

**TX 3RD CT. OF APPEALS. KIRBY VS.
EDGEWOOD ISD. AMICUS CURIAE BRIEF
OF JOHN CULBERSON**

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John Culberson

State Representative District 125

Committees: Public Education, Science & Technology

May 25, 1988

Hon. David Hudson
State Representative
P.O. Box 2910
Austin, Texas 78769

ENTERED MAY 26 1988

Dear David:

I am enclosing a first draft of the constitutional amendment and my Amicus Curiae brief on the Edgewood v. Kirby decision. You have surely been wondering why I have become so energized about this court case. It's because my research convinces me that if this judgment is valid, the Legislature has only two choices next session.

We must create a school finance system that conforms either to the judges' orders or to the voters' orders. There is no third choice. My amicus brief lays out in detail the reasons why caselaw tells us this is true, and if I am mistaken, no one has been able to contradict this conclusion in the six months that I have been promoting the amendment.

Local control is not only lost under the unlikely consolidation option, local control is lost under any option designed to satisfy the judgment. The key is not the option chosen but whether or not the judgment is valid. If it is, local control is gone because democratic control over school finance issues is lost. The courts will use the strict scrutiny test to veto every fiscal decision we make which does not comply 100% with their orders. 99% compliance is not enough under strict scrutiny. Compromise or flexibility is impossible by definition. Taxpayers will have no one to hold accountable for the distribution of \$12.3 billion per biennium, and the Legislature will have lost control over nearly one half of the state's budget. This is why I am so adamantly opposed to this judgment.

This constitutional amendment must be one part of the final solution to the Edgewood dilemma. The Legislature has made tremendous progress in equalizing education funding, especially in recent years. We have farther to go, but we

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NO. 3-87-190-CV

IN THE COURT OF APPEALS
FOR THE THIRD JUDICIAL DISTRICT
OF TEXAS AT AUSTIN

WILLIAM N. KIRBY, ET AL.,

APPELLANTS

VS.

EDGEWOOD INDEPENDENT SCHOOL DISTRICT, ET AL.,

APPELLEES

AMICUS CURIAE BRIEF OF
JOHN CULBERSON
MEMBER, TEXAS HOUSE OF REPRESENTATIVES
DISTRICT 125
ON BEHALF OF APPELLANTS

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can only do so by common agreement through the democratic process in election campaigns, trustee board rooms and legislative chambers.

The second part of the amendment tracks the language of Article 16.001 of the Education Code and is intended to ensure that the Legislature's school finance system provides substantial equality in access to programs and services, regardless of district wealth. However, the critical difference here is that the Legislature and the voters will define what is substantially equal, and not the courts.

I am just as committed to achieving substantial equality as I am to the goal of preserving local and legislative control. Financial details of this second half of the solution to Edgewood are now being developed by many different organizations, committees and state leaders. I will support new dollars in the system to achieve substantial equality, but I will vigorously oppose any plan which does not guarantee final legislative authority.

This amendment does not close the courts to these plaintiffs or anyone else. The same suit could still be brought in state or federal court under federal law and the United States Constitution. The courts can still review the constitutionality of school finance statutes under Marbury v. Madison et al. The Permanent School Fund and other constitutionally defined school funding systems are also protected under this amendment. All rights guaranteed by the federal constitution would still be intact, but under the Texas Constitution the court of final authority over school finance issues will be the court of public opinion expressed through the democratic process.

The brief contains a first draft of the amendment, Judge Clark's final judgment and a critical page from his Findings of Fact and Conclusions in which he defines an adequate education as occurring at a spending level of "at least...\$3,600 (excluding federal funding, debt and facilities) per student." Following these appendixes, I have attached copies of the two definitive Supreme Court cases that still control the law of public school finance in Texas, and I urge you to read both decisions at your leisure in the months ahead. If you are familiar with these two cases and no others, you will have an accurate and largely complete grasp of all the constitutional issues at stake in the historic debate we will face on this critical issue next session.

After you have had a chance to review all of this, I genuinely hope you can join me as a co-author and that you can also help with a petition drive under your name in your district to generate support for the amendment. So far, it has generated over 8,000 signatures from my area and created

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the nucleus of an energetic grassroot volunteer network which is growing very rapidly.

I hope you have not been surprised by the appearance of petitions in your district. If so, I apologize if it caused you any discomfort with your constituents. I have only mailed and distributed the petitions in my district and at speeches in my area, and voters have been sending them to friends around the state on their own. I have no knowledge or control over the circulation of the petitions after they are passed out.

I am truly looking forward to discussing the amendment and your ideas on the subject at great length. I am scheduled to take the bar exam in Austin July 27-29th, so I will necessarily be out of circulation for at least one month prior to this. But before and immediately afterwards, I hope we can visit personally or by phone.

Sincerely yours,

A handwritten signature in black ink, appearing to be 'John' or similar, written in a cursive style.

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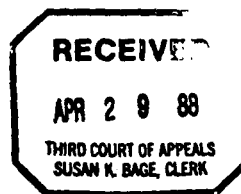


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PRELIMINARY STATEMENT

TO THE HONORABLE COURT OF APPEALS:

As the State Representative for Texas House District 125 and as a member of the Legislative department of state government, I urge the Court of Appeals to reverse and render the judgment of the Trial Court on the basis that final Constitutional authority over public school finance and the efficiency or quality of Texas public schools lies not with the Courts but with the Legislature.

The Texas Constitution, Article VII, Section 1, charges the Legislature with the "duty ... to establish and make suitable provision for the support and maintenance of an efficient system of public free schools," and I urge this Honorable Court to construe this unambiguous language in accord with Mumme v. Marrs¹ and hold that Article VII, Section 1 creates a legislatively enforced guarantee to a free public education and grants nonjusticiable authority over the public school finance system to the Legislature.

Because the Trial Court found education to be a judicially enforceable fundamental right, this decision represents far more than a judicial veto of the twelve billion dollar school finance system. The effect of this judgment will be to transfer final authority over the public school system from the Legislative to the Judicial department of state government.

It is axiomatic in equal protection analysis that a fundamental right cannot exist unless a Court first makes "a judicial determination that the text or structure of the Constitution evidences the existence of a value that should be taken from the control of the political branches of government [and given] judicial protection..."² U.S. Supreme Court Chief Justice Wm. Rehnquist has described this rule as the "'ward of the Court' approach to equal protection ..."³

Once the public schools become the ward of the Courts, as is scheduled to happen on September 1, 1989, local control over the the quality of local schools will vanish,⁴

¹ Mumme v. Marrs, 40 S.W.2d 31 (Tex. 1931).

² Rotunda, Nowak & Young, *Treatise on Constitutional Law* @ 594, n 21 (1983).

³ Sugarman v. Dougall, 93 S.Ct. 2861, 2865 (U.S. 1973) (Rehnquist, J., dissenting).

⁴ San Antonio Independent School District v. Rodriguez, 93 S.Ct. 1278, 1307 (U.S. 1973).

and accountability to the public for nearly one half of the state's total budget will disappear. One Travis County District Court will have statewide authority to order exact equality in access to education funds, and any Legislative act which would allow local schools to benefit financially from a strong local commitment to rise above the state average would be vetoed by the Courts under the strict scrutiny standard.

If this judgment is affirmed, there is no question that the Courts will always strike down any system that does not guarantee exact equality in access to funds. If education is a judicially enforceable fundamental right, and equal protection means equal access to education funds, then the Courts must employ the strict scrutiny standard to review the school finance system.⁵ And only one statute has ever survived judicial review under the strict scrutiny standard in the history of equal protection analysis⁶, and then only because of wartime emergency and necessity.

Indeed, forty five years after Japanese Americans were incarcerated on the West Coast under this statute, this single exception to the typical strict scrutiny veto has been recognized by Congress as a terrible error, and surviving detainees have been awarded \$20,000 apiece and offered a formal apology from the United States Government.⁷ The "continual invalidation of statutes under this standard has led [one prominent constitutional scholar] to aptly describe" ⁸the strict scrutiny test used by the Trial Court as "strict in theory and fatal in fact."⁹

In this Amicus Curiae brief, I hope to show this Honorable Court that judicial assumption of a legislative role over the school finance system is inappropriate and unprecedented under Texas law. I will endeavor to show that affirming this decision would be especially inappropriate at a time when the the state is beginning to recover from a deep recession, the public schools are beginning to show improvement after HB 72 and at

⁵ *Rodriguez*, @ 1289.

⁶ *Korematsu v. United States*, 323 U.S. 214 (U.S. 1944).

⁷ Houston Post, April 21, 1988, @ 1.

⁸ Rotunda, Nowak & Young, Treatise on Constitutional Law @ 633, n 64

⁹ Gunther, Foreward: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection, 86 Harv.L.Rev. 1,8 (1972).

a time when the state is "approaching a crisis in public confidence in the Texas judiciary."¹⁰

The immense economic, social and political impact of affirming this judgment make all of these considerations relevant in the disposition of this appeal. SMU economists Bernard L. Weinstein and Harold T. Gross believe that "after five years of severe decline, the Texas economy is just now beginning to show signs of recovery. Payrolls are growing and the unemployment rate is dropping. But full economic recovery and expansion will be contingent upon a restoration of investor confidence, particularly among out of state investors whose capital is so critical for business expansion. Unfortunately, episodes like the Texaco-Pennzoil flap may scare prospective investors away."¹¹

In my opinion, the impact of Edgewood will dwarf the Texaco-Pennzoil flap. Currently, fifty five percent of the Texans surveyed by the Public Policy Resources Laboratory at Texas A& M University "gave 'only fair' or 'poor' ratings to the work of state courts,"¹² and over half of the attorneys surveyed by The Texas Lawyer believe "the public image of the Texas Supreme Court has suffered grave or serious damage over the past two years."¹³

In many ways, the Edgewood decision truly represents the edge of the woods for Texas. No one yet knows the ultimate cost of compliance with the Trial Court's standard of exact equality, but according to the best estimates of the Texas Education Agency¹⁴ and the Legislative Budget Board¹⁵, the spectrum of possibilities include tax increases from \$11.1 billion to as much as \$149 billion *per year*, and/or consolidation of Texas' 1,063 independent school districts into fewer than twenty regional districts with roughly equal amounts of taxable property wealth.

¹⁰ San Antonio Express, Feb. 27, 1988 citing 1987 Annual Report of the State Commission on Judicial Conduct.

¹¹ B.L. Weinstein & H.T. Gross, Center for Enterprising, Edwin L. Cox School of Business, Southern Methodist University, editorial, Houston Chronicle, November 17, 1987.

¹² Houston Chronicle, March 19, 1988.

¹³ San Antonio Express, Dec. 14, 1987.

¹⁴ School Finance Research: Response to Decision in Edgewood I.S.D. v. Kirby; testimony of Dr. Lynn Moak, Deputy Commissioner for Research and Information, Texas Education Agency, to the State Board of Education, July 10, 1987.

¹⁵ Fiscal Size Up, 1988-89 Biennium, Texas State Services, Legislative Budget Board @ 59.

At one end of the spectrum, the solution to this decision could bankrupt the state. At the other end of the spectrum lies regional or statewide consolidation. Neither of these extreme solutions are likely to happen. The more that the new tax burden is shared at the state level, the less pressure there is to consolidate or redistribute property wealth.

The most likely solution includes unprecedented tax increases at the state and local level, (all of which will be dedicated to education and redistributed equally statewide), combined with one or more of the following options: 1) tax mineral wealth at the state level,¹⁶ or 2) set a "ceiling or cap on the amount of spending by school districts from local funds at a level which could be easily attained by the poorest school districts, also known as leveling down,"¹⁷ or 3) "adjust the current funding formulas to reduce aid going to wealthy districts and increase the amount available to poorer schools, extending the changes that had been made in House Bill 72"¹⁸ or 4) pass a constitutional amendment creating "a state property tax that could be levied at a low rate and dedicated for public education under the current finance system"¹⁹

The final solution, consolidation, is one that no one wants to discuss as a realistic option, but in Judge Clark's opinion, the Legislature "might find that redistricting and putting everybody in equal value tax districts could save the state some money."²⁰

According to the Legislative Budget Board, if Edgewood is affirmed, any one of the possible solutions now being proposed "would require spending increases beyond that witnessed previously in Texas. The \$149.0 billion [per year] option would account for an estimated 65.3 percent of total personal income in Texas ... "²¹ The \$11.1 billion per year option, (which fits the Trial Court's definition of \$3,600 per student as the minimum level of spending required for an adequate education),²² would double current state spending on education²³ and result in unprecedented and unaffordable statewide tax increases.²⁴

¹⁶ Austin American Statesman July 11, 1987.

¹⁷ Fiscal Size Up, 1988-89 Biennium Texas State Services, Legislative Budget Board @ 59

¹⁸ Fiscal Size Up @ 59.

¹⁹ Fiscal Size Up @ 59.

²⁰ Fort Worth Star Telegram, May 23, 1987.

²¹ Fiscal Size Up @ 59.

²² Findings @ 31.

²³ Fiscal Size Up @ 55.

²⁴ Fiscal Size Up @ 59.

And this decision, if affirmed, probably represents just the tip of the iceberg. It is the opinion of the U.S. Supreme Court that if strict scrutiny analysis under the equal protection clause can be applied to the Texas public school finance system, then strict scrutiny can be applied with equal logic to all Legislative efforts to provide "other necessary services customarily financed largely from local property taxes, including local police and fire protection, public health and hospitals, and public utility facilities of various kinds."²⁵

In fact, this trend has already appeared. Less than eight months after the Trial Court handed down its judgment a virtually identical lawsuit was filed against the Texas system of higher education seeking equality of access to funding in all state colleges and universities.²⁶

Under any of the solutions currently being offered to satisfy the Trial Court's standard of exact equality, children in the best public schools will suffer because local control over the quality of local schools will no longer exist. Local commitment will be meaningless, and the new standard of excellence in the state school system of the 1990's will be mediocrity.

Everyone agrees that there are inequities in the current school finance system. Those gaps must be closed, but common sense, historical fact and legal precedent all demonstrate conclusively that problems with the public school finance system can only be solved through the political process.

This Honorable Court should reverse the Trial Court and refuse to assume a legislative role that has been long rejected by the United States Supreme Court and previous Texas Supreme Courts. On this issue, more than any other, the Judicial Department should not install itself as "a super legislature".²⁷ In doing so, the Courts would assume "a level of wisdom superior to that of legislators, scholars, and educational authorities in 50 states, [in an area] where the alternatives proposed are only recently conceived and nowhere yet tested."²⁸ Indeed, recovery under the Trial Court's order is so poorly defined

²⁵ *San Antonio Independent School District v. Rodriguez*, 93 S.Ct 1278, 1307 (U.S. 1973).

²⁶ *League of United Latin American Citizens, et al v. William P. Clements, et al*, Cause No. ____, in the District Court of Cameron County, Texas, ____ Judicial District.

²⁷ *Rodriguez* @ 1308.

²⁸ *Rodriguez* @ 1308.

right to an education. A judicial determination that a right is fundamental requires a second judicial determination that the Court must intervene to protect this right for one of two reasons. Either because the Legislature's regulations injure a discrete and insular minority which is politically powerless and can only look to the Courts for protection,²⁹ or because the regulation in question impinges on the exercise of this particular fundamental right.³⁰

In this judgment, the Trial Court found the current school finance system to be unconstitutional on both grounds. Specifically, the Trial Court ruled that the Texas School Financing System,³¹ "implemented in conjunction with local school district boundaries that contain unequal taxable property wealth for the financing of public education[,] is UNCONSTITUTIONAL AND UNENFORCEABLE IN LAW because it fails to insure that each school district [and] each student has"³² exact "equality of access to funds"³³, whether drawn from "state legislative appropriation or by local taxation, or both ... "³⁴ The Trial Court went on to find that the current finance system is so discriminatory and punitive that low wealth districts would suffer "irreparable harm" if the entire system "as it exists in conjunction with school district boundaries" were not struck down immediately.³⁵

Based on these findings, the Trial Court imposed the harshest judicial remedies available, strict scrutiny to strike down the current school finance system,³⁶ and injunctive relief to order the Commissioner of Education and the Comptroller to cease distributing funds under the current system after September 1, 1989 and to implicitly order the Legislature to create a "constitutionally sufficient" system by that date.³⁷

It is indisputable that there are vast differences between the two ends of the bell curve which illustrate district property wealth, and there are indeed large gaps in spend-

²⁹ *United States vs. Carolene Products Co.*, 304 U.S. 144, 152, n.4 (U.S. 1938).

³⁰ *Rodriguez* @ 17.

³¹ Tex. Educ. Code Ann. § 16.01, et seq. (Vernon 1988).

³² Judgment, June 1, 1987 @ 4; hereinafter referred to as Judgment.

³³ Statement & Findings, April 29, 1987 @ 2, hereinafter referred to as Statement.

³⁴ Judgment @ 5.

³⁵ Judgment @ 7; Findings of Fact & Conclusions of Law, August 27, 1987 @ 72; hereinafter referred to as Findings.

³⁶ Findings @ 11.

³⁷ Judgment @ 7.

ing per student from district to district. It is therefore unnecessary to review the long list of fact findings made by the Trial Court to illustrate these disparities. A Brandeis Brief of that type can certainly be drafted, but it should properly be filed with the 71st Legislature as the proper forum of final appeal on questions of school finance.

II.

The Legislature's role as the proper forum to debate school finance questions can first be seen in the extraordinary effort made by the framers of the Texas Constitution to draw bright lines of authority between the powers of the Legislature and powers of the Courts. Even though the "Father of the Constitution," James Madison, believed that "no political truth is ... of greater intrinsic value, or is stamped with the authority of more enlightened patrons of liberty, than that" of separation of powers,³⁸ the United States Constitution does not contain a specific separation of powers statement. In the federal government, "the separation is accomplished by the constitution's assignment of certain duties and powers to each branch."³⁹

In our state government, the separation of powers doctrine is spelled out in the Texas Constitution, and its importance is further heightened by the fact that it is the only concept embodied in the single section comprising Article II.

The first principle expressed by Article II is unambiguous. "[N]o person, or collection of persons, being of one of these departments, shall exercise any power properly attached to either of the others, except in the instances herein expressly permitted."⁴⁰ The second facet of Article II is "present by implication from the first - that those powers constitutionally confided to one body of government cannot be delegated to another body, agency or level of government."⁴¹

³⁸ The Federalist No. 47.

³⁹ Braden, et al, *The Constitution of the State of Texas: An Annotated and Comparative Analysis* @ 89 (1977). (Hereinafter referred to as Braden et al.)

⁴⁰ Id @ 89.

⁴¹ Id @ 90.

Although it is fundamental to Constitutional analysis under *Marbury v. Madison*⁴² that "the judicial branch of government must necessarily possess the power to declare those acts invalid that are contrary to the Constitution"⁴³, it is equally fundamental under the separation of powers doctrine that not all "proceedings in which a court is involved are necessarily classified as judicial in character under any and all circumstances."⁴⁴ Issues of this kind are political questions which are "beyond judicial competence."⁴⁵

The Texas and the U.S. Supreme Courts have long recognized that the separation of powers doctrine requires that some issues present non justiciable controversies. The rules used by both Courts to define political questions are premised on the historical notion that "the power and authority of a state legislature is plenary and its extent is limited only by the express or implied restrictions thereon contained in or necessarily arising from the Constitution itself."⁴⁶

This is especially true of the uniquely Legislative power to formulate tax policies.⁴⁷ The U.S. Supreme Court pointed out in *Rodriguez* that "in taxation, more than in other fields, legislatures possess the greatest freedom in classification.[and] the presumption of Constitutionality can only be overcome by the most explicit demonstration that a classification is a hostile and oppressive discrimination against particular persons and classes."⁴⁸

On the contrary, the Executive and Judicial departments have only those powers granted by law or the Constitution.⁴⁹ Because of the limited power of the Judiciary, combined with the fact that the state Constitution is a document of express grants of authority premised on clear cut separations of power, Texas Courts have historically exercised strict judicial restraint on separation of power issues by following the same "inflexible rule [as] the Supreme Court of the United States [which] is [to] execute firmly

⁴² *Marbury v. Madison*, 1 Cranch 137 (U.S. 1803).

⁴³ *Government Services Insurance Underwriters v. Jones*, 368 S.W.2d 560 (Tex.1963).

⁴⁴ *Id.* @ 563.

⁴⁵ *Baker v. Carr*, 369 U.S. 684 (U.S. 1962).

⁴⁶ *Jones* @ 563.

⁴⁷ *Madden v. Kentucky*, 60 S.Ct. 406, 408 (U.S. 1940); cited with approval in *Rodriguez* @ 1301; also see *Lehnhausen v. Lake Shore Auto Parts Co.*, 93 S.Ct. 1001 (U.S. 1973).

⁴⁸ *Rodriguez* @ 1301.

⁴⁹ *Government Services Insurance Underwriters v. Jones*, 368 S.W.2d 560 (Tex.1963).

all the judicial powers intrusted to [them, but to] carefully abstain from exercising any power that is not strictly judicial in its character, and which is not clearly confided to [the Courts] by the Constitution."⁵⁰

III.

Texas Courts also follow the same criteria as the United States Supreme Court in identifying non justiciable political questions.⁵¹ Measured against each one of the political question criteria laid out in the seminal case of *Baker v. Carr*⁵², it is absolutely clear that the Trial Court's judgment in the instant case should be reversed and rendered as an unconstitutional judicial invasion of express legislative authority over public school finances.

The first distinguishing characteristic used by the Courts to identify a nonjusticiable political question is the most important because where it exists, it conclusively determines that the issue presented is a political question, and judicial inquiry ends with a dismissal on the merits due to nonjusticiability.⁵³ The Supreme Court in *Baker* reasoned that this first criteria was necessarily conclusive because of the separation of powers doctrine⁵⁴ "Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a co-ordinate political department."⁵⁵

Clearly, the language of Article VII, Section 1, charging the Legislature with the "duty ... to establish and make suitable provision for the support and maintenance of an efficient system of public free schools," is a textually demonstrable constitutional commitment of school finance issues to the Legislature.

Under the federal Constitution, the 5th Circuit has held that Congressional authority to amend a particular excise tax on telephone bills poses a nonjusticiable contro-

⁵⁰ , 256 S.W. 573 (Tex. 1923)

⁵¹ , 772 F.2d 163 (5th Cir. 1985).

⁵² , 82 S.Ct. 691 (U.S. 1962).

⁵³ *Elrod v. Burns*, 96 S.Ct. 2673 (U.S. 1976); *Baker* @ 700.

⁵⁴ *Baker* @ 710.

⁵⁵ *Id* @ 710.

versy because of the textually demonstrable constitutional commitment of revenue raising authority to Congress.⁵⁶

In the area of draft registration, the Supreme Court has rejected an equal protection challenge to a Selective Service regulation which excluded women as a nonjusticiable controversy because of the textually demonstrable constitutional commitment of the power to raise and support armies to Congress.⁵⁷ Similarly, federal courts have refused to second guess Congressional decisions in the regulation of immigration,⁵⁸ in defining standards promulgated by the Environmental Protection Agency,⁵⁹ or in defining disability for purposes of social security disability benefits.⁶⁰

The nonjusticiability of challenges to Congressional decisions on fiscal policy is so strong that the Supreme Court has even refused to review or second guess a Congressional decision to severely limit the use of federal funds to subsidize the cost of abortions, even though restrictions on the right to have an abortion are typically subject to strict scrutiny because of the fundamental right to privacy.⁶¹ "Where the Constitution assigns a particular function wholly and indivisibly to another department, the federal judiciary does not intervene."⁶²

Under the state Constitution, the Attorney General has ruled that the separation of powers doctrine forbids Legislative interference with the State Comptroller's authority to certify revenue estimates because this power is textually committed to the Comptroller's office.⁶³ In addition, the Texas Supreme Court has held that a court challenge to state usury laws should be dismissed as a nonjusticiable controversy because the power to regulate usury is textually committed to the Legislature.⁶⁴ "Under our judicial system our courts have such powers and jurisdiction as are defined by our laws constitutional and statutory ... They have such powers, and such powers only, as are expressly conferred on

⁵⁶ *Texas Association of Concerned Taxpayers, Inc. v. U.S.*, 772 F.2d 163 (5th Cir. 1985).

⁵⁷ *Rostker v. Goldberg*, 101 S.Ct. 2646 (U.S. 1981).

⁵⁸ *Chiaromonte v. Immigration and Naturalization Service*, 626 F.2d 1093 (2nd Cir. 1980).

⁵⁹ *Lead Industries Ass'n, Inc. v. Environmental Protection Agency*, 647 F.2d 1130 (D.C. Cir. 1980).

⁶⁰ *Desedare v. Schweiker*, 683 F.2d 1138 (5th Cir. 1982).

⁶¹ *Harris v. McRae*, 100 S.Ct. 2671 (U.S. 1980).

⁶² @ 725.

⁶³ Beaumont Enterprise, March 20, 1988.

⁶⁴ *Ex Parte Hughes*, 129 S.W.2d 271 (Tex. 1939).

them by law ... ⁶⁵ [and] where the Constitution, as in this instance [usury], places a duty on the Legislature, and the Legislature by appropriate laws purports to carry out such Constitutional mandate, the Legislature is the sole judge of what is adequate."⁶⁶

The Supreme Court based its decision on the language of Article XVI, § 11 of the state constitution, which "enjoins upon the Legislature the duty to provide appropriate pains and penalties to prevent [usury]."⁶⁷ Similarly, the Court of Appeals in the instant case is asked to interpret analogous language in Article VII, § 1 to determine whether this section of the Constitution creates a judicially enforceable fundamental right to an education, or whether this section is a textually demonstrable constitutional commitment of authority over the public schools and school finance to the Legislature.

On the basis of the caselaw authority outlined above, I urge this Honorable Court to reverse and render the Trial Court's judgment on the basis that it impermissibly seeks to resolve a nonjusticiable political question.

However, if the Court does not find the preceding cases to be dispositive of this appeal, I argue that the decision *Mumme v. Marrs* and its progeny are conclusive on the question of final Legislative authority over the school finance system, and in light of these decisions, the Court of Appeals should reverse and render this judgment.

IV.

Although *Mumme v. Marrs* was decided in 1931,⁶⁸ its central holding, which is dispositive of the central issue in *Edgewood*, was specifically reaffirmed in 1985 by the Texas Supreme Court in *Spring Branch I.S.D. v. Stamos*.⁶⁹ In both opinions, the Court held that Legislative decisions on the design of the school finance system are final, and cannot be reviewed by the courts "except when so arbitrary as to be violative of the constitutional rights of the citizen."⁷⁰

⁶⁵ Id @ 273, 274.

⁶⁶ Id @ 276.

⁶⁷ Id @ 274.

⁶⁸ *Mumme v. Marrs*, 40 S.W. 2d 31 (Tex. 1931).

⁶⁹ *Spring Branch I.S.D. v. Stamos*, 695 S.W.2d 556, 559 (1985).

⁷⁰ *Mumme v. Marrs*, @ 36.

This same ruling finds support in every other decision on the subject by Texas appellate courts. For example, what is "efficient" or "suitable" within the meaning of Article VII, § 1 will be left to the Legislature to decide,⁷¹ or to local school boards.⁷² "The word 'suitable' used in connection with the word 'provision' in this section of the Constitution, is an elastic term, depending upon the necessities of changing times or conditions, and clearly leaves to the Legislature the right to determine what is suitable, and its determination will not be reviewed by the Courts if the act has a real relation to the subject and object of the Constitution."

In fact, final Legislative authority over the design of the school finance system is such a powerfully conclusive presumption in Texas that, according to the editors of the *Annotated and Comparative Analysis of the Texas Constitution*, "Not one case was found that nullified an education statute or school board regulation on the basis that it contravened the 'efficiency' or 'suitability' standards of § 1, and challenges on that ground are now rare."⁷³ This is a remarkable statement. Very few areas of the law are so well settled that the editor of an exhaustive annotation on the subject would be moved to make such an assertion. Yet the Trial Court disagrees.

Despite the express terms of the Constitution, despite the clear intent of the framers of the Texas Constitution and despite the unequivocal disagreement of the Texas and the United States Supreme Courts, the Trial Court, by its judgment, seeks to assume final authority over the efficiency, suitability and quality of Texas public schools.

In both *Mumme v. Marrs* and *San Antonio Independent School District v. Rodriguez*, the Supreme Courts admonish the lower courts to exercise judicial restraint and abstain from reviewing Legislative decisions on the design of the Texas school finance system.⁷⁴ Judicial restraint is required under the textually demonstrable commitment criteria of the political question doctrine, but even without this unavoidable rule, the "Judiciary is well advised to refrain from imposing ... inflexible constitutional restraints"⁷⁵ in an area such as public school finance policy where there is clearly a "lack of

⁷¹ *Glass v. Pool*, 166 S.W. 375 (Tex. 1914); Braden et al @ 507.

⁷² *Wilson v. Abilene I.S.D.*, 190 S.W.2d 406 (Tex. Civ. App. - Eastland 1945, writ ref'd w.o.m.); Braden et al @ 507.

⁷³ Braden et al @ 507.

⁷⁴ , @ 1300, 1301, 1302, 1308, 1309, & 1310; *Marrs*, @ 33, 34, 35 & 36.

⁷⁵ *Rodriguez*, @ 1302.

judicially discoverable and manageable standards",⁷⁶ and where the exact equality standard imposed by the Trial Court will "circumscribe or handicap the continued research and experimentation so vital to finding even partial solutions to educational problems and to keeping abreast of ever changing conditions."⁷⁷

The issue of public school finance policy also triggers all of the remaining political question criteria that identify an issue as a non justiciable controversy. As already shown, there is a textually demonstrable constitutional commitment of the issue to the Legislature and there is a lack of judicially discoverable and manageable standards for resolving it.⁷⁸ But in addition, it is impossible for the Courts to resolve this issue without first making an impermissible, nonjusticiable policy determination that the Legislature is incompetent or unable to provide an adequate education to Texas school children when the Legislature is granted sole authority to do so by the Constitution.⁷⁹

Clearly, for the Courts to make such a decision also expresses profound disrespect due the Legislature as the coordinate branch of government textually responsible for final decisions on the efficiency or quality of the public schools.⁸⁰

In addition, there is an unusual need in this case for the Courts to exhibit "unquestioned adherence to ... political decisions already made" by the Legislature because of the unique character of the Texas Constitution, the unwavering line of caselaw authority outlined above and because of the monumental economic, social and political impact of affirming this decision.⁸¹

And finally, there is the absolute certainty "of embarrassment from multifarious pronouncements by various departments" on the question of how public school finance policy should be structured in order to assure an adequate minimum level of quality in the public schools.⁸² Already, various organizations and elected officials and school administrators are all developing alternative funding plans in a frantic effort to satisfy Judge Clark's standard of exact equality in access to funds. In the words of State Treasurer Ann

⁷⁶ *Baker v. Carr* @ 710.

⁷⁷ *Rodriguez* @ 1302.

⁷⁸ @ 710.

⁷⁹ *Id* @ 710.

⁸⁰ *Id* @ 710.

⁸¹ *Id* @ 710.

⁸² *Id* @ 710.

Richards, "There will be a jillion proposals coming up before the legislative session is here. There is going to be a different scenario every other week."⁸³

V.

If for all these reasons, the Court still does not consider the issue of school finance policy to be a nonjusticiable political question, I would urge this Honorable Court to seek guidance from "the foregoing considerations [to] buttress [the] conclusion that Texas' system of public school finance is an inappropriate candidate for strict judicial scrutiny."⁸⁴ In the opinion of the United States Supreme Court, "these same considerations are relevant to the to the determination whether that system, with its conceded imperfections, nevertheless bears some rational relationship to a legitimate state purpose."⁸⁵

Even though the Court in *Rodriguez* was reviewing the Texas school finance system as it existed in 1971, at a time when local wealth disparities resulted in spending disparities far greater than the disparities that exist today, the Court held that "the Constitutional standard under the Equal Protection Clause is whether the challenged state action rationally furthers a legitimate state purpose or interest. We hold that the Texas plan abundantly satisfies this standard."⁸⁶

The legitimate state purpose which the *Rodriguez* Court found to be rationally furthered was local control over the quality of local schools. To quote at length from the opinion:

"The persistence of attachment to government at the lowest level where education is concerned reflects the depth of commitment of its supporters. In part, local control means ... the freedom to devote more money to the education of one's children. Equally important, however, is the opportunity it offers for participation in the decision making process that determines how those local tax dollars will be spent. Each locality is free to tailor local programs to local needs.

⁸³ Houston Chronicle, April 26, 1988 @ § 1, p. 13.

⁸⁴ *Rodriguez* @ 1302.

⁸⁵ *Id* @ 1302.

⁸⁶ *Id* @ 1308.

"Pluralism also affords some opportunity for experimentation, innovation and a healthy competition for educational excellence. An analogy to the National-State relationship in our federal system seems uniquely appropriate. Mr. Justice Brandeis identified as one of the peculiar strengths of our form of government each State's freedom to 'serve as a laboratory; and try novel social and economic experiments'.

"No area of social concern stands to profit more from a multiplicity of viewpoints and from a diversity of approaches than does public education."⁸⁷

In Texas Constitutional interpretation, local control is far more than a legitimate state interest. It is a fundamental right explicitly guaranteed in Article I, § 1 of the state constitution. And local control of locally elected school boards and school districts is guaranteed by six express grants of Legislative power in Article VII, § 3 to create local school districts for the purpose of raising money locally to support local schools.

Thus, the effect of the Trial Court's judgment is to declare these provisions of the Texas Constitution unconstitutional. This is illogical and the Trial Court is powerless to make such a ruling for obvious reasons. The people of Texas wrote and adopted the Constitution, and the Trial Court must obey the dictates of the people as expressed in that document.

Furthermore, in declaring the school finance system as it exists in conjunction with school district boundaries to be unconstitutional, the effect of the Trial Court's judgment is to declare Article XI, § 10 of the state constitution unconstitutional as well, because this recently repealed section specifically validated many existing school district boundaries.

⁸⁷ Id @ 1305.

CONCLUSION

For all of these reasons, or for any one of them, the Trial Court's judgment should be reversed and rendered by this Honorable Court. Whether or not this judgment is reversed on appeal, I believe that the people of Texas must take it on themselves to nullify this judgment through a constitutional amendment granting the Legislature unequivocal and final authority over the school finance system.

I am compelled to this conclusion because of the sheer magnitude of the effects of this judgment and the complete disregard exhibited by the Trial Court for the intent of the framers of the Constitution, for well established rules of law laid down by the highest courts in the land and because of the Trial Court's rejection of the best efforts of the Legislature in seeking to equalize education funding through HB 72 as inadequate, even though the Plaintiff's lead expert witness described HB 72 as "the most comprehensive reform bill passed in the United States by any state."⁸⁸ In the words of our Commissioner of Agriculture, Gary Mauro, arguing on behalf of the Trial Court's judgment, "House Bill 72..was the most significant and far reaching package of education reforms in modern times."⁸⁹ In the words of the Trial Court, HB 72 and all the reforms that preceded it were merely "generous and thoughtful..⁹⁰

One of the most disturbing aspects of the Trial Court's judgment is that the Court has implicitly found that the Legislature and the voters are incompetent or unable to protect this fundamental right to an education. Judicial intervention of this magnitude can only be justified on the basis that the prejudices of the political process have proven to be injurious to a powerless minority or an infringement of a fundamental right.⁹¹ It is this Judicial premise that led Chief Justice Rehnquist to call the Trial Court's analysis "the 'ward of the Court' approach to equal protection."⁹²

⁸⁸ Statement of Facts, @ 52.

⁸⁹ Amicus Curiae Brief of Land Commissioner Gary Mauro, *Kirby et al v. Edgewood et al*, No. 3-87-190-CV

⁹⁰ Statement @ 5.

⁹¹ *United States v. Carolene Products Co.*, 58 S.Ct. 778, 783, n. 4 (U.S. 1938) Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 Yale L.J. 920, 933-35 (1973); Nowak, Rotunda & Young, *A Treatise on Constitutional Law*, 594 n. 21 (1983).

⁹² , 93 S.Ct. 2861, 2865 (U.S. 1973).

As a member of the House Public Education Committee, I recognize the need to diminish the effect of wealth inequalities statewide and the need to strive toward substantial equality in the kind of education available to all Texas students. But I strenuously object to the Trial Court's implicit finding that, because of these funding gaps, the Legislature is incompetent or unable to provide an adequate education to Texas school children.

In order to reassert the Legislature's proper authority over the school finance system, I am proposing a Constitutional amendment which accomplishes two purposes. First of all, it will require that all court challenges to the school finance system be dismissed on the merits as presenting nonjusticiable questions in an area of law textually committed to the Legislature. Secondly, it will track the language of Section 16.001 of the Education Code in requiring the Legislature to design the school finance system so that it provides substantially equal programs and services to all school children regardless of local district wealth. However, the Legislature, not the Courts, will have final authority to decide how to achieve substantial equality, just as under Mumme v. Marrs et al the Legislature is supposed to be the final authority on the meaning of "efficient" and "suitable."

There is precedent for such an amendment as a method of nullifying court rulings. In 1908, the Texas Supreme Court invalidated a series of legislative enactments creating school district boundaries that crossed county lines.⁹³ This decision caused a great uproar across the state because it not only invalidated and dissolved the school district which was directly challenged in the trial court, but it also invalidated over a dozen other school districts and directly challenged final Legislative authority to draw school district boundaries.

This was an intolerable situation (as is the situation posed by the instant case) and in its 1909 regular session, the Legislature adopted and the voters approved a constitutional amendment, §3a of Article 7, which validated school district boundaries which crossed county lines. In 1910, the Texas Supreme Court held in Gillespie v. Lightfoot that this amendment nullified the Parks decision.⁹⁴ The Supreme Court's reasoning is especially relevant to the final disposition of the Edgewood decision:

⁹³ Parks v. West, 111 S.W. 726 (Tex.1908).

⁹⁴ Gillespie v. Lightfoot, 127 S.W. 799 (Tex.1910).

"The amendment of the Constitution is an exertion of the sovereign power of the people of the state to give their expressed will the force of a law supreme over every person and every thing in the state, so long as it does not conflict with the Constitution of the United States.

"The rule so established bears down and supplants all other laws and rules that are inconsistent with it. In determining rights controlled by it, we therefore have only to ascertain what it means and give it full effect, so long as it encounters no opposition in the higher law of the federal Constitution ...

"By the express language of the people the law which made [these school districts] formerly invalid, according to our decision in *Parks v. West*, is changed so that they are henceforth to be regarded as continuously lawful from their formation. There is nothing to prevent the people from establishing such a rule, so long as they do not destroy rights protected by the Constitution of the United States."⁹⁵

In approving the amendment which I am proposing, the people of Texas will not be violating or destroying any rights protected by the U.S. Constitution. *Rodriguez* is still the law of the land, and under *Rodriguez*, education is not a fundamental right entitled to judicial protection under the federal constitution, and the design of school finance systems are left exclusively to the discretion of state legislatures. In fact, adoption of this amendment does not mean education is no longer a fundamental right. Adoption simply means that the Legislature is the proper guardian of that right, not the courts.

It is fundamental hornbook law that state courts may expand the boundaries of judicial protection of constitutional rights beyond the maximum limits provided by the U.S. Supreme Court,⁹⁶ as the Trial Court seeks to accomplish through this judgment. But in the zone of authority that lies between the maximum limit established by the U.S. Supreme Court and the farther limit created by the Texas Courts, it is axiomatic that the people of Texas possess absolute final authority in this area. If the people of Texas choose to rein in the expansive authority of state courts in this zone of state sovereignty, we are free to do so.

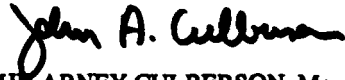
⁹⁵ Id @ 801.

⁹⁶ Nowak, Rotunda & Young, *Treatise on Constitutional Law*, @ 21 (1983).

I believe it was the original intent of the framers of the Texas Constitution that the problems of public school finance be finally decided through public debate in legislative chambers between the taxpayers and their elected representatives rather than in the courtroom. I urge this Honorable Court to follow this clear intent. This is also the opinion of the United States Supreme Court, which concluded its decision in Rodriguez with the following language:

"... certainly innovative thinking as to public education, its methods, and its funding is necessary to assure both a higher level of quality and greater uniformity of opportunity. These matters merit the continued attention of the scholars who already have contributed much by their challenges.
"But the ultimate solutions must come from the lawmakers and the democratic pressures of those who elect them."⁹⁷

Respectfully submitted,



JOHN ABNEY CULBERSON, Member
Texas House of Representatives
P.O. Box 2910, Austin, Texas 78769
Capitol Office: (512) 463-0528
Houston Office: (713) 558-7018

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 29th day of April, 1988, the foregoing was served by first-class, certified mail, return receipt requested, postage prepaid, to each group of counsel recorded.



JOHN ABNEY CULBERSON

TEXAS LEGISLATIVE COUNCIL
Preliminary Draft

By

Culberson

J.R. No. _____

A JOINT RESOLUTION

1 proposing a constitutional amendment providing for equal
2 educational opportunity and authorizing the legislature to
3 determine the method of allocating state funds among school
4 districts.

5 BE IT RESOLVED BY THE LEGISLATURE OF THE STATE OF TEXAS:

6 SECTION 1. Article VII, Section 1, of the Texas Constitution
7 is amended to read as follows:

8 Sec. 1. (a) A general diffusion of knowledge being
9 essential to the preservation of the liberties and rights of the
10 people, it shall be the duty of the Legislature of the State to
11 establish and make suitable provision for the support and
12 maintenance of an efficient system of public free schools so that
13 each student enrolled in those schools has access to programs and
14 services that are appropriate to the student's educational needs
15 and that are substantially equal to those available to any similar
16 student, notwithstanding varying local economic factors.

17 (b) The Legislature may determine the method by which State
18 appropriations for the support of public free schools are allocated
19 among school districts without regard to any other provision in
20 this constitution other than a provision that places a duty or
21 limitation on the Legislature regarding only the support of the
22 public free schools, the regulation of public free schools, or the
23 regulation of political subdivisions if school districts are among
24 the political subdivisions regulated.

1 SECTION 2. This proposed constitutional amendment shall be
2 submitted to the voters at an election to be held on November 7,
3 1989. The ballot shall be printed to provide for voting for or
4 against the proposition: "The constitutional amendment providing
5 for equal educational opportunity and authorizing the legislature
6 to determine the method of allocating state funds among school
7 districts."

EDGEWOOD INDEPENDENT SCHOOL §
DISTRICT, SOCORRO INDEPENDENT §
SCHOOL DISTRICT, EAGLE PASS §
INDEPENDENT SCHOOL DISTRICT, §
BROWNSVILLE INDEPENDENT SCHOOL §
DISTRICT, SAN ELIZARIO INDE- §
PENDENT SCHOOL DISTRICT, SOUTH §
SAN ANTONIO INDEPENDENT SCHOOL §
DISTRICT, LA VEGA INDEPENDENT §
SCHOOL DISTRICT, PHARR-SAN §
JUAN-ALAMO INDEPENDENT SCHOOL §
DISTRICT, KENEDY INDEPENDENT §
SCHOOL DISTRICT, MILANO §
INDEPENDENT SCHOOL DISTRICT, §
HARLANDALE INDEPENDENT SCHOOL §
DISTRICT and NORTH FOREST §
INDEPENDENT SCHOOL DISTRICT §
on their own behalves, on §
behalf of the residents of §
their districts, and on behalf §
of other school districts and §
residents similarly situated; §
ANICETO ALONZO on his own §
behalf and as next friend of §
SANTOS ALONZO, HERMELINDA ALONZO §
and JESUS ALONZO; SHIRLEY §
ANDERSON on her own behalf and §
as next friend of DERRICK PRICE; §
JUANITA ARREDONDO on her own §
behalf and as next friend of §
AUGUSTIN ARREDONDO, JR., NORA §
ARREDONDO and SYLVIA ARREDONDO; §
MARY CANTU on her own behalf and §
as next friend of JOSE CANTU, §
JESUS CANTU and TONATIUH CANTU; §
JOSEFINA CASTILLO on her own §
behalf and as next friend of §
MARIA CORENO; EVA W. DELGADO on §
her own behalf and as next §
friend of OMAR DELGADO; RAMONA §
DIAZ on her own behalf and as §
next friend of MANUEL DIAZ and §
NORMA DIAZ; ANITA GANDARA, JOSE §
GANDARA, JR., on their own §
behalves and as next friend of §
LORRAINE GANDARA and JOSE §
GANDARA, III; NICOLAS GARCIA on §
his own behalf and as next §
friend of NICOLAS GARCIA, JR., §
RODOLFO GARCIA, ROLANDO GARCIA, §
GRACIELA GARCIA, CRISELDA §
GARCIA, and RIGOBERTO GARCIA; §
RAQUEL GARCIA, on her own behalf §
and as next friend of FRANK §
GARCIA, JR., ROBERTO GARCIA, §
RICARDO GARCIA, ROXANNE GARCIA §
and RENE GARCIA; HERMELINDA C. §
GONZALEZ on her own behalf and §
as next friend of ANGELICA MARIA §
GONZALEZ; RICARDO J. MOLINA on §
his own behalf and as next friend §
of JOB FERNANDO MOLINA; OPAL §
MAYO on her own behalf and as §
next friend of JOHN MAYO, SCOTT §
MAYO and REBECCA MAYO; HILDA S. §
ORTIZ on her own behalf and as §
next friend of JUAN GABRIEL §

IN THE DISTRICT COURT

TRAVIS COUNTY, TEXAS

250TH JUDICIAL DISTRICT

ORTIZ; RUDY C. ORTIZ on his own behalf and as next friend of
 MICHELLE ORTIZ, ERIC ORTIZ and
 ELIZABETH ORTIZ; ESTELA PADILLA
 and CARLOS PADILLA on their own
 behalves and as next friend of
 GABRIEL PADILLA; ADOLFO PATINO
 on his own behalf and as next
 friend of ADOLFO PATINO, JR.;
 ANTONIO Y. PINA on his own
 behalf and as next friend of
 ANTONIO PINA, JR., ALMA MIA
 PINA and ANA PINA; REYMUNDO
 PEREZ on his own behalf and as
 next friend of RUBEN PEREZ,
 REYMUNDO PEREZ, JR., MONICA
 PEREZ, RAQUEL PEREZ, ROGELIO
 PEREZ and RICARDO PEREZ; DEMETRIO
 RODRIGUEZ on his own behalf and
 as next friend of PATRICIA
 RODRIGUEZ and JAMES RODRIGUEZ;
 LORENZO G. SOLIS on his own
 behalf and as next friend of
 JAVIER SOLIS and CYNTHIA SOLIS;
 JOSE A. VILLALON on his own
 behalf and as next friend of
 RUBEN VILLALON, RENE VILLALON,
 MARIA CHRISTINA VILLALON and
 JAIME VILLALON;
 Plaintiffs;

ALVARADO INDEPENDENT SCHOOL
 DISTRICT, BLANKET INDEPENDENT
 SCHOOL DISTRICT, BURLESON
 INDEPENDENT SCHOOL DISTRICT,
 CANUTILLO INDEPENDENT SCHOOL
 DISTRICT, CHILTON INDEPENDENT
 SCHOOL DISTRICT, COPPERAS COVE
 INDEPENDENT SCHOOL DISTRICT,
 COVINGTON INDEPENDENT SCHOOL
 DISTRICT, CRAWFORD INDEPENDENT
 SCHOOL DISTRICT, CRYSTAL CITY
 INDEPENDENT SCHOOL DISTRICT,
 EARLY INDEPENDENT SCHOOL
 DISTRICT, EDCOUCH-ELSA INDEPEN-
 DENT SCHOOL DISTRICT, EVANT
 INDEPENDENT SCHOOL DISTRICT,
 FABENS INDEPENDENT SCHOOL
 DISTRICT, FARWELL INDEPENDENT
 SCHOOL DISTRICT, GODLEY INDEPEN-
 DENT SCHOOL DISTRICT, GOLDTHWAITE
 INDEPENDENT SCHOOL DISTRICT,
 GRANDVIEW INDEPENDENT SCHOOL
 DISTRICT, HICO INDEPENDENT SCHOOL
 DISTRICT, JIM HOGG COUNTY INDE-
 PENDENT SCHOOL DISTRICT, HUTTO
 INDEPENDENT SCHOOL DISTRICT,
 JARRELL INDEPENDENT SCHOOL
 DISTRICT, JONESBORO INDEPENDENT
 SCHOOL DISTRICT, KARNES CITY
 INDEPENDENT SCHOOL DISTRICT, LA
 FERIA INDEPENDENT SCHOOL DISTRICT,
 LA JOYA INDEPENDENT SCHOOL
 DISTRICT, LAMPASAS INDEPENDENT
 SCHOOL DISTRICT, LASARA INDEPEN-
 DENT SCHOOL DISTRICT, LOCKHART
 INDEPENDENT SCHOOL DISTRICT, LOS
 FRESNOS CONSOLIDATED INDEPENDENT

SCHOOL DISTRICT, LYFORD INDEPEN- \$
 DENT SCHOOL DISTRICT, LYTLE \$
 INDEPENDENT SCHOOL DISTRICT, \$
 MART INDEPENDENT SCHOOL DISTRICT, \$
 MERCEDES INDEPENDENT SCHOOL \$
 DISTRICT, MERIDIAN INDEPENDENT \$
 SCHOOL DISTRICT, MISSION INDEPEN- \$
 DENT SCHOOL DISTRICT, NAVASOTA \$
 INDEPENDENT SCHOOL DISTRICT, \$
 ODEM-EDROY INDEPENDENT SCHOOL \$
 DISTRICT, PALMER INDEPENDENT \$
 SCHOOL DISTRICT, PRINCETON \$
 INDEPENDENT SCHOOL DISTRICT, \$
 PROGRESSO INDEPENDENT SCHOOL \$
 DISTRICT, RIO GRANDE CITY \$
 INDEPENDENT SCHOOL DISTRICT, \$
 ROMA INDEPENDENT SCHOOL DISTRICT, \$
 ROSEBUD-LOTT INDEPENDENT SCHOOL \$
 DISTRICT, SAN ANTONIO INDEPEN- \$
 DENT SCHOOL DISTRICT, SAN SABA \$
 INDEPENDENT SCHOOL DISTRICT, \$
 SANTA MARIA INDEPENDENT SCHOOL \$
 DISTRICT, SANTA ROSA INDEPENDENT \$
 SCHOOL DISTRICT, SHALLOWATER \$
 INDEPENDENT SCHOOL DISTRICT, \$
 SOUTHSIDE INDEPENDENT SCHOOL \$
 DISTRICT, STAR INDEPENDENT SCHOOL \$
 DISTRICT, STOCKDALE INDEPENDENT \$
 SCHOOL DISTRICT, TRENTON INDE- \$
 PENDENT SCHOOL DISTRICT, VENUS \$
 INDEPENDENT SCHOOL DISTRICT, \$
 WEATHERFORD INDEPENDENT SCHOOL \$
 DISTRICT, YSLETA INDEPENDENT \$
 SCHOOL DISTRICT, CONNIE DEMARSE, \$
 H. B. HALBERT, LIBBY LANCASTER, \$
 JUDY ROBINSON, FRANCES RODRIGUEZ, \$
 and ALICE SALAS; \$
 Plaintiff-Intervenors; \$
 \$
 \$
 vs. \$
 \$
 \$
 \$
 WILLIAM N. KIRBY, INTERIM TEXAS \$
 COMMISSIONER OF EDUCATION; THE \$
 TEXAS STATE BOARD OF EDUCATION; \$
 MARK WHITE, GOVERNOR OF THE \$
 STATE OF TEXAS; ROBERT BULLOCK, \$
 COMPTROLLER OF THE STATE OF \$
 TEXAS; THE STATE OF TEXAS; and \$
 JIM MATTOX, ATTORNEY GENERAL OF \$
 THE STATE OF TEXAS; \$
 Defendants; \$
 \$
 \$
 ANDREWS INDEPENDENT SCHOOL \$
 DISTRICT, ARLINGTON INDEPENDENT \$
 SCHOOL DISTRICT, AUSTWELL TIVOLI \$
 INDEPENDENT SCHOOL DISTRICT, \$
 BECKVILLE INDEPENDENT SCHOOL \$
 DISTRICT, CARROLLTON-FARMERS \$
 BRANCH INDEPENDENT SCHOOL \$
 DISTRICT, CARTHAGE INDEPENDENT \$
 SCHOOL DISTRICT, CLEBURNE INDE- \$
 PENDENT SCHOOL DISTRICT, COPPELL \$
 INDEPENDENT SCHOOL DISTRICT, \$
 CROWLEY INDEPENDENT SCHOOL \$
 DISTRICT, DESOTO INDEPENDENT \$
 SCHOOL DISTRICT, DUNCANVILLE \$
 INDEPENDENT SCHOOL DISTRICT, \$

EAGLE MOUNTAIN-SAGINAW INDEPENDENT SCHOOL DISTRICT, EAMES	\$
INDEPENDENT SCHOOL DISTRICT,	\$
EUSTACE INDEPENDENT SCHOOL DISTRICT, GLASSCOCK INDEPENDENT SCHOOL DISTRICT, GRADY INDEPENDENT SCHOOL DISTRICT, GRAND	\$
PRAIRIE INDEPENDENT SCHOOL DISTRICT, GRAPEVINE-COLLEYVILLE	\$
INDEPENDENT SCHOOL DISTRICT,	\$
HARDIN JEFFERSON INDEPENDENT SCHOOL DISTRICT, HAWKINS	\$
INDEPENDENT SCHOOL DISTRICT,	\$
HIGHLAND PARK INDEPENDENT SCHOOL DISTRICT, HURST EULESS BEDFORD	\$
INDEPENDENT SCHOOL DISTRICT,	\$
IRAAN-SHEFFIELD INDEPENDENT SCHOOL DISTRICT, IRVING INDEPENDENT SCHOOL DISTRICT, KLONDIKE	\$
INDEPENDENT SCHOOL DISTRICT,	\$
LAGO VISTA INDEPENDENT SCHOOL DISTRICT, LAKE TRAVIS INDEPENDENT SCHOOL DISTRICT, LANCASTER	\$
INDEPENDENT SCHOOL DISTRICT,	\$
LONGVIEW INDEPENDENT SCHOOL DISTRICT, MANSFIELD INDEPENDENT SCHOOL DISTRICT, MCMULLEN INDEPENDENT SCHOOL DISTRICT, MIAMI	\$
INDEPENDENT SCHOOL DISTRICT,	\$
MIDWAY INDEPENDENT SCHOOL DISTRICT, MIRANDO CITY INDEPENDENT SCHOOL DISTRICT,	\$
NORTHWEST INDEPENDENT SCHOOL DISTRICT, PINETREE INDEPENDENT SCHOOL DISTRICT, PLANO	\$
INDEPENDENT SCHOOL DISTRICT,	\$
PROSPER INDEPENDENT SCHOOL DISTRICT, QUITMAN INDEPENDENT SCHOOL DISTRICT, RAINS INDEPENDENT SCHOOL DISTRICT, RANKIN	\$
INDEPENDENT SCHOOL DISTRICT,	\$
RICHARDSON INDEPENDENT SCHOOL DISTRICT, RIVIERA INDEPENDENT SCHOOL DISTRICT, ROCKDALE	\$
INDEPENDENT SCHOOL DISTRICT,	\$
SHELDON INDEPENDENT SCHOOL DISTRICT, STANTON INDEPENDENT SCHOOL DISTRICT, SUNNYVALE	\$
INDEPENDENT SCHOOL DISTRICT,	\$
WILLIS INDEPENDENT SCHOOL DISTRICT, and WINK-LOVING INDEPENDENT SCHOOL DISTRICT;	\$
Defendant-Intervenors.	\$

FINAL JUDGMENT

This cause came on to be tried January 20 through April 8, 1987.

After considering the evidence, argument of counsel, the papers and record herein, the Court is of the opinion, and so finds, that the Texas School Financing System (Texas Education Code §16.01, et seq., implemented in conjunction with local

school district boundaries that contain unequal taxable property wealth for the financing of public education) is impermissible, unlawful, violative of, and prohibited by the Constitution and the laws of Texas. Accordingly, Judgment is entered as set out herein.

DECLARATORY JUDGMENT

Pursuant to the Uniform Declaratory Judgment Act, Tex. Civ. Prac. & Rem. Code §37.004, the Court hereby declares and enters Judgment that the Texas School Financing System (Texas Education Code §16.01, et seq., implemented in conjunction with local school district boundaries that contain unequal taxable property wealth for the financing of public education) is UNCONSTITUTIONAL AND UNENFORCEABLE IN LAW.

The Court hereby declares and enters Judgment that the Texas School Financing System (Texas Education Code §16.01, et seq., implemented in conjunction with local school district boundaries that contain unequal taxable property wealth for the financing of public education) is UNCONSTITUTIONAL AND UNENFORCEABLE IN LAW because it fails to insure that each school district in this state has the same ability as every other district to obtain, by state legislative appropriation or by local taxation, or both, funds for educational expenditures, including facilities and equipment, such that each student, by and through his or her school district, would have the same opportunity to educational funds as every other student in the state, limited only by discretion given local districts to set local tax rates, provided this does not prohibit the State from taking into consideration the legitimate district and student needs and district and student cost differences associated with providing a public education. During the course of the trial the Court heard substantial evidence on the merits of the State's taking into consideration legitimate cost differences in its funding formula. The Court is persuaded that legitimate cost differences should be considered in any funding formula and would encourage the State to continue to do so. The failure

described above denies to Plaintiffs and Plaintiff-Intervenors, as well as to the over one million school children attending school in property-poor school districts, the equal protection of the law, equality under the law, and privileges and immunities, all guaranteed by Art. I, §§3, 3A, 19, and 29 of the Texas Constitution.

Nothing in this Judgment is intended to limit the ability of school districts to raise and spend funds for education greater than that raised or spent by some or all other school districts, so long as each district has available, either through property wealth within its boundaries or state appropriations, the same ability to raise and spend equal amounts per student after taking into consideration the legitimate cost differences in educating students.

Further, the Court hereby declares and enters Judgment that the Texas School Financing System (Texas Education Code §16.01, et seq., implemented in conjunction with local school district boundaries that contain unequal taxable property wealth for the financing of public education) is UNCONSTITUTIONAL AND UNENFORCEABLE IN LAW because it is not an "efficient system of free public schools" as required by and guaranteed by Art. VII, §1 of the Texas Constitution.

Further the Court, by virtue of the power conferred on it by Tex. Civ. Prac. & Rem. Code §37.003, to declare rights, status and other legal relations, hereby declares and enters Judgment that the Plaintiffs and Plaintiff-Intervenors and the school children attending school in property-poor school districts are entitled to, conferred with, awarded and guaranteed the equal protection of the law, equality under the law, and the privileges and immunities which flow from Art. I, §§3, 3A, 19, and 29 as well as Art. VII, §1 of the Texas Constitution.

INJUNCTION

It is hereby ORDERED that William N. Kirby, Commissioner of Education, the Texas State Board of Education, and Robert

Bullock, Comptroller of the State of Texas and their successors, and each of them, be and are hereby enjoined from giving any force and effect to the sections of the Texas Education Code relating to the financing of education, including the Foundation School Program Act (Chapter 16 of the Texas Education Code); specifically said Defendants are hereby enjoined from distributing any money under the current Texas School Financing System (Texas Education Code §16.01, et seq., implemented in conjunction with local school district boundaries that contain unequal taxable property wealth for the financing of public education).

It is further ORDERED, that this injunction shall in no way be construed as enjoining Defendants, their agents, successors, employees, attorneys, and persons acting in concert with them or under their direction, from enforcing or otherwise implementing any other provisions of the Texas Education Code.

In order to allow Defendants to pursue their appeal, and should this decree be upheld on appeal, to allow sufficient time to enact a constitutionally sufficient plan for funding public education, this injunction is stayed until September 1, 1989. It is further ORDERED that in the event the legislature enacts a constitutionally sufficient plan by September 1, 1989, this injunction is further stayed until September 1, 1990, in recognition that any modified funding system may require a period of time for implementation. This requirement that the modified system be in place by September 1, 1990, is not intended to require that said modified system be fully implemented by September 1, 1990.

This Court hereby retains jurisdiction of this action to grant further relief whenever necessary or proper pursuant to Tex. Civ. Prac. & Rem. Code §37.011, but, as the Court understands the law, this constitutes no impediment with respect to the finality of this Judgment for the purpose of appeal, and none is intended.

MISCELLANEOUS

This Judgment shall have prospective application only and shall in no way affect (i) the validity, incontestability, obligation to pay, source of payment or enforceability of any presently outstanding bond, note or other security issued, or any contractual obligation, debt or special obligation (irrespective of its source of payment) incurred by a school district in Texas for public school purposes, nor (ii) the validity or enforceability of any tax heretofore levied, or other source of payment provided, or any covenant to levy such tax or provide for such source of payment, for any such bond, note, security, contractual obligation or debt or special obligation, nor (iii) the validity, incontestability, obligation of payment, source of payment or enforceability of any bond, note or other security (irrespective of its source of payment) to be issued and delivered, or any contractual obligation, debt or special obligation (irrespective of its source of payment) incurred by Texas school districts for authorized purposes prior to September 1, 1990, nor (iv) the validity or enforceability of any tax hereafter levied, or other source of payment provided for any such bond, note, or other security (irrespective of its source of payment) issued and delivered, or any covenant to levy such tax or provide for such source of payment, or any contractual obligation, debt or special obligation (irrespective of its source of payment) incurred prior to September 1, 1990, nor (v) the validity or enforceability of any maintenance tax heretofore levied or hereafter levied prior to September 1, 1990 (for any and all purposes other than as specified in clause (iv) above), nor (vi) any election heretofore held or to be held prior to September 1, 1990, pertaining to the election of trustees, the authorization of bonds or taxes (either for maintenance or debt purposes), nor (vii) the distribution to school districts of state and federal funds prior to September 1, 1990, in accordance with current procedures and law as may be modified by the legislature in accordance with law prior to September 1,

1990, nor (viii) the budgetary processes and related requirements of Texas school districts now authorized and required by law during the period prior to September 1, 1990, nor (ix) the assessment and collection after September 1, 1990, of any taxes or other revenues levied or imposed for or pledged to the payment of any bonds, notes or other contractual obligation, debt or special obligation issued or incurred prior to September 1, 1990, nor (x) the validity or enforceability, either before or after September 1, 1990, of any guarantee under Subchapter E, Chapter 20, Texas Education Code, of bonds of any school district that are issued and guaranteed prior to September 1, 1990, it being the intention of this Court that this Judgment should be construed and applied in such manner as will permit an orderly transition from an unconstitutional to a constitutional system of school financing without the impairing of any obligation of contract incurred prior to September 1, 1990.

The Court finds that the sum of \$ 850,960.79 comprises a reasonable and necessary attorney's fee ^{plus expense money back} for all legal work performed by and on behalf of Plaintiffs up to the entry of Declaratory Judgment in this case. The Court further finds that the sum of \$ 25,000.00 from the entry of this Judgment through the first appeal and that \$ 15,000.00 for any further appeal thereafter, constitutes reasonable and necessary Plaintiff attorney's fees for such work.

The Court finds that the sum of \$ 284,244.84 comprises a reasonable and necessary attorney's fee ^{plus expense money back} for all legal work performed by and on behalf of Plaintiff-Intervenors up to the entry of Declaratory Judgment in this case. The Court further finds that the sum of \$ 25,000.00 from the entry of this Judgment through the first appeal and that \$ 15,000.00 for any further appeal thereafter, constitutes reasonable and necessary Plaintiff-Intervenor attorney's fees for such work.

The request of Plaintiff and Plaintiff-Intervenors for attorney's fees against Defendant-Intervenors is denied. Such

an award is barred by the doctrine of sovereign immunity. Further, even if Defendant-Intervenors do not have sovereign immunity from an award of attorney's fees, the Court would not exercise its discretion to award attorney's fees against Defendant-Intervenors. Although Plaintiff and Plaintiff-Intervenors prevailed on the merits, the Court finds that an award of attorney's fees would be neither equitable nor just under the terms of Tex. Civ. Prac. & Rem. Code §37.009. The Court further finds that even if Plaintiffs had prevailed in a claim under Tex. Civ. Prac. & Rem. Code §106.001-003, that the Court would decline to exercise its discretion to award attorney's fees against Defendant-Intervenors under §106.002.

It is further ORDERED AND ADJUDGED that the Texas School Finance System does not violate Art. I, §3 or Art. I §3a by discriminating against Mexican-Americans.

It is further ORDERED and ADJUDGED that because there is not discrimination against Mexican-Americans under the school finance system, the Court will not grant attorney's fees to Plaintiffs under Tex. Civ. Prac. & Rem. Code §106.002.

The Court, although it otherwise would do so, will not enter Judgment for reasonable and necessary attorney's fees against the Defendants because the Court finds that such fees are barred by sovereign immunity.

It is further ORDERED, ADJUDGED and DECREED that all costs are taxed against Defendants.

It is further ORDERED, ADJUDGED and DECREED that all relief requested and not otherwise granted herein *Larry Clark* ~~by Defendants and~~ ~~Defendant-Intervenors~~ is hereby denied.

IT IS SO ORDERED, AND JUDGMENT IS HEREBY ENTERED ACCORDINGLY.

This is a final Judgment; no issues remain in this case.

Signed and entered and dated this 13th day of June of 1987.

Harley Clark
Judge Presiding



HARLEY CLARK
DISTRICT JUDGE
250TH DISTRICT COURT

County of
TRAVIS
STATE OF TEXAS

P.O. BOX 1748
COUNTY COURTHOUSE
AUSTIN, TEXAS 78767

August 27, 1987

Mr. Jim Turner
1500 United Bank Tower
Austin, TX 78701

Mr. Robert E. Luna
744 Campbell Centre 1
Dallas, TX 75206

Mr. Richard Gray
807 Brazos St.
Suite 901
Austin, TX 78701-2553

Mr. Albert H. Kaufman
201 N. St. Mary's St.
Suite 517
San Antonio, TX 78205

Mr. Kervin O'Hanlon
P. O. Box 12548, Capitol Station
Austin, TX 78711-2548

Mr. David Richards
600 W. 7th Street
Austin, TX 78701

Re: Edgewood I.S.D., et al v. Kirby, et al
Cause No. 362,516;
Findings of Fact and Conclusions of Law (filed August 27,
1987).

Dear Lawyers:

Enclosed is a copy of my findings and conclusions filed today.

A few changes were made in my handwriting. I see no reason to type the whole thing over. A new and "prettified" version would simply require several more hours of editing by me.

I truly appreciate the help from Mr. Kauffman and Mr. Turner.

There should be no comeback to me for additions, deletions, changes, etc. This is it.

Good luck to you all.

Very truly yours,

HARLEY CLARK
Judge, 250th District Court
Travis County, Texas

HC/bjv

2. Approximately \$3,600 (excluding federal funding, debt and facilities) per student is expended to provide the education programs which are available to (1) the students in the districts which meet the criteria for "quality" established by the State's Advisory Committee on Accountable Costs, and (2) the 600,000 students in the state's wealthiest school districts. At least this level of expenditure is necessary to provide an adequate educational opportunity, including basic and enrichment programs. (Hooker, Foster, PX 212, PX 105-E)

3. The formulas and factors which determine Foundation School Program (FSP) allotments do not fully state the real cost of providing adequate education programs. Some program costs are unstated, e.g., implementation of maximum salary schedule and maximum class. The program costs which are acknowledged are understated, most notably the Basic Allotment and the weights for Compensatory and Bilingual Education. (Hooker)

4. The acknowledged program costs, i.e., the FSP allotments, average just under \$2700 per student, including \$600 indirectly acknowledged through the Enrichment Equalization Allotment. The difference between adequate program expenditures and acknowledged program costs is, therefore, at least an average \$900 per student. (PX 101-B, PX 105-E)

5. There are no FSP allotments for facilities. All costs of facilities, including debt service on bonds issued for facilities, are unstated costs. Debt service averages just under \$300 per student. (PX 105-H)

Third. Giving the statute involved (article 2678 as amended) the interpretation we have given it, that is, that its application is limited to scholars of free school age subject to transfer, and that the admission of nonresident scholars is subject to the exercise of the discretionary powers of local boards, as heretofore stated, the act is not necessarily unconstitutional, but may apply under the rules heretofore stated.

Fourth. That the refusal of the Dallas school board to admit the Dallas county scholars into its high schools was not, under the record before us, an abuse of discretion, and will not be disturbed.

It follows from what we have said that we are of the opinion that the Court of Civil Appeals made a correct disposition of this case, and the judgment of that court is accordingly affirmed.

MUMME et al. v. MARRS, Superintendent of
Public Instruction, et al.
No. 17401.

Supreme Court of Texas.

May 16, 1931.

1. Schools and school districts ⇨10.

Constitutional provision requiring distribution of "available school funds" to counties according to scholastic population held inapplicable to act appropriating money from general revenue for rural school aid (Acts 41st Leg., 3d Called Sess., c. 14, § 1; Const. art. 7, § 5).

Term "available school funds" under Const. art. 7, § 5, requiring distribution thereof to counties according to scholastic population, does not apply to appropriation from general fund of state for common school purposes, in view of liberal construction of Constitution with reference to creation of institutions of higher education and public school systems, and in view of legislative construction of language of Constitution as authorizing school appropriations from general fund free from limitation.

[Ed. Note.—For other definitions of "Available Funds," see Words and Phrases.]

2. Schools and school districts ⇨10.

Liberal rules for construction of Constitution should apply in determining power of Legislature in organizing public school systems.

3. Constitutional law ⇨26.

Enumeration in Constitution of powers Legislature in providing system of schools should not be regarded as limitation on Legislature's general power to pass laws on subject.

4. Schools and school districts ⇨10.

Legislative power to assign revenue school fund should not be restricted, if constitution provides specific limitation.

5. Constitutional law ⇨12.

Constitutional provisions should be interpreted in light of conditions existing time of their adoption, general spirit of them and prevailing sentiment.

6. Constitutional law ⇨20.

Legislative and executive interpretation of organic law, acquiesced in and long followed, are of great weight, and, in case of doubt, will be followed by court.

7. Constitutional law ⇨18.

Repeal of amendment with same gauge formerly employed, without change in limitation, carries meaning which Legislature had theretofore put on it.

8. Schools and school districts ⇨10.

Constitution makes it mandatory on Legislature to establish state educational term (Const. art. 7, § 1).

9. Schools and school districts ⇨10.

Constitutional provision requiring Legislature to make suitable provision for support and maintenance of school system early confers power to make mandatory, subject only to constitutional restrictions (Const. art. 7, § 1).

10. Constitutional law ⇨70(1).

Legislative determination of methods and regulations in organizing educational system is final except when arbitrary as to be violative of equality right (Const. art. 7, § 1).

11. Schools and school districts ⇨10.

Constitutional provision requiring Legislature to make suitable provision for support and maintenance of public school system to authorize act appropriating money general revenue to financially weak (Const. art. 7, § 1; Acts 41st Leg., 3d Sess., c. 14, § 1).

12. Constitutional law ⇨70(3).

Legislative determination of what constitutes "suitable" provision for maintenance of school system will not be reviewed if equal relation to subject and object of taxation (Const. art. 7, § 1).

Word "suitable," as used in Const. art. 7, § 1, authorizing Legislature to make suitable provisions for support and maintenance of efficient free public school system, is an elastic term, depending on necessities of changing times or conditions.

[Ed. Note.—For other definitions of "Suitable," see Words and Phrases.]

13. Constitutional law \Rightarrow 209, 251.

Whether law secures due process and equal protection depends on subject on which it operates and character of rights affected (Const. U. S. Amend. 14).

14. Constitutional law \Rightarrow 211.

Equal protection of laws is secured if statutes do not subject individual to arbitrary exercise of powers of government (Const. U. S. Amend. 14).

15. Constitutional law \Rightarrow 209.

Legislation is not objectionable as denying equal protection of law if all persons affected are treated alike in same circumstances (Const. U. S. Amend. 14).

16. Constitutional law \Rightarrow 209.

Legislation is valid where classification is based on some real difference existing in subject of enactment, and law applies uniformly to those within particular class (Const. U. S. Amend. 14).

17. Constitutional law \Rightarrow 225(1), 278(2).

Schools and school districts \Rightarrow 10.

Statute providing for rural school aid held not void as denying due process or equal protection, with reference to provisions excluding certain small schools not requiring aid (Acts 41st Leg., 3d Called Sess., c. 14; Const. U. S. Amend. 14).

18. Constitutional law \Rightarrow 225(1), 278(2).

Act providing for appropriation to equalize educational opportunities in rural schools held not to deny due process or equal protection with reference to qualifications and conditions for aid (Acts 41st Leg., 3d Called Sess., c. 14; Const. U. S. Amend. 14).

19. Constitutional law \Rightarrow 225(1), 278(2).

Provisions relative to number of teachers and salary requirements, in statute providing for appropriation for rural school aid, held not to render act void as denying due process or equal protection of law (Acts 41st Leg., 3d Called Sess., c. 14; Const. U. S. Amend. 14).

20. Constitutional law \Rightarrow 229(1).

Provision of rural school aid appropriation act requiring school to vote tax of 75

cents on \$100 valuation of taxable property of district, as condition to receiving aid, held not unreasonable or discriminatory (Acts 41st Leg., 3d Called Sess., c. 14; Const. U. S. Amend. 14).

21. Constitutional law \Rightarrow 225(1).

Provision in rural school appropriation act appropriating amount for payment of tuition of high school students transferred from one district to another held not void as discriminatory, arbitrary or unreasonable (Acts 41st Leg., 3d Called Sess., c. 14, § 10; Acts 40th Leg., c. 181; Const. U. S. Amend. 14).

22. Schools and school districts \Rightarrow 11.

State has power to establish and maintain high schools as part of public free school system (Const. art. 7, § 1).

Error to Court of Civil Appeals of Fourth Supreme Judicial District.

Action by Lillie Mae Mumme, a minor, by her next friend, Mrs. Louise Mumme, and by Mrs. Louise Mumme in her own right, against S. M. N. Myers, Superintendent of Public Instruction, and others. An order granting an injunction was reversed by the Court of Civil Appeals (25 S.W.(2d) 215), and plaintiffs apply for writ of error.

Application denied.

King & York, of Austin, for plaintiffs in error.

Robert Lee Bobbitt, formerly Atty. Gen., and Rice M. Tilley, formerly Asst. Atty. Gen., for defendants in error.

CURTON, C. J.

This case is pending before us on petition for writ of error. The action was originally brought in the district court by Lillie Mae Mumme, a minor within the scholastic age, pupil of a rural school in Medina county having less than 20 scholars, and by Mrs. Louise Mumme, a taxpayer of that county. The cause was heard on an application for a temporary injunction, which was granted in favor of Mrs. Mumme, but denied as to the minor plaintiff. On appeal to the Court of Civil Appeals, the order granting the injunction was reversed, and the application therefor denied. 25 S.W.(2d) 215. The sole question involved is the constitutionality of the Rural Aid Appropriation Act, effective for the biennium beginning September 1, 1929.

The law involved is chapter 14, General Laws of the Third Called Session of the Forty-first Legislature (1929). Section 1 thereof states its general intent as follows: "For the purpose of promoting the public school interest of rural schools and equalizing the edu-

educational opportunities afforded by the State to all children of scholastic age living in small and financially weak school districts."

The act is a complete law governing the distribution of the \$3,000,000 appropriated for the two-year period.

The constitutional provisions primarily invoked against the validity of the act are those which in effect prohibit discriminatory and class legislation, and section 5 of article 7, which defines the "available school fund," and declares this fund "shall be distributed to the several counties according to their scholastic population." The insistence is strongly made that appropriations from the general fund of the state for common school purposes can only be made in accordance with this provision. We have concluded, however, that the limitation quoted has no application to the act before us, and that the objection urged against the validity of the act is without merit. Our reasons for this conclusion will now be stated.

The history of educational legislation in this state shows that the provisions of article 7, the educational article of the Constitution, have never been regarded as limitations by implication on the general power of the Legislature to pass laws upon the subject of education. This article discloses a well-considered purpose on the part of those who framed it to bring about the establishment and maintenance of a comprehensive system of public education, consisting of a general public free school system and a system of higher education. Three institutions of higher learning were expressly provided for. Constitution, article 7, §§ 10 to 15. These express requirements of the Constitution have been met by the creation and maintenance of the University of Texas, the Agricultural and Mechanical College, and the Prairie View Normal. The Legislature, however, has gone far beyond the creation of the three institutions of higher learning specifically required by the organic law, and has created ten additional institutions of similar character without direct constitutional grant, beginning with the Sam Houston Normal at Huntsville in 1879. *Marrs' Texas School Laws* (Ed. 1929). In founding these ten institutions, beginning more than fifty years ago, the Legislature has necessarily held that the specific grants of power contained in the Constitution to erect and maintain the University of Texas, the A. & M. College, and Prairie View Normal were not limitations on its power to create other schools of similar purpose, and to maintain them by appropriations from the general revenue. This interpretation has never been questioned, and is consistent with authorities from other jurisdictions. 24 R. C. L. p. 561, § 3; *Briggs v. Johnson County*, 4 Fed. Cas. 129, No. 1,872; *Burr v. City of Carbondale*, 56 Ill. 453; *State Female Normal School v. Audi-*

tors, 70 Va. 233; *Ransom v. Rutherford*, 123 Tenn. 1, 180 S. W. 1057, 1912d, page 1356; and annotations, so. In re *Kinderhook Schools*, 18 32 P. 422, 19 L. R. A. 949.

The Legislature, in obedience to constitutional mandate, has created a school system, and the act here in controversy is a part of the legislative effort to make an efficient one. This system now has several sources of support expressly provided in the Constitution: (1) the income-permanent school fund; (2) one-half the revenue from occupation taxes; (3) local school taxes by district; (4) an ad valorem state school tax; (5) appropriations by the Legislature from other funds of the state.

(1, 2) The insistence is made that appropriations from the general revenue necessarily be made a part of the school fund, and be apportioned to districts in accordance with their scholastic population, as provided in article 7, § 15, Constitution. We cannot agree with this interpretation of the organic law. As shown above, the Constitution has expressly constrained with reference to the creation of institutions of higher education the same liberal rules should apply, limiting the power of the Legislature as to the public school system. We do not readily suppose that those who framed the Constitution would have left the Legislature with plenary power to create at the same time a system of higher education, an instrument that the Legislature had no right to create when the conditions rendered desirable or necessary to give aid to the public school system in the manner and to the law before us.

(3) That the enumeration in the Constitution of what the Legislature may or may not do in providing a system of education, may be regarded as a limitation on the power of the Legislature to pass laws upon the subject is shown by the decision of the Supreme Court in *Ex parte Cooper*, 3 Tex. 489, 59 Am. Rep. 152, as well as the history of legislation touching the subject of education. In the case named, the act before it a legislative act which levied a privilege tax. There was urged against the validity the provision thereof which provided that this tax, when collected, should be paid into the treasury for the use of the public free schools for the use of the public free schools. It was argued that this pro-

was a limitation on the power of the Legislature to set apart any tax other than one-fourth of the general revenue and the poll tax for school purposes. The court held that the insistence was erroneous, and that the tax and its assignment to free school purposes was valid, stating: "We do not think the position well taken; the section mentioned, as we conceive, only intended to limit and restrict the Legislature in using and appropriating out of the general revenue for school purposes to the amount specified, and not as a limit to their right to republish, or add to, the school fund from other sources." (Italics ours.)

[4] This case is clearly authority for the proposition that, in ascertaining the power which the Legislature may constitutionally exercise with reference to the school system, we are not to limit or restrict that power, including the power to assign revenue derived from sources other than those specifically named, to the school fund, unless we find in the Constitution itself a specific limitation, or one which arises by necessary implication from the language used. This decision was made in 1878, only two years after the adoption of the Constitution. After this decision, in 1883, section 3 of article 7 of the Constitution was amended, and in that amendment, as in each subsequent amendment thereof, down to the present time, the limitation as to funds which could be appropriated from the general revenue was omitted, and there is now no express limitation in the section as to appropriations which may be made from the general revenue. Beginning in 1915, eight general laws making appropriations from the general revenue in aid of rural schools have been enacted. The acts of 1915 and 1917 were passed before the adoption of the amendment to section 3, article 7, which in express terms authorized the Legislature to make an appropriation out of the general revenue to supplement the available school fund otherwise provided for. General Laws, First Called Session, 34th Leg. (1915), p. 22, c. 10; General Laws 35th Leg. (1917), p. 151, c. 80; Harris' Anno. Const. p. 517. The act of 1915, in so far as we know, was unchallenged in the courts, and its essential elements have been embraced in each succeeding enactment, including the one now before the court for review.

In 1917, however, the Legislature submitted, and in November, 1918, the people adopted, an amendment of section 3, article 7, which contained a special grant of power to the Legislature to make appropriations from the general revenue, which, in so far as here involved, then read, and now reads, as follows: "Provided, however, that should the limit of taxation herein named be insufficient the deficit may be made by appropriation from the general funds of the State." See Gen. Laws 35th Leg. (1917) p. 593.

Following the adoption of this amendment, the Legislature in 1919 passed a rural aid law with an appropriation of \$1,000,000, the act being similar in principle and in purpose to the one before the court, and in another act appropriated \$1,000,000 to become "a part of the available school fund." Gen. Laws 36th Leg. (1919) pp. 165, 166, c. 65, § 1. The enactment of these two measures was a plain interpretation of the language just quoted from section 3, article 7, as it then existed, and as it now exists, as authorizing appropriations, not only subject to the limitation of section 5, article 7, but independent of and not subject to that limitation.

This Legislature, within five days after having thus construed the Constitution, submitted an amendment to section 3, article 7, amending, in so far as here involved, the identical language in the then existing section as previously amended, which we have quoted above. See Gen. Laws 36th Leg. (1919) p. 656. This amendment was adopted by the people in November, 1920, after the above legislative and executive constructions of the language employed.

In each of the years 1921, 1923, and 1925, the Legislature passed Rural Aid Acts similar to those previously enacted, and made appropriations therefor (Gen. Laws, First Called Session, 37th Leg. (1921) p. 141, c. 43; Gen. Laws 38th Leg. (1923) p. 39, c. 23; Gen. Laws 39th Leg. (1925) p. 292, c. 113 (Vernon's Ann. Civ. St. arts. 2322m-2322n). While the last named measure was before the Legislature, and on the very day it was finally enacted, the House voted to submit to the people an amendment to section 3, article 7, of the Constitution, which in so far as herein involved contained the same language as the previous amendment. House Journal, 39th Leg., p. 1792; Senate Journal, 39th Leg., p. 1163. The amendment was adopted by the people in November, 1926. Following the adoption of this amendment, the Legislature in June, 1927, once more passed a Rural Aid Act, similar in purpose and effect to those previously enacted, as well as to the existing law. The other Legislature passed an act appropriating \$1,000,000 to become a part of "the available school fund." Gen. Laws, First Called Session, 40th Leg. (1927) pp. 165, 173, c. 39, § 2. We thus find that the Legislature again construed the language of the Constitution by deed that it had the power to appropriate from the general funds of the state, and to make the appropriation free from or subject to the limitations of section 5 of article 7.

In July, 1929, the Third Called Session of the Forty-First Legislature passed the Rural Aid Act under review, as well as an act to supplement the amount of the appropriation made by the previous Legislature for the same purpose. Gen. Laws, Second and Third Called Sessions, 41st Leg. (1929) p. 252, c. 14; page

19, c. 13. Such in outline is the history of the subject.

[5] The Legislature at eight biennial sessions has interpreted the Constitution as it existed in 1915, and as subsequently amended, as containing no limitation on the right of the Legislature to appropriate money from the general revenue of the state for the support of the public free schools of the state. In the light of this legislative history, as well as that of the executive department of the government in executing the laws referred to, we would not be justified in saying that the constitutional power of the Legislature to pass the law before us did not exist unless we could find in the organic law some plain and unambiguous limitation on the right. 9 Texas Jurisprudence, p. 439, § 27; 6 Ruling Case Law, p. 62, §§ 59, 61; Cooley's Const. Lim. (8th Ed.) p. 144; Walker v. Meyers, 114 Tex. 225, 232, 295 S. W. 499. There is no such limitation in the Constitution. The limitation in section 5, article 7, declaring that the available school fund "must be appropriated to counties according to scholastic population," has always applied, and now applies, only to the "available school fund," which is clearly defined in that section. Constitutional provisions, like statutes, are properly to be interpreted in the light of conditions existing at the time of their adoption, the general spirit of the times, and the prevailing sentiments of the people. 6 Ruling Case Law, p. 31, § 46; Kay v. Schneider, 110 Tex. 369, 378, 218 S. W. 479, 221 S. W. 889; Williams v. Carroll (Tex. Civ. App.) 182 S. W. 29; San Antonio Ind. School Dist. v. State (Tex. Civ. App.) 173 S. W. 525; 9 Texas Jurisprudence, p. 437, § 26, p. 434, § 23. The people were acquainted with the benefits of the Rural Aid Law, and thoroughly understood its purposes and operation in 1917, when the constitutional amendment expressly authorizing appropriations from the general funds of the state was submitted and adopted; and a conclusion that by the constitutional amendment of 1917, and the subsequent amendments of section 3, article 7, heretofore referred to, they intended to prohibit the Legislature from continuing the rural aid appropriations in conformity with then existing laws, would not only be unreasonable but contrary, we believe, to the actual facts.

[6, 7] As has been shown, the Legislature since 1915 has consistently construed the Constitution as permitting the enactment of rural aid measures, and the executive department has approved and executed those laws. The universal rule of construction is that legislative and executive interpretations of the organic law, acquiesced in and long continued, as in the case before us, are of great weight in determining the validity of any act, and in case of ambiguity or doubt will be followed by the courts. 9 Texas Ju-

risprudence, p. 439, § 27; 6 Ruling Case Law, p. 62, §§ 59, 60, 61, 62; Cox v. Robinson, 165 Tex. 426, 439, 150 S. W. 1149; Gulf, C. & S. F. Ry. Co. v. Dallas Tvy. Com. App. 16 S.W. (2d) 292, 294; Greene v. Robinson, 117 Tex. 516, 535, 8 S.W.(2d) 455; Thelen v. Robinson, 117 Tex. 489, 8 S.W.(2d) 646; Walker v. Meyers, 114 Tex. 225, 295 S. W. 499; Kimbrough v. Brown, 95 Tex. 394, 55 S. W. 120. In addition, and we think this completely forecloses the matter, the language used in the amendment to section 3, article 7, in 1917, after having been interpreted by the legislative and executive departments as not being subject to the limitation expressed in section 5 has been repeated by the people over and over again during the existence of rural aid statutes. Under a faithful rule of interpretation the re-adoption of the amendment with the same language formerly employed, with out change or limitation, carries with it the meaning which the legislative department has theretofore put upon it. 12 Corpus Juris, p. 717; 6 Ruling Case Law, p. 54; Cox v. Robinson, 165 Tex. 426, 439, 150 S. W. 1149.

We pass now to a consideration of the question as to whether or not the act before us violates the due process and equal protection clauses of the Constitution (article 1, §§ 2, 19).

[8, 9] Under our Constitution, public education is a division or department of the government, the affairs of which are administered by public officers, and in the conduct of which the Legislature has all legislative power not denied it by the Constitution. Stat. Const. art. 7; art. 3, § 42; Cooley's Const. Lim. (8th Ed.) vol. 1, p. 176; 9 Texas Jurisprudence, p. 453, § 38; El Dorado Ind. School Dist. v. Tidale (Tex. Com. App.) 8 S.W.(2d) 420; Ferguson v. Academy Conso Ind. School Dist. (Tex. Civ. App.) 14 S.W.(2d) 1051; 24 Ruling Case Law, p. 558, § 2.

[10] Under the Constitution, our public schools are essentially state schools, and as authority to control their operation, except as otherwise provided, is included among the powers conferred upon the Legislature. Wei County v. School Trustees, 95 Tex. 132, 43 S.W. 878; Constitution, art. 7.

Section 1 of article 7 of the Constitution reads: "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 legislative of the State to establish and make suitable provision for the support and maintenance of an efficient system of public free schools."

The purpose of this section as written was not only to recognize the inherent power of the Legislature to establish an education system for the state but also to make it a mandatory duty of that department to do so. Associated Schools v. School District, 1 Minn. 254, 142 N. W. 325, 47 L. R. A. (N. 1)

200; *Cooley's Const. Lim.* (8th Ed.) vol. 1, p. 159; 6 *Ruling Case Law*, p. 55, § 50. The Constitution, having made it the mandatory duty of the Legislature to "make suitable provision for the support and maintenance of an efficient system of public free schools," necessarily conferred the power to make the mandate effective. 9 *Texas Jurisprudence*, p. 448, § 34; *Cooley's Const. Lim.* (8th Ed.) vol. 1, pp. 138, 139; *Story on the Constitution* (4th Ed.) § 424; *Imperial Irr. Co. v. Jayne*, 104 Tex. 395, 138 S. W. 575, Ann. Cas. 1914B, 322; *Dilly County Line Ind. School Dist. v. Burns* (Tex. Civ. App.) 200 S. W. 270; *Morton v. Gordon*, Dallas, 142, 330. Since the Legislature has the mandatory duty to make suitable provision for the support and maintenance of an efficient system of public free schools, and has the power to pass any law relative thereto, not prohibited by the Constitution, it necessarily follows that it has a choice in the selection of methods by which the object of the organic law may be effectuated. The Legislature alone is to judge what means are necessary and appropriate for a purpose which the Constitution makes legitimate. The legislative determination of the methods, restrictions, and regulations is final, except when so arbitrary as to be violative of the constitutional rights of the citizen. 6 *Ruling Case Law*, p. 155, § 154. The general and basic classification made by the act before us divides the schools of the state into two classes; namely, small and financially weak school districts, and those which are not so small and weak financially as to need aid to bring their schools up to the average standard of education afforded by our system. This classification undoubtedly has a natural basis, one which actually exists. The inequality of educational opportunities in the main arises from natural conditions. Texas is a large state, with approximately 262,000 square miles of territory, much of it sparsely populated; its lands not equally productive, and the taxable wealth of its communities existing in great inequality. The type of school which any community can have must depend upon the population of the community, the productivity of its soil, and generally its taxable wealth. The constitutional allocation of the available school fund according to the scholastic population of counties has heretofore resulted in the same inequality of opportunity or discrimination that the natural factors produce, and the general purpose of the Rural Aid Act was to relieve in some measure these natural inequalities by appropriations from a source other than the "available school fund" as defined in the Constitution.

[11, 12] Referring now to the basis of the Act, that the Legislature has the right to give aid from the general revenue to financially weak schools, we think the constitutional mandate that the Legislature shall make

"suitable provision for the support and maintenance of an efficient system of public free schools," ample authority.

The word "suitable," used in connection with the word "provision" in this section of the Constitution, is an elastic term, depending upon the necessities of changing times or conditions, and clearly leaves to the Legislature the right to determine what is suitable, and its determination will not be reviewed by the courts if the act has a real relation to the subject and object of the Constitution. *Marasso v. Van Delt*, 77 Fla. 492, 81 So. 529; *Sawyer v. Gilmore*, 169 Mo. 109, 83 A. 673.

[13-16] As to whether or not a law secures due process and equal protection as required by the Constitution depends upon the subject on which it operates and the character of rights which it affects. The constitutional guarantee does not forbid the state from adjusting its legislation to differences in situation. Equal protection of laws is secured if the statutes do not subject the individual to arbitrary exercise of the powers of government. It is well settled that legislation is not open to objection if all who are brought under its influence are treated alike in the same circumstances. 9 *Texas Jurisprudence*, p. 553, § 117. In the very nature of society, with its manifold occupations and contacts, the Legislature must have, and clearly does have, authority to classify subjects of legislation, and, when the classification is reasonable—that is, based upon some real difference existing in the subject of the enactment—and the law applies uniformly to those who are within the particular class, the act is not open to constitutional objection. 9 *Texas Jurisprudence*, p. 555, § 119, p. 558, § 120, p. 561, § 121.

[17] In classifying subjects so heterogeneous in population, wealth, and physical features as the school districts and communities of Texas, for the purpose of equalizing the educational opportunities, which these differences engender, great liberty of action must be accorded the legislative department. A careful reading of the law here involved plainly shows that the Legislature has endeavored with painstaking care to effectuate the avowed object of the act, and in so far as our attention has been directed to the details of the legislation, the classifications made, in connection with a reasonable exercise of the power conferred by the organic law to local authorities, are well calculated to achieve the purposes of the act. It is true that equality of educational opportunities for all may not be brought about by the law, but the inequalities which may continue will exist rather by reason of differences in population, wealth, and physical conditions of the school districts or communities, and a failure of local authorities to exercise their constitutional power of taxation, than from the law itself.

Tested by the principles stated, we do not

think the act before us is discriminatory, arbitrary, or unreasonable.

That rural aid appropriations have a real relationship to the subject of equalizing educational opportunities in the state, and tend to make our system more efficient, there can be no doubt. It is true that not all schools will be aided, since many, because of large scholastic population and local wealth against which taxes have been levied, may not need the aid, and are therefore not within the purposes of the act. On the other hand, there may be other schools of obviously so few scholars that any sufficient aid granted would be out of proportion to the general need to be accomplished, and render it unreasonable to attempt it. Or it may be that there are many communities with a small number of scholars and large taxable values, like the one in which the complainant Eddie Mae Mumme resides. Her district contains a scholastic population of six children, with taxable values of \$488,000. If this district should vote the tax of 75 cents on the \$100 valuation required by subdivision 4, & 2, of the act before us, before aid is granted to any school, and to the amount thus produced add the state apportionment from the available school fund, the school would have in hand approximately \$252 per pupil each year, which plainly shows this school does not need state aid.

The results suggested illustrate possible legislative reasons for declining to aid small schools (with less than 20 scholars) unless because of lack of wealth they were unable to maintain a suitable school; in which event they may receive aid under sections 3 and 6 of the act. The law clearly evinces the legislative purpose to aid every school, regardless of number of scholars, where aid is necessary and practicable.

(18) Nor do we think the details of the act, fixing the conditions and qualifications of districts within the general classification entitling them to aid, discriminatory, because these apply alike to all within the classification. 9 Texas Jurisprudence, p. 555, § 419, and other authorities supra.

Nor are the requirements exacted of those who apply for aid arbitrary or unreasonable. Those sections of the law regulating the type of schoolhouse required, the equipment necessary, the courses of study to be pursued, and which require compliance to the lawful orders of the state superintendent and the board of education, are certainly reasonable requirements, and clearly within the legislative power. 24 Ruling Case Law, p. 559, § 3, p. 633, § 62, p. 635, § 93; Associated Schools v. School District, 122 Minn. 254, 142 N. W. 325, 47 L. R. A. (N. S.) 200, and notes; Pasadena City School District v. City of Pasadena, 166 Cal. 7, 134 P. 985, 47 L. R. A. (N. S.) 892, 895, Ann. Cas. 1915B, 1039.

(19) The provisions of the act (see and 11) with reference to the numbers to be employed in ratio to the scholars have for their purpose efficiency and economy in the maintenance of the school. The salary requirements, and 11) have the same purpose, as the salary shall be large enough efficient teachers and justify the character to be prepared for that pay yet not so large as to be extravagant line with compensation generally in services of this high character. Teachers are well calculated to promote equality in character of instruction, and equality of opportunity for the attainment of the purposes of the act.visions are plainly within the zone which the Legislature has over public Ruling Case Law, p. 559, § 3, p. 612, § 62; Bepp v. Clark, 165 Tex. N. W. 172, 52 L. R. A. (N. S.) 1091 Cas. 1905E, 417.

(20) The provision of the law that shall not be eligible to receive rural aid if votes a tax of 75 cents on the valuation of the taxable property of the not an unreasonable requirement, is below the maximum permitted by constitution and laws of the state, voted or not, as determined by the themselves. Nor is it discriminating it applies to all districts alike whether or not.

(21, 22) Complaint is also made of the provision in section 10 of the act to supplement the amount available to pay the tuition of high school transferred from one district to another provided for in chapter 181, General Session of the 49th Legislature which act has since been amended. First Called Session, 41st Leg. (1919) (Verison's Ann. Civ. St. art. 2678, not think this section discriminatory, or unreasonable. Its object is equalization of opportunities, and the purpose of maintaining additional in the classification is reasonable, and alike to all schools and student situated. Certainly the state has to establish and maintain high school as part of its public free school system. Ruling Case Law, p. 557; Richards v. 52 101 612, 34 Ann. Rep. 154; Pe Goodell v. Chicago & N. W. Ry. Co. 384, 121 N. E. 731; Rogers v. School, 128 Iowa 45, 102 N. W. 79 this major power, the minor power the transfer of high school pupils to a district having such a school, with excess of its own requirements, a additional tuition required therefor as a matter of common sense. We

not every community has the wealth or population sufficient to justify the maintenance of a high school, and the law in this respect was enacted for the purpose of equalizing educational opportunities in an economical way. It is not unjust or unreasonable, and does not discriminate against any one of the class to which it applies. The act in this respect is clearly within the legislative power. 24 Ruling Case Law, p. 626, § 84.

We have to-day, in an opinion in the case of Thomas B. Love, as Next Friend of Noota Camp, a Miner, et al v. City of Dallas, 40 S. W.(2d) 20, not yet reported (in State reports), construed the High School Tuition Law, and, as interpreted by us, have sustained its validity. The opinion in the instant case on this subject is to be read and its meaning determined in connection with the opinion in the Love Case.

We have given careful consideration to all questions presented in the application, and have concluded that the Court of Civil Appeals correctly disposed of the case. The application for writ of error is accordingly refused.

FILIPOS et al. v. CHOUKE et al.
No. 5346.

Supreme Court of Texas.
June 10, 1931.

1. Fish \Rightarrow 7(3), 9.

Statute granting right to plant oysters held valid and protected property rights in oyster bed of owner of bayou land coming within statute against interference by another (Rev. Civ. St. 1925, art. 4028).

Rev. Civ. St. 1925, art. 4028, provided that whenever any bayou is included within metes and bounds of original grant or location of land in state, lawful occupant of grant or location is given exclusive right to plant oysters, and that if bayou is not included within such metes and bounds exclusive right of riparian owner shall, when width of bayou \geq 100 yards or less, extend to middle thereof, or to 100 yards from shore when bayou is less than 200 yards wide. Record showed that defendant was owner of land on island which included land in bayou where defendant and oyster bed. Owner of another oyster bed operated boat over defendant's oyster bed stirring up mud and sedimentation in bayou, resulting in damage to defendant's oysters.

2. Fish \Rightarrow 7(3).

Abutting property owner on el of bayou included within field notes held protected in right to grow oysters regardless of title in submerged land in final grant or validating act (4 C. Laws, p. 125; Rev. St. 1925, art. 40).

Error to Court of Civil Appeals Supreme Judicial District.

Action by Joe Filipos and others Chris Chouke and others, in which suits filed a cross-suit. Judgment in this was reversed and rendered by H of Civil Appeals [10 S.W.(2d) 807], at this being error.

Affirmed.

Ray Johnson, of Galveston, for plaintiff.

Stewart, Damiani & Harris, Maco and W. N. Zinn, all of Galveston, for defendants in error.

CRITZ, C.

The record in this case discloses following:

Chris Chouke is the owner of certain on Galveston Island. This title is Chouke by mesne conveyances from and Hall, to whom it was originally given November 28, 1840. This patent was dated by act of the Legislature of passed February 8, 1854. Gamble's I Texas, vol. 4, p. 125. The validating question reads as follows:

"An Act to confirm the patent issued Commissioner of the General Land and Levi Jones and Edward Hall, on the eighth day of November, eighteen hundred and forty.

"Section 1. Be it enacted by the Legislature of the State of Texas, That the issued by the Commissioner of the General Land Office, on the twenty-eighth day of November, eighteen hundred and forty, to Jones and Edward Hall, for lands on Galveston Island, be, and the same is hereby affirmed, and the State of Texas disclaim title in and to the lands described in said act, in favor of the grantees and those who under them.

"Passed, February 8, 1854."

The original survey lines of the Jones and Hall were found after Chouke's field notes showed that in the bayou where Chouke the oyster bed layed in this suit. All land owned by Chouke lies on both sides of bayou and the oyster bed is located between the two bays. In other words, bayou is said to the extent of included through the part of the bayou surveyed lines, Chouke is the owner of the land

\Rightarrow For other cases see same topic and KEY-WORD in 20 Key-Numbers-2 Digests and Indexes

relied on by the Court, merely held that a lessee of mineral rights in Indian lands was not immunized from paying state gross production taxes and state excise taxes on petroleum produced from the lands. These cases would be relevant here if the tribe had leased the ski resort to an outsider who sought the tribal tax immunity. We deal only with an income tax levied on a tribal corporate enterprise conducted by the tribe with federal funds on federal lands leased to the tribe. Federal Indian Law distinguished the *Holmes* and like cases relied on by the Court from an enterprise "organized solely to carry out governmental objectives such as the tribal corporations organized" under the 1934 Act with which we now deal *id.*, at 852-853.

In my view, this state income tax is carried by § 5 through which Congress has given tax immunity to these new tribal enterprises.



U.S. 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000.

Bonifacio P. RODRIGUEZ et al.
No. 71-1532.

Argued Oct. 12, 1972.

Decided March 21, 1973.

Rehearing Denied April 23, 1973.

See 411 U.S. 959, 91 S.Ct. 1919.

Class action was brought on behalf of school children, who were said to be members of poor families residing in seven districts, having low property tax base, challenging reliance by Texas school-financing system on local property taxation. The three-judge District Court 337 F.Supp. 280, rendered judgment holding such system unconstitutional under equal protection clause of the Fourteenth Amendment, and after appeal, the Supreme Court, Mr. Justice Powell, held that subject action was inappropriate case in which to invoke strict judicial scrutiny test, and that such system, which assured basic education for every child in the state and permitted and encouraged participation in and significant control of each district's schools at local level bore a rational relationship to legitimate state purpose and did not violate equal protection clause of the Fourteenth Amendment.

Reversed.
Mr. Justice Stewart concurred and filed opinion.
Mr. Justice Brennan dissented and filed opinion.
Mr. Justice White dissented and filed opinion in which Mr. Justice Douglas and Mr. Justice Brennan joined.
Mr. Justice Blackmun dissented and filed opinion in which Mr. Justice Douglas joined.

1. Constitutional Law—§43(1, 5).

Test of strict judicial scrutiny of a state's laws is reserved for cases involving laws which operate to disadvantage of suspect classes or interfere with exercise of fundamental rights and liberties explicitly or implicitly protected by the constitution.

2. Criminal Law—§2268(1).

While sentencing judges may in imposing fines consider defendant's ability to pay, in such circumstances they are precluded from judicial discretion rather than by constitutional mandate based on equal protection (Georgia v. U.S.C.A., Const. Amend. 14).

3. Constitutional Law—§213.

At least where wealth is involved, equal protection clause of the Fourteenth Amendment does not require absolute equality or precisely equal advantage. U.S. Const. Amend. 14.

4. Schools and School Districts 17

Texas school-financing system which was not shown to discriminate against any definable class of "poor" people or to occasion discriminations depending on relative wealth of families in any district that supplemented state aid through ad valorem tax on property within its jurisdiction did not operate to peculiar disadvantage of any suspect class, for purpose of determining applicability of strict judicial scrutiny test to such system. U.S.C.A. Const. Amend. 14; Vernon's Ann. Tex. St. Const. art. 7, §§ 1-5; art. 10, §§ 1, 2.

5. Constitutional Law 209

It is not province of United States Supreme Court to create substantive constitutional rights in the name of guaranteeing equal protection of the laws. U.S.C.A. Const. Amend. 14.

6. Schools and School Districts 148

While education is one of the most important services performed by the state, it is not among rights afforded explicit or implicit protection under the Federal Constitution.

7. Schools and School Districts 11

Undisputed importance of education will not alone cause United States Supreme Court to depart from usual standard for reviewing a state's social and economic legislation.

8. Elections 7

Right to vote, per se, is not a constitutionally protected right.

9. Elections 7

Protected right, implicit in our constitutional system, exists to participate in state elections on equal basis with other qualified voters whenever the state has adopted elective process for determining who will represent any segment of state's population.

10. Schools and School Districts 17

While goals of guaranteeing citizenry the most effective speech or the most informed electoral choice are to be pursued by a people whose thoughts and beliefs are freed from governmental interference, they are not values to be implemented by judicial intrusion into otherwise legitimate state activities.

11. Schools and School Districts 17

Even if some identifiable quantum of education was entitled to constitutional protection, where only relative differences in spending levels were involved in Texas school-financing system under which each district supplemented state aid through ad valorem tax on property within its jurisdiction, and where the system did not fail to provide each child with opportunity to acquire basic minimum skills necessary for enjoyment of the rights to speech and full participation in political process, such system did not impermissibly interfere with exercise of a "fundamental" right or liberty for purpose of determining applicability of strict judicial scrutiny test. U.S.C.A. Const. Amends. 1, 14; Vernon's Ann. Tex. St. Const. art. 7, §§ 1-5; art. 10, §§ 1, 2.

12. Schools and School Districts 17

In view of fact that Texas school-financing system under which each district supplemented state aid through ad valorem tax on property within its jurisdiction was affirmative and reformatory, such system would be scrutinized under judicial principles sensitive to nature of the state's efforts and to rights reserved to the states under the Constitution. Vernon's Ann. Tex. St. Const. art. 7, §§ 1-5; art. 10, §§ 1, 2.

13. Schools and School Districts 17

In view of fact that class action challenging on equal protection ground the constitutionality of reliance by Texas school-financing system on local property taxation, involved delicate and difficult questions of local taxation, fiscal

planning, educational policy and federalism, such action was inappropriate case in which to invoke strict judicial scrutiny test on such school-financing system. U.S.C.A.Const. Amend. 14; Vernon's Ann.Tex.St.Const. art. 7, §§ 1-5; art. 10, §§ 1, 2.

14. Constitutional Law ⇨18(7)

Questions of federalism are always inherent in process of determining whether a state's laws are to be accorded traditional presumption of constitutionality or are to be subjected instead to rigorous judicial scrutiny.

15. States ⇨1

Maintenance of principles of federalism is foremost consideration in interpreting any of pertinent provisions under which United States Supreme Court examines state action.

16. Schools and School Districts ⇨17

While reliance by Texas school-financing system on local property taxation provided less freedom for choice with respect to expenditures for some districts than for others, existence of "some inequality" in manner in which the state's rationale was achieved was not alone a sufficient basis for striking down the entire system. U.S.C.A.Const. Amend. 14; Vernon's Ann.Tex.St.Const. art. 7, §§ 1-5; art. 10, §§ 1, 2.

17. Schools and School Districts ⇨17

Texas school-financing system under which each district supplemented state aid through ad valorem tax on property within its jurisdiction could not be condemned simply because it imperfectly effected the state's goals. Vernon's Ann.Tex.St.Const. art. 7, §§ 1-5; art. 10, §§ 1, 2.

18. Schools and School Districts ⇨17

Texas school-financing system under which each district supplemented state aid through ad valorem tax on property within its jurisdiction did not fail because other methods of satisfying

the state's interest occasioning "less drastic" disparities in expenditures might be conceived. Vernon's Ann.Tex. St.Const. art. 7, §§ 1-5; art. 10, §§ 1, 2.

19. Constitutional Law ⇨82, 83(1)

Only where state action impinges on exercise of fundamental constitutional rights or liberties must it be found to have chosen the least restrictive alternative.

20. Schools and School Districts ⇨17

Consideration as to whether local control would be preserved and possibly better served under school-financing systems other than Texas system under which each district supplemented state aid through ad valorem tax on property within its jurisdiction was irrelevant for purpose of deciding whether the Texas system might be said to be supported by a legitimate and reasonable basis. Vernon's Ann.Tex.St.Const. art. 7, §§ 1-5; art. 10, §§ 1, 2.

21. Constitutional Law ⇨229(1)

Schools and School Districts ⇨10

Texas school-financing system under which each district supplemented state aid through ad valorem tax on property within its jurisdiction and which assured basic education for every child in the state and permitted and encouraged participation in and significant control of each district's schools at the local level bore rational relationship to legitimate state purpose and did not violate equal protection clause of the Fourteenth Amendment. U.S.C.A.Const. Amend. 14; Vernon's Ann.Tex.St.Const. art. 7, §§ 1-5; art. 10, §§ 1, 2; V.T.C. A., Education Code §§ 11.26(a)(5), 12.01-12.04, 16.13, 16.15-16.19, 16.301 et seq., 16.45, 16.51-16.63.

22. Constitutional Law ⇨209

Constitutional standard under equal protection clause of the Fourteenth Amendment is whether the challenged state action rationally furthers a legitimate state purpose or interest. U.S.C.A.Const. Amend. 14.

Syllabus

The financing of public elementary and secondary schools in Texas is a product of state and local participation. Almost half of the revenues are derived from a largely state-funded program designed to provide a basic minimum educational offering in every school. Each district supplements state aid through an ad valorem tax on property within its jurisdiction. Appellees brought this class action on behalf of schoolchildren said to be members of poor families who reside in school districts having a low property tax base, making the claim that the Texas system's reliance on local property taxation favors the more affluent and violates equal protection requirements because of substantial inter-district disparities in per-pupil expenditures resulting primarily from differences in the value of assessable property among the districts. The District Court, finding that wealth is a "suspect" classification and that education is a "fundamental" right, concluded that the system could be upheld only upon a showing, which appellants failed to make, that there was a compelling state interest for the system. The court also concluded that appellants failed even to demonstrate a reasonable or rational basis for the State's system. *Held:*

1. This is not a proper case in which to examine a State's laws under standards of strict judicial scrutiny, since that test is reserved for cases involving laws that operate to the disadvantage of suspect classes or interfere with the exercise of fundamental rights and liberties explicitly or implicitly protected by the Constitution. Pp. 1288-1302.

(a) The Texas system does not disadvantage any suspect class. It has not been shown to discriminate against any definable class of "poor" people or to occasion discriminations depending on the

relative wealth of the families in any district. And, insofar as the financing system disadvantages those who, disregarding their individual income characteristics, reside in comparatively poor school districts, the resulting class cannot be said to be suspect. Pp. 1288-1294.

(b) Nor does the Texas school-financing system impermissibly interfere with the exercise of a "fundamental" right or liberty. Though education is one of the most important services performed by the State, it is not within the limited category of rights recognized by this Court as guaranteed by the Constitution. Even if some identifiable quantum of education is arguably entitled to constitutional protection to make meaningful the exercise of other constitutional rights, here there is no showing that the Texas system fails to provide the basic minimal skills necessary for that purpose. Pp. 1294-1300.

(c) Moreover, this is an inappropriate case in which to invoke strict scrutiny since it involves the most delicate and difficult questions of local taxation, fiscal planning, educational policy, and federalism, considerations counseling a more restrained form of review. Pp. 1300-1302.

2. The Texas system does not violate the Equal Protection Clause of the Fourteenth Amendment. Though concededly imperfect, the system bears a rational relationship to a legitimate state purpose. While assuring a basic education for every child in the State, it permits and encourages participation in and significant control of each district's schools at the local level. Pp. 1302-1307.

D.C., 337 F.Supp. 280, reversed.

1 Charles Alan Wright, Austin, Tex., 12 for appellants.

Arthur Gochman, San Antonio, Tex., for appellees.

* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See United

States v. Detroit Timber & Lumber Co., 200 U.S. 321, 337, 26 S.Ct. 282, 287, 50 L.Ed. 499.

- 14 1 Mr. Justice POWELL delivered the opinion of the Court.

This suit attacking the Texas system of financing public education was initiated by Mexican-American parents whose children attend the elementary and secondary schools in the Edgewood Independent School District, an urban school district in San Antonio, Texas.¹ They brought a class action on behalf of schoolchildren throughout the State who are members of minority groups or who are poor and reside in school districts having a low property tax base. Named as defendants² were the State Board of Education, the Commissioner of Education, the State Attorney General, and the Bexar County (San Antonio) Board of Trustees. The complaint was filed in the summer of 1968 and a three-judge court was impaneled in January 1969.³ In December 1971⁴ the panel rendered its judgment in a *per curiam* opinion holding the Texas school finance system unconstitutional under the Equal Protection Clause of the Fourteenth Amendment.⁵ The State appealed, and

we noted probable jurisdiction to consider the far-reaching constitutional questions presented. 406 U.S. 966, 92 S.Ct. 2413, 32 L.Ed.2d 665 (1972). For the reasons stated in this opinion, we reverse the decision of the District Court.

I

The first Texas State Constitution, promulgated upon Texas' entry into the Union in 1845, provided for the establishment of a system of free schools.⁶ Early in its history, Texas adopted a dual approach to the financing of its schools, relying on mutual participation by the local school districts and the State. As early as 1883, the state constitution was amended to provide for the creation of local school districts empowered to levy ad valorem taxes with the consent of local taxpayers for the "erection of school buildings" and for the "further maintenance of public free schools."⁷ Such local funds as were raised were supplemented by funds distributed to each district from the State's Permanent and Available School Funds.⁸ The Per-

1 Not all of the children of these complainants attend public school. One family's children are enrolled in private school "because of the condition of the schools in the Edgewood Independent School District." Third Amended Complaint, App. 14.

2 The San Antonio Independent School District, whose name this case still bears, was one of seven school districts in the San Antonio metropolitan area that were originally named as defendants. After a pretrial conference, the District Court issued an order dismissing the school districts from the case. Subsequently, the San Antonio Independent School District joined in the plaintiffs' challenge to the State's school finance system and filed an *amicus curiae* brief in support of that position in this Court.

3 A three-judge court was properly convened and there are no questions as to the District Court's jurisdiction or the direct appealability of its judgment. 28 U.S.C. §§ 2281, 2253.

4 The trial was delayed for two years to permit extensive pretrial discovery and to allow completion of a pending Texas legislative investigation concerning the need

for reform of its public school finance system. 337 F.Supp. 290, 285 n. 11 (W.D.Tex.1971).

5 337 F.Supp. 290. The District Court stayed its mandate for two years to provide Texas an opportunity to remedy the inequities found in its financing program. The court, however, retained jurisdiction to fashion its own remedial order if the State failed to offer an acceptable plan. *Id.* at 286.

6 Tex.Const., Art. X, § 1 (1845).

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

Id., § 2.

"The Legislature shall, as early as practicable, establish free schools throughout the State, and shall furnish means for their support by taxation on property."

7 Tex.Const. of 1876, Art. 7, § 3, as amended, Aug. 14, 1883, Vernon's Ann.Tex.St.

8 *Id.*, Art. 7, §§ 3, 4, 5.

manent School Fund, its predecessor established in 1854 with \$2,000,000 realized from an annexation settlement,⁹ was thereafter endowed with millions of acres of public land set aside to assure a continued source of income for school support.¹⁰ The Available School Fund, which received income from the Permanent School Fund as well as from a state ad valorem property tax and other designated taxes,¹¹ served as the disbursing arm for most state educational funds throughout the late 1800's and first half of this century. Additionally, in 1918 an increase in state property taxes was used to finance a program providing free textbooks throughout the State.¹²

Until recent times, Texas was a predominantly rural State and its population and property wealth were spread relatively evenly across the State.¹³ Sizeable differences in the value of assessable property between local school districts became increasingly evident as the State became more industrialized and as rural-to-urban population shifts became more pronounced.¹⁴ The location of

commercial and industrial property began to play a significant role in determining the amount of tax resources available to each school district. These growing disparities in population and taxable property between districts were responsible in part for increasingly notable differences in levels of local expenditure for education.¹⁵

In due time it became apparent to those concerned with financing public education that contributions from the Available School Fund were not sufficient to ameliorate these disparities.¹⁶ Prior to 1939, the Available School Fund contributed money to every school district at a rate of \$17.50 per school-age child.¹⁷ Although the amount was increased several times in the early 1940's,¹⁸ the Fund was providing only \$46 per student by 1945.¹⁹

Recognizing the need for increased state funding to help offset disparities in local spending and to meet Texas' changing educational requirements, the state legislature in the late 1940's undertook a thorough evaluation of public ed-

9. 3 Gammel's Laws of Texas 1847-1854, p. 1401. See Tex. Const., Art. 7, §§ 1, 2, 5 (interpretive commentaries); 1 Report of Governor's Committee on Public School Education, The Challenge and the Chance 27 (1969) (hereinafter Governor's Committee Report).

10. Tex. Const., Art. 7, § 5 (see also the interpretive commentary); 5 Governor's Committee Report 11-12.

11. The various sources of revenue for the Available School Fund are cataloged in A Report of the Adequacy of Texas Schools, prepared by Texas State Board of Education, 7-15 (1938) (hereinafter Texas State Bd. of Educ.).

12. Tex. Const., Art. 7, § 3, as amended, Nov. 5, 1918 (see interpretive commentary).

13. 1 Governor's Committee Report 35; Texas State Bd. of Educ., *supra*, n. 11, at 5-7; J. Coons, W. Chene, & S. Sugarman, Private Wealth and Public Education 48-49 (1970); 1 Childley, School Funds and Their Appropriation 21-27 (1965).

14. By 1940, one-half of the State's population was clustered in its metropolitan

centers. 1 Governor's Committee Report 35.

15. Gilmer-Aikin Committee, To Have What We Must 13 (1948).

16. Still, The Gilmer-Aikin Bills 11-13 (1950); Texas State Bd. of Educ., *supra*, n. 11.

17. R. Still, *supra*, n. 16, at 12. It should be noted that during this period the median per-pupil expenditure for all schools with an enrollment of more than 200 was approximately \$50 per year. During this same period, a survey conducted by the State Board of Education concluded that "in Texas the best educational advantages offered by the State at present may be had for the median cost of \$52.67 per year per pupil in average daily attendance." Texas State Bd. of Educ., *supra*, n. 11, at 56.

18. General Laws of Texas, 46th Legis., Reg. Sess. 1939, c. 7, pp. 274-275 (\$22.50 per student); General & Special Laws of Texas, 48th Legis., Reg. Sess. 1943, c. 101, pp. 262-263 (\$25 per student).

19. General & Special Laws of Texas, 49th Legis., Reg. Sess. 1945, c. 52, pp. 74-75; Still, *supra*, n. 16, at 12.

ucation with an eye toward major reform. In 1947, an 18-member committee, composed of educators and legislators, was appointed to explore alternative systems in other States and to propose a funding scheme that would guarantee a minimum or basic educational offering to each child and that would help overcome interdistrict disparities in taxable resources. The Committee's efforts led to the passage of the Gilmer-Aikin bills, named for the Committee's co-chairmen, establishing the Texas Minimum Foundation School Program.²² Today, this Program accounts for approximately half of the total educational expenditures in Texas.²³

The Program calls for state and local contributions to a fund earmarked specifically for teacher salaries, operating expenses, and transportation costs. The State, supplying funds from its general revenues, finances approximately 80% of the Program, and the school districts are responsible—as a unit—for providing the remaining 20%. The districts' share, known as the Local Fund Assignment, is apportioned among the school districts under a formula designed to reflect each district's relative taxpaying ability. The Assignment is first divided among Texas' 254 counties pursuant to a complicated economic index that takes into account the relative value of each county's contribution to the State's total income from manufacturing, mining, and agricultural activities. It also con-

siders each county's relative share of all payrolls paid within the State and, to a lesser extent, considers each county's share of all property in the State.²⁴ Each county's assignment is then divided among its school districts on the basis of each district's share of assessable property within the county.²⁵ The district, in turn, finances its share of the Assignment out of revenues from local property taxation.

The design of this complex system was twofold. First, it was an attempt to assure that the Foundation Program would have an equalizing influence on expenditure levels between school districts by placing the heaviest burden on the school districts most capable of paying. Second, the Program's architects sought to establish a Local Fund Assignment that would force every school district to contribute to the education of its children²⁶ but that would not by itself exhaust any district's resources.²⁷ Today every school district does impose a property tax from which it derives locally expendable funds in excess of the amount necessary to satisfy its Local Fund Assignment under the Foundation Program.

In the years since this program went into operation in 1949, expenditures for education—from state as well as local sources—have increased steadily. Between 1949 and 1967, expenditures increased approximately 500%.²⁸ In the

20. For a complete history of the adoption in Texas of a foundation program, see Still, *supra*, n. 10. See also 5 Governor's Committee Report 14; Texas Research League, Public School Finance Problems in Texas 9 (Interim Report 1972).

21. For the 1970-1971 school year this state aid program accounted for 48% of all public school funds. Local taxation contributed 41% and 10.9% was provided in federal funds. Texas Research League, *supra*, n. 20, at 9.

22. 5 Governor's Committee Report 44-48.

23. At present, there are 1,161 school districts in Texas. Texas Research League, *supra*, n. 20, at 12.

24. In 1948, the Gilmer-Aikin Committee found that some school districts were not levying any local tax to support education. Gilmer-Aikin Committee, *supra*, n. 15, at 16. The Texas State Board of Education Survey found that over 400 common and independent school districts were levying no local property tax in 1935-1936. Texas State Bd. of Educ., *supra* n. 11, at 30-42.

25. Gilmer-Aikin Committee, *supra*, n. 15, at 15.

26. 1 Governor's Committee Report 51-53.

last decade alone the total public school budget rose from \$750 million to \$2.1 billion²⁷ and these increases have been reflected in consistently rising per-pupil expenditures throughout the State.²⁸ Teacher salaries, by far the largest item in any school's budget, have increased dramatically—the state-supported minimum salary for teachers possessing college degrees has risen from \$2,400 to \$6,000 over the last 20 years.²⁹

The school district in which appellees reside, the Edgewood Independent School District, has been compared throughout this litigation with the Alamo Heights Independent School District. This comparison between the least and most affluent districts in the San Antonio area serves to illustrate the manner in which the dual system of finance operates and to indicate the extent to which substantial disparities exist despite the State's impressive progress in recent years. Edgewood is one of seven public school districts in the metropolitan area. Approximately 22,000 students are enrolled in its 25 elementary and secondary schools. The district is situated in the core-city sector of San Antonio in a residential neighborhood

that has little commercial or industrial property. The residents are predominantly of Mexican-American descent; approximately 90% of the student population is Mexican-American and over 6% is Negro. The average assessed property value per pupil is \$5,960—the lowest in the metropolitan area—and the median family income (\$4,686) is also the lowest.³⁰ At an equalized tax rate of \$1.05 per \$100 of assessed property—the highest in the metropolitan area—the district contributed \$26 to the education of each child for the 1967–1968 school year above its Local Fund Assignment for the Minimum Foundation Program. The Foundation Program contributed \$222 per pupil for a state-local total of \$248.³¹ Federal funds added another \$108 for a total of \$356 per pupil.³²

Alamo Heights is the most affluent school district in San Antonio. Its six schools, housing approximately 5,000 students, are situated in a residential community quite unlike the Edgewood District. The school population is predominantly "Anglo," having only 18% Mexican-Americans and less than 1% Negroes. The assessed property value per pupil exceeds \$49,000,³³ and the median

27. Texas Research League, *supra*, n. 20, at 2.

28. In the years between 1949 and 1967, the average per-pupil expenditure for all current operating expenses increased from \$206 to \$493. In that same period, capital expenditures increased from \$44 to \$102 per pupil. 1 Governor's Committee Report 53–54.

29. Acts 1949, 54th Legis. ch. 625, § 334, Art. 4, Tex. Educ. Code Ann. § 16.502 (1972); see generally 3 Governor's Committee Report 113–116. Berke, Carnevale, Morgan & White, *The Texas School Finance Case: A Wrong in Search of a Remedy*, 1 U. of T. & Edn. 659, 681–682 (1972).

30. The family income figures are based on 1960 census statistics.

31. The Available School Fund, technically, provides a second source of state money. That Fund has continued as in years past (see text accompanying nn. 16–19, *supra*) to distribute uniform per-pupil grants to every district in the State. In 1968, this Fund allotted \$98 per pupil

However, because the Available School Fund contribution is always subtracted from a district's entitlement under the Foundation Program, it plays no significant role in educational finance today.

32. While federal assistance has an ameliorating effect on the difference in school budgets between wealthy and poor districts, the District Court rejected an argument made by the State in that court that it should consider the effect of the federal grant in assessing the discrimination claim. 337 F.Supp. at 284. The State has not renewed that contention here.

33. A map of Bexar County included in the record shows that Edgewood and Alamo Heights are among the smallest districts in the county and are of approximately equal size. Yet, as the figures above indicate, Edgewood's student population is more than four times that of Alamo Heights. This factor obviously accounts for a significant percentage of the differences between the two districts in per-pupil property values and expenditures.

family income is \$8,001. In 1967-1968 the local tax rate of \$.85 per \$100 of valuation yielded \$333 per pupil over and above its contribution to the Foundation Program. Coupled with the \$225 provided from that Program, the district was able to supply \$558 per student. Supplemented by a \$36 per-pupil grant from federal sources, Alamo Heights spent \$594 per pupil.

Although the 1967-1968 school year figures provide the only complete statistical breakdown for each category of aid,³⁴ more recent partial statistics indicate that the previously noted trend of increasing state aid has been significant. For the 1970-1971 school year, the Foundation School Program allotment for Edgewood was \$356 per pupil, a 62% increase over the 1967-68 school year. Indeed, state aid alone in

1970-1971 equaled Edgewood's entire 1967-1968 school budget from local, state, and federal sources. Alamo Heights enjoyed a similar increase under the Foundation Program, netting \$491 per pupil in 1970-1971.³⁵ These recent figures also reveal the extent to which these two districts' allotments were funded from their own required contributions to the Local Fund Assignment. Alamo Heights, because of its relative wealth, was required to contribute out of its local property tax collections approximately \$100 per pupil, or about 20% of its Foundation grant. Edgewood, on the other hand, paid only \$8.46 per pupil, which is about 2.4% of its grant.³⁶ It appears then that, at least as to these two districts, the Local Fund Assignment does reflect a rough approximation of the relative taxpaying potential of each.³⁷

If Alamo Heights had as many students to educate as Edgewood does (22,000) its per pupil assessed property value would be approximately \$11,100 rather than \$49,000, and its per-pupil expenditures would therefore have been considerably lower.

34. The figures quoted above vary slightly from those utilized in the District Court opinion, 337 F.Supp. at 282. These trivial differences are apparently a product of that court's reliance on slightly different statistical data than we have relied upon.

35. Although the Foundation Program has made significantly greater contributions to both school districts over the last several years, it is apparent that Alamo Heights has enjoyed a larger gain. The sizable difference between the Alamo Heights and Edgewood grants is due to the emphasis in the State's allocation formula on the guaranteed minimum salaries for teachers. Higher salaries are guaranteed to teachers having more years of experience and possessing more advanced degrees. Therefore, Alamo Heights, which has a greater percentage of experienced personnel with advanced degrees, receives more state support. In this regard, the Texas Program is not unlike that presently in existence in a number of other States. *Cones, Clune, Sugarman, supra*, n. 13, at 123-125. Because more dollars have been given to

districts that already spend more per pupil, such Foundation formulas have been described as "anti-equalizing." *Ibid.* The formula, however, is anti-equalizing only if viewed in absolute terms. The percentage disparity between the two Texas districts is diminished substantially by state aid. Alamo Heights derived in 1967-1968 almost 13 times as much money from local taxes as Edgewood did. The state aid grants to each district in 1970-1971 lowered the ratio to approximately two to one, i. e., Alamo Heights had a little more than twice as much money to spend per pupil from its combined state and local resources.

36. Texas Research League, *supra*, n. 20, at 13.

37. The Economic Index, which determines each county's share of the total Local Fund Assignment, is based on a complex formula conceived in 1949 when the Foundation Program was instituted. See text, *supra*, at 1283-1284. It has frequently been suggested by Texas researchers that the formula be altered in several respects to provide a more accurate reflection of local taxpaying ability, especially of urban school districts. 5 Governor's Committee, Report 48; Texas Research League, Texas Public School Finance: A Majority of Exceptions 31-32 (2d Interim Report 1972); Berke, Carnevale, Morgan & White, *supra*, n. 20, at 680-681.

115 1 Despite these recent increases, substantial interdistrict disparities in school expenditures found by the District Court to prevail in San Antonio and in varying degrees throughout the State³⁸ still exist. And it was these disparities, largely attributable to differences in the amounts of money collected through local property taxation, that led the District Court to conclude that Texas' dual system of public school financing violated the Equal Protection Clause. The District Court held that the Texas system discriminates on the basis of wealth in the manner in which education is provided for its people. 337 F.Supp., at 282. Finding that wealth is a "suspect" classification and that education is a "fundamental" inter-

est, the District Court held that the Texas system could be sustained only if the State could show that it was premised upon some compelling state interest. *Id.*, at 282-284. On this issue the court concluded that "[n]ot only are defendants unable to demonstrate compelling state interests . . . they fail even to establish a reasonable basis for these classifications." *Id.*, at 284.

Texas virtually concedes that its historically rooted dual system of financing education could not withstand the strict judicial scrutiny that this Court has found appropriate in reviewing legislative judgments that interfere with fundamental constitutional rights³⁹ or that involve suspect classifications.⁴⁰ If, as

38. The District Court relied on the findings presented in an affidavit submitted by Professor Berke of Syracuse University. His sampling of 110 Texas school districts demonstrated a direct correlation between the amount of a district's taxable property and its level of per pupil expenditures.

But this study found only a partial correlation between a district's median family income and per-pupil expenditures. The study also shows, in the relatively few districts at the extremes, an inverse correlation between percentage of minorities and expenditures.

Categorized by Equalized Property Values,
Median Family Income, and State-Local Revenue

Market Value of Taxable Property Per Pupil	Median Family Income From 1960	Per Cent Minority Pupils	State & Local Revenues Per Pupil
Above \$100,000 (10 districts)	\$5,900	8%	\$815
\$100,000-\$50,000 (26 districts)	\$4,425	32%	\$544
\$50,000-\$30,000 (30 districts)	\$4,900	23%	\$483
\$30,000-\$10,000 (40 districts)	\$5,050	31%	\$462
Below \$10,000 (4 districts)	\$3,325	79%	\$305

Although the correlations with respect to family income and race appear only to exist at the extremes, and although the affiant's methodology has been questioned (see Goldstein, *Interdistrict Inequalities in School Financing: A Critical Analysis of Serrano v. Priest and its Progeny*, 129 U.Pa.L.Rev. 504, 523-525, nn. 67, 71 (1972)), insofar as any of these correlations is relevant to the constitutional thesis presented in this case we may accept its basic thrust. But see *infra*, at 1292-1293. For a defense of the reliability

of the affidavit, see Berke, Carnevale, Morgan & White, *supra*, n. 29.

39. *E.g.*, *Police Dept. of the City of Chicago v. Mosley*, 408 U.S. 92, 92 S.Ct. 2286, 33 L.Ed.2d 212 (1972); *Dunn v. Blumstein*, 405 U.S. 330, 92 S.Ct. 995, 31 L.Ed. 2d 274 (1972); *Shapiro v. Thompson*, 394 U.S. 618, 89 S.Ct. 1322, 22 L.Ed. 2d 680 (1969).

40. *B. v. Graham v. Richardson*, 403 U.S. 365, 91 S.Ct. 1848, 29 L.Ed.2d 534 (1971); *Loving v. Virginia*, 388 U.S. 1,

previous decisions have indicated, strict scrutiny means that the State's system is not entitled to the usual presumption of validity, that the State rather than the complainants must carry a "heavy burden of justification," that the State must demonstrate that its educational system has been structured with "precision," and is "tailored" narrowly to serve legitimate objectives and that it has selected the "less drastic means" for effectuating its objectives.⁴¹ the Texas financing system and its counterpart in virtually every other State will not pass muster. The State candidly admits that "[n]o one familiar with the Texas system would contend that it has yet achieved perfection."⁴² Apart from its concession that educational financing in Texas has "defects"⁴³ and "imperfections,"⁴⁴ the State defends the system's rationality with vigor and disputes the District Court's finding that it lacks a "reasonable basis."

This, then, establishes the framework for our analysis. We must decide, first, whether the Texas system of financing public education operates to the disadvantage of some suspect class or impinges upon a fundamental right explicitly or implicitly protected by the Constitution, thereby requiring strict judicial scrutiny. If so, the judgment of the District Court should be affirmed. If not, the Texas scheme must still be examined to determine whether it rationally furthers some legitimate, articulated state purpose and therefore does not constitute an invidious discrimination in

violation of the Equal Protection Clause of the Fourteenth Amendment.

II

The District Court's opinion does not reflect the novelty and complexity of the constitutional questions posed by appellees' challenge to Texas' system of school financing. In concluding that strict judicial scrutiny was required, that court relied on decisions dealing with the rights of indigents to equal treatment in the criminal trial and appellate process,⁴⁵ and on cases disapproving wealth restrictions on the right to vote.⁴⁶ Those cases, the District Court concluded, established wealth as a suspect classification. Finding that the local property tax system discriminated on the basis of wealth, it regarded those precedents as controlling. It then reasoned, based on decisions of this Court affirming the undeniable importance of education,⁴⁷ that there is a fundamental right to education and that, absent some compelling state justification, the Texas system could not stand.

We are unable to agree that this case, which in significant aspects is *sui generis*, may be so neatly fitted into the conventional mosaic of constitutional analysis under the Equal Protection Clause. Indeed, for the several reasons that follow, we find neither the suspect-classification nor the fundamental-interest analysis persuasive.

A

[1] The wealth discrimination discovered by the District Court in this

87 S.Ct. 1817, 18 L.Ed.2d 1019 (1967); *McLaughlin v. Florida*, 379 U.S. 184, 85 S.Ct. 283, 13 L.Ed.2d 222 (1964).

41. See *Dunn v. Blumstein*, *supra*, 405 U.S., at 343, 92 S.Ct., at 1103, and the cases collected therein.

42. Brief for Appellants 11.

43. *Id.*

44. Tr. of Oral Arg. 3; Reply Brief for Appellants 2.

45. *E.g., Griffin v. Illinois*, 351 U.S. 12, 76 S.Ct. 585, 100 L.Ed. 891 (1956);

Douglas v. California, 372 U.S. 353, 83 S.Ct. 811, 9 L.Ed.2d 811 (1963).

46. *Harper v. Virginia Bd. of Elections*, 383 U.S. 663, 86 S.Ct. 1079, 16 L.Ed. 2d 149 (1966); *McDonald v. Board of Election Comm'rs*, 394 U.S. 802, 89 S.Ct. 1404, 22 L.Ed.2d 739 (1969); *Bullock v. Carter*, 405 U.S. 134, 92 S.Ct. 849, 31 L.Ed.2d 92 (1972); *Ginsbury v. Occor*, 400 U.S. 512, 63 S.Ct. 854, 35 L.Ed.2d 381 (1973).

47. See cases cited in text, *infra*, at 1294-1295.

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case, and by several other courts that have recently struck down school-financing laws in other States,⁴⁸ is quite unlike any of the forms of wealth discrimination heretofore reviewed by this Court. Rather than focusing on the unique features of the alleged discrimination, the courts in these cases have virtually assumed their findings of a suspect classification through a simplistic process of analysis: since, under the traditional systems of financing public schools, some poorer people receive less expensive educations than other more affluent people, these systems discriminate on the basis of wealth. This approach largely ignores the hard threshold questions, including whether it makes a difference for purposes of consideration under the Constitution that the class of disadvantaged "poor" cannot be identified or defined in customary equal protection terms, and whether the relative—rather than absolute—nature of the asserted deprivation is of significant consequence. Before a State's laws and the justifications for the classifications they create are subjected to strict

judicial scrutiny, we think these threshold considerations must be analyzed more closely than they were in the court below.

The case comes to us with no definitive description of the classifying facts or delineation of the disfavored class. Examination of the District Court's opinion and of appellees' complaint, briefs, and contentions at oral argument suggests, however, at least three ways in which the discrimination claimed here might be described. The Texas system of school financing might be regarded as discriminating (1) against "poor" persons whose incomes fall below some identifiable level of poverty or who might be characterized as functionally "indigent,"⁴⁹ or (2) against those who are relatively poorer than others,⁵⁰ or (3) against all those who, irrespective of their personal incomes, happen to reside in relatively poorer school districts.⁵¹ Our task must be to ascertain whether, in fact, the Texas system has been shown to discriminate on any of these possible bases and, if so, whether the re-

48. *Serrano v. Priest*, 5 Cal.3d 584, 396 Cal. Rptr. 601, 487 P.2d 1241 (1971); *Van Dusen v. Hamfield*, 334 F.Supp. 870 (D.C.Minn.1971); *Robinson v. Cahill*, 118 N.J.Super. 223, 287 A.2d 187 (1972); *Milliken v. Green*, 389 Mich. 1, 203 N.W.2d 457 (1972), rehearing granted, Jan. 1973.

49. In their complaint, appellees purported to represent a class composed of persons who are "poor" and who reside in school districts having a "low value of property." Third Amended Complaint, App. 15. Yet appellees have not defined the term "poor" with reference to any absolute or functional level of impecuniosity. See text, *infra*, at 1290-1291. See also Brief for Appellees 1, 3; Tr. of Oral Arg. 20-21.

50. Appellees' proof at trial focused on comparative differences in family incomes between residents of wealthy and poor districts. They endeavored, apparently, to show that there exists a direct correlation between personal family income and educational expenditures. See text, *infra*, at 1292-1293. The District Court may have been relying on this

notion of relative discrimination based on family wealth. Citing appellees' statistical proof, the court emphasized that "those districts most rich in property also have the highest median family income . . . while the poor property districts are poor in income." 337 F.Supp. at 282.

51. At oral argument and in their brief, appellees suggested that description of the personal status of the residents in districts that spend less on education is not critical to their case. In their view, the Texas system is impermissibly discriminatory even if relatively poor districts do not contain poor people. Brief for Appellees 13-14; Tr. of Oral Arg. 20-21. There are indications in the District Court opinion that it adopted this theory of districts' discrimination. The opinion repeatedly emphasizes the comparative financial status of districts and early in the opinion it describes appellees' class as being composed of "all . . . children throughout Texas who live in school districts with low property valuations." 337 F.Supp. at 281.

sulting classification may be regarded as suspect.

The precedents of this Court provide the proper starting point. The individuals, or groups of individuals, who constituted the class discriminated against in our prior cases shared two distinguishing characteristics: because of their impecuniosity they were completely unable to pay for some desired benefit, and as a consequence, they sustained an absolute deprivation of a meaningful opportunity to enjoy that benefit. In *Griffin v. Illinois*,¹²¹ 351 U.S. 12, 76 S.Ct. 585, 100 L.Ed. 891 (1956), and its progeny,¹²² the Court invalidated state laws that prevented an indigent criminal defendant from acquiring a transcript, or an adequate substitute for a transcript, for use at several stages of the trial and appeal process. The payment requirements in each case were found to occasion *de facto* discrimination against those who, because of their indigency, were totally unable to pay for transcripts. And the Court in each case emphasized that no constitutional violation would have been shown if the State had provided some "adequate substitute" for a full stenographic transcript. *Britt v. North Carolina*, 404 U.S. 226, 228, 92 S.Ct. 431, 434, 30 L.Ed.2d 400 (1971); *Gardner v. California*, 393 U.S. 367, 89 S.Ct. 580, 21 L.Ed.2d 601 (1969); *Draper v. Washington*, 372 U.S. 487, 83 S.Ct. 774, 9 L.Ed.2d 899 (1963); *Eskridge v. Washington State Board of Prisons*, 357 U.S. 214, 78 S.Ct. 1061, 2 L.Ed.2d 1269 (1958).

Likewise, in *Douglas v. California*, 372 U.S. 353, 83 S.Ct. 814, 9 L.Ed.2d 811 (1963), a decision establishing an indigent defendant's right to court-

appointed counsel on direct appeal, the Court dealt only with defendants who could not pay for counsel from their own resources and who had no other way of gaining representation. *Douglas* provides no relief for those on whom the burdens of paying for a criminal defense are relatively speaking, great but not insurmountable. Nor does it deal with relative differences in the quality of counsel acquired by the less wealthy.

[2] *Williams v. Illinois*, 399 U.S. 235, 90 S.Ct. 2018, 26 L.Ed.2d 586 (1970), and *Tate v. Short*, 401 U.S. 395, 91 S.Ct. 668, 28 L.Ed.2d 130 (1971), struck down criminal penalties that subjected indigents to incarceration simply because of their inability to pay a fine.¹²³ Again, the disadvantaged class was composed only of persons who were totally unable to pay the demanded sum. Those cases do not touch on the question whether equal protection is denied to persons with relatively less money on whom designated fines impose heavier burdens. The Court has not held that fines must be structured to reflect each person's ability to pay in order to avoid disproportionate burdens. Sentencing judges may, and often do, consider the defendant's ability to pay, but in such circumstances they are guided by sound judicial discretion rather than by constitutional mandate.

Finally, in *Bullock v. Carter*, 405 U.S. 134, 92 S.Ct. 849, 31 L.Ed.2d 92 (1972), the Court invalidated the Texas filing-fee requirement for primary elections. Both of the relevant classifying facts found in the previous cases were present there. The size of the fee, often running into the thousands of dollars and,

121. *Mayer v. City of Chicago*, 404 U.S. 189, 92 S.Ct. 410, 30 L.Ed.2d 372 (1971); *Williams v. Oklahoma City*, 393 U.S. 158, 89 S.Ct. 1818, 23 L.Ed.2d 140 (1969); *Gardner v. California*, 393 U.S. 367, 89 S.Ct. 580, 21 L.Ed.2d 601 (1969); *Roberts v. LaVallee*, 389 U.S. 40, 88 S.Ct. 194, 19 L.Ed.2d 41 (1967); *Long v. Dis-*

trict Court of Iowa, 385 U.S. 192, 87 S.Ct. 362, 17 L.Ed.2d 290 (1966); *Draper v. Washington*, 372 U.S. 487, 83 S.Ct. 774, 9 L.Ed.2d 899 (1963); *Eskridge v. Washington State Board of Prisons*, 357 U.S. 214, 78 S.Ct. 1061, 2 L.Ed.2d 1269 (1958).

in at least one case, as high as \$8,900, effectively barred all potential candidates who were unable to pay the required fee. As the system provided "no reasonable alternative means of access to the ballot" (*id.*, at 149; 92 S.Ct. at 859), inability to pay occasioned an absolute denial of a position on the primary ballot.

Only appellees' first possible basis for describing the class disadvantaged by the Texas school-financing system—discrimination against a class of definably "poor" persons—might arguably meet the criteria established in these prior cases. Even a cursory examination, however, demonstrates that neither of the two distinguishing characteristics of wealth classifications can be found here. First, in support of their charge that the system discriminates against the "poor," appellees have made no effort to demonstrate that it operates to the peculiar disadvantage of any class fairly definable as indigent, or as composed of persons whose incomes are beneath any

[2] designated poverty level. Indeed, there is reason to believe that the poorest families are not necessarily clustered in the poorest property districts. A recent and exhaustive study of school districts in Connecticut concluded that "[i]t is clearly incorrect . . . to contend that the 'poor' live in 'poor' districts Thus, the major factual assumption of *Serrano*—that the educational financing system discriminates

against the 'poor'—is simply false in Connecticut."⁵³ Defining "poor" families as those below the Bureau of the Census "poverty level,"⁵⁴ the Connecticut study found, not surprisingly, that the poor were clustered around commercial and industrial areas—those same areas that provide the most attractive sources of property tax income for school districts.⁵⁵ Whether a similar pattern would be discovered in Texas is not known, but there is no basis on the record in this case for assuming that the poorest people—defined by reference to any level of absolute impecuniosity—are concentrated in the poorest districts.

[3] Second, neither appellees nor the District Court addressed the fact that, unlike each of the foregoing cases, lack of personal resources has not occasioned an absolute deprivation of the desired benefit. The argument here is not that the children in districts having relatively low assessable property values are receiving no public education; rather, it is that they are receiving a poorer quality education than that available to children in districts having more assessable wealth. Apart from the unsettled and disputed question whether the quality of education may be determined by the amount of money expended for it,⁵⁶ a sufficient answer to appellees' argument is that, at least where wealth is involved, the Equal Protection Clause does not require absolute equality or precisely equal advantages.⁵⁷ Nor indeed, in view of

53. Note, A Statistical Analysis of the School Finance Decisions: On Winning Battles and Losing Wars, 81 Yale L.J. 1303, 1328-1329 (1972).

54. *Id.*, at 1324 and n. 102.

55. *Id.*, at 1328.

56. Each of appellees' possible theories of wealth discrimination is founded on the assumption that the quality of education varies directly with the amount of funds expended on it and that, therefore, the difference in quality between two schools

can be determined simplistically by looking at the difference in per-pupil expenditures. This is a matter of considerable dispute among educators and commentators. See nn. 86 and 101, *infra*.

57. *E.g.*, *Ballock v. Carter*, 405 U.S. at 137, 149, 92 S.Ct. at 852, 858; *Mayer v. City of Chicago*, 404 U.S. at 194, 92 S.Ct. at 414; *Draper v. Washington*, 372 U.S. at 495-496, 83 S.Ct. at 778-779; *Douglas v. California*, 372 U.S. at 357, 83 S.Ct. at 816.

the infinite variables affecting the educational process, can any system assure equal quality of education except in the most relative sense. Texas asserts that the Minimum Foundation Program provides an "adequate" education for all children in the State. By providing 12 years of free public-school education, and by assuring teachers, books, transportation, and operating funds, the Texas Legislature has endeavored to "guarantee, for the welfare of the state as a whole, that all people shall have at least an adequate program of education. This is what is meant by 'A Minimum Foundation Program of Education.'" ⁵⁸ The State repeatedly asserted in its briefs in this Court that it has fulfilled this desire and that it now assures "every child in every school district an adequate education." ⁵⁹ No proof was offered at trial persuasively discrediting or refuting the State's assertion.

¹²⁵ 1 For these two reasons—the absence of any evidence that the financing system discriminates against any definable category of "poor" people or that it results in the absolute deprivation of education—the disadvantaged class is not susceptible of identification in traditional terms.⁶⁰

As suggested above, appellees and the District Court may have embraced a second or third approach, the second of which might be characterized as a theo-

ry of relative or comparative discrimination based on family income. Appellees sought to prove that a direct correlation exists between the wealth of families within each district and the expenditures therein for education. That is, along a continuum, the poorer the family the lower the dollar amount of education received by the family's children.

The principal evidence adduced in support of this comparative-discrimination claim is an affidavit submitted by Professor Joele S. Berke of Syracuse University's Educational Finance Policy Institute. The District Court, relying in major part upon this affidavit and apparently accepting the substance of appellees' theory, ¹²⁶ noted, first, a positive correlation between the wealth of school districts, measured in terms of assessable property per pupil, and their levels of per-pupil expenditures. Second, the court found a similar correlation between district wealth and the personal wealth of its residents, measured in terms of median family income. 337 F. Supp., at 282 n. 3.

If, in fact, these correlations could be sustained, then it might be argued that expenditures on education—equated by appellees to the quality of education—are dependent on personal wealth. Appellees' comparative-discrimination theory would still face serious unanswered

58. Gilmer-Aikin Committee, *supra*, n. 15, at 13. Indeed, even though local funding has long been a significant aspect of educational funding, the State has always viewed providing an acceptable education as one of its primary functions. See Texas State Bd. of Educ., *supra*, n. 11, at 1, 7.

59. Brief for Appellants 35; Reply Brief for Appellants 1.

60. An educational financing system might be hypothesized, however, in which the analogy to the wealth discrimination cases would be considerably closer. If elementary and secondary education were made available by the State only to those able to pay a tuition assessed against

each pupil, there would be a clearly defined class of "poor" people—definable in terms of their inability to pay the prescribed sum—who would be absolutely precluded from receiving an education. That case would present a far more compelling set of circumstances for judicial assistance than the case before us today. After all, Texas has undertaken to do a good deal more than provide an education to those who can afford it. It has provided what it considers to be an adequate base education for all children and has attempted, though imperfectly, to ameliorate by state funding and by the local assessment program the disparities in local tax resources.

questions, including whether a bare positive correlation or some higher degree of correlation⁶¹ is necessary to provide a basis for concluding that the financing system is designed to operate to the peculiar disadvantage of the comparatively poor,⁶² and whether a class of this size and diversity could ever claim the special protection accorded "suspect" classes. These questions need not be addressed in this case, however, since appellees' proof fails to support their allegations or the District Court's conclusions.

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Professor Berke's affidavit is based on a survey of approximately 10% of the school districts in Texas. His findings, previously set out in the margin,⁶³ show only that the wealthiest few districts in the sample have the highest median family incomes and spend the most on education, and that the several poorest districts have the lowest family incomes and devote the least amount of money to education. For the remainder of the districts—96 districts composing almost 90% of the sample—the correla-

tion is inverted, i. e., the districts that spend next to the most money on education are populated by families having next to the lowest median family incomes while the districts spending the least have the highest median family incomes. It is evident that, even if the conceptual questions were answered favorably to appellees, no factual basis exists upon which to found a claim of comparative wealth discrimination.⁶⁴

This brings us, then, to the third way in which the classification scheme might be defined—*district* wealth discrimination. Since the only correlation indicated by the evidence is between district property wealth and expenditures, it may be argued that discrimination might be found without regard to the individual income characteristics of district residents. Assuming a perfect correlation between district property wealth and expenditures from top to bottom, the disadvantaged class might be viewed as encompassing every child in every district except the district that has the most assessable wealth and spends the

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61. Also, it should be recognized that median income statistics may not define with any precision the status of individual families within any given district. A more dependable showing of comparative wealth discrimination would also examine factors such as the average income, the mode, and the concentration of poor families in any district.

62. Cf. *Jefferson v. Hackney*, 406 U.S. 535, 547-549, 92 S.Ct. 1724, 1732-1733, 72 L.Ed.2d 285 (1972); Ely, *Legislative and Administrative Motivation in Constitutional Law*, 79 Yale L.J. 1205, 1258-1259 (1970); Simon, *The School Finance Decisions: Collective Bargaining and Future Finance Systems*, 82 Yale L.J. 409, 439-440 (1973).

63. *Supra*, at 1287 n. 38.

64. Studies in other States have also questioned the existence of any dependable

correlation between a district's wealth measured in terms of assessable property and the collective wealth of families residing in the district measured in terms of median family income. *Ridenour & Ridenour, Serrano v. Priest: Wealth and Kansas School Finance*, 20 Kan.L. 213, 225 (1972) ("it can be argued that there exists in Kansas almost an inverse correlation: districts with highest income per pupil have low assessed value per pupil, and districts with high assessed value per pupil have low income per pupil"); Davis, *Taxpaying Ability: A Study of the Relationship Between Wealth and Income in California Counties*, in *The Challenge of Change in School Finance*, 10th Nat. Educational Assn. Conf. on School Finance 199 (1967); Note, 81 Yale L.J., *supra*, n. 53. See also Goldstein, *supra*, n. 38, at 522-527.

most on education.⁶⁵ Alternatively, as suggested in Mr. Justice MARSHALL's dissenting opinion, *post*, at 1329, the class might be defined more restrictively to include children in districts with assessable property which falls below the statewide average, or median, or below some other artificially defined level.

However described, it is clear that appellees' suit asks this Court to extend its most exacting scrutiny to review a system that allegedly discriminates against a large, diverse, and amorphous class, unified only by the common factor of residence in districts that happen to have less taxable wealth than other districts.⁶⁶ The system of alleged discrimination and the class it defines have none of the traditional indicia of suspectness; the class is not saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process.

[4] We thus conclude that the Texas system does not operate to the peculiar disadvantage of any suspect class. But in recognition of the fact that this Court has never heretofore held that wealth discrimination alone provides an adequate basis for invoking strict scrutiny, appellees have not relied solely on this contention.⁶⁷ They also assert that the State's system impermissibly interferes with the exercise of a "fundamental" right and that accordingly the prior decisions of this Court require the application of the strict standard of judicial review. *Graham v. Richardson*, 403 U.S. 365, 375-376, 91 S.Ct. 1848, 1853-1854, 29 L.Ed.2d 534 (1971); *Kramer v. Union Free School District*, 395 U.S. 621, 89 S.Ct. 1886, 23 L.Ed.2d 583 (1969); *Shapiro v. Thompson*, 394 U.S. 618, 89 S.Ct. 1322, 22 L.Ed.2d 600 (1969). It is this question—whether education is a fundamental right, in the sense that it is among the rights and liberties protected by the Constitution—which has so consumed the attention of courts and commentators in recent years.⁶⁸

65. Indeed, this is precisely how the plaintiffs in *Serrano v. Priest* defined the class they purported to represent: "Plaintiff children claim to represent a class consisting of all public school pupils in California, 'except children in that school district . . . which . . . affords the greatest educational opportunity of all school districts within California.'" 5 Cal.3d, at 589, 96 Cal.Rptr. at 604, 487 P.2d, at 1244. See also *Van Dusen v. Hatfield*, 334 F.Supp. at 873.

66. Appellees, however, have avoided describing the Texas system as one resulting merely in discrimination between districts *per se* since this Court has never questioned the State's power to draw reasonable distinctions between political subdivisions within its borders. *Griffin v. County School Board of Prince Edward County*, 377 U.S. 218, 230-231, 84 S.Ct. 1226, 1232-1233, 12 L.Ed.2d 256 (1964); *McGowan v. Maryland*, 366 U.S. 420, 427, 81 S.Ct. 1101, 1105, 6 L.Ed.2d 393 (1961); *Nashburg v. Maryland*, 346 U.S.

545, 552, 74 S.Ct. 280, 284, 98 L.Ed. 281 (1954).

67. *E.g.*, *Harper v. Virginia Bd. of Elections*, 383 U.S. 663, 86 S.Ct. 1079, 16 L.Ed.2d 169 (1966); *United States v. Kras*, 409 U.S. 434, 93 S.Ct. 631, 34 L.Ed. 2d 626 (1973). See Mr. Justice MARSHALL's dissenting opinion, *post*, at 1342.

68. See *Serrano v. Priest*, *supra*; *Van Dusen v. Hatfield*, *supra*; *Robinson v. Cahill*, 118 N.J.Super. 223, 287 A.2d 187, (1972); *Unos, Chino & Sugarman, supra*, n. 13, at 329-393; *Goldstein, supra*, n. 38, at 534-541; *Vieira, Unequal Educational Expenditures: Some Minority Views on Serrano v. Priest*, 37 *McL. Rev.* 617, 618-621 (1972); *Comment, Educational Financing, Equal Protection of the Laws, and the Supreme Court*, 70 *Mich.L.Rev.* 1324, 1335-1342 (1972); *Note, The Public School Financing Cases: Interdistrict Inequalities and Wealth Discrimination*, 14 *Ariz.L.Rev.* 88, 129-124 (1972).

In *Brown v. Board of Education*, 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873 (1954), a unanimous Court recognized that "education is perhaps the most important function of state and local governments." *Id.*, at 493, 74 S.Ct., at 691. What was said there in the context of racial discrimination has lost none of its vitality with the passage of time:

"Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms." *Ibid.*

This theme, expressing an abiding respect for the vital role of education in a free society, may be found in numerous opinions of Justices of this Court writing both before and after *Brown* was decided. *Wisconsin v. Yoder*, 406 U.S. 205, 213, 92 S.Ct. 1526, 1532, 32 L.Ed.2d 234 (Burger, C.J.), 237, 238-239, 92 S.Ct. 1544-1545 (White, J.), (1972); *Abington School Dist. v. Schempp*, 374 U.S. 203, 230, 83 S.Ct. 1560, 1575, 10 L.Ed.2d 844 (1963) (Brennan, J.); *People of State of Illinois ex rel. McCollum v. Board of Education*, 333 U.S. 203, 212, 68 S.Ct. 461, 465, 92 L.Ed. 649 (1948) (Frankfurter, J.); *Pierce v. Society of Sisters*, 268 U.S. 510, 45 S.Ct. 571, 69 L.Ed. 1070 (1925); *Meyer v. Nebraska*,

262 U.S. 390, 43 S.Ct. 625, 67 L.Ed. 1042 (1923); *Interstate Consolidated Street R. Co. v. Massachusetts*, 207 U.S. 79, 28 S.Ct. 26, 52 L.Ed. 111 (1907).

Nothing this Court holds today in any way detracts from our historic dedication to public education. We are in complete agreement with the conclusion of the three-judge panel below that "the grave significance of education both to the individual and to our society" cannot be doubted.⁶⁹ But the importance of a service performed by the State does not determine whether it must be regarded as fundamental for purposes of examination under the Equal Protection Clause. Mr. Justice Harlan, dissenting from the Court's application of strict scrutiny to a law impinging upon the right of interstate travel, admonished that "[v]irtually every state statute affects important rights." *Shapiro v. Thompson*, 394 U.S., at 655, 661, 89 S.Ct., at 1342, 1345. In his view, if the degree of judicial scrutiny of state legislation fluctuated, depending on a majority's view of the importance of the interest affected, we would have gone "far toward making this Court a 'super-legislature.'" *Ibid.* We would, indeed, then be assuming a legislative role and one for which the Court lacks both authority and competence. But Mr. Justice Stewart's response in *Shapiro* to Mr. Justice Harlan's concern correctly articulates the limits of the fundamental-rights rationale employed in the Court's equal protection decisions:

"The Court today does not 'pick out particular human activities, characterize them as 'fundamental,' and give them added protection'
To the contrary, the Court simply recognizes, as it must, an established constitutional right, and gives to that right no less protection than the Constitution itself demands." *Id.*, at 642, 89 S.Ct., at 1335. (Emphasis in original.)

Mr. Justice Stewart's statement serves to underline what the opinion of the Court in *Shapiro* makes clear. In subjecting to strict judicial scrutiny state welfare eligibility statutes that imposed a one-year durational residency requirement as a precondition to receiving AFDC benefits, the Court explained:

"[I]n moving from State to State . . . appellees were exercising a constitutional right, and any classification which serves to penalize the exercise of that right, unless shown to be necessary to promote a compelling governmental interest, is unconstitutional." *Id.*, at 634, 89 S.Ct., at 1331. (Emphasis in original.)

112 The right to interstate travel had long been recognized as a right of constitutional significance,⁷⁰ and the Court's decision, therefore, did not require an ad hoc determination as to the social or economic importance of that right.⁷¹

Lindsey v. Normet, 405 U.S. 56, 92 S.Ct. 862, 31 L.Ed.2d 36 (1972), decided only last Term, firmly reiterates that social importance is not the critical determinant for subjecting state legislation to strict scrutiny. The complainants in that case, involving a challenge to the procedural limitations imposed on tenants in suits brought by landlords under Oregon's Forcible Entry and Wrongful Detainer Law, urged the Court to examine the operation of the statute under "a more stringent standard than mere rationality." *Id.*, at 73, 92 S.Ct., at 874. The tenants argued that the statutory

limitations implicated "fundamental interests which are particularly important to the poor," such as the "need for decent shelter" and the "right to retain peaceful possession of one's home." *Ibid.* Mr. Justice White's analysis, in his opinion for the Court is instructive:

"We do not denigrate the importance of decent, safe and sanitary housing. But the Constitution does not provide judicial remedies for every social and economic ill. We are unable to perceive in that document any constitutional guarantee of access to dwellings of a particular quality or any recognition of the right of a tenant to occupy the real property of his landlord beyond the term of his lease, without the payment of rent

Absent constitutional mandate, the assurance of adequate housing and the definition of landlord-tenant relationships are legislative, not judicial, functions." *Id.*, at 74, 92 S.Ct., at 874. (Emphasis supplied.)

Similarly, in *Dandridge v. Williams*, 397 U.S. 471, 90 S.Ct. 1153, 25 L.Ed.2d 491 (1970), the Court's explicit recognition of the fact that the "administration of public welfare assistance involves the most basic economic needs of impoverished human beings," *id.*, at 485, 90 S.Ct., at 1162,⁷² provided no basis for departing from the settled mode of constitutional analysis of legislative classifications involving questions of economic and social policy. As in the

70. *E. g.*, *United States v. Guest*, 383 U.S. 745, 757-759, 86 S.Ct. 1170, 1177-1179, 16 L.Ed.2d 239 (1966); *Oregon v. Mitchell*, 400 U.S. 112, 229, 237-238, 91 S.Ct. 260, 317, 321-322, 27 L.Ed.2d 272 (1970) (opinion of Brennan, White, and Marshall, J.J.).

71. After *Dandridge v. Williams*, 397 U.S. 471, 90 S.Ct. 1153, 25 L.Ed.2d 491 (1970), there could be no lingering question about the constitutional foundation for the Court's holding in *Shapiro*. In *Dandridge*, the Court applied the rational basis test in reviewing Maryland's maximum family grant provision under its AFDC program. A federal district court held the provision unconstitutional, applying a stricter standard of review. In the course of reversing the lower court, the Court distinguished *Shapiro* properly on the ground that in that case "the Court found state interference with the constitutionally protected freedom of interstate travel." *Id.*, at 484 n. 16, 90 S.Ct., at 1161.

72. The Court refused to apply the strict scrutiny test despite its contemporaneous recognition in *Goldberg v. Kelly*, 397 U.S. 254, 264, 90 S.Ct. 1011, 1018, 25 L.Ed.2d 287 (1970) that "welfare provides the means to obtain essential food, clothing, housing, and medical care."

72. The Court refused to apply the strict scrutiny test despite its contemporaneous recognition in *Goldberg v. Kelly*, 397 U.S. 254, 264, 90 S.Ct. 1011, 1018, 25 L.Ed.2d 287 (1970) that "welfare provides the means to obtain essential food, clothing, housing, and medical care."

case of housing, the central importance of welfare benefits to the poor was not an adequate foundation for requiring the State to justify its law by showing some compelling state interest. See also *Jefferson v. Hackney*, 406 U.S. 535, 92 S.Ct. 1724, 32 L.Ed.2d 285 (1972); *Richardson v. Belcher*, 404 U.S. 78, 92 S.Ct. 254, 30 L.Ed.2d 231 (1971).

[5] The lesson of these cases in addressing the question now before the Court is plain. It is not the province of this Court to create substantive constitutional rights in the name of guaranteeing equal protection of the laws. Thus, the key to discovering whether education is "fundamental" is not to be found in comparisons of the relative societal significance of education as opposed to subsistence or housing. Nor is it to be found by weighing whether education is as important as the right to

travel. Rather, the answer lies in assessing whether there is a right to education explicitly or implicitly guaranteed by the Constitution. *Eisenstadt v. Baird*, 405 U.S. 438, 92 S.Ct. 1029, 31 L.Ed.2d 349 (1972);⁷³ *Dunn v. Blumstein*, 405 U.S. 330, 92 S.Ct. 995, 31 L.Ed.2d 274 (1972);⁷⁴ *Police Dept. of City of Chicago v. Mosley*, 408 U.S. 92, 92 S.Ct. 2286, 33 L.Ed.2d 212 (1972);⁷⁵ *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535, 62 S.Ct. 1110, 86 L.Ed. 1655 (1942).⁷⁶

[6, 7] Education, of course, is not among the rights afforded explicit protection under our Federal Constitution. Nor do we find any basis for saying it is implicitly so protected. As we have said, the undisputed importance of education will not alone cause this Court to depart from the usual standard for reviewing a State's social and economic

73. In *Eisenstadt*, the Court struck down a Massachusetts statute that prohibited the distribution of contraceptive devices, finding that the law failed "to satisfy even the more lenient equal protection standard." 405 U.S., at 447 n. 7, 92 S.Ct., at 1035. Nevertheless, in *dictum*, the Court recited the correct form of equal protection analysis: "[I]f we were to conclude that the Massachusetts statute impinges upon fundamental freedoms under *Griseff* [v. Connecticut, 381 U.S. 479, 85 S.Ct. 1678, 14 L.Ed.2d 510 (1965)], the statutory classification would have to be not merely *rationally related* to a valid public purpose but *necessary* to the achievement of a *compelling* state interest." *Ibid.* (emphasis in original).

74. *Dunn* fully embraces this Court's voting rights cases and explains that "this Court has made clear that a citizen has a *constitutionally protected right* to participate in elections on an equal basis with other citizens in the jurisdiction." 405 U.S., at 336, 92 S.Ct., at 1000 (emphasis supplied). "The constitutional underpinnings of the right to equal treatment in the voting process can no longer be doubted even though, as the Court noted in *Harper v. Virginia Bd. of Elections*, 383 U.S., at 645, 86 S.Ct., at 1080, 'the right to vote in state elections is nowhere expressly mentioned.'" See *Oregon v. Mitchell*, 400 U.S., at 135, 138-144, 91 S.Ct., at 270, 271-275 (Douglas, J.) 229, 241-242.

91 S.Ct. 317, 323-324 (Brennan, White, and Marshall, JJ.); *Bullock v. Carter*, 405 U.S., at 140-144, 92 S.Ct., at 854-856; *Kramer v. Union Free School District*, 395 U.S. 621, 625-630, 89 S.Ct. 1886, 1888-1889, 23 L.Ed.2d 583 (1969); *Williams v. Rhodes*, 393 U.S. 23, 29, 30-31, 89 S.Ct. 5, 9, 10-11, 21 L.Ed.2d 24 (1968); *Reynolds v. Sims*, 377 U.S. 533, 551-562, 84 S.Ct. 1302, 1377-1382, 12 L.Ed.2d 506 (1964); *Gray v. Sanders*, 372 U.S. 368, 379-381, 83 S.Ct. 801, 807-809, 9 L.Ed.2d 821 (1963).

75. In *Mosley*, the Court struck down a Chicago antipicketing ordinance that exempted labor picketing from its prohibitions. The ordinance was held invalid under the Equal Protection Clause after subjecting it to careful scrutiny and finding that the ordinance was not narrowly drawn. The stricter standard of review was appropriately applied since the ordinance was one "affecting First Amendment interests." 408 U.S., at 101, 92 S.Ct., at 2293.

76. *Skinner* applied the standard of close scrutiny to a state law permitting forced sterilization of "habitual criminals." Implicit in the Court's opinion is the recognition that the right of procreation is among the rights of personal privacy protected under the Constitution. See *Roe v. Wade*, 410 U.S. 113, 152, 93 S.Ct. 705, 726, 35 L.Ed.2d 147 (1973).

legislation. It is appellees' contention, however, that education is distinguishable from other services and benefits provided by the State because it bears a peculiarly close relationship to other rights and liberties accorded protection under the Constitution. Specifically, they insist that education is itself a fundamental personal right because it is essential to the effective exercise of First Amendment freedoms and to intelligent utilization of the right to vote. In asserting a nexus between speech and education, appellees urge that the right to speak is meaningless unless the speaker is capable of articulating his thoughts intelligently and persuasively. The "marketplace of ideas" is an empty forum for those lacking basic communicative tools. Likewise, they argue that the corollary right to receive information⁷⁷ becomes little more than a hollow privilege when the recipient has not been taught to read, assimilate, and utilize available knowledge.

[8,9] A similar line of reasoning is pursued with respect to the right to vote.⁷⁸ Exercise of the franchise, it is contended, cannot be divorced from the educational foundation of the voter. The electoral process, if reality is to

conform to the democratic ideal, depends on an informed electorate; a voter cannot cast his ballot intelligently unless his reading skills and thought processes have been adequately developed.

[10] We need not dispute any of these propositions. The Court has long afforded zealous protection against unjustifiable governmental interference with the individual's rights to speak and to vote. Yet we have never presumed to possess either the ability or the authority to guarantee to the citizenry the most effective speech or the most informed electoral choice. That these may be desirable goals of a system of freedom of expression and of a representative form of government is not to be doubted.⁷⁹ These are indeed goals to be pursued by a people whose thoughts and beliefs are freed from governmental interference. But they are not values to be implemented by judicial intrusion into otherwise legitimate state activities.

[11] Even if it were conceded that some identifiable quantum of education is a constitutionally protected prerequisite to the meaningful exercise of either right, we have no indication that the present levels of educational expendi-

77. See, e.g., *Red Lion Broadcasting Co. v. FCC.* 395 U.S. 367, 389-390, 89 S.Ct. 1794, 1806-1807, 23 L.Ed.2d 371 (1969); *Stanley v. Georgia*, 394 U.S. 557, 564, 89 S.Ct. 1243, 1247, 22 L.Ed.2d 542 (1969); *Lamont v. Postmaster General*, 381 U.S. 301, 306-307, 85 S.Ct. 1493, 1496-1497, 14 L.Ed.2d 398 (1965).

78. Since the right to vote, *per se*, is not a constitutionally protected right, we assume that appellees' references to that right are simply shorthand references to the protected right, implicit in our constitutional system, to participate in state elections on an equal basis with other qualified voters whenever the State has adopted an elective process for determining who will represent any segment of the State's population. See n. 74, *supra*.

79. The States have often pursued their entirely legitimate interest in assuring "intelligent exercise of the franchise," *Katzenbach v. Morgan*, 384 U.S. 641, 655,

86 S.Ct. 1717, 1726, 16 L.Ed.2d 828 (1966), through such devices as literacy tests and age restrictions on the right to vote. See *ibid.*; *Oregon v. Mitchell*, 400 U.S. 112, 91 S.Ct. 260, 27 L.Ed.2d 272 (1970). And, where those restrictions have been found to promote intelligent use of the ballot without discriminating against those racial and ethnic minorities previously deprived of an equal educational opportunity, this Court has upheld their use. Compare *Lassiter v. Northampton County Bd. of Elections*, 360 U.S. 45, 79 S.Ct. 985, 3 L.Ed.2d 1072 (1959), with *Oregon v. Mitchell*, *supra*, 400 U.S., at 133, 91 S.Ct., at 269 (Black, J.), 135, 144-147, 91 S.Ct. 270, 274-276 (Douglas, J.), 152, 216-217, 91 S.Ct. 279, 310-311 (Harlan, J.), 229, 231-236, 91 S.Ct. 317, 318-321 (Brennan, White, and Marshall, J.J.), 281, 282-284, 91 S.Ct. 343-344 (Stewart, J.), and *Gaston County v. United States*, 395 U.S. 285, 89 S.Ct. 1720, 23 L.Ed.2d 390 (1969).

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127. 1 There in Texas provide an education that falls short. Whatever merit appellees' argument might have if a State's financing system occasioned an absolute denial of educational opportunities to any of its children, that argument provides no basis for finding an interference with fundamental rights where only relative differences in spending levels are involved and where—as is true in the present case—no charge fairly could be made that the system fails to provide each child with an opportunity to acquire the basic minimal skills necessary for the enjoyment of the rights of speech and of full participation in the political process.

Furthermore, the logical limitations on appellees' nexus theory are difficult to perceive. How, for instance, is education to be distinguished from the significant personal interests in the basics of decent food and shelter? Empirical examination might well buttress an assumption that the ill-fed, ill-clothed, and ill-housed are among the most ineffective participants in the political process, and that they derive the least enjoyment from the benefits of the First Amendment.⁸⁰ If so, appellees' thesis would cast serious doubt on the authority of *Dandridge v. Williams*, *supra* and *Lindsey v. Normet*, *supra*.

[12] We have carefully considered each of the arguments supportive of the District Court's finding that education is a fundamental right or liberty and have found those arguments unpersuasive. In one further respect we find this a particularly inappropriate case in which to subject state action to strict judicial scrutiny. The present case, in

another basic sense, is significantly different from any of the cases in which the Court has applied strict scrutiny to state or federal legislation touching upon constitutionally protected rights. Each of our prior cases involved legislation which "deprived," "infringed," or "interfered" with the free exercise of some such fundamental personal right or liberty. See *Skinner v. Oklahoma, ex rel. Williamson*, *supra*, 316 U.S. at 536, 62 S.Ct. at 1111; *Shapiro v. Thompson*, *supra*, 394 U.S. at 634, 89 S.Ct. at 1331; *Dunn v. Blumstein*, *supra*, 405 U.S. at 338-343, 92 S.Ct. at 1001-1004. A critical distinction between those cases and the one now before us lies in what Texas is endeavoring to do with respect to education. Mr. Justice Brennan, writing for the Court in *Katzenbach v. Morgan*, 384 U.S. 641, 86 S.Ct. 1717, 16 L.Ed.2d 828 (1966), expresses well the salient point:⁸¹

"This is not a complaint that Congress . . . has unconstitutionally denied or diluted anyone's right to vote but rather that Congress violated the Constitution by not extending the relief effected [to others similarly situated]

"[The federal law in question] does not restrict or deny the franchise but in effect extends the franchise to persons who otherwise would be denied it by state law. . . . We need only decide whether the challenged limitation on the relief effected . . . was permissible. In deciding that question, the principle that calls for the closest scrutiny of distinctions in laws denying fundamental rights

80. See Schoettle, *The Equal Protection Clause in Public Education*, 71 *Col.L.Rev.* 1355, 1389-1390 (1971); *Vieira, supra*, n. 68, at 622-623; Comment, *Tenant Interest Representation: Proposal for a National Tenants' Association*, 47 *Tex.L. Rev.* 1169, 1172-1173, n. 61 (1969).

81. *Katzenbach v. Morgan* involved a challenge by registered voters in New York City to a provision of the Voting Rights Act of 1965 that prohibited enforcement of a state law calling for English literacy

tests for voting. The law was suspended as to residents from Puerto Rico who had completed at least six years of education at an "American-flag" school in that country even though the language of instruction was other than English. This Court upheld the questioned provision of the 1965 Act over the claim that it discriminated against those with a sixth-grade education obtained in non-English-speaking schools other than the ones designated by the federal legislation.

is inapplicable; for the distinction challenged by appellees is presented only as a limitation on a reform measure aimed at eliminating an existing barrier to the exercise of the franchise. Rather, in deciding the constitutional propriety of the limitations in such a reform measure we are guided by the familiar principles that a 'statute is not invalid under the Constitution because it might have gone farther than it did,' that a legislature need not 'strike at all evils at the same time,' and that 'reform may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind' . . . *Id.*, at 656-657, 86 S. Ct., at 1727. (Emphasis in original.)

The Texas system of school financing is not unlike the federal legislation involved in *Katzenbach* in this regard. Every step leading to the establishment of the system Texas utilizes today—including the decisions permitting localities to tax and expend locally, and creating and continuously expanding the state aid—was implemented in an effort to extend public education and to improve its quality.⁸² Of course, every reform that benefits some more than others may be criticized for what it fails to accomplish. But we think it plain that, in substance, the thrust of the Texas system is affirmative and reformatory and, therefore, should be scrutinized under judicial principles sensitive to the nature of the State's efforts and to the rights reserved to the States under the Constitution.⁸³

[13] It should be clear, for the reasons stated above and in accord with the prior decisions of this Court, that this is not a case in which the challenged state action must be subjected to the searching judicial scrutiny reserved for laws that create suspect classifications or impinge upon constitutionally protected rights.

We need not rest our decision, however, solely on the inappropriateness of the strict-scrutiny test. A century of Supreme Court adjudication under the Equal Protection Clause affirmatively supports the application of the traditional standard of review, which requires only that the State's system be shown to bear some rational relationship to legitimate state purposes. This case represents far more than a challenge to the manner in which Texas provides for the education of its children. We have here nothing less than a direct attack on the way in which Texas has chosen to raise and disburse state and local tax revenues. We are asked to condemn the State's judgment in conferring on political subdivisions the power to tax local property to supply revenues for local interests. In so doing, appellees would have the Court intrude in an area in which it has traditionally deferred to state legislatures.⁸⁴ This Court has often admonished against such interferences with the State's fiscal policies under the Equal Protection Clause:

"The broad discretion as to classification possessed by a legislature in the field of taxation has long been recognized. . . . [T]he passage

82. Cf. *Meyer v. Nebraska*, 262 U.S. 390, 43 S.Ct. 825, 67 L.Ed. 1042 (1923); *Pierre v. Society of Sisters*, 268 U.S. 510, 45 S.Ct. 571, 69 L.Ed. 1070 (1925); *Hargrave v. Kirk*, 313 F.Supp. 944 (M.D. Fla.1970), vacated, 401 U.S. 478, 91 S.Ct. 856, 28 L.Ed.2d 196 (1971).

83. See *Schultz v. Kuebel*, 404 U.S. 357, 92 S.Ct. 479, 30 L.Ed.2d 502 (1971); *McDonagh v. Board of Election Com'rs*, 394

U.S. 802, 89 S.Ct. 1404, 22 L.Ed.2d 739 (1969).

84. See, e.g., *Hell's Gap R. Co. v. Pennsylvania*, 134 U.S. 232, 10 S.Ct. 533, 33 L.Ed. 822 (1890); *Carmichael v. Southern Coal & Coke Co.*, 301 U.S. 495, 508-509, 57 S.Ct. 868, 871-872, 81 L.Ed. 1245 (1937); *Allied Stores of Ohio, Inc. v. Bowers*, 358 U.S. 522, 79 S.Ct. 437, 3 L.Ed.2d 450 (1959).

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of time has only served to underscore the wisdom of that recognition of the large area of discretion which is needed by a legislature in formulating sound tax policies.

It has . . . been pointed out that in taxation, even more than in other fields, legislatures possess the greatest freedom in classification. Since the members of a legislature necessarily enjoy a familiarity with local conditions which this Court cannot have, the presumption of constitutionality can be overcome only by the most explicit demonstration that a classification is a hostile and oppressive discrimination against particular persons and classes.

"Madden v. Kentucky, 309 U.S. 83, 87-88, 60 S.Ct. 406, 408, 84 L.Ed. 590 (1940).

See also *Lehnhausen v. Lake Shore Auto Parts Co.*, 410 U.S. 356, 93 S.Ct. 1001, 35 L.Ed.2d 351 (1973); *Wisconsin v. J. C. Penney Co.*, 311 U.S. 435, 445, 61 S.Ct. 246, 250, 85 L.Ed. 267 (1940).

Thus, we stand on familiar grounds when we continue to acknowledge that the Justices of this Court lack both the expertise and the familiarity with local problems so necessary to the making of wise decisions with respect to the raising and disposition of public revenues. Yet, we are urged to direct the States either to alter drastically the present sys-

tem or to throw out the property tax altogether in favor of some other form of taxation. No scheme of taxation, whether the tax is imposed on property, income, or purchases of goods and services, has yet been devised which is free of all discriminatory impact. In such a complex arena in which no perfect alternatives exist, the Court does well not to impose too rigorous a standard of scrutiny lest all local fiscal schemes become subjects of criticism under the Equal Protection Clause.⁸⁵

In addition to matters of fiscal policy, this case also involves the most persistent and difficult questions of educational policy, another area in which this Court's lack of specialized knowledge and experience counsels against premature interference with the informed judgments made at the state and local levels. Education, perhaps even more than welfare assistance, presents a myriad of "intractable economic, social, and even philosophical problems." *Dandridge v. Williams*, 397 U.S. at 487, 90 S.Ct. at 1163. The very complexity of the problems of financing and managing a statewide public school system suggests that "there will be more than one constitutionally permissible method of solving them," and that, within the limits of rationality, "the legislature's efforts to tackle the problems" should be

85. Those who urge that the present system be invalidated offer little guidance as to what type of school financing should replace it. The most likely result of rejection of the existing system would be statewide financing of all public education with funds derived from taxation of property or from the adoption or expansion of sales and income taxes. See *Simon, supra*, n. 62. The authors of *Private Wealth and Public Education*, *supra*, n. 43, at 201-242, suggest an alternative scheme, known as "district power equalizing." In simplest terms, the State would guarantee that at any particular rate of property taxation the district would receive a stated number of dollars regardless of the district's tax base. To finance the subsidies to "poorer" districts, funds would be taken away from the "wealthier" districts that, because of their higher property values, collect more than the stated

amount at any given rate. This is not the place to weigh the arguments for and against "district power equalizing," beyond noting that commentators are in disagreement as to whether it is feasible, how it would work, and indeed whether it would violate the equal protection theory underlying *Appellee's* case. President's Commission on School Finance, *Schools, People, & Money* 32-33 (1972); *Barman & Brown, Some Reflections on Serrano v. Priest*, 49 J. Urban L. 701, 705-708 (1972); *Brest, Book Review*, 23 Stan.L.Rev. 591, 594-596 (1971); *Goldstein, supra*, n. 38, at 542-543; *Wise, School Finance Equalization Lawsuits: A Model Legislative Response*, 2 Yale Rev. of L. & Gov. Action 123, 125 (1971); *Sillard & White, Intrastate Inequalities in Public Education: The Case for Judicial Relief Under the Equal Protection Clause*, 1070 Wyo.L.Rev. 7, 29-30.

entitled to respect. *Jefferson v. Hackney*, 406 U.S., at 546-547, 92 S.Ct., at 1731. On even the most basic questions in this area the scholars and educational experts are divided. Indeed, one of the major sources of controversy concerns the extent to which there is a demonstrable correlation between educational expenditures and the quality of education⁸⁶—an assumed correlation underlying virtually every legal conclusion drawn by the District Court in this case. Related to the questioned relationship between cost and quality is the equally unsettled controversy as to the proper goals of a system of public education.⁸⁷ And the question regarding the most effective relationship between state boards of education and local school boards, in terms of their respective responsibilities and degrees of control, is now undergoing searching re-examination. The ultimate wisdom as to these and related problems of education is not likely to be divined for all time even by the scholars who now so earnestly debate the issues. In such circumstances, the judiciary is well advised to refrain from imposing on the States inflexible constitutional restraints that could circumscribe or handicap the continued research and experimentation so vital to finding even partial solutions to educational problems and to keeping abreast of ever-changing conditions.

[14, 15] It must be remembered, also, that every claim arising under the Equal Protection Clause has implications for

the relationship between national and state power under our federal system. Questions of federalism are always inherent in the process of determining whether a State's laws are to be accorded the traditional presumption of constitutionality, or are to be subjected instead to rigorous judicial scrutiny. While "[t]he maintenance of the principles of federalism is a foremost consideration in interpreting any of the pertinent constitutional provisions under which this Court examines state action,"⁸⁸ it would be difficult to imagine a case having a greater potential impact on our federal system than the one now before us, in which we are urged to abrogate systems of financing public education presently in existence in virtually every State.

The foregoing considerations buttress our conclusion that Texas' system of public school finance is an inappropriate candidate for strict judicial scrutiny. These same considerations are relevant to the determination whether that system, with its conceded imperfections, nevertheless bears some rational relationship to a legitimate state purpose. It is to this question that we next turn our attention.

III

The basic contours of the Texas school finance system have been traced at the outset of this opinion. We will now describe in more detail that system and how it operates, as these facts bear di-

86. The quality-cost controversy has received considerable attention. Among the notable authorities on both sides are the following: C. Jencks, *Inequality* (1972); C. Silberman, *Crisis in the Classroom* (1970); U.S. Office of Education, *Equality of Educational Opportunity* (1969) (the Coleman Report); On *Equality of Educational Opportunity* (F. Mosteller & D. Moynihan eds. 1972); J. Guthrie, G. Kleindorfer, H. Levin & R. Stout, *Schools and Inequality*; President's Commission on School Finance, *supra*, n. 85; Swanson, *The Cost-Quality Relationship, in The Challenge of Change in School Finance*, 10th Nat. Educational Assn. Conf. on School Finance 151 (1967).

87. See the results of the Texas Governor's Committee's statewide survey on the goals of education in that State. 1 Governor's Committee Report 59-68. See also Goldstein, *supra*, n. 38, at 519-522; Schneitke, *supra*, n. 80; authorities cited in n. 86, *supra*.

88. *Allied States of Ohio, Inc. v. Bowers*, 358 U.S. 522, 530, 532, 79 S.Ct. 437, 442, 444, 3 L.Ed.2d 480 (1959) (Brennan, J., concurring); *Karzenbach v. Morgan*, 384 U.S., at 659, 661, 86 S.Ct., at 1731, 1732 (Harlan, J., dissenting).

rectly upon the demands of the Equal Protection Clause.

Apart from federal assistance, each Texas school receives its funds from the State and from its local school district. On a statewide average, a roughly comparable amount of funds is derived from each source.⁸⁹ The State's contribution, under the Minimum Foundation Program, was designed to provide an adequate minimum educational offering in every school in the State. Funds are distributed to assure that there will be one teacher—compensated at the state-supported minimum salary—for every 25 students.⁹⁰ Each school district's other supportive personnel are provided for: one principal for every 30 teachers;⁹¹ one "special service" teacher—librarian, nurse, doctor, etc.—for every 20 teachers;⁹² superintendents, vocational instructors, counselors, and educators for exceptional children are also provided.⁹³ Additional funds are earmarked for current operating expenses, for student transportation,⁹⁴ and for free textbooks.⁹⁵

The program is administered by the State Board of Education and by the Central Education Agency, which also have responsibility for school accreditation⁹⁶ and for monitoring the statutory teacher-qualification standards.⁹⁷ As reflected by the 62% increase in funds allotted to the Edgewood School District over the last three years,⁹⁸ the State's financial contribution to education is steadily increasing.

None of Texas' school districts, however, has been content to rely alone on funds from the Foundation Program.

By virtue of the obligation to fulfill its Local Fund Assignment, every district must impose an ad valorem tax on property located within its borders. The Fund Assignment was designed to remain sufficiently low to assure that each district would have some ability to provide a more enriched educational program.⁹⁹ Every district supplements its Foundation grant in this manner. In some districts, the local property tax contribution is insubstantial, as in Edgewood where the supplement was only \$26 per pupil in 1967. In other districts, the local share may far exceed even the total Foundation grant. In part, local differences are attributable to differences in the rates of taxation or in the degree to which the market value for any category of property varies from its assessed value.¹⁰⁰ The greatest interdistrict disparities, however, are attributable to differences in the amount of assessable property available within any district. Those districts that have more property, or more valuable property, have a greater capability for supplementing state funds. In large measure, these additional local revenues are devoted to paying higher salaries to more teachers. Therefore, the primary distinguishing attributes of schools in property-affluent districts are lower pupil-teacher ratios and higher salary schedules.¹⁰¹

89. In 1970 Texas expended approximately \$2.1 billion for education and a little over one billion came from the Minimum Foundation Program. Texas Research League, *supra*, n. 20, at 2.

90. Tex. Educ. Code Ann. § 16.13 (1972); V.T.C.A.

91. *Id.* § 16.18.

92. *Id.* § 16.15.

93. *Id.* §§ 16.16, 16.17, 16.19.

94. *Id.* §§ 16.15, 16.51, 16.63.

95. *Id.* §§ 12.01, 12.03.

96. *Id.* § 33.23(a)-(5).

97. *Id.* § 16.501 et seq.

98. See *supra* at 1296.

99. Gilmer-Aikin Committee, *supra*, n. 15, at 15.

100. There is no uniform statewide assessment practice in Texas. Commercial property, for example, might be assessed at 20% of market value in one county and at 50% in another. 5 Governor's Committee Report 25-26; Berke, Carnevale, Morgan & White, *supra*, n. 20, at 662-667, n. 10.

101. Texas Research League, *supra*, n. 20, at 18. Texas in this regard is not unlike most other States. One commentator

¹⁴⁷ This, then, is the basic outline of the Texas school financing structure. Because of differences in expenditure levels occasioned by disparities in property tax income, appellees claim that children in less affluent districts have been made the subject of invidious discrimination. The District Court found that the State had failed even "to establish a reasonable basis" for a system that results in different levels of per-pupil expenditure. 337 F.Supp., at 284. We disagree.

¹⁴⁸ In its reliance on state as well as local resources, the Texas system is comparable to the systems employed in virtually every other State.¹⁰² The power to tax local property for educational purposes has been recognized in Texas at least

has observed that "disparities in expenditures appear to be largely explained by variations in teacher salaries." Simon, *supra*, n. 82, at 413.

As previously noted, see text accompanying n. 86, *supra*, the extent to which the quality of education varies with expenditure per pupil is debated inconclusively by the most thoughtful students of public education. While all would agree that there is a correlation up to the point of providing the recognized essentials in facilities and academic opportunities, the issues of greatest disagreement include the effect on the quality of education of pupil-teacher ratios and of higher teacher salary schedules. *E. g.*, Office of Education, *supra*, n. 86, at 316-319. The state funding in Texas is designed to assure, on the average, one teacher for every 25 students, which is considered to be a favorable ratio by most standards. Whether the minimum salary of \$6,000 per year is sufficient in Texas to attract qualified teachers may be more debatable, depending in major part upon the location of the school district. But there appear to be few empirical data that support the advantage of any particular pupil-teacher ratio or that document the existence of a dependable correlation between the level of public school teachers' salaries and the quality of their classroom instruction. An intractable problem in dealing with teachers' salaries is the absence, up to this time, of satisfactory techniques for judging their ability or performance. Relatively few school systems have merit plans of any kind, with the result that teachers' salaries are usually increased across the board in a way which

since 1883.¹⁰³ When the growth of commercial and industrial centers and accompanying shifts in population began to create disparities in local resources, Texas undertook a program calling for a considerable investment of state funds.

The "foundation grant" theory upon which Texas legislators and educators based the Gilmer-Aikin bills, was a product of the pioneering work of two New York educational reformers in the 1920's, George D. Strayer and Robert M. Haig.¹⁰⁴ Their efforts were devoted to establishing a means of guaranteeing a minimum statewide educational program without sacrificing the vital element of local participation. The Strayer-Haig thesis represented an accommodation be-

tempts to reward the least deserving on the same basis as the most deserving. Salaries are usually raised automatically on the basis of length of service and according to predetermined "steps," extending over 10- to 12-year periods.

¹⁰² President's Commission on School Finance, *supra*, n. 85, at 9. Until recently, Hawaii was the only State that maintained a purely state-funded educational program. In 1968, however, that State amended its educational finance statute to permit counties to collect additional funds locally and spend those amounts on its schools. The rationale for that recent legislative choice is instructive on the question before the Court today:

"Under existing law, counties are precluded from doing anything in this area, even to spend their own funds if they so desire. This corrective legislation is urgently needed in order to allow counties to go above and beyond the State's standards and provide educational facilities as good as the people of the counties want and are willing to pay for. Allowing local communities to go above and beyond established minimums to provide for their people encourages the best features of democratic government." Haw.Sess.Laws, 1968, Act 28, § 1.

¹⁰³ See text accompanying n. 7, *supra*.

¹⁰⁴ G. Strayer & R. Haig, *The Financing of Education in the State of New York* (1923). For a thorough analysis of the contribution of these reformers and of the prior and subsequent history of educational finance, see Chans, Chans & Sugarman, *supra*, n. 13, at 39-95.

tween these two competing forces. As articulated by Professor Coleman:

"The history of education since the industrial revolution shows a continual struggle between two forces: the desire by members of society to have educational opportunity for all children, and the desire of each family to provide the best education it can afford for its own children."¹⁰⁵

The Texas system of school finance is responsive to these two forces. While assuring a basic education for every child in the State, it permits and encourages a large measure of participation in and control of each district's schools at the local level. In an era that has witnessed a consistent trend toward centralization of the functions of government, local sharing of responsibility for public education has survived. The merit of local control was recognized last Term in both the majority and dissenting opinions in *Wright v. Council of the City of Emporia*, 407 U.S. 451, 92 S.Ct. 2196, 33 L.Ed.2d 51 (1972). Mr. Justice Stewart stated there that "[d]irect control over decisions vitally affecting the education of one's children is a need that is strongly felt in our society." *Id.*, at 469, 92 S.Ct., at 2206. The Chief Justice, in his dissent, agreed that "[l]ocal control is not only vital to continued public support of the schools, but it is of overriding importance from an educational standpoint as well." *Id.*, at 478, 92 S.Ct., at 2211.

The persistence of attachment to government at the lowest level where education is concerned reflects the depth of commitment of its supporters. In part,

local control means, as Professor Coleman suggests, the freedom to devote more money to the education of one's children. Equally important, however, is the opportunity it offers for participation in the decisionmaking process that determines how those local tax dollars will be spent. Each locality is free to tailor local programs to local needs. Pluralism also affords some opportunity for experimentation, innovation, and a healthy competition for educational excellence. An analogy to the Nation-State relationship in our federal system seems uniquely appropriate. Mr. Justice Brandeis identified as one of the peculiar strengths of our form of government each State's freedom to "serve as a laboratory; and try novel social and economic experiments."¹⁰⁶ No area of social concern stands to profit more from a multiplicity of viewpoints and from a diversity of approaches than does public education.

[16-20] Appellees do not question the propriety of Texas' dedication to local control of education. To the contrary, they attack the school-financing system precisely because, in their view, it does not provide the same level of local control and fiscal flexibility in all districts. Appellees suggest that local control could be preserved and promoted under other financing systems that resulted in more equality in educational expenditures. While it is no doubt true that reliance on local property taxation for school revenues provides less freedom of choice with respect to expenditures for some districts than for others,¹⁰⁷ the existence of "some inequality

105. J. Coleman, *Forward to Strayer & Haig, supra*, at vii.

106. *New State Ice Co. v. Liebmann*, 285 U.S. 262, 280, 311, 52 S.Ct. 371, 375, 387, 76 L.Ed. 717 (1932) (Brandeis, J., dissenting).

107. Mr. Justice WHITE suggests in his dissent that the Texas system violates the Equal Protection Clause because the means it has selected to effectuate its interest in local autonomy fail to guaran-

tee complete freedom of choice to every district. He places special emphasis on the statutory provision that establishes a maximum rate of \$1.50 per \$100 valuation at which a local school district may tax for school maintenance. *Tex. Educ. Code Ann.* § 2004(d) (1972). The maintenance rate in Edgewood when this case was litigated in the District Court was \$.55 per \$100, barely one-third of the allowable rate. (The tax rate of \$1.05 per \$100, see *supra*, at 1285, is the equalized rate for maintenance

ity" in the manner in which the State's rationale is achieved is not alone a sufficient basis for striking down the entire system. *McGowan v. Maryland*, 366 U.S. 420, 425-426, 81 S.Ct. 1101, 1104-1105, 6 L.Ed.2d 393 (1961). It may not be condemned simply because it imperfectly effectuates the State's goals. *Dandridge v. Williams*, 397 U.S., at 485, 90 S.Ct. at 1161. Nor must the financing system fail because, as appellees suggest, other methods of satisfying the State's interest, which occasion "less drastic" disparities in expenditures, might be conceived. Only where state action impinges on the exercise of fundamental constitutional rights or liber-

ties must it be found to have chosen the least restrictive alternative. Cf. *Dunn v. Blumstein*, 405 U.S., at 343, 92 S.Ct. at 1003; *Shelton v. Tucker*, 364 U.S. 479, 488, 81 S.Ct. 247, 252, 5 L.Ed.2d 231 (1960). It is also well to remember that even those districts that have reduced ability to make free decisions with respect to how much they spend on education still retain under the present system a large measure of authority as to how available funds will be allocated. They further enjoy the power to make numerous other decisions with respect to the operation of the schools.¹⁰⁸ The people of Texas may be justified in believing¹⁰⁹ that other systems of school financing,

and for the retirement of bonds.) Appellees do not claim that the ceiling presently bars desired tax increases in Edgewood or in any other Texas district. Therefore, the constitutionality of that statutory provision is not before us and must await litigation in a case in which it is properly presented. Cf. *Hargrave v. Kirk*, 313 F.Supp. 944 (M.D.Fla. 1970), vacated, 401 U.S. 476, 91 S.Ct. 856, 28 L.Ed.2d 196 (1971).

108. Mr. Justice MARSHALL states in his dissenting opinion that the State's asserted interest in local control is a "mere sham," *post*, at 1346, and that it has been offered, not as a legitimate justification, but "as an excuse" for inter-district inequality." *Id.*, at 1345. In addition to asserting that local control would be preserved and possibly better served under other systems—a consideration that we find irrelevant for the purpose of deciding whether the system may be said to be supported by a legitimate and reasonable basis—the dissent suggests that Texas' lack of good faith may be demonstrated by examining the extent to which the State already maintains considerable control. The State, we are told, regulates "the most minute details of local public education," *ibid.*, including textbook selection, teacher qualifications, and the length of the school day. This assertion, that genuine local control does not exist in Texas, simply cannot be supported. It is abundantly refuted by the elaborate statutory division of responsibilities set out in the Texas Education Code. Although policy decision-making and supervision in certain areas are reserved to the State, the day-to-day authority over the "management and control" of all public elementary and secondary schools is squarely placed on the

local school boards. *Tex. Educ. Code Ann.* §§ 17.01, 23.26 (1972). Among the innumerable specific powers of the local school authorities are the following: the power of eminent domain to acquire land for the construction of school facilities, *id.*, §§ 17.26, 23.26; the power to hire and terminate teachers and other personnel, *id.*, §§ 13.101-13.103; the power to designate conditions of teacher employment and to establish certain standards of educational policy, *id.*, § 13.901; the power to maintain order and discipline, *id.*, § 21.305, including the prerogative to suspend students for disciplinary reasons, *id.*, § 21.301; the power to decide whether to offer a kindergarten program, *id.*, §§ 21.131-21.135, or a vocational training program, *id.*, § 21.111, or a program of special education for the handicapped, *id.*, § 11.16; the power to control the assignment and transfer of students, *id.*, §§ 21.074-21.080; and the power to operate and maintain a school bus program, *id.*, § 16.52. See also *Perry v. LaMarque Ind. School Dist.*, 328 F.Supp. 638, 642-643 S.D.Tex. (1971), reversed, 466 F.2d 1064 (CA5, 1972); *Nichols v. Aldine Ind. School Dist.*, 376 S.W.2d 182 (Tex.Civ. App. 1962). Local school boards also determine attendance zones, location of new schools, closing of old ones, school attendance hours (within limits), grading and promotion policies subject to general guidelines, recreational and athletic policies, and a myriad of other matters in the routine of school administration. It cannot be seriously doubted that in Texas education remains largely a local function, and that the preponderating bulk of all decisions affecting the schools is made and executed at the local level, guaranteeing the greatest participation by those most directly concerned.

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which place more of the financial responsibility in the hands of the State, will result in a comparable lessening of desired local autonomy. That is, they may believe that along with increased control of the purse strings at the state level will go increased control over local policies.¹⁰⁹

Appellees further urge that the Texas system is unconstitutionally arbitrary because it allows the availability of local taxable resources to turn on "happenstance." They see no justification for a system that allows, as they contend, the quality of education to fluctuate on the basis of the fortuitous positioning of the boundary lines of political subdivisions and the location of valuable commercial and industrial property. But any scheme of local taxation—indeed the very existence of identifiable local governmental units—requires the establishment of jurisdictional boundaries that are inevitably arbitrary. It is equally inevitable that some localities are going to be blessed with more taxable assets

than others.¹¹⁰ Nor is local wealth a static quantity. Changes in the level of taxable wealth within any district may result from any number of events, some of which local residents can and do influence. For instance, commercial and industrial enterprises may be encouraged to locate within a district by various actions—public and private.

Moreover, if local taxation for local expenditures were an unconstitutional method of providing for education then it might be an equally impermissible means of providing other necessary services customarily financed largely from local property taxes, including local police and fire protection, public health and hospitals, and public utility facilities of various kinds. We perceive no justification for such a severe denigration of local property taxation and control as would follow from appellees' contentions. It has simply never been within the constitutional prerogative of this Court to nullify statewide measures for financing public services merely because the bur-

109. This theme—that greater state control over funding will lead to greater state power with respect to local educational programs and policies—is a recurrent one in the literature on financing public education. Professor Simon, in his thoughtful analysis of the political ramifications of this case, states that one of the most likely consequences of the District Court's decision would be an increase in the centralization of school finance and an increase in the extent of collective bargaining by teacher unions at the state level. He suggests that the subjects for bargaining may include many "non-salary" items, such as teaching loads, class size, curricular and program choices, questions of student discipline, and selection of administrative personnel, matters traditionally decided heretofore at the local level. Simon, *supra* n. 62, at 434-436. See, e.g., Coleman, *The Struggle for Control of Education: In Education and Social Policy: Local Control of Education* 61, 77-79 (C. Bowers, J. Housago & D. Dyke eds. 1970); J. Goussart, *The Child, The Parent, and The State* 27 (1950). Unless a local community, through its school board, has some control over the purse, there can be little real feeling in the community that the schools are (in fact) local schools.

"T. Howe, *Anatomy of a Revolution*, in *Saturday Review* 84, 88 (Nov. 20, 1971). "It is an axiom of American politics that control and power follow money. . . ."; R. Hutchinson, *State-Administered Locally-Shared Taxes* 21 (1931). "[S]tate administration of taxation is the first step toward state control of the functions supported by these taxes. . . .". Irrespective of whether one regards such prospects as detrimental, or whether he agrees that the consequence is inevitable, it certainly cannot be doubted that there is a rational basis for this concern on the part of parents, educators, and legislators.

110. This Court has never doubted the propriety of maintaining political subdivisions within the States and has never found in the Equal Protection Clause any basis for rule of territorial uniformity. *McGowan v. Maryland*, 366 U.S. at 427, 81 S.Ct. at 1165. See also *Griffin v. County School Board of Prince Edward County*, 377 U.S. at 230-231, 84 S.Ct. at 1232-1233; *Salzburg v. Maryland*, 316 U.S. 545, 74 S.Ct. 289, 38 L.Ed. 281 (1954). Cf. *Board of Education of, etc. v. Moskowitz*, 409 U.S. 965, 668 (CA10 1962).

dens or benefits thereof fall unevenly depending upon the relative wealth of the political subdivisions in which citizens live.

[21, 22] In sum, to the extent that the Texas system of school financing results in unequal expenditures between ¹⁴⁵ children who happen to reside in different districts, we cannot say that such disparities are the product of a system that is so irrational as to be invidiously discriminatory. Texas has acknowledged its shortcomings and has persistently endeavored—not without some success—to ameliorate the differences in levels of expenditures without sacrificing the benefits of local participation. The Texas plan is not the result of hurried, ill-conceived legislation. It certainly is not the product of purposeful discrimination against any group or class. On the contrary, it is rooted in decades of experience in Texas and elsewhere, and in major part is the product of responsible studies by qualified people. In giving substance to the presumption of validity to which the Texas system is entitled, *Lindsley v. Natural Carbonic Gas Co.*, 220 U.S. 61, 78, 31 S.Ct. 337, 340, 55 L.Ed. 369 (1911), it is important to remember that at every stage of its development it has constituted a "rough accommodation" of interests in an effort to arrive at practical and workable solutions. *Metropolis Theatre Co. v. City of Chicago*, 228 U.S. 61, 69-70, 33 S.Ct. 441, 443, 57 L.Ed. 730 (1913). One also must remember that the system here challenged is not peculiar to Texas or to any other State. In its essential characteristics, the Texas plan for financing public education reflects what many educators for a half century have thought was an enlightened approach to a problem for which there is no perfect solution. We are unwilling to assume for ourselves a level of wisdom superior to that of legislators, scholars, and educational authorities in 50 States, especially where the alternatives proposed are only recently conceived and nowhere yet tested. The constitutional standard under

the Equal Protection Clause is whether the challenged state action rationally furthers a legitimate state purpose or interest. *McGinnis v. Royster*, 410 U.S. 263, 270, 93 S.Ct. 1055, 1059, 35 L.Ed.2d 282 (1973). We hold that the Texas plan abundantly satisfies this standard.

11V

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In light of the considerable attention that has focused on the District Court opinion in this case and on its California predecessor, *Serrano v. Priest*, 5 Cal.3d 584, 96 Cal.Rptr. 601, 487 P.2d 1241 (1971), a cautionary postscript seems appropriate. It cannot be questioned that the constitutional judgment reached by the District Court and approved by our dissenting Brothers today would occasion in Texas and elsewhere an unprecedented upheaval in public education. Some commentators have concluded that, whatever the contours of the alternative financing programs that might be devised and approved, the result could not avoid being a beneficial one. But, just as there is nothing simple about the constitutional issues involved in these cases, there is nothing simple or certain about predicting the consequences of massive change in the financing and control of public education. Those who have devoted the most thoughtful attention to the practical ramifications of these cases have found no clear or dependable answers and their scholarship reflects no such unqualified confidence in the desirability of completely uprooting the existing system.

The complexity of these problems is demonstrated by the lack of consensus with respect to whether it may be said with any assurance that the poor, the racial minorities, or the children in overburdened core-city school districts would be benefited by abrogation of traditional modes of financing education. Unless there is to be a substantial increase in state expenditures on education across the board—an event the likelihood of which is open to considerable

[57] question¹¹¹—these groups stand to realize gains in terms of increased per-pupil expenditures only if they reside in districts that presently spend at relatively low levels, *i. e.*, in those districts that would benefit from the redistribution of existing resources. Yet, recent studies have indicated that the poorest families are not invariably clustered in the most impecunious school districts.¹¹² Nor does it now appear that there is any more than a random chance that racial minorities are concentrated in property-poor districts.¹¹³ Additionally, [58] several research projects have concluded that any financing alternative designed to achieve a greater equality of expenditures is likely to lead to higher taxation and lower educational expenditures in the major urban centers,¹¹⁴ a result that

would exacerbate rather than ameliorate existing conditions in those areas.

These practical considerations, of course, play no role in the adjudication of the constitutional issues presented here. But they serve to highlight the wisdom of the traditional limitations on this Court's function. The consideration and initiation of fundamental reforms with respect to state taxation and education are matters reserved for the legislative processes of the various States, and we do no violence to the values of federalism and separation of powers by staying our hand. We hardly need add that this Court's action today is not to be viewed as placing its judicial imprimatur on the status quo. The need is apparent for reform in tax systems which

111. Any alternative that calls for significant increases in expenditures for education, whether financed through increases in property taxation or through other sources of tax dollars, such as income and sales taxes, is certain to encounter political barriers. At a time when nearly every State and locality is suffering from fiscal undernourishment, and with demands for services of all kinds burgeoning and with weary taxpayers already resisting tax increases, there is considerable reason to question whether a decision of this Court nullifying present state taxing systems would result in a marked increase in the financial commitment to education. See Senate Select Committee on Equal Educational Opportunity, 92d Cong., 2d Sess., *Toward Equal Educational Opportunity* 339-345 (Comm. Print 1972); Berke & Callahan, *Serrano v. Priest: Milestone or Millstone for School Finance*, 21 J. Pub. L. 23, 25-26 (1972); Simon, *supra*, n. 82, at 420-421. In Texas, it has been calculated that \$2.4 billion of additional school funds would be required to bring all schools in that State up to the present level of expenditure of all but the wealthiest districts—an amount more than double that currently being spent on education. Texas Research League, *supra*, n. 20, at 16-18. An *amicus curiae* brief filed on behalf of almost 30 States, focusing on these practical consequences, claims with some justification that "each of the undersigned states . . . would suffer severe financial stringency." Brief of *Amici Curiae* in Support of Appellants 2 (filed by Montgomery County, Md., et al.).

112. See Note, *supra*, n. 53. See also authorities cited n. 114, *supra*.

113. See Goldstein, *supra*, n. 38, at 526; Jencks, *supra*, n. 90, at 27; U. S. Comm'n on Civil Rights, *Inequality in School Financing: The Role of the Law* 37 (1972). Coons, Clune & Sugarman, *supra*, n. 13, at 356-357, n. 47, have noted that in California, for example, [f]ifty-nine percent of minority students live in districts above the median [average valuation per pupil]. In Bexar County, the largest district by far—the San Antonio Independent School District—is above the local average in both the amount of taxable wealth per pupil and in median family income. Yet 72% of its students are Mexican-Americans. And, in 1967-1968 it spent only a very few dollars less per pupil than the North East and North Side Independent School Districts, which have only 7% and 18% Mexican-American enrollment respectively. Berke, Carnevale, Morgan & White, *supra*, n. 29, at 673.

114. See Senate Select Committee on Equal Educational Opportunity, 92d Cong., 2d Sess., *Issues in School Finance* 129 (Comm. Print 1972) (monograph entitled *Inequities in School Finance* prepared by Professors Berke and Callahan); U. S. Office of Education, *Finances of Large-City School Systems: A Comparative Analysis* (1972) (HEW publication); U. S. Comm'n on Civil Rights, *supra*, n. 113, at 33-36; Simon, *supra*, n. 62, at 410-411, 418.

may well have relied too long and too heavily on the local property tax. And certainly innovative thinking as to public education, its methods, and its funding is necessary to assure both a higher level of quality and greater uniformity of opportunity. These matters merit the continued attention of the scholars who already have contributed much by their challenges. But the ultimate solutions must come from the law-makers and from the democratic pressures of those who elect them.

Reversed.

Mr. Justice STEWART concurring.

The method of financing public schools in Texas, as in almost every other State, has resulted in a system of public education that can fairly be described as chaotic and unjust.¹ It does not follow, however, and I cannot find, that this system violates the Constitution of the United States. I join the opinion and judgment of the Court because I am convinced that any other course would mark an extraordinary departure from principled adjudication under the Equal Protection Clause of the Fourteenth Amendment. The uncharted directions of such a departure are suggested, I think, by the imaginative dissenting opinion my Brother MARSHALL has filed today.

Unlike other provisions of the Constitution, the Equal Protection Clause confers no substantive rights and creates no substantive liberties.² The function of the Equal Protection Clause, rather, is

simply to measure the validity of *classifications* created by state laws.

There is hardly a law on the books that does not affect some people differently from others. But the basic concern of the Equal Protection Clause is with state legislation whose purpose or effect is to create discrete and objectively identifiable classes.³ And with respect to such legislation, it has long been settled that the Equal Protection Clause is offended only by laws that are invidiously discriminatory—only by classifications that are wholly arbitrary or capricious. See, e.g., *Rinaldi v. Yeager*, 384 U.S. 305, 86 S.Ct. 1497, 16 L.Ed.2d 577. This settled principle of constitutional law was compendiously stated in Mr. Chief Justice Warren's opinion for the Court in *McGowan v. Maryland*, 366 U.S. 420, 425-426, 81 S.Ct. 1101, 1105, 6 L.Ed.2d 393, in the following words:

"Although no precise formula has been developed, the Court has held that the Fourteenth Amendment permits the States a wide scope of discretion in enacting laws which affect some groups of citizens differently than others. The constitutional safeguard is offended only if the classification rests on grounds wholly irrelevant to the achievement of the State's objective. State legislatures are presumed to have acted within their constitutional power despite the fact that, in practice, their laws result in some inequality. A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it."

1. See *New York Times*, Mar. 11, 1973, p. 1, col. 1.

2. There is one notable exception to the above statement: It has been established in recent years that the Equal Protection Clause confers the substantive right to participate on an equal basis with other qualified voters whenever the State has adopted an electoral process for determining who will represent any segment of the State's population. See, e.g., *Reynolds v. Sims*, 377 U.S. 533, 84 S.Ct. 1362, 12 L.Ed.2d 506; *Kramer v. Union Free*

School District, 395 U.S. 621, 80 S.Ct. 1886, 23 L.Ed.2d 583; *Dunn v. Blumstein*, 405 U.S. 330, 336, 92 S.Ct. 995, 999, 31 L.Ed.2d 271. But there is no constitutional right to vote, as such. *Minor v. Happersett*, 21 Wall. 162, 22 L.Ed. 627. If there were such a right, both the Fifteenth Amendment and the Nineteenth Amendment would have been wholly unnecessary.

3. But see *Bullock v. Carter*, 405 U.S. 134, 92 S.Ct. 840, 31 L.Ed.2d 92.

This doctrine is no more than a specific application of one of the first principles of constitutional adjudication—the basic presumption of the constitutional validity of a duly enacted state or federal law. See Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 Harv.L.Rev. 129 (1893).

161 Under the Equal Protection Clause, this presumption of constitutional validity disappears when a State has enacted legislation whose purpose or effect is to create classes based upon criteria that, in a constitutional sense, are inherently "suspect." Because of the historic purpose of the Fourteenth Amendment, the prime example of such a "suspect" classification is one that is based upon race. See, e.g., *Brown v. Board of Education*, 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873; *McLaughlin v. Florida*, 379 U.S. 184, 85 S.Ct. 283, 13 L.Ed.2d 222. But there are other classifications that, at least in some settings, are also "suspect"—for example, those based upon national origin,⁴ alienage,⁵ indigency,⁶ or illegitimacy.⁷

Moreover, quite apart from the Equal Protection Clause, a state law that impinges upon a substantive right or liberty created or conferred by the Constitution is, of course, presumptively invalid, whether or not the law's purpose or effect is to create any classifications. For example, a law that provided that newspapers could be published only by people

who had resided in the State for five years could be superficially viewed as invidiously discriminating against an identifiable class in violation of the Equal Protection Clause. But, more basically, such a law would be invalid simply because it abridged the freedom of the press. Numerous cases in this Court illustrate this principle.⁸

162 In refusing to invalidate the Texas system of financing its public schools, the Court today applies with thoughtfulness and understanding the basic principles I have so sketchily summarized. First, as the Court points out, the Texas system has hardly created the kind of objectively identifiable classes that are cognizable under the Equal Protection Clause.⁹ Second, even assuming the existence of such discernible categories, the classifications are in no sense based upon constitutionally "suspect" criteria. Third, the Texas system does not rest "on grounds wholly irrelevant to the achievement of the State's objective." Finally, the Texas system impinges upon no substantive constitutional rights or liberties. It follows, therefore, under the established principle reaffirmed in Mr. Chief Justice Warren's opinion for the Court in *McGowan v. Maryland*, *supra*, that the judgment of the District Court must be reversed.

Mr. Justice BRENNAN, dissenting.

Although I agree with my Brother WHITE that the Texas statutory scheme

4. See *Oyama v. California*, 332 U.S. 633, 644-646, 68 S.Ct. 269, 274-275, 92 L.Ed. 249.

5. See *Graham v. Richardson*, 403 U.S. 365, 372, 91 S.Ct. 1848, 1852, 29 L.Ed.2d 534.

6. See *Griffin v. Illinois*, 351 U.S. 12, 76 S.Ct. 585, 100 L.Ed. 891. "Indigency" means actual or functional indigency; it does not mean comparative poverty (i.e., relative comparative affluence). See *James v. Valtierra*, 402 U.S. 137, 91 S.Ct. 1331, 28 L.Ed.2d 678.

7. See *Gomez v. Perez*, 409 U.S. 535, 93 S.Ct. 872, 35 L.Ed.2d 56; *Weber v. Aetna Casualty & Surety Co.*, 406 U.S. 164, 92 S.Ct. 1400, 31 L.Ed.2d 768.

8. See, e.g., *Police Dept. of City of Chicago v. Mosley*, 408 U.S. 92, 92 S.Ct. 2286, 33 L.Ed.2d 242 (free speech); *Shapiro v. Thompson*, 394 U.S. 618, 89 S.Ct. 1322, 22 L.Ed.2d 600 (freedom of interstate travel); *Williams v. Rhodes*, 393 U.S. 23, 89 S.Ct. 5, 21 L.Ed.2d 24 (freedom of association); *Skinner v. Oklahoma, ex rel. Williamson*, 316 U.S. 535, 62 S.Ct. 1110, 86 L.Ed. 1655 ("liberty" conditionally protected by Due Process Clause of Fourteenth Amendment).

9. See *Katzenbach v. Morgan*, 384 U.S. 641, 660, 86 S.Ct. 1731, 1732, 16 L.Ed.2d 828 (Harlan, J., dissenting).