I

IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 71-1332

SAN ANTONIO INDEPENDENT SCHOOL DISTRICT, *et al.*, *Appellants,*

v.

DEMETRIO P. RODRIGUEZ, *et al.*, *Appellees.*

On Appeal from the United States District Court for the Western District of Texas

MOTION FOR LEAVE TO FILE BRIEF FOR WENDELL ANDERSON, Governor of the State of Minnesota KENNETH M. CURTIS, Governor of the State of Maine RICHARD F. KNEIP, Governor of the State of South Dakota PATRICK J. LUCEY, Governor of the State of Wisconsin WILLIAM G. MILLIKEN, Governor of the State of Michigan AS AMICI CURIAE

MOTION

Amici hereby respectfully move for leave to file a brief urging affirmance of the lower court decision in the above-entitled case. Counsel for Appellees have consented to the filing of the attached brief. Counsel for Appellants have not so consented.

Amici are the Governors of the above-listed States. As Governors and chief executive officers of their respective States, Amici are responsible for upholding and carrying out the commands of the Constitutions

and laws of their States, including the provisions thereof requiring the establishment of public schools and commanding the children of their States to attend school for a substantial number of years. Each Amicus is responsible, as the elected representative of the entire citizenry of his State, for financial decisions affecting all State operations, including those pertaining to the support and finance of the public schools.

Amici are deeply concerned about the continuing crisis in public education and the difficulties facing public educational systems in their States and around the nation. Amici recognize that grave inequities now exist in the educational resources available to public school students, and that these inequities exist because of vast disparities in the local property tax bases upon which the various States have required local school districts to rely for the support of public education. Amici, whose States have educational systems which suffer in one degree or another from the same infirmities as the financing system here at issue, believe that the inequities in educational resources resulting from such systems are in violation of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution and that these inequalities must be eliminated.

In pursuance of their duties as chief executive officers of their States, Amici have thoroughly examined and are familiar with school financing problems.* As a result of these studies, Amici have concluded that it is

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* Specific statements of the involvement of the Amici Anderson, Curtis, Kneip, Lucey and Milliken with school financing programs appear at pages III-VIII of Amici's Motion for Leave to File Brief submitted to this Court in connection with the Jurisdictional Statement.

necessary, in order to maintain a viable system of public education available to all without discrimination based upon wealth or other factors irrelevant to the educational process, to devise a system which provides:

—quality education for every child, regardless of his place of residence;

—a rational method of financing the educational system which assures the availability of the needed resources;

—equity of tax burden among the citizens of a state; and

—meaningful local control over educational matters where appropriate.

Amici believe that financing systems which meet the above-listed requirements, and which eleminate the wealth discrimination and resulting constitutional problems stemming from the current local property tax-based systems, can be instituted without great difficulty, social or administrative, by the adoption of school finance systems not dependent upon the wealth of the local school districts.

Amici further believe that the standard adopted by the court below is uniquely suited to bring about the achievement of a constitutional non-discriminatory method of public school finance without in any way infringing on the proper sovereign prerogatives of the various States, including those of which they are Governors. The decision of the court below sets forth a single easily comprehensible constitutional command and quite properly leaves it to the States to choose, as they can and must, from a multitude of possible financing systems.

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For these reasons, Amici request that this Court grant leave to file the attached brief urging affirmance of the decision of the lower court.

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BRIEF FOR

WENDELL ANDERSON, Governor of the State of Minnesota
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PATRICK J. LUCEY, Governor of the State of Wisconsin
WILLIAM G. MILLIKEN, Governor of the State of Michigan

AS AMICI CURIAE

INTRODUCTION

Article VII, § 1 of the Constitution of the State of Texas provides that:

> 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.

Over the years since Texas, in its first statehood Constitution of 1845, adopted the predecessor of Article

VII, § 1, the method used to finance the State public school system has varied. Thus, while originally the schools were to be supported by the State directly, for some time Texas has supported its public schools in large part with funds raised from school district property taxes.[1]

The details of the Texas financing system as it has evolved are complicated, but the general workings and effect of the system are both clear and undisputed:[2] the reliance upon local property taxes for school funds has made the local property tax base the primary determinant of the amount of funds available for the schools in any district, and this amount varies tremendously from district to district within the Texas school system.

Of the 79 Texas school districts with over 5,000 students, the richest has a tax base per pupil more than 23 times that of the poorest. By taxing at equal rates, the richest of these districts would have 23 times more dollars per pupil to spend on its schools than would the poorest. The Plaintiffs' Edgewood school district in metropolitan San Antonio could raise only $37 per pupil in 1969-70 while the Alamo Heights school district, also in metropolitan San Antonio, was able with a lower tax rate to raise $412 per pupil. Thus, the dif-

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[1] A brief history of Texas' school financing system appears in 5 Governor's Committee on Public School Education, The Challenge and the Chance: Public Education in Texas—Financing the System 11-17 (1969) [hereinafter cited as Public Education in Texas].

[2] The parties stipulated below that the "facts are generally not in dispute." Appendix, p. 45 ¶ 6 [hereinafter cited as App.]. A full and comprehensible description of the Texas school finance system is J. Berke, A. Carnevale, D. Morgan & R. White, *The Texas School Finance Case: A Wrong in Search of a Remedy,* J. Law & Educ. (to appear in Fall, 1972).

ference in funds raised locally was due solely to the disparities in wealth between the two districts.[3]

In addition to the funds the local districts raise themselves, each district receives a direct payment from the State. These payments are made in recognition of the fact that the property tax-based system works great discriminations,[4] and, in theory, are supposed to lessen the extent of the discrimination among districts. In fact, the grants to local districts are calculated in a fashion that not only does not substantially alleviate the differences between the rich and the poor districts, but in many cases actually provides more dollars to wealthy districts than to poor ones.[5] Thus, Alamo Heights received $250 per pupil in direct State grants in 1969-70 while Edgewood, despite the fact that it could itself raise less than one eleventh as much per student, received only $242.

The court below agreed with Plaintiffs' contentions that the Texas school financing system outlined above substantially disadvantages children residing in property-poor districts. Indeed, the court found that Texas has chosen "to subsidize the rich at the expense of the poor" (App. 262) and enjoined Texas from continuing to make "the quality of public education a function of

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[3] *See* Pl. Ex. 12 based upon computer runs supplied by the State of Texas Education Agency. *See also* App. 217, 219.

[4] It was the recognition of these discriminations by the Texas Legislature's Gilmer-Aiken Committee in 1948 that led to the adoption of the present system. *See* Gilmer-Aiken Committee, To Have What We Must (1948).

[5] App. 208. *See also* United States Commission on Civil Rights, The Texas School System 31 (1972) (page cite is to the Commission-approved typewritten copy; publication in printed form is expected shortly).

wealth other than the wealth of the State as a whole." (App. 270).

The State's appeal thus raises in this Court the constitutionality of the discriminatory system presently used by Texas to finance public education, a system in which discrimination arises solely because the State has chosen to provide revenue for its schools based upon a factor—the wealth of the district in which the schools are located—having no relation whatsoever to any educational goal.

As State Governors with responsibility for the interests of all the children of their States, Amici are committed to reforming the present discriminatory systems of school financing, systems which plainly cannot and do not work,[6] and replacing them with systems which operate without discrimination on the basis of local district wealth. That result, Amici believe, is dictated by equity and common sense, as well as constitutionally required.

Amici have concluded that there is no practical or administrative reason why revised systems of financial support of public school systems, consistent with the decision of the court below, cannot be instituted, and that public school systems of the type required to provide equal educational opportunities for *all* children—not merely those from rich school districts—can only result from the standard found constitutionally required by the court below. Amici therefore urge that the decision be affirmed.

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[6] *See, e.g.*, President's Commission on School Finance, Schools, People & Money: The Need for Educational Reform 11-15 (1972) [hereinafter cited as President's Commission]; National Legislative Conference, A Legislator's Guide to School Finance 13-22 (1972).

ARGUMENT

The Decision of the Court Below That the Provisions of the Constitution and Laws of Texas Governing the Financing of Public Education Violate the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution Should Be Affirmed

Amici submit that because the present case involves public education and the manner in which such education is furnished to the nation's children, it has an importance far beyond that suggested by Appellants.

Appellants and their supporters seek to trivialize the present case by characterizing the issue as whether a "Proposition I" developed by "imaginative scholars" should proceed to "enshrinement in the Constitution of the United States." (App. Br. 8). Amici, State Governors deeply concerned about inequities in educational finance, submit that the real issue in this case is whether the Fourteenth Amendment prohibits States from providing more tax dollars for public education to rich districts than to poor districts. The fact that, in addition, the poor districts are taxed more heavily than rich districts to provide such funds merely serves to exacerbate the discrimination.

I. THE ROLE OF EDUCATION IN AMERICAN SOCIETY IS UNIQUE

A. EDUCATION IS A STATE FUNCTION

1. The States Are Required by Their Constitutions To Provide Free Public Education

The Constitutions of 48 of the 50 States require the State legislature to establish a system of public

schools.[7] Article VII, § 1 of the Texas Constitution is typical in this regard:

> 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.

The history of the Texas constitutional provisions is illustrative of the significance of education as a State function. The 1827 Constitution of the Mexican State of Coahuila and Texas provided that the State was to establish schools in all towns. No schools were in fact established, and the neglect of public education by the State "was one of the chief grievances charged against the Mexican government" when Texas declared its independence.[8] The Constitution of the Republic of Texas declared that:

> It shall be the duty of Congress, as soon as circumstances will permit, to provide by law a general system of education. General Provisions, Section 5 of the Constitution of 1836.

This provision formed the basis for Texas' current constitutional requirement that the State establish a system of "free public schools."

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[7] *See* the table reproduced as an Appendix to this brief. Until the decision in Brown v. Board of Education, 347 U.S. 483 (1954), all 50 States had constitutional provisions requiring public schools. In attempts to avoid the mandate of *Brown,* Mississippi made its constitutional provision discretionary with the State legislature and South Carolina repealed its constitutional provision altogether.

[8] *See* Interpretive Comment, 2 Vernon's Constitution of the State of Texas Annotated 373 (1955).

2. Local School Districts Are Simply Agencies of the State

In interpreting this constitutional provision, the courts of Texas have recognized that education is a State function. Thus, it was observed in *El Dorado Independent School District* v. *Tisdale,* 3 S.W.2d 420, 422 (Tex. Comm. Civ. App. 1928), that:

> [I]n constitutional terms, it is commanded that the Legislature shall 'establish and make suitable provision for the support and maintenance of an efficient system of public free schools.' The object, manifestly, is a state object: its achievement, as plainly, is to be in consequence a use of state power. . . .

Furthermore, the Texas courts, like the courts in other states,[9] are emphatic in asserting that local school districts are nothing more than administrative units set up for the convenience of the State in administering its system. In *Treadway* v. *Whitney Independent School District,* 205 S.W.2d 97, 99 (Tex. Civ. App. 1947) the court declared:

> [W]hen carrying out the functions for which it was thus created, [a school district] could act only as an agent of the state. . . . As a result of the acts of the Legislature our school system is not of mere local concern but is statewide. While a school district is local in territorial limits, it is an integral part of the vast school system which is coextensive with the confines of the State of Texas.

These court decisions recognize what is the fact not only in Texas, but in every one of the United States: education is a State function.

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[9] *See* the decisions discussed in A. Wise, Rich Schools, Poor Schools 94-98 (1968).

3. State Statutes Regulate Every Aspect of Public Education

State control in Texas, as elsewhere, extends to in-depth statutory regulation of the educational system. Thus not only does the State of Texas create, consolidate and abolish school districts (Ch. 19, Texas Education Code, Acts of 1969, Ch. 889),[10] but it regulates their activities down to the minutest detail. The Texas Education Code contains some 250 pages of statutes controlling, *inter alia,* mandatory subject matter, acceptable textbooks, teacher qualifications and tenure, personnel salary bases, special programs, length of school day, and a variety of other details. Acts of 1969, Ch. 889, *passim.*[11] Most importantly, the school districts have taxing power only because and to the extent that the State has delegated its power to tax for schools. Tex. Stat. Ann. arts. 2802g, 2802h, 2802i, and 2802i-1 —2802i-32, as amended by Acts of 1969, Ch. 889.

While certain of the details vary from State to State, the State's control of the educational system and of the school districts as a part of that system was aptly put by the Supreme Court of Illinois in *People* v. *Deatherage*, 401 Ill. 25, 31-32, 81 N.E.2d 581, 586 (1948):

> A community school district, like any other school district established under enabling legislation, is

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[10] *See also* United States v. Texas, 321 F.Supp. 1043 (E.D. Tex. 1970).

[11] Among the Texas Education Code's provisions regulating the details of school operations are §§ 4.15-.16 (criminal penalties for failure to teach required subjects); §§ 21.101-.112 (required subjects); §§ 12.11-.27, 12.62 (schools required to use State-approved textbooks and approval procedures established); Chs. 13 and 21, Subch. D (procedures for teacher certification and dismissal established); § 16.31 (teachers' base pay fixed); §§ 11.03-.11 (special programs); § 21.002 (length of school day); § 2.06 (State oath required of teachers); § 11.52 (uniform system of forms and reports for schools).

> entirely subject to the will of the legislature thereafter. With or without the consent of the inhabitants of a school district, over their protests, even without notice or hearing, the State may take the facilities in the district, without giving compensation therefor, and vest them in other district agencies. . . . The area of the district may be contracted or expanded, it may be divided, united in whole or in part with another district, and the district may be abolished. All this at the will of the legislature. The "property of the school district" is a phrase which is misleading. The district owns no property, all school facilities, such as grounds, buildings, equipment, etc., being in fact and law the property of the State and subject to the Legislative will . . . .

In sum, school districts are simply administrative units created by the States for their convenience in the operation of the State school system, in accordance with the mandate of each State's constitution.[12]

B. THE STATES HAVE HISTORICALLY TREATED EDUCATION AS BEING DIFFERENT FROM OTHER GOVERNMENTAL SERVICES

For both historical reasons, and reasons relating to the functioning of the American political system, education occupies a place in the hierarchy of rights and privileges of a citizen very different from welfare, housing, police protection and other such governmental services. Even before the United States as we now know it was formed, the Continental Congress, operating under the Articles of Confederation, required in the

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[12] This point could hardly be made more succinctly than it has been by the State of Florida, Fla. Stat. Ann. § 299.01: "Public education is basically a function and responsibility of the state."

Northwest Ordinance of 1787 that "schools and the means of education shall forever be encouraged." 1 U.S.C. pp. xxxviii-xxxix. As noted above, 48 of the 50 States require in their Constitutions that the legislature establish and maintain a system of public education. Only one State (New York) requires in its Constitution that the State government provide any service other than education (welfare). Furthermore, less than half the State Constitutions even make specific mention of any other services which the State may elect to provide. In addition, every State but one requires compulsory school attendance of its children.[13] Thus, the unique place of education in America is secure: education, and only education, is a right of American children guaranteed by virtually every single State.

C. EDUCATION IS INTIMATELY BOUND UP IN THE DEMOCRATIC POLITICAL PROCESS

One need only look at the State Constitutions to discover why education is treated so differently from all other services provided by the States: education has always been considered to be a necessary part of the democratic political process, a support without which the political system of the United States could not stand.[14] Thus, like the Texas constitutional provision

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[13] *See* the table reproduced as an Appendix to this brief. Mississippi repealed its compulsory attendance statute in an attempt to avoid the impact of Brown v. Board of Education, *supra*.

[14] Interestingly, Virginia historically recognized the special relationship between voting and education by providing that two-thirds of its poll tax be used "exclusively in aid of the public free schools." Constitution of Virginia, Article VIII, § 173. *See* Harper v. Virginia State Board of Elections, 383 U.S. 663, 664 n.1 (1966).

quoted at pages 2 and 6, *supra*,[14a] the following provision of the Minnesota Constitution is typical:

> The stability of a republican form of government depending mainly upon the intelligence of the people, it shall be the duty of the legislature to establish a general and uniform system of public schools. Constitution of Minnesota, Article VIII, § 1.

This Court has also recognized the special role of education in our democratic society:

> Thomas Jefferson pointed out early in our history that some degree of education is necessary to prepare citizens to participate effectively and intelligently in our open political system if we are to preserve freedom and independence. Further, education prepares individuals to be self-reliant and self-sufficient participants in society. We accept these propositions. *Wisconsin* v. *Yoder,* 92 S. Ct. 1526, 1536 (1972).

Indeed, Mr. Chief Justice Burger in *Yoder* noted that a figure no less influential than Thomas Jefferson even proposed to condition citizenship on the ability to read. *Id.* at 1538 n. 14.

In a concurring opinion in *Yoder,* quoting *Brown* v. *Board of Education, supra,* Mr. Justice White reaffirmed that:

> Today education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expendi-

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[14a] *See also* Texas Education Code, Acts of 1969, Ch. 889, § 2.01 which provides:

> The objective of State support and maintenance of a system of public education is education for citizenship and is grounded upon a conviction that a general diffusion of knowledge is essential for the welfare of Texas and for the preservation of the liberties and rights of citizens.

> tures for education both demonstrate our recognition of the importance of education to our democratic society.... It is the very foundation of good citizenship.

Id. at 1544. See also *Keyishian* v. *Board of Regents,* 385 U.S. 589, 603 (1967); *Shelton* v. *Tucker,* 364 U.S. 479, 487 (1960); *Illinois ex rel. McCollum* v. *Board of Education,* 333 U.S. 203, 231 (1948) (Mr. Justice Frankfurter, concurring); *cf. Epperson* v. *Arkansas,* 393 U.S. 97 (1968).

Thus the States, though their Constitutions, and this Court, through its decisions, have enunciated the same conclusions as those who have conducted empirical studies of the relationship between voting and participation in the political process, on the one hand, and education, on the other: a citizen's willingness and ability to participate in the civic and political life of these United States is uniquely dependent upon education.[15]

Amici believe, therefore, that education's special relationship to the political process, recognized by the States themselves, makes education a uniquely important State function which is distinct from all other State services of whatever nature.

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[15] Scholars whose studies have led to this conclusion include J. Guthrie, G. Kleindorfer, H. Levin & T. Stout, Schools and Inequality 165-67 (1971), reprinted in Hearings Before the Senate Select Comm. on Equal Educational Opportunity, 92nd Cong., 1st Sess., pt. 16C, Appendix I, pp. 7068-70 (1971); R. Hess & J. Torney, The Development of Political Attitudes in Children 217-18 (1967); R. Agger & V. Ostrom, *Political Participation in a Small Community,* in H. Eulau (ed.), Political Behavior 138-48 (1956); and A. Campbell, *The Passive Citizen,* Acta Sociologica, Vol. VI, No. 1-2 at 9-21 (1962).

Voting statistics which demonstrate the same result have been compiled by the United States Department of Commerce, Bureau of the Census, *Years of Schooling Completed—Reported Voter Participation in 1968 and 1964,* Current Population Reports, Series P 20, No. 192, Table 11 (1968).

II. THE TEXAS SCHOOL FINANCING SYSTEM IS DISCRIMINATORY

On its appeal, Texas does not dispute, as it could not, that its financing system provides substantially more money per child to property-rich than to property-poor districts. Instead, Texas and its supporters [16] maintain that the fact that under the present system the rich districts receive two or three or even ten times as much funding per student as do their poorer brethren is irrelevant because there is no showing that money makes a difference in the quality of the education furnished to school children. (App. Br. 5, 16-25).

A. EQUALITY OF EDUCATIONAL OPPORTUNITY IS TOTALLY UNRELATED TO STUDENTS' SCORES ON STANDARDIZED TESTS

As other Amici point out, much of the argument Texas makes on this point is based on its misreading of the relevant educational literature.[17] Far more importantly, however, Appellants are confusing State input into the public schools (in the form of funds) with a particular type of output of the schools (students'

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[16] It is noteworthy that the Amici filing briefs in support of Appellants herein consist entirely of two categories—the first is State Attorneys General, who are required as their States' chief legal officers to defend State laws against constitutional attack, and the second is the legal officers representing a selection of the richest school districts in the nation, *e.g.*, Beverly Hills and San Marino, California, Grosse Point and Bloomfield Hills, Michigan, and Montgomery County, Maryland.

[17] See Briefs Amicus Curiae of the National Education Association, et al. [hereinafter cited as NEA Brief] and John L. Serrano, Jr., et al. [hereinafter cited as Serrano Brief]. *Compare,* Office of Education, Equality of Educational Opportunity 316 (1969) (The Coleman Report) *with* Report of Commissioner's Ad Hoc Group on School Finance, Department of Health, Education and Welfare, in Hearings Before the Senate Select Comm. on Equal Educational Opportunity, 92nd Cong., 1st Sess., p. 8388 (1971).

scores on standardized tests). While perhaps a relevant indicator in some cases of the effectiveness of public school education, test scores are simply not relevant to a determination of whether children are being afforded equal educational opportunity by a State. On the other hand, there is no doubt whatever as to the direct relationship between expenditures and educational opportunities.[18] As the President's Commission noted:

> [M]oney builds schools, keeps them running, pays their teachers, and, in crucial, if not clearly defined ways, is essential if children are to learn. President's Commission xi.

B. DISCRIMINATION IN THE PROVISION OF FUNDS FOR EDUCATION IS THE CRITICAL ISSUE

There is an evident difference between wealthy and poor school districts. Wealthy districts often have well-trained and experienced teachers, modern, well maintained facilities, new and up-to-date textbooks, first class libraries, language laboratories, special art and music classes, experimental programs, and a host of other educational advantages. Poor districts frequently have under-trained and temporary teachers, dilapidated, often hazardous facilities, old textbooks, inadequate library facilities, no special classes or teachers

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[18] Indeed, Appellants cannot quite bring themselves to consistency in their argument that money is irrelevant in providing educational opportunities, for they point out as evidence of their concern for education that in the period of 1960-1970 the "increase in expenditures . . . [in Texas] was from $750 million to $2.1 billion, while the numbers of students increased only 37%, so that expenditures per student doubled from $416 to $855." (App. Br. 9). It is interesting that while the State found 1960's $416 per pupil too little, and hence more than doubled that figure by 1970, Plaintiffs' Edgewood school district reached $416 for the first time ever in 1970—and at that time was $439 below the State average. The figures are from Texas Research League, Public School Finance Problems in Texas 14 (1972).

for subjects such as art, music, or foreign languages, and overburdened administrators.[19] Any parent, any teacher, any student knows that in every one of the myriad of ways that distinguish a school from a place which merely serves to keep children off the street, money makes a critical difference. Regardless of whether Appellants acknowledge this, this Court already has.

In *Sweatt* v. *Painter,* 339 U.S. (1950), this Court was called upon to decide whether the two racially exclusive law schools provided by the State of Texas, one for whites only, one for blacks only, met the test of "substantial equality" as then required under the separate but equal doctrine. This Court held that the two schools were not substantially equal:

> [W]e cannot find substantial equality in the educational opportunities offered white and Negro law students by the State. In terms of number of the faculty, variety of courses and opportunity for specialization, size of the student body, scope of the library, availability of law review and similar activities, the [white only] University of Texas Law School is superior. What is more important the University of Texas Law School possesses to a far greater degree those qualities which are incapable of objective measurement but which make for greatness in a law school. Such qualities, to name but a few, include reputation of the faculty, experience of the administration, position and influence of the alumni, standing in the community, traditions and prestige. It is difficult to believe that one who had a free choice between these law schools would consider the question close. *Id.* at 633-34.

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[19] *See generally,* Robinson v. Cahill, 118 N.J. Super. 223, 287 A.2d 187 (1972).

Sweatt is on all fours with the current case. Substitute "rich districts" and "poor districts" for "white" and "Negro," and replace "law school" with "public school" and we have the situation currently facing the nation's school districts. As this Court held in *Sweatt,* schools whose disparities are as severe as those listed above—which Appellants do not and cannot deny on the record before the Court—are unequal, and that inequality flows from one source: discrimination in funding due to existing public school finance systems such as that of Texas.[20]

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[20] Equally dispositive of Appellants' arguments as to lack of discrimination is this Court's decision in Gaston County v. United States, 395 U.S. 285 (1969). Gaston County sought relief from the provisions of the Voting Rights Act of 1965 which forbade the use of literacy tests under certain circumstances. The United States opposed the granting of relief on the ground that the reimposition of a literacy test would place a specially onerous burden on the black citizens of the county, since the county had traditionally maintained separate and inferior schools for blacks.

This Court affirmed the lower court's refusal to allow Gaston County to reimpose a literacy test, finding that the black schools had been inferior to the white schools. The Court based its conclusion on several findings:

> 1. the property tax base of the white schools was from two to five times that of the black schools (here wealthy Alamo Heights has over 6 times the property tax base of Plaintiffs' Edgewood district, App. 216, and variations of as much as 23 times in property tax base between districts occur elsewhere in Texas);
>
> 2. the teachers in the black schools were less qualified than those in the white schools, since 95% of the black but only 5% of the white teachers had emergency credentials (here the Plaintiffs' Edgewood district had 47% of its teachers on emergency certificates, while the wealthy Alamo Heights district across town had only 11%, App. 117); and
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> 3. the salaries of the black teachers ranged around 50% of those of the white teachers (here Edgewood's salary scale was consistently around 80% of Alamo Heights', App. 118).

The similarities to the present case are striking.

C. A CORRELATION BETWEEN THE POVERTY OF A SCHOOL DISTRICT AND THE POVERTY OF ITS RESIDENTS NEED NOT BE ESTABLISHED TO SHOW UNCONSTITUTIONAL DISCRIMINATION

Appellants argue that the findings of the court below really show only a discrimination against school districts rather than against individuals [21] and that there-

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[21] In fact, the court below found, based upon the evidence in the record before it—evidence which Appellants did not at the time contest—that in Texas the rich districts have the highest median family income and the poor districts the lowest. 337 F.Supp. at 282; App. 259.

In their attempt to do on appeal what they could not or would not do before the trial court, Appellants rely on S. Goldstein, *Interdistrict Inequalities in School Financing: A Critical Analysis of* Serrano v. Priest *and Its Progeny,* 120 U. Pa. L. Rev. 504 (1972), to attack the affidavit testimony of Joel S. Berke (App. 198). Professor Berke's affidavit demonstrated that, in Texas at any rate, property-rich districts and high family income go hand in hand. In his attack on the undisputed evidence before the court below, Professor Goldstein failed to note that, while the number of districts in the top (rich) and bottom (poor) categories is small, the number of students involved is not: the four poorest districts in the sample used by Professor Berke had over 50,000 students, 10% of the students in the entire sample. Furthermore, the direct correlation between district wealth and familial wealth remains in effect when the lines are redrawn to leave 20% of the students in the top category (i.e., richest school districts) and 20% of the students in the bottom category (poorest districts). In short, the statistical correlation between rich districts and family wealth is true for all the districts at the top and bottom of the wealth chart. Hence the study supports quite adequately the court's finding that there is an affirmative correlation between poor districts and poor people.

The attempts by Appellants to introduce new evidence before this Court illustrate perfectly the problems created when a party asks an appellate court to rely upon evidence not in the record. Not only does this tactic preclude the opposing party's effective rebuttal of the newly offered evidence, it allows the moving party to choose unrepresentative bits and pieces of the story. Here, for example, the Appellants rely on an article in the Kansas Law Review as demonstrating the absence of a relation between school district and

fore the court below was unjustified in holding such discrimination a violation of equal protection. (App. Br. 30-31). Despite Appellants' arguments to the contrary, the fact that the State has created and maintained a system which discriminates against groups rather than against specific individuals does not render such discrimination acceptable under the decisions of this Court. For it is not, and never has been, a principle of constitutional law that the State may freely discriminate against a variety of individuals if only it divides them into districts or groups.

For example, in *Reynolds* v. *Sims,* 377 U.S. 533 (1964), this Court struck down a legislative districting system which gave additional power to rural areas through a county representation system. "One part of the State" was given greater representation than "another part of the State." *Id.* at 562. The vice there was that the State system favored one district at the expense of another. Of course, the Court recognized in *Reynolds* that the real parties in interest, as here, were people—there voters, in the case at bar school children and taxpayers—since the ultimate weight of discrimination against groups is borne by their members. *See also Gray* v. *Sanders,* 372 U.S. 368 (1963).

Equally illustrative is *Bullock* v. *Carter,* 405 U.S. 134 (1972). There the State of Texas had established a system of filing fees requiring candidates for office

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individual wealth. (App. Br. 22-23.) Yet Appellants fail to mention that an authoritative study done in 1970, and repeated in 1972, by the Pennsylvania Department of Education showed a 96% correlation statewide between school district and individual wealth. Report of the Pennsylvania Department of Education, Bureau of Educational Research (May 1970); Report of the Pennsylvania Department of Education, Bureau of Educational Research (August 1972).

to pay up to $8,900 as a prerequisite for appearing on the ballot. The Court, in rejecting the State's argument that no discrimination against identifiable individuals was involved, struck down the statutes at issue on the ground that they discriminated against "the voters supporting a particular candidate" who could not afford the filing fees, despite the absence of "discrete and precisely defined segments of the community" who could be identified as the victims of the discrimination. *Id.* at 144.

And in *Gordon* v. *Lance,* 403 U.S. 1 (1971), this Court in describing *Cipriano* v. *Houma,* 395 U.S. 701 (1969), and *Gray* v. *Sanders, supra,* stated that the "defect" in the statutory systems there at issue "lay in the denial or dilution of voting power because of group characteristics—geographic location and property ownership. . . ." *Id.* at 4.

Thus, as the Court has recognized, the discrimination against a group is, in effect, discrimination against each of its members because of their membership in the group.

III. THE DISCRIMINATION AT ISSUE REQUIRES CLOSE JUDICIAL SCRUTINY

Appellants and their supporters contend that the court below erred in applying a "compelling interest test" in determining whether the discriminatory school financing system they defend amounts to "invidious discrimination" in violation of the Fourteenth Amendment of the Constitution of the United States. They maintain that the discrimination involved herein should be subject only to a so-called "rational basis" test. (App. Br. 26-37.) Thus the Court is presented with pages of argument aligning the "compelling interest"

cases [22] on the one side and the "rational basis" cases [23] on the other, with the Appellants attempting to distinguish the one from the other according to this label or that.

But this Court's sophistication with equal protection issues has gone beyond that point. For the real question, as this Court has indicated, does not depend upon attaching labels but upon the delicate balancing of interests required by the Constitution. Thus, the proper question to be asked in determining whether Texas' discriminatory system can pass constitutional muster is threefold, for the inquiry concerns:

> the character of the classification in question; the individual interests affected by the classification; and the governmental interests asserted in support of the classification. *Dunn* v. *Blumstein,* 405 U.S. 330, 335 (1972).

See also Weber v. *Aetna Cas. & Sur. Co.,* 92 S. Ct. 1400 (1972); *Williams* v. *Rhodes,* 393 U.S. 23 (1968); *Carrington* v. *Rash,* 380 U.S. 89 (1965).

Amici have discussed above the interests affected by the classification (education) and the character of the classification (school district wealth).[24] It remains to examine the governmental interests asserted in support

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[22] *E.g.,* Griffin v. Illinois, 351 U.S. 12 (1956); Harper v. Virginia State Board of Elections, *supra;* Bullock v. Carter, *supra.*

[23] *E.g.,* Dandridge v. Williams, 397 U.S. 471 (1970); James v. Valtierra, 402 U.S. 137 (1971); Jefferson v. Hackney, 92 S.Ct. 1724 (1972).

[24] As indicated above, Appellants appear to argue that the applicable "classification" is not wealth but geography. App. Br. 20. Amici are not interested in debating the point, since both classifications are equally objectionable. *See* Reynolds v. Sims, *supra;* Gray v. Sanders, *supra;* Bullock v. Carter, *supra.*

of the classification against the background of the discriminatory provision of educational opportunities on the basis of school district wealth. Before doing so, however, it is necessary to discuss the substantiality of the State interests required in order to justify the discrimination.

Amici have demonstrated the relation of education to voting and the political process, a relation historically accepted by all the United States, and the unique place of education in our society. Others argue, Amici think persuasively, that education is a "fundamental interest."[25] Amici have also demonstrated that the discrimination involved here—the provision of more money to the children of rich school districts than to the children of poor ones—is substantial. This court has held such wealth discriminations to be "suspect." *Harper* v. *Virginia State Board of Elections, supra.* However, Amici do not believe that the resolution of this case turns upon whether education is found to be a "fundamental interest" or whether classification according to school district wealth is held "suspect."

The critical point is that education as a governmental function is singularly important to the political process and, as a result, is unique in its history and treatment by every State. Education is thus in a vastly different position from all other government "services," such as welfare,[26] housing,[27] fire or police protection, sanitation, and the like. In addition, the discrimination against the children resident in poor school districts

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[25] *See* Serrano Brief.

[26] *See* Jefferson v. Hackney, *supra;* Dandridge v. Williams, *supra.*

[27] *See* James v. Valtierra, *supra.*

is substantial and based upon a factor—wealth—completely extraneous to educational considerations. At the very least, such a serious discrimination in the provision of education deserves and requires that this Court look carefully into the rationale asserted to justify the discrimination. And upon such an examination, it becomes clear that Texas not only would serve no "compelling interest" by preserving its present discriminatory school financing system, but that it would serve no rational interest at all.

IV. TEXAS HAS NO INTEREST—COMPELLING OR OTHERWISE—IN PRESERVING THE PRESENT IRRATIONAL AND DISCRIMINATORY SCHOOL FINANCING SYSTEM

In all the various briefs filed by Appellants and the Amici who support them, there is no attempt made, for obvious reasons, to explain the desirability or sense of providing funds for education so that children who live in rich districts receive more money to spend on education (even though their parents make less tax effort), while children who live in poor districts receive less money (even though their parents try harder). Instead, the Appellants now advance the claim that the discriminatory system is justified because it is necessary to provide "local autonomy" and "local control." Under this argument, the existing system, with all its attendant inequities, is required in order to effectuate the State's purposeful decentralization of public education. The facts are otherwise.

A. THE PRESENT SYSTEM IS IRRATIONAL AND UNWORKABLE

In connection with their contention that the present system is necessary for local control of the schools, Appellants assert that "The Texas plan is not the re-

sult of happenstance." (App. Br. 37). However, an analysis of the evolution of the Texas system reveals that it—along with the educational financing systems of most other States—is in fact the product of virtually complete happenstance.

Texas adopted a system of local financing of schools in the last century when this nation was of substantially different composition than it is today. In the nineteenth century, inequalities in wealth among school districts were not pronounced and the expenditures required for education were comparatively modest. Therefore it is conceivable that local funding may have once made a good deal of sense. The coming of industrialization and mechanization in the twentieth century changed all that rapidly, however. In the space of a few decades there were vast differences in ability to support the schools where there had been few before.[28]

By the 1920's it was commonly recognized by educators that something had to be done to prevent the total collapse of the States' school financing systems. For already the pattern later to emerge fully was becoming clear: attempting to rely wholly on local districts to finance public education could not work. The pioneering work done by Strayer and Haig in 1923,[29] cited by Appellants to suggest that the current system is the result of repeated studies (App. Br. 36), came to the conclusion that the States had to "equalize" the vast inequities arising from the basic local property tax-based system.

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[28] E. Fuller & J. Pearson, Education in the States: Nationwide Development Since 1900, p. 204 (1957).

[29] G. Strayer & R. Haig, Financing of Education in the State of New York (1923).

The "foundation programs" resulting from the Strayer-Haig study may well have constituted an "enlightened approach" in the 1920's when they were first developed, particularly in contrast to what came before, but that in no way suggests that the crazy-quilt patchwork system that we now see was purposefully or rationally created.

By way of illustrating the irrationality of the present system, which Appellants suggest reflects the "judgment" of "legislative bodies" as to "wise policy" (App. Br. 25), let us assume that a State legislature wished to start from scratch to devise a program to finance public education in the State. If the legislature started from the proposition that the State should provide a free public education to all its children, it is inconceivable that it would establish a system providing that the monies raised would be disbursed to the local units administering the schools in direct proportion to the value of the property within those units. Such a result would be inconceivable because there is no rational connection between the purpose for which the funds would be spent, namely, the education of children, and the value of real property in the geographic unit responsible for utilizing the funds to educate children.[30]

As the President's Commission has stated:

> The process by which funds are raised and distributed for public education throughout the

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[30] The result would be even more clear where the geographic units were school districts, the boundaries of which have historically often been motivated by economic, racial or political considerations having nothing whatsoever to do with any legitimate educational purpose, let alone the raising of tax monies. *See* United States v. Texas, *supra*.

> United States has, during the past century, evolved into a dense jungle of legislation, formulas, and procedures. More than that, whatever its initial intentions and results, it is no longer effective or equitable by the present criteria we apply to measure public purposes. President's Commission 26.

Thus it is clear that the present discriminatory system is in no meaningful sense the product of a "policy" of "legislative bodies." Rather it is the ultimate in sheer happenstance, a product of historical accident. In fact, the Texas Governor's Committee on School Finance observed that the present system "almost defies comprehension" and is based upon factors "a little better . . . than sheer chance, but not much."[31] Indeed, as a recent report dealing with another State's similar system of financing concluded:[32]

> It is difficult to conceive of a less workable structure, fraught with such possibilities for inaction and lack of focus for leadership, than the one existing at the state level in education.

B. UNLIKE THE PRESENT SYSTEM, THE SYSTEMS PERMITTED BY THE LOWER COURT DECISION WOULD NOT INHIBIT LOCAL CONTROL OF EDUCATION

1. Under the Present System, Local Control Exists Only for the Rich Districts

The present system of school finance is not necessary for local control of the schools. In fact, the exact opposite is true: the present system prevents meaningful local control by all except the richest districts.

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[31] Public Education in Texas, 57, 48.

[32] Office of Planning Coordination, Michigan Bureau of Policies and Programs, A Chronology of Educational Reform 1 (1970).

Texas, like other States, has created school districts and made many of them poor:

> [T]he case [is] unusual in the extent to which governmental action *is* the cause of the wealth classifications. The school funding scheme is mandated in every detail by the California Constitution and statutes. Although private residential and commercial patterns may be partly responsible for the distribution of assessed valuation throughout the State, such patterns are shaped and hardened by zoning ordinances and other governmental land-use controls which promote economic exclusivity.... Governmental action drew the school district lines, thus determining how much local wealth each district would contain.... *Serrano* v. *Priest,* 5 Cal. 3rd 584, 487 P.2d 1241, 1254 (1971).[33]

Having created and perpetuated rich and poor districts, the State then leaves it to such districts to go beyond the amount of the direct State grants "as their desires and resources permit." (App. Br. 6). This, according to Appellants, is the essence of local control.

The facts belie this contention. Plaintiffs' Edgewood district, taxing at the highest rate in San Antonio, was able to raise $37 per student in 1969-70. Even with the State direct grant of $242 per pupil, Edgewood had less than half the funds available per pupil as did the average Texas school district.[34] As a result of its poverty, Edgewood could not provide such essentials as adequate classrooms, sufficient library resources, or experienced teachers, and the district had to forego

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[33] *See also* Van Dusartz v. Hatfield, 334 F.Supp. 870, 876 (D. Minn. 1971).

[34] *See* notes 3 and 18, *supra.*

programs available to richer districts.[35] This occurred despite the fact that Edgewood's tax rate was the highest in its area. It was not Edgewood's "desire," or the "lack of concern" on the part of Edgewood parents, which made Edgewood unable to afford what the richer districts had. It was, quite simply, poverty.

In contrast, Alamo Heights, a wealthy district also in San Antonio, although taxing itself at a lower rate than did Edgewood, raised $412 per student and, in addition, received $250 in direct state grants in 1969-70.[36] Alamo Heights could afford the luxury of local control, of deciding where to spend the funds the State of Texas has given it. Edgewood had no such luxury. The simple fact is that the image of local control over financing of education is completely illusory for a district such as Edgewood because of its poverty.

Nevertheless, Appellants contend:

> The Court below thought that the choice Texas gives to school districts was illusory since "poor" districts in reality have no choice. Even though they tax themselves heavily they cannot raise much money (337 F.Supp. at 284, App. 259). But this is not like *Hargrave* v. *Kirk,* 313 F.Supp. 944 (M.D. Fla. 1970), *vacated* 401 U.S. 476 (1971), where the state made it impossible as a matter of law for a poor family or school district to provide an expensive education. Here the state has assured every child in every school district an adequate education. It leaves to the people of each district the choice whether to go beyond the minimum and, if so, by how much. In fact, every district in the state does go beyond the minimum

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[35] App. 236-38.

[36] *See* note 3, *supra.*

> foundation program (App. 57). Thus the people of each district do in fact have a choice and have exercised it. (App. Br. 35.)

Contrary to Appellants' assertions, the present case is identical to *Hargrave*. In addition to making it impossible "as a matter of law" for a poor school district to provide a quality education,[37] Texas, like most other States, has made it impossible as a matter of fact by creating and maintaining property-poor school districts.

2. The Systems Permitted by the Decision of the Court Below Allow Local Control for All Districts

Under the standard proposed by the court below (whether labelled "fiscal neutrality" or something else), there are many ways in which Texas, or any other State, could structure its educational finance system so as to leave financing at the local level and at the same time eliminate the present interdistrict discrimination. Under the rule adopted by the court below, of course, this type of decision is, as it should be, left to the State.

One method by which a State could retain local level financing is the so-called district power-equalizing approach whereby the State would guarantee all the dis-

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[37] Texas, like Florida, imposes legal restrictions on the poor districts' ability to raise funds through the mechanism of statutory maximum limits on the tax rates which local districts may impose for education. The statutory maximum allowed for local taxing efforts varies according to the size of the school district, but is in most cases around $1.75 per $100 assessed valuation. Tex. Stat. Ann. arts. 2802g, 2802h, 2802i, and 2802i-1—2802i-32, as amended by Acts of 1969, Ch. 889. Needless to say, such limits weigh lightly on the rich districts which can obtain substantial revenues at low rates.

tricts the same amount of revenue for any given level of tax effort.[38] Another method would be for the State to reapportion the local districts so that the value of taxable property within each district is approximately the same.[39] Yet a third approach would be for the State to remove commercial, industrial and mineral property from the local tax roll, tax such property on a statewide basis, and return the revenues to the local districts in a manner intended to equalize the disparities

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[38] For a fuller description of how this system would work, *see* J. Coons, W. Clune & S. Sugarman, Private Wealth and Public Education 201-42 (1970). Appellants argue that this would be politically unattainable because the richer districts would block any changes in the financing system which operated to reduce the revenues which they can obtain for education without making comparatively greater tax effort. Credibility is lent to this argument by the fact that it is precisely the political power of the richer districts coupled with the benefits they obtain from the existing system that is responsible, as Amici have discovered in their attempts to achieve reform of educational finance in their States, for the perpetuation of the existing discrimination against poorer districts. However, if the richer districts block enactment of legislative programs aimed at leaving financing of education at the local level while eliminating discrimination in its results, the responsibility for any resulting loss of local control will fall on the very same rich districts which seek to defend the present system by contending that its elimination will destroy local control. Appellants' position thus reduces itself to the proposition that if the courts eliminate the unjustifiable benefits the rich districts obtain from the present system, those rich districts will, in response, destroy local control of public education.

[39] Appellants object that this method is impossible and not to be taken "seriously." (App. Br. 14). In fact, this type of reapportionment is taking place continuously as the number of school districts declines around the country. *See* National Education Finance Project, Alternative Programs for Financing Education 104-05 (1971). Indeed, the State of Texas routinely makes calculations of similar complexity in conjunction with its current "foundation" program. See Public Education in Texas 45-58.

arising from variations in the value of the residential property remaining in the local tax base. Other methods involving various combinations of the above with State equalizing funds obtained from sources other than local property taxes could be enumerated at length. All of these preserve local control, yet are consistent with the provision of a nondiscriminatory education.

To be sure, it is up to the State under the lower Court's decision to determine whether education shall be financed or controlled locally or on a statewide basis. However, as Amici have pointed out above, school districts are now and always have been mere instrumentalities of the State. Since any State could choose at present to finance education on a statewide basis and since the lower court decision does not oblige a State to finance education in any particular manner, it is difficult for Amici to understand why any decisions which States might make in the future to finance education on a statewide basis can be considered to be a reduction of local autonomy compelled by the decision in this case.

In any event, State decisions as to school finance systems do not go to the heart of local control. As this Court has recognized, local control of the public schools has numerous advantages in that it allows those who best know how the schools are operating to determine those aspects of the operation of the schools which can and should vary according to local conditions. *Wright* v. *Council of the City of Emporia,* 92 S. Ct. 2196, 2206 (1972). Amici do not disagree with this premise. However, even if a State should elect to finance education on a statewide basis, that would not affect local control over such things as "curricular decisions, the

structure of grade levels, [and] the planning of extra-curricular activities. . . .'' See *Id.* at 2211 (dissenting opinion of Mr. Chief Justice Burger). Nor would full State funding of education affect local decision-making power over personnel decisions, administration of the schools, or the allocation of the district's revenue among different educational objectives. In sum, even a State takeover of educational finance need not reduce local control over the public schools.

As Amici have shown above, Texas' current system of school finance does not promote local control of public education and, furthermore, is neither rational nor workable. In fact, the current system, by depriving poor school districts of the funds to pursue programs readily available to the rich districts, precludes the poor districts from enjoying the benefits of meaningful local control. On the other hand, the rule adopted by the court below is not only educationally sound and rationally based, but allows both the rich and poor districts the benefits of local control. It is evident, therefore, that Appellants' arguments that the State is pursuing the valid interest of promoting local control in maintaining its discriminatory finance system are entirely devoid of merit.

Accordingly, the State has no interest—compelling or otherwise—to justify providing educational opportunities in a discriminatory manner based upon district wealth. In view of the educational interests and the nature of the discrimination involved, under the established constitutional principles discussed earlier this Court must conclude that the Texas school financing system is violative of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.

V. APPELLANTS' CONTENTIONS AS TO THE CATASTROPHIC EFFECTS OF AN AFFIRMANCE OF THE LOWER COURT DECISION ARE WITHOUT MERIT

The foregoing analysis has demonstrated that the Texas school finance system is, as the lower court held it to be, unconstitutional. Appellants and the Amici supporting their position, however, seek to avoid the impact of the constitutional requirements by assertions that an affirmance of the lower court decision would have catastrophic effects on State public education. Amici are in a particularly good position, as State Governors active in the area of school finance reform, to evaluate the accuracy of these predictions and have no hesitation in stating to this Court that such predictions are without merit. Appellants, and their supporters, make the following arguments, which Amici will discuss seriatim:

1. Appellants maintain that nondiscrimination would require a tremendous increase in educational expenditures. App. Br. 39-40; Brief Amicus Curiae of Montgomery County et al. 99-102 [hereinafter cited as Montgomery County Brief].[40] This is not so. While it is true that if a State chooses to equalize all schools at the level of spending now enjoyed only by the wealthiest districts there would be an increase in educational outlays—although not a tremendous one—a State is free to choose the level of equalization to insure that there is little cost increase. The President's Commission on School Finance has recently completed a study of this subject which included a thorough analytical treatment of the cost factors involved.

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[40] Inconsistently, certain Amici also argue that the decision below will result in less funds being spent on education with resulting "enforced mediocrity" for the public schools. Montgomery County Brief 48-54. There is no justification in the record, or otherwise, for such a contention.

According to the President's Commission, Texas, which currently spends over $1.5 billion annually on its schools, would increase costs no more than $40 million by converting to equalized schools if it chose to equalize payments at the 50th percentile.[41] This amounts to an increase of around 2.6%—less than that required annually from inflation alone. Nationwide the figures are similar. Thus, in the United States, which spends $45 billion annually on education,[42] the additional costs involved in equalizing at a 50th percentile level amount to $1.3 billion, an increase in outlay of less than 3%. Of course, if States choose to equalize at higher levels—that is, in Appellants' terms, decide to make high quality education available for all—the costs will increase. But even so, the increases required are not prohibitive. Thus, if Texas chooses to equalize at the 70th percentile, its increase in costs would be $92 million (6.1%) and at the 90th percentile that increase would be $263 million (17.5%). Similarly, nationwide, the cost if all States choose to equalize at the 70th percentile would increase by $2.5 billion (6%) and at the 90th percentile by $6 billion (15%).[43]

While Amici do not submit that these are necessarily small figures, they do show that the order of magnitude of expenditures necessary to equalize our schools even at the level of the very best is not overwhelming and that to maintain a school system in which the overall quality is higher than the average now but which does not discriminate against poor districts need cost almost nothing more than we are presently paying.

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[41] 2 Staff Report, President's Commission on School Finance Reform, Review of Existing State School Finance Programs 15 (1972) [hereinafter cited as Staff Report].

[42] President's Commission 11.

[43] Staff Report 15.

2. Appellants also contend that an equalized educational finance system would not reflect local variations in such things as the cost of educational facilities, the needs of disadvantaged or exceptional students for special facilities, the local tax burden for services other than education, and the like. In this connection, Appellants are particularly solicitous for the situation of the cities which, Appellants claim, will actually lose educational revenues under an equalized system.

Concededly, under the standard adopted by the court below, it is possible that a State could choose to adopt a system of public school finance that did not give weight to any of the above-specified variables. However, Amici, as Governors familiar with and active in the areas of school finance reform, believe that while such a result is conceivable, it is much more likely that any school financing system enacted to comply with the standard adopted by the court below will embody the type of sophisticated attempt to rationalize educational financing exemplified by the proposed California statute reproduced as Appendix B to the Brief Amicus Curiae of Richard M. Clowes, et al. In any event, the present Texas system takes into account none of the factors listed by Appellants, and it is difficult to see what legitimate State interest is furthered by perpetuating a demonstrably irrational system of school financing on the ground that its replacement, while of necessity a significant improvement, might not be ideal from some points of view.

3. Appellants also raise the spectre of a mass flight from the public schools by the children of those who already object to having their children attend school with blacks and other members of minority groups. (App. Br. 46-47; Montgomery County Brief 51). Not

only is it singularly unattractive to propose that this Court trade off wealth discrimination in exchange for eliminating racial discrimination,[44] but this contention is factually erroneous.

First, perpetuating discrimination against the poor in educational financing will hardly promote the use of the public schools to achieve "a society that is not divided by artificial barriers of race or class or wealth." (App. Br. 47). On the contrary, it is precisely the existence of school districts in which high property values, low tax rates and ample funding for public education coincide that is the principal cause of the creation of residential enclaves from which the black and the poor are excluded. Second, as the attempts to avoid desegregation have shown, the fact that persons who place their children in private schools are still taxed to support public schools operates as a substantial deterrent to "flight away from the public schools" by all but the richest.

In closing this section of their Brief, Amici would re-emphasize that the constitutional standard adopted by the court below—correctly in our view—does nothing more than require the State to stop using a system which discriminates against the children residing in poor districts. It does not require that the State util-

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[44] This Court has heard similar arguments before. In Monroe v. Board of Commissioners, 391 U.S. 450 (1968), the defendant school district attempted to justify its operation of a free transfer system which resulted in the maintenance of segregated schools. This Court stated that:

> We are frankly told that without the transfer option it is apprehended that white students will flee the school system altogether. But it should go without saying that the vitality of these constitutional principles cannot be allowed to yield simply because of disagreement with them. *Id.* at 459.

ize any particular means of financing. Rather, it sets forth the basic constitutional standard and quite properly leaves it to the State to make the policy decisions as to which of the many possible methods of school financing it will adopt.

Consistent with the decision of the lower court, there are many financing arrangements the State could adopt. The basic structures of some of these variations include:

1. A uniform formula, whereby the State grants each district the same amount per pupil;
2. "Power equalizing," whereby the State assures that each district receives equal funds for equal local tax effort;
3. Variation by cost of services, whereby the State pays more to those districts (generally urban ones) where costs are higher;
4. Combination formulae, whereby the State pays either a uniform amount under formula 1 or variable amounts under formula 3 and allows the districts additional leeway to spend more, for example, under formula 2.

The four types of formulae mentioned above are merely a few of those available. There are, in addition, many other factors that the State could consider in adopting a particular financing program. These include variations in educational need (such as programs for the handicapped), educational innovation and experimentation, and municipal overburden (that is, since urban areas are harder pressed to provide all the necessary municipal services than are rural areas, the urban areas

may require additional aid). None of the formulae suggested above, nor the variations thereon, are of great administrative difficulty and any of them could, based upon a State's policy decision as to how best to spend the funds available to it, form the basis of an adequate and constitutional school financing system.

CONCLUSION

The principal interest of Amici in filing this brief is to insure that this Court in the present case does not, in effect, endorse the existing defects in the financing of public education in the various States, including those governed by Amici. Amici believe, and the court below recognized, that the discrimination against poor children which results from such a system of school financing is in violation of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution and must be eliminated. Each Amicus herein is presently engaged in drafting and seeking the passage of legislation which would eliminate this discrimination against poor children. While constitutional law obviously cannot be made for the purpose of supporting legislative reform efforts, it is equally true that constitutional law should not thwart such efforts, particularly where, as in the present area of school financing, the absence of legislative reform is attributable to the entrenched political power of persons who most benefit from the inequalities of the status quo. As Amici have pointed out elsewhere in this Brief, the standard applied by the lower court allows many possible school financing systems, the details of which are properly to be filled in by the State according to its policy determinations. For the foregoing reasons,

Amici believe that the decision of the court below is correct and should be affirmed by this Court.

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APPENDIX

APPENDIX

Table of State Provisions on Education and Other Services

	Education Constitutionally Mandated	Constitutional Recognition of Relation of Education to Voting	Compulsory Education Required by Statute	Other Services Constitutionally Mandated	Other Services Mentioned in Constitution
Alabama	Yes		Yes	No	Hospitals & Welfare
Alaska	Yes		Yes	No	No
Arizona	Yes		Yes	No	No
Arkansas	Yes	Yes	Yes	No	No
California	Yes	Yes	Yes	No	Welfare
Colorado	Yes		Yes	No	No
Connecticut	Yes		Yes	No	No
Delaware	Yes		Yes	No	No
Florida	Yes	Yes	Yes	No	Health
Georgia	Yes	Yes	Yes	No	Slum Clearance
Hawaii	Yes		Yes	No	Welfare & Slum Clearance
Idaho	Yes	Yes	Yes	No	No
Illinois	Yes	Yes	Yes	No	No
Indiana	Yes	Yes	Yes	No	Welfare
Iowa	Yes		Yes	No	No
Kansas	Yes		Yes	No	Welfare
Kentucky	Yes		Yes	No	No
Louisiana	Yes		Yes	No	Welfare
Maine	Yes	Yes	Yes	No	No
Maryland	Yes		Yes	No	No
Massachusetts	Yes	Yes	Yes	No	No

	Education Constitutionally Mandated	Constitutional Recognition of Relation of Education to Voting	Compulsory Education Required by Statute	Other Services Constitutionally Mandated	Other Services Mentioned in Constitution
Michigan	Yes	Yes	Yes	No	No
Minnesota	Yes	Yes	Yes	No	No
Mississippi	No[a]		No[c]	No	Health
Missouri	Yes	Yes	Yes	No	Welfare
Montana	Yes		Yes	No	No
Nebraska	Yes		Yes	No	No
Nevada	Yes	Yes	Yes	No	Welfare
New Hampshire	Yes	Yes	Yes	No	No
New Jersey	Yes		Yes	No	No
New Mexico	Yes		Yes[d]	No	Welfare
New York	Yes		Yes	Welfare	Housing
N. Carolina	Yes	Yes	Yes	No	Welfare
N. Dakota	Yes	Yes	Yes	No	No
Ohio	Yes		Yes	No	No
Oklahoma	Yes		Yes[d]	No	Welfare
Oregon	Yes		Yes	No	No
Pennsylvania	Yes		Yes	No	Welfare
Rhode Island	Yes	Yes	Yes	No	No
S. Carolina	No[b]		Yes	No	No
S. Dakota	Yes	Yes	Yes	No	No
Tennessee	Yes	Yes	Yes	No	No
Texas	Yes	Yes	Yes	No	Welfare
Utah	Yes		Yes	No	No
Vermont	Yes		Yes	No	No
Virginia	Yes		Yes[d]	No	No

	Education Constitutionally Mandated	Constitutional Recognition of Relation of Education to Voting	Compulsory Education Required by Statute	Other Services Constitutionally Mandated	Other Services Mentioned in Constitution
W. Virginia	Yes		Yes	No	No
Washington	Yes	Yes	Yes	No	No
Wisconsin	Yes		Yes	No	No
Wyoming	Yes		Yes	No	No

[a] Education formerly mandatory, Constitution amended after Brown v. Board of Education, *supra*, to make provision of educational services within the legislature's discretion.

[b] Education formerly mandatory, constitutional provision repealed after Brown v. Board of Education, *supra*.

[c] School attendance formerly compulsory, statute repealed after Brown v. Board of Education, *supra*.

[d] Constitutional provision.