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IN THE

Supreme Court of the United States

October Term, 1971

No. 71-1332

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

vs.

DEMETRIO P. RODRIGUEZ, et al.,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS

BRIEF OF AMICI CURIAE: RICHARD M. CLOWES, SUPERINTENDENT OF SCHOOLS OF THE COUNTY OF LOS ANGELES, HAROLD J. OSTLY, TAX COLLECTOR AND TREASURER OF THE COUNTY OF LOS ANGELES; EL SEGUNDO UNIFIED SCHOOL DISTRICT; GLENDALE UNIFIED SCHOOL DISTRICT; SAN MARINO UNIFIED SCHOOL DISTRICT; LONG BEACH UNIFIED SCHOOL DISTRICT; SOUTH BAY UNION HIGH SCHOOL DISTRICT; BEVERLY HILLS UNIFIED SCHOOL DISTRICT; AND SANTA MONICA UNIFIED SCHOOL DISTRICT, ALL OF LOS ANGELES COUNTY.

INTERESTS OF AMICI

Amici Curiae are (1) the County Superintendent of Schools and the Treasurer-Tax Collector of the County of Los Angeles who are charged with administering certain aspects of the California public school financing system as it affects local school government in Los Angeles County, and (2) several school districts in the County of Los Angeles. Amici are spon-

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sored by John D. Maharg, County Counsel of Los Angeles County, their authorized law officer. Amici, with the exception of one of the school districts, are all parties defendant (the school districts by way of intervention) in the case of *Serrano v. Priest* (Los Angeles Superior Court No. C938254) which is now proceeding to trial in a California Superior Court, upon remand from the California Supreme Court. See *Serrano v. Priest,* 5 Cal.3d 584, 487 P.2d 1241, 96 Cal. Rptr. 601.

In the action presently before this Court, the court below cited the opinion of the California Supreme Court in *Serrano v. Priest, supra* (1971), in support of its conclusion that Appellees are deprived of equal protection of the laws under the Fourteenth Amendment to the United States Constitution by the operation of the Texas public school financing system. *Rodriguez v. San Antonio Independent School District,* 337 F.Supp. 280, 281 (n. 1) (1972).

The school districts appearing as amici are charged with the operation of public schools within Los Angeles County, all of which would be adversely affected to a serious degree by application of the rule urged by Appellees and adopted by the court below. The Texas public school financing system is substantially similar to the system of financing public schools in California.[1]

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[1]The California and Texas school financing systems are similar in effect to the systems used in 49 of the 50 states. Hawaii is the only state without local school district control of education. See *Hawaii Rev. Laws,* §§296-2, 298-2 (1968).

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Amici are gravely concerned that the "equal protection" standard of review as applied to state public school financing systems by the court below in this case, and by the California Supreme Court in *Serrano v. Priest, supra,* if upheld by this Court, would place a constitutional straitjacket upon local school boards, state legislatures and Congress in their attempts to solve and adjust the myriad of problems involved in the day-to-day and on-going operation of this nation's public school systems.

Amici believe that one of the geniuses of the public school systems in America in general, and California in particular, has been the incentives for and abilities of local school boards and state legislatures, democratically elected, to experiment and innovate in finding solutions to educational problems, many of which are of purely local concern and others which are of universal application. The responsiveness of the local school district to the needs, desires and problems of the local populace would inevitably be drastically impaired by application of the constitutional rule of law sought to be established by Appellees.

STATEMENT

This case presents to this high Court fundamental questions concerning the drastic restructuring of a state's local governmental services, and the role to be played by the judicial branch of government in doing so. The impact of the decision to be made in this case

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will be felt not only by the thousands of school districts in 49 of the 50 states, but by reason of the logical difficulties in distinguishing educational services from other important governmental services provided by local units of state government, the impact of this decision will surely be felt by almost all such local governmental units with respect to their provision of important services in their respective communities.[2]

The strategies employed in this case were fully mapped out in 1970 by Professor Coons and his associates in their book "Private Wealth and Public Education."[3] This book was dedicated by its authors "To nine old friends of the children," and the validity of the arguments contained in their book are now presented to this Court for determination.

It is this book that first presented the disarmingly simple formulation of a proposed new principle of "equal protection" constitutional law. Coons' "simple" formula is: "The quality of public education may not be a function of wealth other than the wealth of the state as a whole." (Coons, et al., *supra,* Footnote 3, Introduction, p. 2.)

It may be seen from the Order appealed from that the District Court below fully embraced this formula.[4]

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[2]A lawsuit challenging state and local legislation regulating the funding of police and fire protection services on the basis of the *Serrano* rule has already been filed in California. A *"Serrano"*-type complaint, *San Anselmo Police Officers Association, et al. v. The City of San Anselmo, et al.,* 61302, was filed on May 3, 1972, in the County of Marin.

[3]Coons, John P., Clune III, Wm. H., Sugarman, Stephen D., *Private Wealth and Public Education,* the Belknap Press of Harvard University Press, Cambridge, Mass. (1970).

[4]337 F.Supp. 280, 285-286.

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The California Supreme Court, the first to declare an entire state's system of financing its public schools to be unconstitutional, likewise adopted Coons' thesis.[5]

The California Supreme Court emphasized in its Modification of Opinion that inasmuch as the case involved an appeal from a judgment of dismissal entered upon the sustaining of general demurrer to the Complaint, it was not a "final judgment on the merits." The Supreme Court remanded the case to the trial court with directions to overrule the demurrers and to allow defendants a reasonable time to answer. The Answer was filed on May 1, 1972, and the case is now being prepared for trial.

As Coons points out, the system of financing public schools which is here under attack is one of many variations of the so-called "foundation plan." The conceptual basis for the "foundation plan," the purpose of which was to make adjustments in state contributions to public school districts within the state to account for district wealth variations, was originated by George D. Strayer and Robert M. Haig in 1923.[6] The "foundation plan" as utilized by most of the states with numerous variations was developed by Paul R. Mort.[7]

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[5]*Serrano v. Priest,* 5 Cal.3d 584, 589, 487 P.2d 1241, 96 Cal. Rptr. 601: "We have determined that this funding scheme invidiously discriminates against the poor because it makes the quality of a child's education a function of the wealth of his parents and neighbors."

[6]Strayer, G. D. and Haig, R. M., *Financing of Education in the State of New York* (New York, 1923).

[7]Coons, *supra,* p. 63; Mort, P. R., Reusser, W. C. and Polley, J. W., *Public School Finance,* 3d Ed. (New York, 1960).

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Amici will not undertake to describe the "foundation plan" used in the State of Texas, which is under attack here, as this will no doubt be fully described in the briefs of the parties to the suit. The California Foundation Program is described by the California Supreme Court in *Serrano v. Priest,* 5 Cal.3d 584, 591, 595.

SUMMARY OF ARGUMENT

1. The District Court below erroneously held that the complex system of laws providing for the financing of the Texas public school system violates the "equal protection" clause of the Fourteenth Amendment to the United States Constitution. The District Court erroneously applied the onerous standard of review whereby the defendants were required to carry the burden of showing that its legislative classifications were necessary to promote compelling state interests. The first question to be resolved in this case is "What standard of review is to be applied in determining the validity of the complex public school financing laws?" In uncritically relying upon *Serrano v. Priest,* 5 Cal. 3d 584, 487 P.2d 1241, 96 Cal.Rptr. 601, the District Court failed to consider vital questions and factors. The District Court should have carefully analyzed the alleged suspect classification of wealth and noted that this classification involved wealth of school districts and not wealth of people. The District Court should have noted that the alleged "fundamental" interest (quality of education) allegedly affected by the alleged

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"wealth" classification was not an interest of people in quality education but rather an interest in not being unduly burdened in paying taxes. The court failed to take into consideration, in determining its standard of review, numerous other factors, including the individual interests of parents in directing the upbringing and education of their children, vital societal or governmental interests in permitting within reasonable limits local community control in making decisions affecting the schooling of the children in the community and in allocating local public funds in support thereof, the necessity of permitting the Legislature and Congress to remain free of a constitutional straitjacket with respect to their efforts to improve public education and make innovations therein, and the ability of the courts to fashion and enforce fair and appropriate remedies as compared with the ability of the Legislature and Congress to deal with the complex and rapidly changing problems in public education. Applying all these considerations, the standard of review to be applied to this complex set of school financing laws must be less onerous than the one applied by the District Court.

2. Under any standard of review which might fairly and reasonably be applied to the complex school financing laws of Texas, the laws are valid under the equal protection clause. The people of Texas, including the parents of children attending public schools in that state, have expressly attempted to preserve and protect, through their financing system, their compelling interest in assuring essential educational services for

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all children, while at the same time making appropriate accommodations to the vital interest of parents in local communities in the course those educational services take. The individual, societal and governmental interests served by the Texas school financing laws are not merely important, they are compelling. This is true especially when it is considered that the school financing laws are necessarily complex if they are to attempt to make provision for the differing educational needs of students, and the inability of plaintiffs to establish feasible and better alternatives to meet those differing educational needs while accommodating a reasonable degree of local decision-making with respect to the education of the children. The classifications made in the school financing laws of Texas promote these compelling interests in such a way as to satisfy any realistic standard of judicial review.

3. Independent of the foregoing, the monumental nature of the task of more fairly allocating financial resources of the state among the school districts is one which the courts are not equipped to tackle. This necessarily complex, t i g h t l y interwoven and rapidly changing set of laws calculated to approach excellence in the providing of educational services to students of widely varying educational needs, is such that only the Legislature, local school boards, and Congress are equipped to handle. The resources available to them far outstrip the resources available to the courts to deal with these complexities. These problems are far better tackled by experts working together t o w a r d

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common goals than by courts relying upon the services of experts in adversary proceedings. Were the courts to undertake the staggering task of closely monitoring efforts of the Legislature, school boards and Congress with respect to their efforts to improve the quality of public education, they would to that extent encourage those bodies to deem themselves absolved of their responsibilities, with the further adverse consequence of subjecting the results of such efforts as they might continue to make to extreme uncertainty, with resulting doubts as to the validity of school district taxes and contractual commitments. The courts should accordingly exercise judicial restraint and evidence their faith in the democratic processes, the arena in which solutions to these complex problems have historically and are now being hammered out.

4. In any event, the judgment below should be reversed because the order granting the injunction lacks specificity and fails to describe in reasonable detail what the defendants must do in order to avoid the drastic contempt remedy available to enforce the order. The order, in enjoining the defendants from giving any force or effect to the Texas school financing laws "insofar as they discriminate against plaintiffs and others on the basis of wealth other than wealth of the State as a whole," clearly fails to comply with the requirements of Section 65(d) of the Federal Rules of Civil Procedure. In further ordering that named defendants be ordered to reallocate the school funds "in such a manner as not to violate the equal protection provisions

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of both the United States and Texas Constitutions," the order even more clearly violates the provisions of Rule 65(d). The Judgment below should also be reversed because of failure of the plaintiffs to include as defendants those authorized by law to carry out an effective decree, namely, the Legislature and the Governor.

ARGUMENT

I

THE DISTRICT COURT ERRED IN APPLYING THE "COMPELLING INTEREST" TEST RATHER THAN A LESS ONEROUS STANDARD OF REVIEW IN TESTING THE VALIDITY OF THE TEXAS SCHOOL FINANCING LAWS.

A. The District Court, in the course of uncritically relying upon Serrano, erroneously concluded that the "necessary to promote a compelling state interest" test should be applied.

The District Court below followed the decision of the California Supreme Court in *Serrano v. Priest,* 5 Cal.3d 584, 487 P.2d 1241, 96 Cal.Rptr. 601 (1971) in determining that the onerous "compelling interest" test should be applied in determining the validity or invalidity of the system of laws of the State of Texas making provision for the financing of the public schools. In footnote 1 the District Court stated: "Serrano convincingly analyzed discussions regarding the suspect nature of classification based on wealth . . ."

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(337 F.Supp. 280, 281.) (Professor Goldstein of the University of Pennsylvania has written a most penetrating analysis of the elusive principles of law involved in *Serrano v. Priest,* which amici believe to be so valuable in analyzing the issues involved that we attach a copy of his article, "Interdistrict Inequality in School Financing: A Critical Analysis of *Serrano v. Priest* and Its Progeny," 120 Univ. of Penn. L.R. 504 (1972). (See Appendix A.) The extreme importance of this case appears to amici to provide complete justification for commending to this busy Court that it read Professor Goldstein's thought-penetrating analysis.)

In relying heavily upon *Serrano,* the District Court did so uncritically. It failed to note, for example, that the case came to the California Supreme Court by way of appeal from a judgment of dismissal entered after sustaining the defendants' general demurrers, and that accordingly the California Supreme Court assumed that all material allegations in the complaint were true.

Thus, the Supreme Court assumed for the purposes of its decision that different levels of educational expenditure affect the quality of education. (5 Cal.3d 584, 599 n. 14, 601 n. 16, 487 P.2d 1241, 1251, 1253.) The California Supreme Court specifically noted that these were matters which would be the subject matter of proof in the trial court upon remand.

The California Supreme Court also assumed for the purposes of its decision the truth of plaintiffs' allegation that there is a correlation between a district's per

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pupil assessed valuation and the wealth of its residents. (5 Cal.3d 584, 600-601, 487 P.2d 1241, 1252.)

The District Court below, in failing to set forth any determination that higher expenditures for education result in better education, apparently relied upon the *Serrano* decision, which, as indicated, assumed . . . the truth of that proposition without deciding it because the case arose by way of demurrer.

As pointed out by Goldstein (App. A, pp. 26-29) research reports so far have found little relationship between expenditure levels and the educational outputs measured, when other variables were held constant, and since *Serrano* sent the matter back to the trial court, "the issue still remains open for proof, proof that does not appear to be available."

The significance of the lack of proof in the District Court below and in *Serrano* is that plaintiffs have failed to satisfy their burden of proof as to the cost-quality correlation in order to invoke the ultimate constitutional principle which they urged upon, and which was adopted by, both courts, i.e., "The quality of public education may not be a function of wealth other than the wealth of the state as a whole." (Goldstein, App. A, p. 14.) To fit educational expenditures into this formula, it becomes necessary to equate educational spending w i t h quality of education. The District Court's uncritical reliance on *Serrano* to equate these two factors was thus unwarranted.

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The District Court below also lacked adequate basis for its conclusion that the Texas financing system draws distinctions based upon the wealth of its citizens, in relying upon *Serrano* and upon an affidavit submitted at trial. As noted in Goldstein (App. A, p. 33), the affidavit relied upon by the District Court "was a questionable source; a careful reading of the data contained in the affidavit creates grave doubts about the validity of its conclusions."

The fact of the matter is that both *Serrano* and the *Rodriguez* courts relied upon the extremes presented by statistics, failing to take account of the peculiarities which might be involved in those extremes and ignoring the clustering of the data between the extremes.

It must be readily apparent that some of the people living in at least some of the "poorer" school districts are richer than some of the people living in some of the "richer" school districts. There is nothing on the face of the Texas school financing laws which draws a distinction in distributing the State largesse among the districts which diminishes or withholds its allocations based on low wealth of any individuals. The legislative classifications make no invidious discrimination against people based on their wealth, but rather distribute state school funds to the districts in such a way that districts with lower tax bases are in some cases unable to raise the same number of dollars per pupil as those with higher tax bases. If there is "wealth discrimination" in the State financing system, it is against districts, not people.

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The districts, as political subdivisions of the State, enjoy no protection under the equal protection clause against actions of the state.[8] Those who have standing to complain, people, are not discriminated against "on the basis of their wealth." The so-called "suspect classification of wealth" relied upon in *Serrano* and *Rodriguez,* simply does not exist as to those who bring this action and, accordingly, there is no basis for invoking the "compelling interest" test.

The *Rodriguez* court also failed to note that the wealth classification cases relied upon in *Serrano* were cases involving total denial of important rights to indigent persons, such as the right to vote or to be free from imprisonment as a result of criminal prosecution. Here, the question is not one of denying to the poor or to any person the important right to be educated, but rather the question of the *extent* to which the states may exercise discretion in distributing state funds for education differentially in different territories of the state. Actually, both Texas and California distribute more state funds per pupil to those districts with lower assessed valuation per pupil; what the plaintiffs complain about is that the State does not discriminate enough against people living in wealthy areas in favor of those living in poorer areas.[9] As pointed out in Goldstein, App. A, p. 48:

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[8]*Carmichael v. Southern Coal Co.,* 301 U.S. 495, 81 L.Ed. 1245 (1936); *Hess v. Mullaney* (9th Cir. 1954) 213 F.2d 635, cert. den. sub nom. *Hess v. Dewey,* 348 U.S. 835 (1954); *Board of Ed. of Ind. Sch. Dist., 20, Muskogee v. State of Oklahoma* (10th Cir. 1969) 409 F.2d 665.

[9]Would plaintiffs' argument not also constitutionally require California to more steeply graduate its income tax rate (presently 1 to 10%)?

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"The real problem is the individual taxpayer's difficulty in paying his tax bill. If *Serrano* labels relative deprivations among districts unconstitutional, then does its logic not require elimination of disproportionate sacrifice among those who pay the tax? Does the former proposition even make any sense without the latter?

"If there is a constitutional vice created by the differential ability of taxpayers to meet their obligations, does this then mean that proportional, or even progressive, taxation is constitutionally compelled? It is doubtful that the *Serrano* court meant to suggest this outcome. Nevertheless, without such a conclusion it is difficult to understand why it is unconstitutional to have a system whereby one district can more easily raise revenue than another. It is indeed probable under present financing systems, including that of California, that the average resident of a rich district pays higher taxes, in terms of gross dollars, for his schools than does the average resident of a poor district, despite the fact that the resident of the rich district is taxed at a lower rate. This may be the result of the higher assessed valuation and, perhaps, larger average property holdings of the individual taxpayers in the rich district. A correlation may even exist between the amount of tax dollars paid by the average resident of a district and the educational expenditures of that district. If this is so, the difficulty is not with disproportionate payments but with inequitable taxation, not only in the hypotheticals above, but also in the existing financing schemes. The logic of *Serrano,* which invalidated these existing financing schemes, may

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therefore require the wealthy taxpayer to bear a greater burden than just having to pay more tax dollars than the poor. Instead it may demand at least a proportional tax system, and possibly one that is progressive."

B. In determining the standard of review to be applied in an "equal protection" case, all pertinent factors should be considered.

This case presents to this high Court an unparalleled opportunity to initiate the establishment of more definitive guidelines for determination of the degree of closeness of judicial scrutiny to be applied in cases impugning the validity of statutes under the equal protection clause of the Fourteenth Amendment to the United States Constitution. The complexity of the public school financing laws of the State of Texas, and other elements in this case hereinafter analyzed, demonstrate the need for more definitive guidelines in establishing the all-important standard of review to be applied.

As previously noted, the Court below relied heavily on the reasoning of the California Supreme Court in *Serrano v. Priest,* 5 Cal.3d 584, 487 P.2d 1241, 96 Cal. Rptr. 601 (1971). *Serrano* reasoned that a "suspect classification" (wealth) taken together with a "fundamental interest" (education) automatically invokes application of the "compelling interest" test. Under this test, the state must show that the classifications made by the legislation in question are *necessary* to promote

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a *compelling* interest of the state. (*Dunn v. Blumstein,* 405 U.S. 330, 31 L.Ed.2d 274, 284, 92 S.Ct. 995 (1972).) If there are other reasonable ways to achieve compelling state interests with a lesser burden on constitutionally protected activity, a state may not choose the way of greater interference; it must choose "less drastic means." (31 L.Ed.2d at 285; *Shelton v. Tucker,* 364 U.S. 479, 488, 5 L.Ed.2d 231, 237, 81 S.Ct. 247 (1960).)

But it is backwards reasoning to conclude from the combination of a "suspect classification" and a "fundamental interest" that the onerous "compelling interest" test is to be applied.[10] Rather, the first question to ask in any equal protection case is "What standard of review is to be applied?" As stated in *Bullock v. Carter,* 405 U.S. 134, 31 L.Ed.2d 92, 99, 92 S.Ct. 849 (1972):

> "The threshold question to be resolved is whether the filing fee system should be sustained if it can be shown to have some rational basis, or whether it must withstand a more rigid standard of review. * * * "In approaching candidate restrictions, it is essential to examine in a realistic light the extent and nature of their impact on voters."

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[10]In *Dunn v. Blumstein, supra,* Mr. Chief Justice Burger dissenting, stated: "In both cases some informed and responsible persons are denied the vote. while others less informed and less responsible are permitted to vote. Some lines must be drawn. To challenge such lines by the 'compelling state interest' standard is to condemn them all. So far as I am aware, no state law has ever satisfied this seemingly insurmounatble standard, and I doubt one ever will, for it demands nothing less than perfection." (31 L.Ed.2d at 296.)

To which may be added, perfection is not the standard of excellence that can be expected of our democratic and republican processes as carried on by legislative bodies comprising elected representatives of peoples with widely varying and competing interests.

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That more than a simplistic approach to the standard of review is and should be required, is further evidenced by the recent pronouncement of this Court in *Wisconsin v. Yoder,* 405 U.S. ....., 32 L.Ed.2d 15, 24, 92 S.Ct. 1526 (1972), in which the Court stated:

> "Thus, a State's interest in universal education, however highly we rank it, is not totally free from a balancing process when it impinges on other fundamental rights and interests, such as those specifically protected by the Free Exercise Clause of the First Amendment and the traditional interest of parents with respect to the religious upbringing of their children so long as they, in the words of Pierce, 'prepare [them] for additional obligations.' 268 U.S. at 535, 69 L.Ed. at 1078."

See also *Schilb v. Kuebel,* 40 L.W. 4107; *James v. Strange,* 40 L.W. 4711, 4714.

In view of the extreme importance of the standard of review to be applied, and in view of the extreme uncertainty as to the meaning of the term "fundamental interest,"[11] it seems apparent that the courts should not blind themselves to any relevant factors in determining the standard of review to be applied.

This Court has wisely limited application of the onerous "close scrutiny" standard of review to cases

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[11]It may be extremely difficult in future cases to distinguish between public education on the one hand, and a host of governmental services on the other hand, with respect to the "fundamental" character of the interests involved, e.g., health, welfare, police, fire, and sanitary services. The courts should leave themselves open to examine these important governmental services in the light of all relevant considerations in determining whether or not they are to be subjected to the virtually impossible burdens of the "compelling interest" test.

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in which inherently suspect classifications and well recognized fundamental interests are clearly and definitely involved and affected. (See *Griffin v. Illinois,* 351 U.S. 12, 100 L.Ed. 891, 76 S.Ct. 585 (1956); *Douglas v. California,* 372 U.S. 353, 9 L.Ed.2d 811, 83 S.Ct. 814 (1963); *Harper v. State Board of Elections,* 383 U.S. 663, 16 L.Ed.2d 169, 86 S.Ct. 1079 (1966); *Bullock v. Carter,* 405 U.S. 134, 31 L.Ed.2d 92, ..., 92 S.Ct. 849 (1972); and *Dunn v. Blumstein,* 405 U.S. 330, 31 L.Ed.2d 274, 284, 92 S.Ct. 995 (1972).)

In determining the standard of review to be applied in an equal protection case, and in this case involving extensive and intricately interwoven laws providing the system for financing the schools of the State of Texas, the Court should carefully consider (1) the character of each interest allegedly affected by the legislation, (2) the degree to which each interest is affected, (3) the interrelationship of each *basis* of the legislative classification in question with each *basis* or *reason* for determining whether the interest affected is so vital as to be denominated as "fundamental," (4) the anticipated impact of judicial intervention on the societal or governmental interests promoted by the legislation, and (5) the ability of the courts to fashion and enfore a fair and appropriate remedy. (*Bullock v. Carter, supra, McDonald v. Board of Elections Commissioners,* 394 U.S. 802, 22 L.Ed.2d 739, 89 S.Ct. 1404 (1969); *Dandridge v. Williams,* 397 U.S. 471; *Jefferson v. Hackney,* 40 L.W. 4585 (1972); *Dunn v. Blumstein,* 405 U.S. 330, 31 L.Ed.2d 274, 284, 92 S.Ct. 995

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(1972).) Thus, for example, in *Bullock v. Carter,* the Court carefully analyzed the effect of the Texas candidate filing fee system on all interests affected, including the rights of individuals to vote, before concluding that close judicial scrutiny was required because the system had both a "real and appreciable impact on the exercise of the franchise" and a relation to the "resources of the voters supporting a particular candidate." (405 U.S. 134, ..., 31 L.Ed.2d 92, 100.)

When all of the foregoing factors are carefully considered and their interrelationships analyzed, amici submit that it becomes clear that some standard of equal protection review less onerous than the "necessary to promote a compelling state interest" test should be applied to the complex and vitally important school financing laws of the State of Texas.

In sum, the first question to ask in approaching an equal protection case such as this is "What standard of review is to be applied?", and all relevant considerations should be taken into account, inasmuch as deciding upon the standard of review is virtually to decide an equal protection case.

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C. Consideration of all pertinent factors involved in this case requires that a less onerous standard of review be applied in testing the validity of the complex Texas school financing laws under the equal protection clause.

Professor Goldstein's article (App. A) points up the opportunity to sharpen the judicial tools available in determining the standard of review to be applied in equal protection cases. This case presents such an opportunity inasmuch as the statutory scheme challenged here on the basis of the equal protection clause is much more complex and presents much greater difficulties than were presented in the cases utilizing the "close scrutiny" test, primarily the school desegregation cases, the reapportionment cases, and the cases dealing with the rights of persons accused of crime to free transcripts or free counsel.

Goldstein's approach is that it is not appropriate to simply examine the legislative classifications, the interests affected thereby and the degree to which the interests are promoted by the means adopted by the Legislature. Goldsein's approach, and we submit it is correct, is that each *basis* of the legislative classification in question is to be examined with respect to its relationship with each *basis* or *reason* for determining that the interest affected is so vital as to be denominated as "fundamental." (App. A, pp. 26, et seq.)

Accordingly, utilizing the approach of considering all relevant factors in the light of Goldstein's sugges-

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tions, we turn to examine those factors relevant to determining the appropriate standard of judicial review to be applied in this case.

1. The individual interests involved.

The lower court in the instant case found that "the great significance of education to the individual" was further justification for application of the demanding close scrutiny test. (337 F.Supp. 280, 283.) Nowhere in its opinion, however, does the court identify or analyze the extent to which this interest of the individual is affected by the Texas financing system or the extent to which any adverse effect can or will be remedied by the Court's judgment.

There is no contention in the instant case that the Texas school finance system operates to deny an education to any individual or group of individuals. Indeed, it is at once apparent that the Texas financing system, as does California's, guarantees what the Legislature has determined to be minimum essential educational financing for each pupil through the Minimum Foundation Program (Texas Ed. Code §§16.01, et seq.)[12] The people of Texas, therefore, have not simply undertaken to provide for public schools but have assured support for essential educational programs for each individual attending those schools.

Since it is readily apparent that the financing sys-

[12]California's Foundation Program formulas are found at §§17651-17680, 17702, 17901 and 17902 of the California Ed. Code.

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tem does not deny any individual an education, it seems necessary to consider the extent to which the financing system impairs or effects that interest, if at all. The court below apparently did not consider the impact of the financing system on the education an individual receives.[13]

The empirical data amassed in continued efforts to determine factors positively correlated to measurable educational outputs have, to date, failed to support any findings of affirmative correlation between expenditure levels and education outputs. The Coleman report,[14] the findings of which have recently been reaffirmed,[15] found that the expenditure levels and resources of a school system, and even the system itself, have little if any true effect upon educational achievement, and that the two major determinants of educational achievement are the family background of the student and influences of his peer group. (See Coleman, et al., *Equality of Educational Opportunity,* U.S.

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[13]Nowhere in its opinion does the court below discuss the effect of the financing system on the education that is afforded individuals by the Texas school systems. Instead, the court appears to focus solely upon the disparities in tax rates, property valuations, and expenditures, and upon the relative abilities of "wealthy" and "poor" districts to raise additional funds over and above the Foundation Program amounts. The California Supreme Court in *Serrano v. Priest,* was not confronted with this issue, due to the procedural status of that case. As stated by the Court:

> "Defendants contend that different levels of educational expenditure do not affect the quality of education. However, plaintiffs' complaint specifically alleges the contrary, and for purposes of testing the sufficiency of a complaint against a general demurrer, we must take its allegations to be true." *Serrano v. Priest,* 5 Cal.3d 584, 601, 487 P.2d 1241, 1253, 96 Cal.Rptr. 601, ..., n. 16.

[14]Equality of Educational Opportunity, U.S. Dept. of H.E.W., U.S. Govt. Printing Office (1966).

[15]Mosteller & Moynihan, "A Pathbreaking Report" in On Equality of Ed. Opportunity, pp. 36-45; see also Averch, Pincus, et al., How Effective is Schooling? (Rand Corp. 1972).

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Dept. of H.E.W., U.S. Govt. Printing Office [1966] at p. 325.)

Coons and his associates make it crystal clear that when they refer to "quality" of public education in the first term of their formula, they are referring to money, and not to actual educational outputs.[16]

While there is no question that education is an interest of vital importance to both the individual and society in general,[17] there is nothing in the record of this case nor the literature and studies in the field of education to indicate that these interests are adversely affected by a school financing system such as the one in question. Unlike the cases involving rights to criminal process and voting rights, where the evil to be remedied[18] could easily be seen to substantially impair the individual interest involved, there is no reliable

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[16]"If we are to speak of equality, we must first reckon with quality. There must be some standard for judging whether education is better in one district than in another. We have already distinguished two basic views of equal opportunity—the objective school concept and the subjective child-performance concept—and the difference is relevant here. Having chosen the objective standard, the measure of quality becomes not what is achieved but *what is available.* This way of stating the issue very nearly dictates the answer. What is available becomes whatever goods and services are purchased by school districts to perform their task of education. Quality is the sum of district expenditures per pupil; quality is money.

"This approach may appear excessively formal, but it has significant advantages. Its employment reduces the problem of quality to manageable simplicity. . . .

* * *

"The formal dollar standard for measuring quality would suffice as a basis for our central theme, that wealth must not determine the quality of public education; indeed, it is an integral part of that theme. . . ." [Emphasis theirs; Coons, et al., *Private Wealth and Public Education, supra,* pages 25-26.]

[17]*Brown v. Bd.,* 347 U.S. 483, 98 L.Ed. 873, 74 S.Ct. 686 (1954); *Pierce v. Society of Sisters,* 268 U.S. 510 (1925); *Wisconsin v. Yoder,* 32 L.Ed.2d 15; *Griffin v. County School Bd.,* 377 U.S. 218 (1964).

[18]e.g., denial of transcript, *Griffin v. Ill.,* 351 U.S. 12 (1956) and attorney, *Douglas v. Calif.,* 372 U.S. 353 (1963) to indigent defendants; denial of vote to indigents—*Harper v. St. Bd. of Elections,* 383 U.S. 663 (1966),

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data which indicates that the "evil" of the financing system sought to be restructured by plaintiffs—differential availability of financial resources per pupil—has any adverse effect on an individual's interest in education.

Legislation affecting the right of a person to avail himself of governmental services, such as education, has not been, and should not be, subjected to the same closeness of judicial scrutiny as legislation affecting the constitutionally protected right to vote, the fountainhead of all our rights. Indeed, other interests such as the individual's right to subsistence and shelter would appear to have at least as substantial an effect on an individual's opportunities to survive and succeed in society as education. Yet, this Court has determined that legislative enactments affecting these latter interests are not subject to strict judicial scrutiny. (*Dandridge v. Williams,* 397 U.S. 471 (1970); *Jefferson v. Hackney,* ..... U.S. ....., 32 L.Ed.2d 285, 92 S.Ct. ..... (1972); *James v. Valtierra,* 402 U.S. 137, 28 L.Ed.2d 678, 91 S.Ct. 1331.)

Actually, the interest of individuals upon which the court below focused appears to be the individual interest of local property taxpayers in achieving the same ability to raise tax dollars for education as other taxpayers with the same tax rate, regardless of varying property valuations. The logical conclusion, if this interest were to be accorded favored constitutional pro-

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dilution of voting power, due to malapportionment *Reynolds v. Sims,* 377 U.S. 533; and primary filing fee requirements, *Bullock v. Carter,* 405 U.S. 134, 31 L.Ed.2d 92, 92 S.Ct. 849 (1972).

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tection, would appear to be that progressive taxation is compelled.[19] This Court has held, however, that the benefits to which a taxpayer is constitutionally entitled are those derived from his enjoyment of the privileges of living in an organized society, established and safeguarded by the expenditure of public monies for public purposes, and that the benefits received need not be porportional to the burdens imposed by taxation. (*Carmichael v. Southern Coal Co.,* 301 U.S. 495, 81 L.Ed. 1245, 57 S.Ct. 868.)[20]

The many factors involved in the individual taxpayer's choices as to government services to be provided by his taxes, and the relative abilities among taxpayers to pay for those services which affect the tax rates of local school districts, were recognized by the courts in *McInnis v. Shapiro,* 293 F.Supp. 327 (N.D. Ill. 1968) aff'd. sub nom. *McInnis v. Ogilvie,* 394 U.S. 322 (1969), and *Burruss v. Wilkerson,* 310 F. Supp. 572 (W.D. Va. 1969) aff'd. 397 U.S. 44 (1970).[21]

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[19]Goldstein, App. A, p. 49.

[20]Also, it has been held that distribution and utilization of property taxes is a matter within the discretion of the state, and that use of taxes in the county or district where they were raised does not constitute an invidious discrimination or an unreasonable classification. (*Board of Ed. of Ind. Sch. Dist. 20, Muskogee v. State of Oklahoma,* 409 F.2d 665, 668 (10th Cir. 1969); *Hess v. Mullaney,* 213 F.2d 635, 639-40 (9th Cir. 1954).)

[21]The three-judge court in *Hargrave v. Kirk,* 313 F.Supp. 944 (1970), reversed on other grounds sub nom. *Askew v. Hargrave,* 401 U.S. 476, distinguished the operation of the Florida Millage Rollback Act from the financing system involved in *McInnis* on the basis that the property tax ceiling established by the Florida Act prevented local districts from raising more money locally to finance their children's education, thereby requiring them to spend less even if they desired to spend more. This vice is not present in the Texas or California financing systems, which are essentially identical to the systems of Illinois and Virginia. The *Hargrave* court stated, at 313 F.Supp. 944 at 949:

> "Irrespective of the plaintiffs' successful attack on the Act, we know that there will continue to be disparities in per pupil expenditures in Florida, either because some counties may not desire to spend as much

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Indeed, it has been noted that the economic burden of the average resident of a so-called rich school district may be greater than that of the average resident of a poor district, because he pays higher taxes in terms of gross dollars for his schools and, in addition, the cost of his child's education may be substantially reflected in the price of his home.[22]

2. The actual character of the alleged classification.

The three-judge District Court, relying upon the direction of the California Supreme Court in *Serrano v. Priest, supra* (337 F. Supp. 280, 281 n. 1),[23] and the line of U.S. Supreme Court criminal process and voting rights cases[24] recognized in *Hargrave v. McKinney,* 413 F.2d 320, 324 (5th Cir. 1969), (on remand, *Hargrave v. Kirk,* 313 F. Supp. 944 [M.D. Fla. 1970], vacated on other grounds sub nom., *Askew v. Hargrave,* 401 U.S. 476, 91 S.Ct. 856, 28 L.Ed.2d 196 [1971]), determined that the Texas school financing system involves a classification based upon "wealth." This classification, when affecting a "fundamental" interest, was held to require close judicial scrutiny of the financing system (337 F.Supp. 280, 282-283).

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as other counties on the education of their children, or because, in the poorer counties, they cannot. Plaintiffs do not contest the variations in per pupil expenditures from these causes, but only 'the unequal impediment placed on us by the state because we are "poor."' We consider this to be a fundamental distinction between the cases."

[22]Goldstein, App. A, pp. 48-49, n. 91.

[23]"Serrano convincingly analyzes discussions regarding the suspect nature of classifications based on wealth . . ." (337 F.Supp. at 281, n. 1.)

[24]*Harper v. Va. State Bd. of Elections; Douglas v. Calif.; Griffin v. Illinois, supra,* n. 18; *McDonald v. Bd. of Election Comm'rs.,* 394 U.S. 802, 22 L.Ed.2d 739, 89 S.Ct. 1404(1969).

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Apparently, the District Court found, as did *Serrano,* that the financing system classified *school districts* according to wealth, in that it permits "citizens of affluent districts to provide higher quality education for their children, while paying lower taxes, . . ." (337 F.Supp. 280, 285.)[25]

Professor Coons and associates freely concede that the "wealth" to which they refer in their simple formula is the wealth of school districts, and not the wealth of persons or families. They state:

> "We have noted at several points that, in the school finance issue, the poverty involved is always that of the district and only sometimes (though usually) that of the individual."[26]

Amici submit that the lower court's determination that the Texas financing system involved a suspect classification based upon "wealth" is incorrect because (a) the court erroneously relied upon the so-called "de facto wealth classification" cases decided by this Court,[27] (b) classification of school districts by wealth, if such a classification exists, does not constitute a

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[25]The District Court also noted an affidavit showing statistics concerning 110 of the State's 1,200 school districts and compared the median family incomes of families in the richest ten districts with those in the four poorest districts for the year 1960. Its conclusion that "those districts most rich in property also have the highest median family income and the lowest percentage of minority pupils, while the poor property districts are poor in income. . . ." (337 F.Sup. 282) is seriously questioned in Goldstein, App. A, pp. 33-34, wherein he notes that among the three groupings of the remaining 96 school districts the data even shows an inverse relationship between median family income and district tax base per pupil.

[26]Coons, et al., *Private Wealth and Public Education, supra,* p. 374.

[27]*Griffin v. Ill.,* 351 U.S. 12 (1956); *Douglas v. California,* 372 U.S. 353 (1963); *Harper v. State Bd. of Elections,* 383 U.S. 663 (1966).

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classification of individuals by wealth, and (c) this Court has recently held that state legislation allegedly establishing a classification based upon wealth is not subject to close judicial scrutiny where the interest affected was housing or shelter.[28]

(a) The line of U.S. Supreme Court "de facto wealth classification" cases relied upon by the California Supreme Court in *Serrano* and the lower court in the instant case, all involved clear infringements of recognized fundamental *individual* interests. In *Harper v. Va. State Bd. of Elections,* 383 U.S. 663 (1966) the payment of a poll tax as a precondition to voting was invalidated because it conditioned an individual's right to vote on the payment of a fee. In *Griffin v. Illinois,* 351 U.S. 12 (1956) and *Douglas v. California,* 372 U.S. 353 (1963) states were precluded from requiring an indigent criminal defendant to pay for a transcript or an attorney for appeal, requirements which effectively barred such individuals from access to the full criminal judicial process.

That the Texas school financing legislation does not adversely affect an *individual's* interest in education, no matter how highly that interest is ranked, has previously been noted. Thus, it does not appear that any fundamental individual interest is affected by any wealth classification that is arguably embodied in the school financing scheme.

(b) Additionally, these cases all involved classifi-

[28] *James v. Valtierra,* 402 U.S. 137, 28 L.Ed.2d 678, 91 S.Ct. 1331 (1971).

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cations which precluded *individuals* from exercising their rights to vote or to invoke the criminal judicial processes. The lower court in the instant case, like *Serrano,* essentially found that the financing system classifies *districts* by wealth. Thus, the system, if it can be deemed to classify at all, classifies *districts* and not individuals in that manner.

Thus, the rich person living in a poor school district is disadvantaged at least as much as a poor person in the same district, with respect to the local taxes imposed upon his property to finance his children's education. Similarly, the poor person living in a rich school district is advantaged at least as much as a rich person in the same district with respect to the school district tax rate. Therefore, what the court below and the California Supreme Court focused upon is not a classification of individuals by wealth, but the lack of uniformity in the burdens on taxpayers in the various school districts, regardless of differences in their individual wealth. That the financing system does not classify individuals by wealth and does not condition the ability to provide educational dollars on individual wealth is apparent.

In this connection, it is pertinent that intrastate or interdistrict territorial uniformity has not been held to be required under the Equal Protection Clause (*Salsburg v. Maryland,* 346 U.S. 545, 551-52, 98 L.Ed. 281, 74 S.Ct. 280 [1953]), except in cases involving racial discrimination, (see, e.g., *Griffin v. County School Board,* 377 U.S. 218, 84 S.Ct. 1226, 12 L.Ed.

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2d 256 [1964]), or effective impairment of the right to vote (e.g., *Reynolds v. Sims,* 377 U.S. 533, 84 S.Ct. 1362, 12 L.Ed.2d 506 [1964]). It is apparent that if equality in school district tax bases is constitutionally required, then tax base equality would also be required for all taxes imposed by local entities which provide such services as public welfare, health services, police and fire protection, sewers, streets, drains, lighting, libraries, hospitals, parks and playgrounds. Obviously, such a rule of law would completely destroy the manifest benefits derived from delegation of taxing powers to cities, counties, school districts and special districts, and effectively destroy local government.

(c) Also, even assuming, arguendo, that the school finance system does classify individuals or districts by wealth, this Court's decision in *James v. Valtierra, supra,* 402 U.S. 137, 28 L.Ed.2d 678, 91 S.Ct. 1331, precludes application of the close scrutiny test on that basis alone.[29] It is more than apparent that the high premium placed upon community participation in decisions which may lead to large expenditures of local governmental funds is present in the area of education to at least the same extent it is present in low income housing.[30] Any disadvantage to a particular group which may result from the operation of the school financing system is certainly balanced by the values of

[29]The presence of a wealth classification in *James* is vigorously argued by Justice Marshall in his dissent in that case. (28 L.Ed.2d at 684-685.) The absence of wealth classification in the school finance system is discussed above.

[30]The attempt of state legislatures and local school boards to tackle the problems of education in an ad hoc manner are discussed below, together with the particular desirability of this approach in the field of education.

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local autonomy and control of local educational policies and decisions.[31]

3. Societal or governmental interests supporting or affected by the Texas school finance system.

The policy reflected in the Texas school financing system, like California's, is to permit a high degree of local control and responsibility over the administration of the state's public schools and over the amount of money to be expended locally for public school education, while at the same time assuring essential educational financing for all who attend public schools. The dollar amount per pupil raised for educational purposes within any school district, over and above the state contribution, rests within the sound discretion of the local school district governing board and the voters of that district. (Texas Education Code §§20.01, et seq.; California Education Code §§20800, et seq.)

Thus, the aspect of the financing system which is attacked by Appellees can be seen to embody a singular devotion to democratic values and precepts in the administration and control of education. The number and

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[31]As stated by Mr. Justice Black in his majority opinion in *James*, 402 U.S. 137, 142, 28 L.Ed.2d 678, 683, 91 S.Ct. 1331:

> "The people of California have also decided by their own vote to require referendum approval of low-rent public housing projects. This procedure ensures that all the people of a community will have a voice in a decision which may lead to large expenditures of local governmental funds for increased public services and to lower tax revenues. It gives them a voice in decisions that will affect the future development of their own community. This procedure for democratic decision making does not violate the constitutional command that no State shall deny to any person 'the equal protection of the laws.'" [Footnotes omitted.]

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complexity of the variables attendant to the administration and control of a local school district, most of which involve financial considerations, render such local fiscal autonomy in education essential, if not compelling. The variables to be evaluated and accommodated by local boards and the state legislature include statewide variations in costs and salaries, the relative efficiency of school districts, and the need for local innovation and experimentation to accommodate local needs or desires. The high, indeed fundamental, value placed upon democratic processes which permit all of the people of the community to have a voice in public policy decisions which may lead to increased expenditures of local governmental funds is well settled, and has recently been reaffirmed by this Court, (*James v. Valtierra,* 402 U.S. 137, 28 L.Ed.2d 678, 682-683, 91 S.Ct. 1331 (1971).) Adoption of the equal protection standard and rule urged by Appellees and adopted by the court below can only diminish the values of the democratic processes in educational matters by undercutting the responsibility and concomitant local spirit and interest which flow from local autonomy and control of educational programs and the amount of money to be expended on those programs.[32]

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[32]It seems apparent that if the spirit of local responsibility is weakened or destroyed, it may be difficult to revive. In tracing the history of local control and responsibility for education, Gordon C. Lee, in An Introduction to Education in Modern America, Henry Holt & Co., New York (1954) "Education and 'Grass Roots' Democracy: The Administration of Education at the Local Level," ch. 12, p. 207, has stated:

> "The trend today is decidedly in the direction of school district consolidation. Improved transportation has meant that schools could serve larger areas; the resultant combination of erstwhile independent school districts has meant the availability of more adequate resources for school support. However, even this seemingly altogether desirable reform is

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One of the geniuses of the public school systems in America has been the ability of local school districts, whose residents desired and whose funds permitted, to experiment and innovate in finding solutions to educational problems, many of which were of purely local concern and others which were of universal application. The progress and achievements of the public education systems in this country since its founding speak for themselves. The incentive and leadership behind much of this progress has been the high motivation and performance of individual school districts which have undertaken innovative practices and proven or disproven reasonable educational theories. The performance and motivation of such school districts has been of benefit to all school districts.[33] A constitutional rule which would result in a general leveling of educational expenditures would effectively destroy the spirit and motivation of such districts and would eliminate one element of stimulating leadership in education which has existed since the inception of our public education systems.

Another governmental or societal interest which is unquestionably affected by the school finance legisla-

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accompanied by certain very real problems. The intimacy and warmth often characteristic of the smaller school are all too frequently missing in the larger schools. The close contact between school and community, and the resultant high degree of public interest, are difficult to retain as the district is enlarged. All of which indicates that the movement towards consolidation can be carried too far, to the point where the real and vital benefits of genuinely local responsibility are lost."

Diminution of the responsibility of local fiscal control would have much the same effect on local spirit and interest in education as school district consolidation, because limitation of local fiscal options will inevitably reduce local responsibility to determine educational priorities and the distribution of educational dollars.

[33]Mort, P., et al., *Public School Finance* (3rd ed., New York 1960).

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tion in question is the interest of the state in treating individually the multitude of problems in the area of education. This Court has held that, in the area of economics and social legislation, a state may "address a problem 'one step at a time, or even select one phase of one field and apply a remedy there, neglecting the others.' *Williamson v. Lee Optical Co.,* 348 U.S. 483, 488, 99 L.Ed. 563, 572, 75 S.Ct. 461." *Dandridge v. Williams,* 397 U.S. 471, 484, 25 L.Ed.2d 491, 501, 90 S.Ct. 1153. See also *Jefferson v. Hackney,* 405 U.S. ....., 32 L.Ed.2d 285, 92 S.Ct. 1724.

The California Legislature, for example, has devoted considerable attention in recent years to special educational problems in such areas as programs for the physically handicapped, the mentally retarded, the educationally handicapped and for children with working parents. These programs have all involved categorical "excess-cost" state funding which the local districts may augment. Thus, it can be seen that the Legislature has been tackling the myriad problems in education on an individualized basis, problem by problem. The adoption of the constitutional rule urged by Appellees and adopted by the court below in this case would seriously jeopardize the efforts of state legislatures and local boards to tackle these particularized educational problems in such a manner.[34]

A further interest of society, and an individual in-

[34] The intent of the California Legislature to provide for local control and responsibility through the present financing system is set forth in its statement of purposes of the Foundation Program. See California Ed. Code §17300, pp. 44-47, infra.

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terest of parents, which would be affected by affirmance of the rule adopted by the court below has recently been recognized and reaffirmed by this Court. This is the interest of the parent in being able to control his child's education and upbringing. The interest of the state in requiring universal compulsory public education has twice been held to yield to the interest of the parent in determining where and by whom his child should be educated and attempting to achieve the best education he can for his child. (*Pierce v. Society of Sisters,* 268 U.S. 510, 269 L.Ed. 1070, 45 S.Ct. 571 (1925); *Wisconsin v. Yoder,* 405 U.S. ....., 32 L.Ed. 2d 15, 92 S.Ct. 1526 (1972).) The constitutional rule urged by plaintiffs and adopted by the lower court, would effectively limit the opportunities within the public school system of a parent who desired to pay more for his child's education or to have an effective voice in the determination of the amount of funds to be expended on educational programs within his local school district.

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4. Consequence of frustrating legislative and congressional attempts to promote educational opportunities.

In addition to the foregoing factors to be considered in determining the standard of review to be applied, we submit that it is highly relevant to consider the consequences which would flow from the standard of review adopted.

Thus, full consideraton should be given, in this case, to the impact upon the school financing system of imposing a constitutional "straitjacket" of close judicial scrutiny on legislative and congressional attempts to promote educational opportunities. Our concepts of educational services to be provided are by no means static; they are in this modern area undergoing revolutionary changes.[35]

There is room here for only two of numerous possibile examples. (For other examples of innovation, see those programs described in Footnote 40, infra, and on page 60 of text.) The State Superintendent of Public Instruction of the State of California is presently urging that the California Legislature adopt Senate Bill 1302 (Appendix C) which would provide "Early Childhood Education Programs," which would launch many pupils on their educational voyages at the age of three years and nine months. In an interview reported in a legal newspaper, The Los Angeles Daily

[35]See R. Butts & L. Cremin, *A History of Education in American Culture* (1953) L. Cremin, *The Transformation of the School* (1961), both cited in *Wisconsin v. Yoder,* 405 U.S. ....., 32 L.Ed.2d 15, 26, 92 S.Ct. 1526.

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Journal, July 4, 1972, Superintendent Riles is quoted as follows:

> "Q. How are you planning to solve the problem of California's falling test scores?
>
> "A. One thing is our proposed early childhood program.
>
> "The essence of the program is to find out how to change the elementary grades to make sure the children are excited.
>
> "We'll try to individualize the programs. What you're talking about here is children with problems with language, or low-income children—any number of things, including the problems of gifted children. When you individualize his work, you give him the kind of work that will challenge him.
>
> "Another thing we're aiming at is to assure that every student will have one salable skill at the end of high school. We've had task forces on these things since early 1971."

The other example of striking educational innovation in-process is that of "career education." The official journal of the California School Boards Association, after describing U.S. Commissioner of Education, Sidney P. Marland, as "an outspoken advocate of reform in vocational education, states:

> "* * * He has announced that such reform will be one of a very few major priority areas for the Office of Education. Under his leadership, the federal government is financing research, leadership training, and exemplary programs, many of which, incidentally, are located in California.

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"'Career education' is what Marland calls his proposal. What is career education anyway? Is it a fancier name for that rather shopworn commodity traditionally known as 'vocational training'? Emphatically not, according to Marland, who deplores the widespread tendency to divide curriculum and students into three traditional categories: college preparatory, vocational training, and general education. Career education would be a whole new scene; it would involve *every* student, regardless of academic ambition, and it would extend throughout a student's entire schooling, from kindergarten on. Instead of limited specific skills training, which has characterized so much of vocational education, it would introduce students to a more flexible and open-ended grouping skills.

"These skills are the fifteen occupational clusters illustrated in Figure 1 and identified in Figure 2. Each cluster has a whole range of occupational options, each of which offers a number of entry levels requiring varying degrees of skills and/or training. For example, in the health cluster there are such possibilities as accident prevention, pharmacology, medical and dental sciences, to name a few, and each of these areas may be entered from different stages of formal preparation. Open entry and exit from school to work and back again are important aspects of Marland's concept; persons are to be encouraged to check in and out of educational programs throughout their lives to upgrade their skills in a particular field or to retrain themselves for an entirely new career. Such career flexibility is crucial in a society as complex and technological as ours, as we have been pain-

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fully learning in the past few years." ("California School Boards," July/August 1972, pp. 7-8.)

Thus, not only the techniques but basic concepts of education are in the process of rapid innovative changes. To subject to the "necessary to a compelling state interest" test legislative efforts to inaugurate such innovative programs in selected or less-than-all school districts of the state would, at best, stifle such efforts, and at worst, condemn them.

5. The ability of the courts to fashion and enforce fair and appropriate remedies.

As previously noted, to apply the "necessary to promote a compelling state interest" test to legislation is virtually to condemn that legislation. It thus becomes important to consider, among all the relevant factors in determining the proper standard of review, the ability of the courts to fashion and enforce fair and appropriate remedies with respect to the statutory provisions which would probably be invalidated under that standard of review.

Since amici are treating separately the question of the ability of the courts to fashion and enforce remedies with respect to the vastly complex and intricately interwoven legislation making up the Texas system of financing its public schools, we refer to Point III for the substance of these considerations which should be weighed by the courts as one of the factors in determining the standard of review to be applied here.

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The lack of faith in the democratic electoral process demonstrated by the plaintiffs who initiate attacks such as this upon comprehensive school financing programs should not be shared by the courts. Professor Coons and his associates, in their blueprint for litigation attacking school financing systems such as this, consider and give short shrift to the feasibility of achieving their ends through established democratic processes.[36] This high Court on the other hand has expressed its great faith in the democratic electoral processes and has evidenced extreme solicitude for protection of the rights of people to vote, and for the right of voters to see that their votes are not diluted by means of any form of invidious discrimination, including discrimination on the basis of the individual's ability or even willingness to pay.[37]

D. Conclusion.

For the foregoing reasons it is respectfully submitted that this Court should consider all relevant factors and reasons in determining the highly important question of the standard of review to be applied to the complex system of laws whereby the State of Texas finances its public schools. We submit that a careful analysis of the alleged classification involved (wealth), the individual and societal or governmental interest involved (public education), the interrelationships be-

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[36]Coons, et al., *Private Wealth and Public Education*, Belknap Press of Harvard University Press (1970) pp. 287-289.

[37]*James v. Valtierra*, 402 U.S. 137 (1971); Bullock v. Carter, ... U.S. ....., 31 L.Ed.2d 92 (1972).

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tween each basis for determining that the legislative classification is "suspect" and each basis for determining that the interests affected are "fundamental," the consequences for public education of applying a strict standard of judicial review, and the abilities of the courts to fashion and enforce fair and appropriate remedies, must lead inexorably to the conclusion that something less than the onerous "necessary to promote a compelling state interest" test be applied.

II

THE TEXAS SCHOOL FINANCING SYSTEM IS VALID UNDER ANY FAIRLY APPLICABLE STANDARD OF REVIEW.

The provision, administration and control of public education is undoubtedly one of the most complex, if not the most complex, set of problems of state and local governments, and increasingly, of the Congress of the United States.

In attempting to ascertain and accommodate the multitudinous and varying educational needs and desires of the people in the different regions and localities, the people of Texas, like the people of California, have devised a system of school financing which is designed to assure essential educational programs and opportunities to each child attending public schools within the state, while at the same time providing for and permitting a high degree of local control and responsibility over the administration of local schools

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and over the amount of money to be raised and expended locally for educational programs.[38]

The desires of the people of California to assure essential educational programs and opportunities uniformly to all pupils and to assure local control of programs and expenditures is clearly reflected in the following legislative statement of principles and purposes of the Foundation Program:

> "It is the intent of the Legislature that the administration of the laws governing the financial support of the public school system in this State be conducted within the purview of the following principles and policies:
>
> "The system of public school support should be designed to strengthen and encourage local responsibility for control of public education. Local school districts should be so organized that they can facilitate the provision of full educational opportunities for all who attend the public schools. Local control is best accomplished by the development of strong, vigorous, and properly organized local school administrative units. It is the State's responsibility to create or facilitate the creation of local school districts of sufficient size to properly discharge local responsibilities and to spend the tax dollar effectively.
>
> "Effective local control requires that all local administrative units contribute to the support of school budgets in proportion to their respective abilities, and that all have such flexibility in their

[38]Texas Education Code §§16.01, et seq. and 20.01, et seq., California Education Code §§17651, et seq. and 20800, et seq.

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taxing programs as will readily permit of progress in the improvement of the educational program. Effective local control requires a local taxing power, and a local tax base which is not unduly restricted or overburdened.

"The system of public school support should assure that state, local, and other funds are adequate for the support of a realistic foundation program. It is unrealistic and unfair to the less wealthy districts to provide for only a part of the financing necessary for an adequate educational program.

"The system of public school support should permit and encourage local school districts to provide and support improved district organization and educational programs. The system of public school support should prohibit the introduction of undesirable organization and educational practices, and should discourage any such practices now in effect. Improvement of programs in particular districts is in the interests of the State as a whole as well as of the people in individual districts, since the excellence of the programs in some districts will tend to bring about program improvement in other districts.

"The system of public school support should make provision for the apportionment of state funds to local school districts on a strictly objective basis that can be computed as well by the local districts as by the State. The principle of local responsibility requires that the granting of discretionary powers to state officials over the distribution of state aid and the granting to these officials of the power to impose undue restriction

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on the use of funds and the conduct of educational programs at the local level be avoided.

"The system of public school support should effect a partnership between the State, the county and the local district, with each participating equitably in accordance with its relative ability. The respective abilities should be combined to provide a financial plan between the State and the local agencies known as the foundation program for public school support. Toward this foundation program, each county and district, through a uniform method should contribute in accordance with its true financial ability.

"The system of public school support should provide, through the foundation program, for essential educational opportunities for all who attend the public schools. Provision should be made in the foundation program for adequate financing of all educational services.

"The broader based taxing power of the State should be utilized to raise the level of financial support in the properly organized but financially weak districts of the State, thus contributing greatly to the equalization of educational opportunity for the students residing therein. It should also be used to provide a minimum amount of guaranteed support to all districts, for such state assistance serves to develop among all districts a sense of responsibility to the entire system of public education in the State. State assistance to all districts also would create a tax leeway for the exercise of local initiative." (California Education Code §17300.)

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Thus, it can seen that the California Legislature has attempted to accommodate, through the Foundation Program, both the compelling interest of children in receiving essential educational opportunities and the compelling interests of parents in directing and controlling the education and upbringing of their children.

Just as the problems of the poor are complex, and states are given great leeway in discharging their "difficult responsibility of allocating limited public welfare funds among the myriad of potential recipients,"[39] so the problems of all groups and individuals in education are even more complex, and state legislatures and local school boards should be allowed to adjust and solve the variant problems and allocate the limited funds for public education in the most democratic manner possible in order to accommodate local needs and desires for education services.

The problems of the poor in education are only one of the legion of educational problems faced by the legislature on a continuing basis. California, like Texas and other states, has specifically attacked the problems of poor and disadvantaged by providing compensatory education programs, which include special state funding.[40] Additionally, the people of California have as-

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[39] *Jefferson v. Hackney*. 405 U.S. ....., ..., 32 L.Ed. 285, 299, 92 S.Ct. 1724 (1972).

[40] These programs include: crash programs in reading and mathematics—California Education Code §§6490-6498, special programs for mentally gifted minors from disadvantaged areas—§§6421-6434, and pre-school follow through programs—§§6499-6499.9; see generally, California Education Code §§6450, et seq.

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sured essential levels of education to all children with other or additional specific educational problems.[41] A constitutional rule which would require a general leveling of educational expenditures, such as the rule adopted by the court below and the California Supreme Court in *Serrano v Priest, supra,* would undoubtedly infringe upon the abilities of the legislature and local school boards to accommodate the varied interests and needs of children and their parents in these special problem areas.[42]

Additionally, it should be pointed out that the Texas Legislature, in attempting to satisfy the compelling interest of the state in assuring essential educational programs for all children on a uniform basis, has taken into account the disparities in tax bases among the districts and attempted to equalize any concomitant variances in local abilities to support the foundation program and other programs by use of the "economic

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[41]e.g., Programs for educationally handicapped minors, California Education Code §§6750-6753; mentally handicapped minors, §§6870-6874.6, 6920; mentally retarded minors, §§6901-6920; neurologically handicapped minors, §§26401-26404; orthopedically handicapped minors, §§894-894.4; physically handicapped minors, §§6801-6822; and vocational training and rehabilitation services, §§7001-7028. All these programs include special state funding while allowing local participation in the discretion of local school boards, dependent upon local needs and desires for such programs.

[42]For example, it is doubtful whether under the *Serrano-Rodriguez* rule, a local district with special needs and desires for deaf and hard-of-hearing classes could raise and expend, from local sources, whatever funds it felt were necessary or desirable to supplement basic state apportionments allowed for such classes. If such supplementation is not constitutionally permissible, the compelling interests of some parents in directing and controlling their children's education would be thwarted. If it is permissible, the rule makes no sense in that the citizens of one locality, whether due to differing desires or abilities to pay, or both, would be allowed to provide for higher expenditures (and under the assumption of the rule, a higher quality of education) in a particular educational area, to the disadvantage of the child with the same needs in a district where the school board does not choose to provide or supplement such a program.

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index" (Texas Education Code §§16.74-16.78). California has similarly attempted to equalize any such disparities through equalization aid (California Education Code §§17901, 17902) and supplementary aid (§§17920-17926) to districts with lower property valuations.

In view of the apparent absence of a correlation between educational expenditures and educational outputs or the quality of education afforded,[43] the interests of the state in preserving its foundation program formulas and local district options would appear to be all the more compelling. The absence of evidence of such a correlation additionally increases the desirability of giving state legislatures and local school boards great leeyway in determining the formulas for allocation of educational funds, since those bodies are uniquely equipped to respond to the varying educational needs and their concomitant financing requirements on a continuing basis.[44]

The compelling interest of parents in directing and controlling the education and upbringing of their children has been recognized and recently reaffirmed by this Court. (*Pierce v. Sociey of Sisters, supra* (1925); *Wisconsin v. Yoder, supra* (1972).) The reality that pupils and parents in varying localities[45] have differing educational needs and desires strongly militates toward preservation of local control over local educa-

[43]See notes 14 and 15 and accompanying text.

[44]See Argument III, infra.

[45]And within a sprawling urban-suburban area such as Los Angeles County.

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tional programs and their concomitant fiscal allocations. The purpose reflected in the present financing system to permit the citizens of local districts to raise additional tax funds and expend them within the district for whatever government services they determine are needed has been wisely preserved and protected.[46] Allocation and expenditure of funds on educational programs, depending on the complex and varying needs and desires of parents and their children, including their needs or preferences for other governmental services, is largely a problem of parental choice.[47]

This interest of parents was also recognized by Mr. Justice Stewart in his majority opinion in *Wright v. Council of the City of Emporia,* 40 Law Week 4806, 4812:

> "Direct control over decisions vitally affecting the education of one's children is a need that is strongly felt in our society, . . . "

In that case, the City of Emporia's attempt to form a new and separate school system was found to be unacceptable not because creation of a separate system would result in a disparity in a racial balance between the city and county schools, but because the timing of the attempt indicated a clearly racial motive to impede the dismantling of a duel school system, pursuant to court order, under a plan which entities representing

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[46]See *General Am. Tank Car Corp. v. Day,* 270 U.S. 367, 70 L.Ed. 635, 46 S.Ct. 234 (1926); *Hess v. Mullaney* (9th Cir. 1954), 213 F.2d 635, cert. den. sub nom. *Hess v. Dewey* (1954), 348 U.S. 836, 99 L.Ed. 659, 75 S.Ct. 50; *Board of Ed. of Ind. Sch. Dist., 20, Muskogee v. State of Oklahoma,* 409 F.2d 665, 668 (10th Cir. 1969).

[47]Brest, Book Review, 23 Stanford L.Rev. 591, 596, 611-12 (1971).

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two-thirds of the students affected had apparently accepted.[48] The Court recognized that absent such prohibited racial intent, the attempt to create a new school system would be acceptable.

> "Once the unitary system has been established and accepted, it may be that Emporia, if it still desires to do so, may establish an independent system without such an adverse effect upon the students remaining in the county, . . ." 40 Law Week at 4812.

In the instant case, the school finance system quite clearly does not reflect such an invidious motive, either on its face or as applied. Therefore, the values of parental choice in allocation and expenditure of educational funds would appear to be all the more compelling, and the finance system, inasmuch as it preserves and promotes such parental choice, certainly withstands constitutional scrutiny.

In its statement of principles and purposes of the Foundation Program, the California Legislature expressly recognized one of the paramount state interests reflected in the present financing systems, which was wholly ignored by the court below and the California Supreme Court in *Serrano v. Priest, supra*:

> "The system of public school support should permit and encourage local school districts to provide and support improved district organization and educational programs . . . . Improvement of programs in particular districts is in the interests

[48] 40 Law Week at 4811-4812.

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> of the State as a whole as well as of the people in individual districts, since the excellence of programs in some districts will tend to bring about program improvement in other districts." (California Education Code §17300.)

It has long been recognized that much of the remarkable progress and achievements of the American public school systems has resulted from the incentive and leadership of individual school districts which have undertaken innovative educational programs and, in the course of so doing, have proven or disproven reasonable educational theories. The opportunities for the people of a local school district to choose to establish and finance innovative programs are expressly promoted by the present financing systems.[49]

More basic, however, is the interest of the state, through the financing system, to permit districts with peculiar educational problems to accommodate the needs and desires of their students and parents in a democratic manner. School districts in urban areas must accommodate special educational needs which may not be a factor in suburban or rural districts. Some rural districts, likewise, must accommodate certain educational needs not prevalent in urban or suburban districts.

The State Legislatures of Texas and California have wisely recognized, in establishing and maintaining the present financing systems, that the people within

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[49]Mort, P., et al. *Public School Finance,* 3rd Ed. (New York 1960) pp. 207, 213.

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local school districts are uniquely equipped to consider the various factors involved in determining what educational programs are necessary and desirable for their particular district and in determining the level of expenditures for such programs. These various factors include:

1. The costs of continuing contractual commitments for educational services, such as teachers' salaries, which may vary widely from district to district.
2. The costs of other necessary and desired governmental services, such as police and fire protection, health and sanitation services, and other municipal services such as streets, drains and lighting.
3. The availability of federal funds for educational programs, which may relieve the pressures to allocate local funds to certain desirable educational programs.[50]
4. The interests of parents and students in continuity of educational programs within the district.
5. The shifting nature and composition of the district population and any concomitant changes

[50]The impact of federal funds on the abilities of local parents and taxpayers to choose the levels of support for educational programs they desire to provide was totally ignored by the court below and by the California Supreme Court in *Serrano v. Priest*. Both courts focused heavily upon tax rates and district expenditures and assessed valuations per pupil. This data, to be realistic, should include all federal funds distributed to the school districts in any consideration of disparities in school financing and expenditures. To do otherwise would be to require the state legislatures and local school boards to ignore the various federally-funded educational programs in all decisions concerning the level of funding for particular educational programs, a requirement which is obviously irrational. Additionally, large, tax-exempt property holdings within a particular district, such as church and government holdings, may significantly affect such data.

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in their educational needs and desires. Large districts such as Los Angeles, for example, are experiencing significant changes due to redevelopment, resulting in increased assessed valuations, and a decline in pupil population.

6. The impact of private school attendance within the district, which affects the amount of state and local funds allocable per pupil and the incentive of many district residents to supplement the level of funding of public school educational programs.

These factors, in addition to innumerable others, must be considered and adjusted on a continuing basis by the state legislature and local school boards. The complex problems of education, on both a statewide level and even within a particular school district, can and do change rapidly. Any combination of factors, such as those noted above, may, in the best judgment of the people of a state or a local school district, call for the adoption of programs or procedures which operate to the disadvantage of some particular group or groups within the state or district. It will almost always be true that the state or the local school district could accomplish its particular goals and purposes by some other program or procedure which would be less onerous to the disadvantaged group. However, in the area of education, the problems are numerous and complex, and the populations of many districts contain many diverse and shifting groups. Under such circumstances, the Texas and California Legislature's deci-

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sions to allow local choice in the adjustment and accommodation of these problems and groups is more than merely reasonable, it is compelling.

To require state and local legislative bodies, in all decisions concerning the adjustment and accommodation of educational problems, including funding, to determine and choose the least onerous means as to the interest of each group which may potentially be disadvantaged, is to require the unreasonable, if not the impossible. As Mr. Justice Black noted in his majority opinion in *James v. Valtierra,* upholding local referendum procedures for approval of low-income housing:

> "Under any such holding [requiring the State to choose the least onerous method of accomplishing its purposes if a particular group is disadvantaged by a state legislative scheme], presumably a State would not be able to require referendums on any subject unless referendums were required on all, because they would always disadvantage some group. And this Court would be required to analyze governmental structures to determine whether a gubernatorial veto provision or a filibuster rule is likely to 'disadvantage' any of the diverse and shifting groups that make up the American people." (*James v. Valtierra, supra,* 402 U.S. 137, 142, 28 L.Ed.2d 678, 683, 91 S.Ct. 1331.)

It is obvious that such a holding applied to the school finance system in the instant case would require the Court to analyze the governmental structures and procedures of state and local school districts concern-

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ing all aspects of educational decision-making, a task for which courts are clearly ill-suited.

The lower courts in *McInnis v. Shapiro,* 293 F. Supp. 327 (N.D. Ill. 1968) aff'd sub nom, *McInnis v. Ogilvie,* 394 U.S. 322, 333 (1969) and *Burruss v. Wilkerson,* 310 F.Supp. 572, 574 (W.D. Va. 1969) aff'd 397 U.S. 44 (1970) both recognized the complexity of legislative decision-making in the field of education and educational finance. As the lower court in *McInnis* stated, quoting from *Metropolis Theatre Co. v. City of Chicago,* 228 U.S. 61, 69-70, 57 L.Ed. 730 (1913):

> " 'The problems of government are practical ones and may justify, if they do not require rough accommodations—illogical, it may be, and unscientific . . . . Mere errors of government are not subject to our judicial review.' " (293 F.Supp. at 333.)

A careful analysis of the complexities involved in legislative decision-making in the field of education clearly indicates that the decisions of Texas and California to permit local choice while assuring essential programs and levels of support on a uniform basis is neither illogical nor unscientific. Rather, it represents a devotion to democracy and a historical and common sense recognition that decisions concerning distribution of governmental services in such a complex and changing area should be made at the local level in the most democratic manner possible. To hold that the mere involvement of the state in the provision of such governmental services requires that all such services

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must be distributed equally or in a manner devoid of aspects of localized pricing mechanisms would inevitably require wholesale restructuring of all governmental institutions.[51]

Indeed, all of the arguments made by plaintiffs in the instant case, including those concerning the applicable standard of equal protection review, the alleged availability of less onerous alternatives, and the alleged availability of judicially manageable standards were presented to this Court in the jurisdictional statements and various amici briefs filed in the *McInnis* and *Burruss* cases. By its summary affirmance in those cases, this Court rejected plaintiffs' contentions, wisely recognizing the complexity of educational finance legislation and the desirability of permitting local choice in such matters. This Court has consistently afforded state legislatures special freedom in the area of taxation classifications.

> "The broad discretion as to classification possessed by a legislature in the field of taxation has long been recognized. This Court fifty years ago concluded that 'the Fourteenth Amendment was not intended to compel the State to adopt an iron rule of equal taxation,' and the passage 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. Traditionally classification has been a device for fitting tax programs to local needs and usages in order to achieve an equitable distribution

[51]Brest, Book Review, 23 Stanford L.Rev. 591, 599-600 (1971).

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> of the tax burden. It has, because of this, 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. The burden is on the one attacking the legislative arrangement to negative every conceivable basis which might support it." [Footnotes omitted; *Madden v. Kentucky,* 309 U.S. 83, 87-88, 84 L.Ed. 590, 593 (1939).]

The constitutional rule urged by plaintiffs and appellees herein and adopted by the court below and by the California Supreme Court in *Serrano v. Priest,* can only result in an irrational upward or downward leveling of educational expenditures resulting in increased tax burdens and artificial uniformity in educational programs. The compelling wisdom of permitting local choice in the adjustment of complex educational problems must necessarily be ignored if such a constitutional rule is to become the law of this land.

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III

THE MONUMENTAL TASK OF MORE FAIRLY ALLOCATING FINANCIAL RESOURCES TO SCHOOL DISTRICTS IS PROPERLY A FUNCTION TO BE EXERCISED BY THE STATE LEGISLATURE AND THE CONGRESS, AND NOT BY THE COURTS.

The exceedingly intricate and complex problems which would be faced by the courts were they to take unto themselves the Herculean task of more fairly allocating a state's available financial resources among its school districts, requires the conclusion that the courts should leave these problems in the hands of those equipped to deal with them: the State Legislatures, Governors, school boards, the United States Congress and the President.

A brief summary of the difficulties involved should suffice to demonstrate that the courts are not equipped to deal with these problems.

Differences in Status Quo

How would the courts alleviate the consequences of presently existing differences in situations among the various school districts of a single state? Take, for example, the consequences of some districts having old buildings requiring repair or replacement, with inadequate playgrounds, as compared with districts having new buildings with adequate playgrounds. What about the same differences within the same school district, such as the large Los Angeles Unified School District

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with old buildings in the central core and new buildings near its perimeter resulting from newcomers settling farther and farther from the central city? What about differences in the levels of bonded indebtedness among the districts, the differences in existing contractual commitments, salary schedules, commitments made by school staff in reliance on such salary schedules, differences among districts in average salaries because of differences of positions on graduated salary schedules, and differences in programs among districts, such as adult education, vocational education, lunch programs, and culturally disadvantaged programs? Are the courts in fact equipped to equitably alleviate the consequences of such differences in the present situations of the numerous school districts of a state?

Allowing for Differences in Educational Needs

Are the courts equipped to make equitable allowances for the differences in educational needs of the pupils of a state? Plaintiffs concede that such differences exist, but contend that their simple formula permits making appropriate allowances therefor. However, they fail to point out how the courts are equipped to equitably deal with them. Surely, the state legislatures and the Congress are far better equipped to deal with these problems than are the courts. We note the following examples of particular educational programs adopted in California which indicate legislative attempts to deal with special problems of pupils on an individual basis. For culturally disadvantaged minors, the California Legislature has adopted:

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(1) Crash programs in reading and mathematics (California Education Code [hereinafter Ed. C.] §§ 6490-6498).

(2) Special programs for mentally gifted minors from disadvantaged areas (Ed.C. §§6421-6434).

(3) Pre-school follow-through programs (Ed.C. §§6499-6499.9).

Other special programs adopted by the California Legislature include:

(1) Educationally handicapped minors (Ed.C. §§6750-6753).

(2) Mentally handicapped minors (Ed.C. §§6870-6874.6, 6920).

(3) Mentally retarded minors (Ed.C. §§6901-6920).

(4) Neurologically handicapped minors (Ed.C. §§26401-26404).

(5) Orthopedically handicapped minors (Ed.C. §§ 894-894.4)

(6) Physically handicapped minors (Ed.C. §§6801-6822).

(7) Vocational training and rehabilitation services (Ed.C. §§7001-7028).

Even if it is granted that the courts, like the Legislature, may make appropriate allowances for such programs, on what basis would the courts, from year to year, determine *how much* allowance should be made

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for each such program, where such programs should be located and what differential should be allowed to account for differences in costs, etc. arising by reason of their location in remote rural areas as compared with urban or suburban areas?

Allowing for Differences in Costs

Are the courts in fact equipped to allow for differences in prevailing salaries in the various geographical areas of the state, for differences in costs of land acquisition and construction of buildings, for differences in the efficiencies among school districts, because of differences in size or other factors, in such matters as administration, supervision, and purchasing?

Allowing for Federal Grants and Private Gifts

Are the courts equipped to make appropriate allowances for funds available to school districts through Federal grants and private gifts? The court below noted "a series of decisions prohibiting deductions from state aid to districts receiving 'impacted area' aid." (337 F.Supp. 280, 285.) And, how would the courts allow for differences among school districts in amounts received by way of private gift?

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Allowing for Differential Services Rendered by State and Intermediate Educational Units

How would the courts make appropriate allowances in allocating funds among the districts for differences from county to county and from district to district in the amount of services rendered by such intermediate governmental units as the Office of the County Superintendent of Schools in California?

The California Legislature has provided that the County Superintendent of Schools may, and in many instances must, provide various services implementing those provided by school districts. These include special education program coordination, supervision of instruction, attendance and health services, provision of guidance, library, and audio-visual services, and provision of programs for education of the physically handicapped and mentally retarded (Ed.C. §§885-896).

The State Department of Education of California is authorized to engage in various programs and projects, some of which are to be on a pilot project basis, in order to carry out the declared legislative intent "to foster innovation and creative change in education, based on research and proven need" and to "join together the United States Office of Education, the State of California, and local school system to bring purposeful change and experimentation to schools throughout the state, through the use of all available resources of the state." (Ed.C. §575) The scope of the activity authorized by the Legislature to be performed at the

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state level may be indicated by the following articles of the California Education Code, contained in Chapter 6 entitled:

"ELEMENTARY AND SECONDARY EDUCATION ACT OF 1965 AND EDUCATIONAL RESEARCH

Article		Section
1.	General Provisions	575
2.	Educational Innovation Advisory Commission	576
3.	Special Educational Projects	589
4.	Supplementary Educational Centers	590
5.	Experimental, Demonstration, and Operational Projects	591
6.	Evaluation of Projects	592
7.	Incentive Grants	593"

Allowing For Innovation on "Pilot Project" Basis

How are the courts to make appropriate provision for innovation of new educational programs, where there is a need for testing the efficacy of these programs before it is feasible to launch them in all school districts of the state? Would the courts be acting within the proper sphere of their functions were they to institute such innovative programs on pilot bases? See Senate Bill 1302 attached hereto as Appendix C providing for the innovative "Early Childhood Educational Program" to show the extreme complexities in which the Legislature must become involved in order to pro-

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vide for an innovative program, and the requirement or ability to tap vast sums of public funds in order to fund such a program. If this is too much for the courts to accomplish, and if under the court's order the Legislature may not provide for innovative programs, does not the court order deprive the school districts of the state, and by extension the nation, of the benefits to be derived from learning the results and operating technique of such programs?

The plaintiffs have placed the courts in a dilemma. The more simple the rule which might be adopted by the court, the less it would provide for alleviation of the consequences of the wide variety of differences in the educational needs and desires of the millions of students to be affected, and of the consequences of differences in local situations. To adopt a simple rule would be to cast the children of a state from a single mold leading us to fulfillment of the dire predictions in Orwell's "1984."

The more complex the rule, to make provision for alleviation of the consequences of such differences, is to place an impossible on-going task upon the courts—a task with which the state legislatures, the Congress, and the various executive and administrative agencies created by them, are continuing to grapple, using vast sums of money in support of those efforts.[52] For example, are the courts prepared to fashion remedies which

[52]The National Education Finance Project initiated by the United States Office of Education in 1968 resulting in the oft-quoted publications of which "Alternative Programs for Financing Education" Vol. 5 is but one. was funded for approximately $2,000,000. *Id.* p. vii.

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even remotely approach the complexities of A.B. 1283 (Appendix B) presently pending before the California Legislature in apparent response to the *Serrano* decision?

The problems involved here are well illustrated by the order of the District Court below, in which the Court simply restrains the defendants from giving any effect to the existing financing laws of the State of Texas "insofar as they discriminate against plaintiffs and others on the basis of wealth other than the wealth of the state as a whole" and orders them to "reallocate the funds available for financial support of the school system * * * in such a manner as not to violate the equal protection provisions of both the United States and Texas Constitutions." The Court stayed its order for a period of two years "in order to afford the defendant and the Legislature an opportunity to take all steps reasonably feasible to make the school system comply with the applicable law." (337 F.Supp. 280, 286.)

If the Legislature should fail to comply within that period of time, the question arises, how would the court itself fashion and enforce a remedy which would comply with the rule embodied in the order, while at the same time "equalizing educational opportunities" by taking into account, not all of the considerations noted above, but simply the most important of those considerations? How would the court see to it that the funds required to implement its ultimate order are made available? How would the courts manage to ac-

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complish this each fiscal year in an era of rapidly changing educational concepts? The problems of providing educational funds are inextricably intertwined with the problems of raising the necessary funds through taxation.[53]

It must be recognized that the problems faced here are far more difficult that those involved in the reapportionment and desegregation cases—those problems are mere "child's play" by comparison.

The courts are not the proper forums in which to hammer out solutions to these intricate problems. As pointed out by Professor Kurland:

> "When Edward H. Levi, in his talk at the dedication of the new Earl Warren Legal Center at Berkeley, mentioned the problem with which we are concerned here, he said that the proper forum for finding a solution was not a conference but a research center. He was, of course, right, that conferences do not supply solutions for such basic problems. But the same reason that makes it unlikely that a conference will provide solutions makes it unlikely, even Mr. Levi to the contrary notwithstanding, the judiciary is going to afford an answer. And my third point of difficulty with the suggested constitutional doctrine of equality of educational opportunity is that the Supreme Court is the wrong forum for providing a solution. But I must warn you against my personal bias. Mr. Levi finds the 'accomplishment [of the Su-

[53]The "power equalizing" concept offered by Coons by way of token concession to the concept of local decision-making demonstrates plaintiffs' acknowledgment of the close relationship between allocating educational funds and problems of taxation. J. Coons, W. Clune & Sugarman, "Private Wealth and Public Education," pp. 14-15 (1970).

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> preme Court . . . awesome.' I find it awful. But even he conceded 'that many of the decisions point directions for work which cannot be accomplished by the Court itself.' Let me suggest some reasons why I think this would be one of the problems that the Court should leave to others—at least for some time longer—to bring to solution.''[54]

Professor Kurland goes on to point out that "the ingredients for success of any fundamental decision based on the equal protection clause are three, at least two of which must be present each time for the Court's will to prevail beyond its effect on the immediate parties to the lawsuit. The first requirement is that the constitutional standard be a simple one. The second is that the judiciary have adequate control over the means of effectuating enforcement. The third is that the public acquiesce—there is no need for agreement, simply the absence of opposition—in the principle and its application.''[55]

Professor Kurland appears to concede that the rule urged by Professor Coons and adopted by *Serrano* and the District Court below, is a simple one, thus satisfying the first of his three requirements. Although amici agree that in its formulation, the rule is simple enough, we submit that its apparent simplicity is highly misleading. The first term in the formula, "the quality of public education," is itself so complex as to have

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[54]Kurland, "Equal Educational Opportunity: The Limits of Constiututional Jurisprudence Undefined," 35 Univ. of Chicago L. Rev. 583, 592 (1968). (Footnotes omitted.)

[55]Kurland, *supra,* footnote 54, p. 592.

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defied the best efforts of professional educators to the present day and for the foreseeable future. Plaintiffs persuaded the *Serrano* court and the District Court below that they had avoided the pitfall of "lack of judicially manageable standards" by transforming their original demand that the courts enforce "equality of educational opportunities" into the formula "the quality of public education shall not be a function of wealth other than the wealth of the State as a whole." But, it is patently evident that they have not avoided that pitfall since they utilized in their new formulation the initial term "quality of public education" rather than some term such as "expenditures per pupil." Plaintiffs' formulation does not embody the simple rule "one scholar, one dollar," inasmuch as they acknowledge and allege that different students have different educational needs requiring differential expenditures. Plaintiffs are still asking the courts to oversee "the quality of education," not merely to equalize expenditures per pupil, and in doing so, they ask the courts to perform the impossible, as was recognized in *McInnis v. Shapiro,* 293 F.Supp. 327 (N.D. Ill. 1968)[56] and *Burruss v. Wilkerson,* 310 F.Supp. 572 (W.D. Va. 1969).[57]

In further response to Professor Levi's statement that the proper forum for finding a solution to these problems is not a conference but a research center, amici suggest that indeed extensive on-going research

[56]Aff'd, sub nom. *McInnis v. Ogilvie,* 394 U.S. 322 (1969).
[57]Aff'd 397 U.S. 44 (1970).

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is required in the vital field of providing quality educational opportunities to the children of the state, and that such research should be conducted in an atmosphere involving well intentioned educational and fiscal experts working together toward common goals, rather than vying with each other in adversary court proceedings.[58]

An adverse consequence of the courts themselves undertaking the resolution of these problems of staggering magnitude would be the absolving of the state legislatures and Congress of this responsibility with the further consequence that the vast resources available to those legislatives bodies would not be utilized.

A further adverse consequence, should the Congress and the legislatures nevertheless continue to exercise responsibility, would be the extreme uncertainty of the constitutional validity of each of their laws and regulations were the "necessary to promote a compelling state interest" test be made applicable thereto by this high Court.

Although it may be imagined that a well-intentioned mastermind with powerful computers at his disposal and the power of the state behind him could solve the problems of public education in a more equi-

[58]Logically all other governmental services, with perhaps the exception of certain minor ones, would be subject to the *Serrano* rule. If the courts are to involve themselves in all these multitudinous problems assuring themselves that the quality of such governmental services are not to be a function of wealth other than the wealth of the State as a whole, the courts would be undertaking to themselves the impossible burdens of running the State and local governments, and would thereby be failing to give appropriate deference to the democratic ideas upon which this nation is founded and to the social values involved in the striving of communities for excellence and individualism.

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table manner than the legislatures and the Congress have heretofore done, utilizing such means would not comport with the genius of this nation—democracy, nor with our concepts of the rights of our people to pursue individualism[59] and excellence.[60]

Professor Coons and associates, after outlining five strategies which might be used in attacking public school financing systems in the courts, gather them together as follows:

> "An Eclectic Approach. The disadvantages of these action-oriented t a c t i c s can be diminished without losing any advantages. What the child really seeks is a fair hearing on the merits of the constitutional issue, plus a declaration of principle, and the broadest possible freedom for the judge to coax and impel the legislature to a relevant response. On the whole, the approach that will most often serve these needs best is an action for a declaratory judgment naming as defendants state and county officials—and perhaps district boards and superintendents—who have the duty and power to collect the tax or spend for public education. Such a forum can produce a judgment upon the constitutionality of the whole package of laws.
>
> "Furthermore, having declared the system invalid, no immediate action would be required of the court. It could, as in Brown, wait a period to consider the remedy or await legislative reprise;

[59]Wisconsin v. Yoder, 405 U.S. ....., 32 L.Ed. 2d 15, 92 S.Ct. 1526 (1972).

[60]Kurland's Article at p. 591, J. Garner, Excellence: Can We Be Equal and Excellent Too? (1961).

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> this would be especially appropriate in a case where an intervening legislative session could address the question of the proper state response. All the political forces could participate in the remodeling of the state scheme while the court retained jurisdiction and awaited local developments. If the state did not respond in an acceptable fashion, the court could proceed by stages on motion of individual plaintiffs to excuse students from the duty of attendance, order admission in other districts, possibly award money compensation, begin to impound and then to redistribute equalization and flat funds, and then tie up the money of the richer districts. Before the court would shut down the entire system, use its contempt power, or raise taxes, it could even take a leaf from the book of reapportionment by hiring the computer expert who would assist the court in redrafting school districts to produce a uniform wealth base for each.'"[61]

In sum, the courts are not equipped to resolve the intricate multi-faceted problems involved in pursuing the ideal of providing high quality education to all the pupils of a state; these problems must be left to the legislatures and the Congress with the faith that, with all their imperfections, they will represent the will of the people of this country to zealously and diligently pursue that ideal.

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[61]Coons, et al., "Private Wealth and Public Education," *supra,* Chapter 12, "Conclusion: "Tactics and Politics," pp. 447-448. (Footnotes omitted.)

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IV

THE JUDGMENT BELOW SHOULD BE REVERSED BECAUSE THE ORDER GRANTING THE INJUNCTION LACKS SPECIFICITY AND FAILS TO DESCRIBE IN REASONABLE DETAIL THE ACTS SOUGHT TO BE RESTRAINED AND BECAUSE OF ABSENCE OF INDISPENSABLE PARTIES.

Lack of Specificity

The Order of the Court below orders that:

> "(1) The defendants and each of them be preliminarily and permanently restrained and enjoined from giving any force and effect to the operation of said Article 7, § 3 of the Texas Constitution, and the sections of the Texas Education Code relating to the financing of education, including the Minimum Foundation School Program Act, insofar as they discriminate against plaintiffs and others on the basis of wealth other than the wealth of the State as a whole, and that defendants, the Commissioner of Education and the members of the State Board of Education, and each of them, be ordered to reallocate the funds available for financial support of the school system, including, without limitation, funds derived from taxation of real property by school districts, and to otherwise restructure the financial system in such a manner as not to violate the equal protection provisions of both the United States and Texas Constitutions; * * * " (337 F.Supp. 280, 285-286.)

The court went on to order that this mandate be

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stayed "for a period of two years in order to afford the defendants and the Legislature an opportunity to take all steps reasonably feasible to make the school system comply with the applicable law; * * *." (337 F.Supp. 280, 286.)

In a recent case decided by this Court, *Gunn v. University Committee to End the War in Vietnam,* 399 U.S. 383, 386, 26 L.Ed.2d 684, 687, 90 S.Ct. 2013 (1970), the three-judge District Court below had rendered an opinion concluding with the following paragraph:

> "'We reach the conclusion that Article 474 is impermissibly and unconstitutionally broad. The Plaintiffs herein are entitled to their declaratory judgment to that effect, and to injunctive relief against the enforcement of Article 474 as now worded, insofar as it may affect rights guaranteed under the First Amendment. However, it is the Order of this Court that the mandate shall be stayed and this Court shall retain jurisdiction of the cause pending the next session, special or general, of the Texas legislature, at which time the State of Texas may, if it so desires, enact such disturbing-the-peace statute as will meet constitutional requirments.' 289 F. Supp. at 475."

The similarity between the language of this paragraph and the order here in question is readily apparent.

In *Gunn* this Court dismissed the direct appeal for want of jurisdiction on the ground that there was no

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order of any kind either granting or denying an injunction, interlocutory or permanent, as required by 28 U.S.C. §1253.

This Court pointed out that its dismissal of the appeal was not based on a mere technicality that the basic reason for the limitations in 28 U.S.C. §1253 upon this Court's power of review is that until a district court issues an injunction, or enters an order denying one, it is not possible to know with any certainty what the lower court has decided.

This Court went on to state:

> "Rule 65(d) of the Federal Rules of Civil Procedure provides that any order granting an injunction 'shall be specific in terms' and 'shall describe in reasonable detail . . . the act or acts sought to be restrained.'
>
> "As we pointed out in International Longshoremen's Assn. v. Philadelphia Marine Trade Assn. 389 U.S. 64, 74, 19 L.Ed. 2d 236, 244, 88 S.Ct. 201, the 'Rule . . . was designed to prevent precisely the sort of confusion with which this District Court clouded its command.' An injunctive order is an extraordinary writ, enforceable by the power of contempt. 'The judicial contempt power is a potent weapon. When it is founded upon a decree too vague to be understood, it can be a deadly one. Congress responded to that danger by requiring that a federal court frame its orders so that those who must obey them will know what the court intends to require and what it means to forbid.' Id., at 76, 19 L.Ed. 2d at 245.

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> "That requirement is essential in cases where private conduct is sought to be enjoined, as we held in the Longshoremen's case. It is absolutely vital in a case where a federal court is asked to nullify a law duly enacted by a sovereign State. Cf. *Watson v. Buck,* 313 U.S. 387, 85 L.Ed. 1416, 61 S.Ct. 962, 136 ALR 1426."

This Court pointed out that failure of the District Court to follow up its opinion with an injunction was an unfortunate result at best, for if confronted with such an opinion by a federal court, state officials would no doubt hesitate long before disregarding it.

It is submitted that when the District Court does follow up its opinion with an order granting a mandatory injunction, as in the case at bar, but where the injunction lacks specificity and fails to describe in reasonable detail what the defendants must do, the result is even more unfortunate because state officials would no doubt face an even more serious dilemma inasmuch as the purportedly valid injunctive order would appear to them to be enforceable by the power of contempt.

It appears to be patent on its face that the order of the District Court below, requiring certain of the defendants to restructure the financial system "in such a manner as not to violate the equal protection provisions of both the United States and Texas Constitutions," fails to satisfy the standards established by Rule 65(d) of the Federal Rules of Civil Procedure. In *Swift & Company v. United States,* 196 U.S. 375,

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396, 49 L.Ed. 518, 524, 25 S.Ct. 276 (1904) Justice Holmes, in reviewing an injunctive order under the Sherman Antitrust Act, stated:

> "The [Sherman Antitrust] law has been upheld and therefore we are bound to enforce it notwithstanding these difficulties. On the other hand, we equally are bound, by the first principles of justice, not to sanction a decree so vague as to put the whole conduct of the defendants' business at the peril of a summons for contempt. We cannot issue a general injunction against all possible breaches of the law. We must steer between these opposite difficulties if we can."

It further appears that mandatory injunctions should be made especially clear.

As stated in *National Labor Relations Board v. Bell Oil & Gas Co.* (C.C.A. 5th, 1938) 98 Fed.2d 405 at 406-407:

> "Mandatory injunctions should be clear, direct and unequivocal. They should not be hedged about by conditions and qualifications which cannot be performed or which may be confusing to one of ordinary intelligence. If placed in a dilemma by an ambiguous order, one who acts in good faith and with due respect to the court is not guilty of contempt."

Since the complexities involved in the subject matter of this case are such as to clearly demonstrate that this Court is in no position to redraft the order of injunction so as to meet the requirements of Rule 65(d)

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of the Federal Rules of Civil Procedure, it is respectfully submitted that the judgment must be reversed.

Lack of Indispensable Parties

Plaintiffs did not include among the defendants either the State Legislature, which adopted the school financing laws in question, and which has the power to change them, nor the Governor, whose power of approval and of veto can determine whether legislative enactments go into effect.

Rule 65(d) of the Rules of Federal Procedure also provides:

> "Every order granting an injunction * * * is binding only upon the parties to the action, their officers, agents, servants, employees, and attorneys, and upon those persons in active concert or participation with them who receive actual notice of the order by personal service or otherwise."

As pointed out in *Thaxton v. Vaughan* (4th Cir., 1963) 321 F.2d 474, 478, no valid decree may be entered in the absence of parties necessary to carry out the terms of the decree.

Professor Coons and his associates considered this problem as follows:

> "In this form of litigation the proper defendant is again difficult to identify. All the relief sought is beyond the power of any agent of the state operating under the existing state law. The real target is the legislature in all these cases but even

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more directly here. Perhaps the legislature should be named defendant as it was in the *Colorado Assembly case.* (Lucas v. Forty-fourth General Assembly, 377 U.S. 713 (1964).) The problem is that in reapportionment there was, at least in theory, a *duty* of the legislature to act; here there seems no duty, for public education is concededly not a right. Yet there is at least this right, that public education be either validly structured or abolished. (The thought is reminiscent of the prescription of *Brown v. Board of Education,* 347 U.S. 483 (1954), which passed no judgment upon the right to an education, but only upon the right to its dispensation without racial segregation.) Seemingly the state legislature has a duty to do one or the other which would render it the proper defendant. Even if such a duty exists, however, the inclusion of the legislature as a party is awkward and undesirable unless it is clearly necessary.'"[62]

Accordingly, the failure of the plaintiffs to include among the defendants the Legislature and the Governor should require a reversal. Perhaps it would be necessary to also include all school districts which would be adversely affected by the carrying out of the court's injunctive decree.

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[62]Coons, et al., Private Wealth and Public Education, supra, p. 445.

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CONCLUSION

For the forgoing reasons amici respectfully submit that the judgment of the District Court below should be reversed with directions that the case be dismissed.

Respectfully submitted,

JOHN. D. MAHARG,
County Counsel

JAMES W. BRIGGS,
Division Chief, Schools Division

DONOVAN M. MAIN,
Deputy County Counsel
Attorneys for Amici Curiae

By: James W. Briggs /s/
Division Chief
Schools Division
648 Hall of Administration
500 West Temple Street
Los Angeles, California 90012
(213) 625-3611, Ext. 65643

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