. § 13.115 (Vernon 1972).

237. TEX. EDUC. CODE ANN. § 13.046(b) (Vernon Supp. 1987).

238. *Id.*

239. *Id.*

240. Acts 1984, 68th Leg., 2nd Called Sess., ch. 28, art. III, part D, § 4, eff. Sept. 1, 1984.

241. Although TEX. EDUC. CODE ANN. § 13.110 (Vernon 1972 and Vernon Supp. 1987) says that "[a]ny teacher employed under a continuing contract may be released at the end of any school year and his employment with the school district terminated at that time, . . . upon notice and hearing (if *requested*)" (emphasis supplied), as a practical matter those teachers who failed the TECAT are out of the classroom. TEX. EDUC. CODE ANN. § 13.047 (Vernon Supp. 1987).

242. TEX. EDUC. CODE ANN. § 13.110(8) (Vernon Supp. 1987).

243. See generally M. MCCARTHY & N. CAMBRON, *supra* note 38, at 24 (1981).

244. Rapp, *supra* note 30, at § 6.02[5].

245. *Id.*

Because the penalty of certificate revocation is more serious than discharge, evidentiary standards are more rigorous, or considerations of procedural due process weigh more heavily in revocation decisions.²⁴⁶

Under Texas law, each teacher who failed the TECAT especially those teachers whose teaching certificates state that they are valid for life²⁴⁷ should be able successfully to challenge the competency testing provision as unconstitutional on procedural due process grounds.

4. Destruction of the Teachers' Liberty Interest

Teachers who failed the TECAT can challenge the statute as violative of their liberty interests.²⁴⁸ One source suggests that

[a] teacher is deprived of a liberty interest in dismissal cases if:

- (1) The teacher is the subject of allegedly false charges that seriously damage his or her standing or associations in the community, including instances where the teacher's good name, reputation, honor, or integrity is impugned; or
- (2) A stigma or other disability based upon allegedly false charges is attached so as to foreclose the teacher's freedom to take advantage of present or future employment opportunities elsewhere.²⁴⁹

Mere termination of employment does not deprive a teacher of a liberty interest although it may affect the teacher's attractiveness to other employees.²⁵⁰ Moreover, in *Bishop v. Wood*²⁵¹ the Supreme Court held

246. *Id.*

247. That is, all teachers who were issued certificates prior to the 1979 changes in the law or all of those who had earned Master Teacher Certificates under the current law are in the best position to challenge the constitutionality of the law.

248. L. TRIBE, *supra* note 189, at § 10-9 (1978) states:

While the extension of procedural safeguards to statutory entitlements beyond the constitutional and common law core of personal interests was the most significant change in procedural due process jurisprudence during the early 1970's, this period was also marked by the recognition of a broader set of 'core' interests; there is no inconsistency, in short, between the entitlement view and the preservation of a core of substantive 'liberty' and 'property' rights independent of a state's laws. The [Supreme] Court appeared, for example, to find a liberty interest 'where a person's good name, reputation, honor or integrity is at stake because of what the government is doing to him (citing *Wisconsin v. Constantineau*, 400 U.S. 433, 437, (1971) and *Board of Regents v. Roth*, 408 U.S. 564, 473 (1972)).

But see, *Paul v. Davis*, 424 U.S. 643 (1976) (establishing no right to invoke procedural due process unless reputation is coupled with some other more tangible interest such as employment, or the so-called 'reputation plus' test).

249. Rapp, *supra* note 30, at § 6.15 [2][b][ii].

250. *Id.*

251. 426 U.S. 341 (1976).

that regardless of the truth, validity, or potential reputational impact or stigmatizing effect of a school board's reasons for terminating a teacher's employment, there is no deprivation of "liberty" if the reasons for dismissal are not publicly disclosed at the instigation of the employer.²⁵² However, in *Board of Regents v. Roth*,²⁵³ the Supreme Court cited examples of stigmatizing charges under both the community standing and the job-foreclosure components of its test. Lack of intellectual ability is an example of an allegation that could foreclose future employment possibilities.²⁵⁴ Arguably then, teachers who fail the TECAT, which is characterized as a literacy or basic skills test, can allege that their reputations have been damaged and their employability in sister jurisdictions has been markedly decreased.

The one significant hurdle in alleging an impermissible infringement of their liberty interest the teachers will have to overcome is the falsity test. Texas officials may rebut by stating that the teacher's failure of the test substantiates the state's claim that the teachers are intellectually deficient²⁵⁵ and have no place in the classroom.

Assuming that some teachers may be able to overcome the falsity test, teachers should be able to satisfy the requirements that their reputations in the community were injured. The passage of House Bill 72 along with the teacher competency testing provisions was widely celebrated. Statistics indicating how many teachers took, passed, or failed the examinations were widely publicized.²⁵⁶ Teachers who were conspicuously absent from their classrooms after the June 30, 1986 deadline for passing the test are necessarily forced to explain to their colleagues and members of their communities why they are no longer

252. *Id.* at 348.

253. 408 U.S. 564 (1971).

254. Rapp, *supra* note 214, at § 6.15 [2][b][iii]. See also *Debra P. v. Turlington*, 474 F. Supp. 244 (M.D. Fla. 1979), *aff'd in part, vacated in part*, 644 F.2d 397 (5th Cir. 1981), *reh'g denied* (per curiam) 654 F.2d 1079 (1981), *on remand* 564 F. Supp. 177 (M.D. Fla. 1983), *aff'd* 730 F.2d 1405 (11th Cir. 1984).

255. A well-established principle of tort law is that truth is a defense to any allegations of defamation.

256. One article stated that about 203,000 Texas teachers and administrators took the test administered in March 1986. JorJanna Price, *Teacher Test: Exam Not Such a Monster Most Educators Discover*, Houston Post, Mar. 11, 1986, at A1, col.1. Another account revealed that 3.3 per cent of the 203,000 educators who took the TECAT in March failed the mandatory reading and writing test. It went on to say that those 6,500 teachers and educators must pass a retest on June 28 or they will lose their jobs in the fall. Houston Post, June 12, 1986, at B9 col. 1. Yet another article stated that up to 25,000 teachers and school administrators were slated to take TECAT II with 6,579 of them needing to pass to keep their jobs. Houston Post, June 27, 1986, at A11, col. 1. One reporter indicated that in Houston about 248 educators failed TECAT twice. Hope E. Paasch, *More Teachers Joining Lawsuit: 248 Failed TECAT Twice*, Houston Post, Aug. 26, 1986, at 4A, col. 1.

teaching. So even teachers who can establish some basis²⁵⁷ other than a lack of intellectual ability for their failing scores on the TECAT will carry the stigma of being intellectually deficient.

In the *Debra P. v. Turlington*²⁵⁸ case the court found unconstitutional Florida's requirement that all high school students pass a minimum competency test (MCT)²⁵⁹ as a condition precedent to receiving a high school diploma. Students who failed the MCT would receive only a certificate of completion. Besides concluding that the MCT violated the student's right to due process, the court also found that the "students who fail the functional literacy test perceive of themselves as 'global failures.'"²⁶⁰ Hence, because virtually everyone has a chance to obtain a high school diploma, failure to obtain one can suggest to prospective employers that a person is intellectually incapable of obtaining one. Therefore, in *Debra P.*, the court also recognized that there was a violation of the particular student's liberty interests in that the presumption against the student's intellectual capacity significantly foreclosed subsequent employment and educational opportunities to the students. By analogy then, a court could find that the liberty interest of the teachers who failed the test were impermissibly infringed in violation of the constitution.

5. Violations of the Teachers' Procedural and Substantive Due Process Rights

Because the teachers who failed the TECAT were summarily decertified and fired from their jobs, the teachers can allege that the summary decertifications and terminations of their employment contracts are unconstitutional because they violate their substantive²⁶¹ and procedural due process rights.²⁶²

257. Arguably some teachers may be able to show other prior or subsequent test scores which establish that they are not intellectually deficient but that they merely performed badly on the day they took the TECAT.

258. *Debra P. v. Turlington*, 474 F. Supp. 244 (M.D. Fla. 1979), *aff'd in part, vacated in part*, 644 F.2d 397 (5th Cir. 1981), *reh'g denied* (per curiam) 654 F.2d 1079 (1981); *on remand* 564 F. Supp. 177 (M.D. Fla. 1983), *aff'd* 730 F.2d 1405 (11th Cir. 1984).

259. Fla. Stat. § 232-246(1)(b) (1978). The test was called a functional literacy examination, the SSAT-II.

260. *Debra P. v. Turlington*, 474 F. Supp. 244 at 258 (M.D. Fla. 1979).

261. U.S. CONST. amends. V & XIV; TEX. CONST. art. I sect. 19. See generally SCHWARTZ, *supra* note 21, at 165 to 168; *Debra P. v. Turlington*, 474 F. Supp. 244 (M.D. Fla. 1979), *aff'd in part, vacated in part* 644 F.2d 397 (5th Cir. 1981); *reh'g denied* (per curiam) 654 F.2d 1079 (1981), *on remand* 564 F. Supp. 177 (M.D. Fla. 1983), *aff'd* 730 F.2d 1405 (11th Cir. 1984).

262. *Id.*

A. *Violation of the Teachers' Procedural Due Process Rights*

In its implementation of the teacher competency testing provisions, the State of Texas violated the teachers' procedural due process rights by failing to provide them with notice, hearing and appeal as mandated under Texas law. Texas law requires that before a school district can terminate a teacher's employment contract, the teacher must be notified of the contemplated termination and given an opportunity to be heard. Moreover, if the teacher is employed under a continuing contract, the teacher can appeal the termination decision.

Likewise, prior to cancelling a teacher's certificate, the state must provide notice, hearing, and appeal. Teachers who failed to take or pass the TECAT prior to the statutory deadline thereby failed to meet a condition to continuing certification. Here, the teachers' certificates were revoked by legislative fiat and they were denied procedural due process. While it may be argued that the notice requirement is satisfied because the teachers knew they had to pass the TECAT by June 3, 1986, nothing in the statute suggested that the revocation would be done without the teachers being accorded due process of law. The state's constructive notice argument should be rejected because that type of notice is not the type of notice each teacher is due. What the statute does say is that failure to pass the test is another grounds for cancelling a teacher's certificate. It does not say that the state can avoid providing the teachers with procedural due process if the alleged basis for revocation is the teacher's failure to take or pass the TECAT by June 30, 1986.

Houston Independent School District (HISD) is one district where the school board voted to fire immediately teachers who took the TECAT twice and failed it both times.²⁶³ The HISD board of trustees also voted not to consider any waiver requests which would, if granted, allow the teachers to retain their jobs if they could demonstrate an extraordinary need to keep them.²⁶⁴ In an editorial, the Houston Post criticized the HISD board's decision.²⁶⁵ The editorial urged the establishment of a local review board which could hear individual appeal cases so that before the board "snatch[ed] away a person's income and livelihood," the board could be certain it is justified in every case.

263. Price, and Hensel, *HISD to Fire Teachers who Fail Skills Test Twice*, Houston Post, Aug. 1, 1986, A1, col. 2.

264. *Id.*

265. Houston Post, August 7, 1986, B1, col. 1.

The HISD Board rejected that recommendation, and local teachers filed suit to try and retain their jobs.²⁶⁶

B. Violation of the Teachers' Substantive Due Process Rights

Governmental action can still be ruled unconstitutional even though it satisfies procedural due process requirements if the governmental action violates substantive due process. Governmental action which is "arbitrary and capricious does not achieve or even frustrates a legitimate state interest, or is fundamentally unfair violates substantive due process."²⁶⁷ Admittedly, the Texas teachers would have a difficult burden trying to establish that the Texas Legislature's efforts to improve the quality of education in the state are arbitrary and capricious. Courts, generally, decline to interfere in a state's regulation of education.²⁶⁸ Judges are reluctant to substitute their judgment for that of legislators. Nonetheless, in an appropriate case, a court can find that the governmental action is arbitrary and capricious. Given the harshness of the decertification sanction, a court can rule that the Texas Legislature sought to achieve a lawful end by unlawful means.

Thus even if one agrees with the state of Texas' aim to eject incompetent teachers from the classroom, one can object to the use of the TECAT as the means to do it. Other bases for ejecting incompetent teachers exist. All teachers in Texas are subject to periodic performance appraisals. School administrators can thereby lawfully terminate the employment contract of any teachers whose performance in the classroom warrants it. Termination of an employment contract is a less onerous burden on teachers because they can still seek employment in other school districts throughout the state. Whereas decertification bars the teachers from qualifying for teaching positions not only in the state of Texas but also in sister jurisdictions. Texas regulatory authorities could also impose more rigorous in-service training and continuing education requirements on teachers whose effectiveness is in question. Such measures are more valid than requiring all certified teachers regardless of their areas of specialty to take a literacy or basic skills test.

Teachers can also attack the imposition of the testing requirement

266. Hensel, *48 Teachers Sue HISD over Firings: Claim TECAT Violated Rights*, Houston Post, August 21, 1986, A9, Col.1.

267. *Debra P. v. Turlington* 644 F.2d 397, 404 (5th Cir. 1981), see L. TRIBE, *supra* note 189, at § 8-7.

268. See generally M. MCCARTHY & N. CAMBRON, *supra* note 38.

on the grounds that it is not rationally related to what it is they teach or how well their students will subsequently perform on other standardized tests. For example, certified teachers with 25 years experience as music teachers may question the propriety of using the TECAT to measure their competence to teach music. In sum, if the Texas Legislature's goal is to improve the quality of education for students and to ensure that the teachers can help the students achieve their fullest potential, the TECAT is an inappropriate vehicle to achieve this goal.

Part Three

Policy Implications For Other Professions and Occupations

One should not view the imposition of competency testing requirements on teachers myopically because if the law remains unchallenged there are significant policy implications for members of other professions who are licensed or certified under Texas law. Basically, if the Texas teacher decertification law remains in effect all other persons licensed or certified in this state are vulnerable. Some of the professions or occupations licensed under Texas law include attorneys,²⁶⁹ architects,²⁷⁰ dentists,²⁷¹ physicians,²⁷² and accountants.²⁷³ Members of each of them could be forced to comply with additional testing requirements as a condition for continued certification of licensure. For

269. Attorneys are regulated by the State Bar of Texas. Their licenses are apparently valid for life although members who are not considered inactive must pay fees. TEX. EDUC. CODE ANN. art. 321a-1 § 10 (Vernon Supp. 1987). Attorneys are subject to disbarment. TEX. EDUC. CODE ANN. art. 313 (Vernon 1973).

270. Architects are regulated by the Texas Board of Architectural Examiners. TEX. ADMIN. CODE tit. 22 §§ 1.62 and 3.62 (1986) specifically provide that architects and landscape architects' certificates are valid for life. However, TEX. EDUC. CODE ANN. art. 249a § 11 (Vernon Supp. 1987) provides for the certificates' expiration and penalties are imposed for the failure to renew at TEX. EDUC. CODE ANN. art. 249a § 12 (Vernon Supp. 1987). Section 11 provides for the revocation of the certificate for incompetence or recklessness, and there is a similar provision for landscape architects at TEX. EDUC. CODE ANN. art. 249c § 8 (Vernon Supp. 1987).

271. Dentists are regulated by the Texas State Board of Dental Examiners dealt with at TEX. ADMIN. CODE tit. 22 §§ 101.2 et. seq. (1986) their licenses are apparently valid for life, but are subject to revocation or cancellation pursuant to TEX. EDUC. CODE ANN. art. 4548h § 2(a) (Vernon Supp. 1987).

272. Physicians are regulated by the Texas State Board of medical Examiners. Their licenses apparently only expire if a fee is not paid pursuant to TEX. ADMIN. CODE tit. 22 § 167.1 (1986), TEX. REV. CIV. STAT. ANN., art. 4495(b) § 4.01 and § 4.12(4) (Vernon Supp. 1987) also provide for their revocation.

273. Accountants are regulated by the Texas State Board of Public Accountancy. Their licenses are subject to renewal. TEX. ADMIN. CODE. tit. 22 § 515.1 (1986) and TEX. REV. CIV. STAT. ANN. art. 41a-1 § 9 (Vernon Supp. 1987). They can also be cancelled under TEX. REV. CIV. STAT. ANN. art. 41a-1 §§ 9(a)(2) and 21(b) (Vernon Supp. 1987).

instance, based on the teacher decertification precedent, criminal law attorneys who have practiced law for twenty-five years could be subsequently compelled to take and pass a contracts examination similar to that given in first year law school courses on the theory that failure to pass the test is evidence of the attorneys' incompetence and justifies or supports the attorneys' disbarment.

While it is true that attorneys as well as other professionals often impose continuing education requirements on themselves, the circumstances are distinguishable from the teacher decertification case. In fact, Texas is one such state where attorneys do have a mandatory continuing legal education (MCLE) requirement, but a majority of the members of the bar association voted to approve the imposition of the additional study which does not require the attorneys to pass an examination after taking the MCLE course. In contrast, the testing requirements and sanctions imposed on the teachers was done hurriedly by the Texas Legislature at the insistence of H. Ross Perot, the chair of SCOPE, and as indicated earlier, without prior consultation with educators throughout the state.

Conclusion

The Texas Legislature's decision to improve the quality of public education is laudable; the means it chose, however, are objectionable. Its imposition of competency tests requirements on all teachers regardless of experience raises a number of legal and policy issues which are now being scrutinized in the courthouses throughout the state and reexamined by the legislators who passed H.B. 72 in 1984, which impermissibly authorized the decertification of teachers if they failed the TECAT even though their certificates were valid for life. Texas' decision is particularly objectionable given that other remedies for ridding classrooms of incompetent teachers are available to it. In fact, Texas law provides for the termination of employment contracts of incompetent teachers in accordance with due process. In contrast, the teachers who failed to take and pass the TECAT by June 30, 1986, were in most instances summarily fired and decertified in violation of their constitutional rights.

By precipitously enacting the teacher competency testing provisions of H.B. 72, the Texas Legislature established a new class of the unemployed: decertified teachers who were educated as teachers, and who now must turn to another trade or profession. Moreover, questions concerning the efficacy of the TECAT as a way to identify incompetent teachers proliferate. The TECAT makes no provision for people who are excellent and effective teachers, but poor test takers.

It also makes no provision for people who are excellent test takers, but poor teachers. Finally, the Texas solution fails to establish a positive correlation between how a particular teacher's performance on the TECAT translates into a better classroom performance which results in that teacher's students performing better on standardized tests. Evidence for this proposition is found in the fact that Texas' Senate Education Committee recently approved by an 8-0 vote a bill to abolish the test which would purportedly measure how much teachers know about the subject they teach.

Finally, if the teacher competency testing and decertification provisions remain unchallenged, members of other professions should be concerned because their certificates and licenses are also vulnerable. Using the teacher competency testing program as precedent, attorneys, architects, dentists, accountants and others could be required to take and pass additional tests as a condition for continued certification or licensure. While many professions, like attorneys, impose mandatory continuing education requirements on their members, fulfilling the additional study requirements does not necessitate passing a test; and in many cases, the additional education requirements were approved by a majority of the members beforehand. Such was not the case with the teacher competency testing decision. In fact, most educators were ignorant of the contents of H.B. 72 until after its enactment. For the foregoing reasons, plaintiffs who seek to challenge the legality of TECAT legislation in federal court can argue that the test is violative of Title VI and Title VII of the Civil Rights Act of 1964, and that it impermissibly infringes the teachers' property and liberty interests and violated their procedural and substantive due process rights.