IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-1332

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

v.

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

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

MOTION FOR LEAVE TO FILE BRIEF FOR

WENDELL ANDERSON, Governor of the State of Minnesota
KENNETH M. CURTIS, Governor of the State of Maine
RICHARD F. KNEIP, Governor of the State of South Dakota
PATRICK J. LUCEY, Governor of the State of Wisconsin
WILLIAM G. MILLIKEN, Governor of the State of Michigan

AS AMICI CURIAE

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

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The interests of Amici and their reasons for requesting leave to file the attached brief are as follows:

1. Amici, whose individual and particular interests are set forth in more detail below, are the Governors of the above-listed States. As Governors and chief executive officers of their respective States, Amici are responsible for upholding and carrying out the commands of the Constitutions and laws of their various States, including the provisions thereof requiring the establishment of public schools and school districts and commanding the children of their States to attend school. Amici are responsible for financial decisions affecting all State operations, including those pertaining to support and financing of the public schools.

2. Amici are deeply concerned about the ongoing and continuing crisis in public education and the difficulties facing public educational systems in their States and around the nation. Amici recognize that grave inequities now exist in the educational resources available to public school students, and that these inequities exist because of variation in local property tax bases upon which local school districts must rely in order to support their school systems. Amici believe that these inequalities in educational resources violate the requirements of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution and that these inequalities must be eliminated. It is for this reason that Amici today request leave to file the attached Brief.

3. In pursuance of their duties as chief executive officers of their States, Amici have thoroughly examined and are familiar with school finance problems in their States. Amici believe that these finance prob-

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lems and the inequities resulting from the current local property tax-based systems can be obviated without great difficulty, social or administrative, by the institution of school finance systems not dependent upon the wealth of the local school districts.

4. Amici believe it is necessary, in order to continue to maintain a viable public school system and to make such public education available to all without discrimination, that a system be devised which provides:

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

—a rational method of school finance to assure the necessary resources;

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

—local control over educational matters where appropriate.

5. Each Amicus has taken steps to achieve these goals within his state:

(a) The Amicus Wendell Anderson is Governor of the State of Minnesota. The public schools of Minnesota have historically relied upon local property taxes for well over half of operating funds. The resulting system of pubic school financing produced great inequities for both taxpayers and school children. Extremes of per pupil expenditures went from less than $400 to more than $1,000. Tax rates varied from 80 mills to more than 300 mills. Many high expenditure districts were able to finance their expensive and high quality educational programs with lower property taxes than nearby low expenditure districts. This was caused by the inequalities of property tax capacity between districts.

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In 1971 the Amicus presented specific proposals to eliminate inequalities based upon the differing property tax capacity of rich and poor districts. The legislature adopted the proposals in a modified form. The state share of school operating cost was raised from 43% in the 1970-71 school year to more than 60% in the 1971-72 school year to approximately 70% for the 1972-73 school year. The inequality of tax rates between school districts has been greatly decreased under the new system. Overall property taxes for school operating cost have been reduced approximately 20% with reductions of more than 60% in some very poor districts with formerly higher tax rates. Transition to the new finance system has been smooth. Local school boards retain their previously existing authority over programs, curriculum and how funds are expended. The Amicus is currently preparing recommendations for amendments to that law to strengthen and perfect its equalization aims.

(b) The Amicus Kenneth M. Curtis is Governor of the State of Maine. In the State of Maine approximately 60% of the revenues to support public schools are received from the local property tax. There are pronounced inequities among towns in both the administration of the tax and the amount levied. Well documented studies by the Legislature and the Maine Education Council indicate that a fairer and less burdensome system could be adopted by using funds from a State collected property tax with a uniform mill school levy supplemented by other increased State revenues to finance our public schools. Additional proposals presented to the Maine Legislature include a phased full state funding of public school costs financed primarily by an increase in the State income tax.

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The Resolution of December 10, 1971 by the Maine State Board of Education is but one example of the continuing efforts the State of Maine is making to resolve any present inequities in school finance by decreasing the reliance on local property tax as a source of school funds. Pursuant to these efforts, by a joint order of February 4, 1972, the Maine State Legislature established a representative committee to study the tax structure of the State. Amicus believes, as do many civic, governmental and educational groups in Maine, that a revised system of public school finance which complies with the Fourteenth Amendment as interpreted by the court below can and should be established in the State of Maine.

(c) The Amicus Richard F. Kneip is Governor of the State of South Dakota. Article VIII, § 1 of the Constitution of the State of South Dakota states that "the stabilization of a republican form of government depending on the morality and intelligence of the people, it shall be the duty of the Legislature to establish and maintain a general and uniform system of public schools wherein tuition shall be without charge, and equally open to all; and to adopt all suitable means to secure to the people the advantages and opportunities of education." The public schools of South Dakota have historically relied upon local property taxes for approximately 70% of their funds, and the State government has historically failed to fund fully its minimum foundation program of support for schools which is designed to reduce finance disparities among school districts.

In 1968 the South Dakota Education Policies and Goals Commission established by the South Dakota Legislature pointed out that inequalities in financial

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ability and educational load exist among South Dakota school districts and that these inequalities could be reduced by increasing the proportions of school cost assumed by the State with funds to be distributed on an equalization basis.

In 1971 the Counsel For Tax Decision established by the Amicus recommended revisions in the State and local tax structure and educational finance system that include (1) substituting State funds for portions of local school property taxes with those State funds distributed on an equalization basis; (2) modifying the State minimum foundation program to improve its equalization affects; and (3) equalizing the burden of property and sales taxes with respect to the income of taxpayers. These proposals of the Counsel For Tax Decision form the basis for the recommendations of the Amicus to the 1972 South Dakota Legislature, and these recommendations would have, if adopted, the effect of reducing the inequalities in the financial resources available for the education of children in different locations in South Dakota and in reducing inequalities in the tax burden among the citizens of the State. The Amicus is continuing through the resources available to his office a review of alternative tax and educational finance proposals to form the basis of future recommendations aimed at achieving equality of educational opportunities and equity in taxation.

(d) The Amicus Patrick J. Lucey is Governor of the State of Wisconsin. Wisconsin has historically been committed to resolving the problems of financing primary and secondary education; the State has taken action designed to meet the many legal and fiscal problems associated with financing elementary and secondary education by the property tax due to the

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combination of rising education costs, requirements for equal educational opportunity, and accelerating needs for other local services. The Wisconsin Legislature recently reformed the method of tax redistribution from the State to local units of government to result in more equitable allocation of State revenues.

Wisconsin has created a Governor's Task Force on Educational Financing and Tax Reform. The Task Force has been charged with the responsibility of reviewing the State's educational financing dilemma and making recommendations to alleviate the problems. This Task Force is now working on proposals for new financing methods. It should be noted that all of these State efforts are attempts to shift the burden of financing education from the local property tax to some other, more equitable, revenue source. The existence of property taxpayer revolts in Wisconsin, which reflect the oppressive burden the property tax is placing on the State's corporate and individual citizenry, makes it obvious that the local property tax is an inappropriate funding source for educational needs.

(e) The Amicus William G. Milliken is Governor of the State of Michigan. There has been a growing recognition of the inequities caused by Michigan's system of school finance in which 52% of the revenues are derived from the local property tax. The inequities have continued to grow since they were first documented in the comprehensive study "School Finance and Educational Opportunity in Michigan," conducted in 1968 by the Michigan Department of Education at the direction of the Legislature. Following the report, the Amicus appointed a Governor's commission to examine the alternative proposals made in the study

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and to make specific recommendations. Based upon these recommendations, a school finance reform proposal was submitted to the people and Legislature of Michigan. The proposal would eliminate the inequities caused by the variation of property tax wealth among local school districts.

The Amicus believes, as do many civic, educational, and research groups in Michigan, that his alternative can be implemented at a reasonable cost while improving the quality of education and retaining the traditional powers and responsibilities of local school boards.

Amici have examined the issues presented to the Court by this case. Amici have concluded that (a) there is no practical or administrative reason why revised systems of financial support of public school systems, consistent with the decision of the court below, cannot be instituted, and (b) a public school system of the type required to provide meaningful education for all our children can only result from the standard found constitutionally required by the Court below. Amici accordingly request that the Court grant leave to file the attached brief urging affirmance of the decision of the lower court.

Respectfully submitted,

David Bonderman

Peter Van N. Lockwood
Attorneys for Amici Curiae

May 17, 1972

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BRIEF FOR

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AS AMICI CURIAE

QUESTION PRESENTED

Whether the decision of the United States District Court for the Western District of Texas, holding that the Texas scheme for financing public school education violates the Equal Protection Clause of the Fourteenth Amendment by creating a system in which the funds

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available to a school district depend in large part upon the wealth of the district, as measured by the property tax base, should be affirmed.

PROCEEDINGS BELOW

Plaintiffs brought this class action before a three judge court in the Western District of Texas. They charged that the State of Texas, committed by its constitution to provide a free public school system,[1] was violating the Equal Protection Clause of the Fourteenth Amendment of the Federal Constitution by creating and maintaining a system for public school financing which, without justification, provides Plaintiffs' school district substantially less funds than are provided other districts. Plaintiffs charged that despite the fact that great disparities exist between the property tax bases of the various districts, the State of Texas has not only made the amount of funds available to schools dependent upon the local property tax base, with the result that children living in poorer districts are substantially disadvantaged, but has through the use of its Foundation program actually chosen to provide greater supplements to the richer districts,[2] thereby further disadvantaging and dis-

[1] Article 7, § 1 of the Texas Constitution provides that

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

[2] *E.g.*, wealthy Alamo Heights, a San Antonio suburban school district, has a property tax base sufficiently high to have raised $412 per pupil in 1969-70 and it obtained $250 per pupil from the state. The moderate San Antonio North Side district raised $144 per pupil that year from local property tax sources and got $258 per pupil from the State of Texas. Edgewood, the San Antonio

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criminating against the children residing in poorer districts.

Plaintiffs originally brought this action on July 30, 1968. The defendants moved to dismiss, but on October 20, 1969, while denying that motion, the court abated further action for two years so as to allow the legislature the opportunity to correct the inequities complained of by the *Rodriguez* Plaintiffs. 337 F. Supp. 280 at 285 n. 11. When the legislature failed to take appropriate steps, the court acted. On December 23, 1971, the court held that the Texas system of school finance unconstitutionally discriminates against the Plaintiff school children. The District Court noted that the present system "tends to subsidize the rich at the expense of the poor" and found that such a system is violative of the Fourteenth Amendment to the United States Constitution. The court itself ordered no new system, since that choice is to be left to the State of Texas:

> Now it is incumbent upon the Defendants and the Texas Legislature to determine what new form of financing should be utilized to support public education. The selection may be made from a wide variety of financing plans so long as the program adopted does not make the quality of public education a function of wealth other than the wealth of the state as a whole.

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school district in which Plaintiffs reside could raise only $37 per pupil from local taxes but got only $242 per pupil in State aid. Plaintiff's Exhibit 12, based upon computer runs supplied by the State of Texas Education Agency. See also affidavit of Joel S. Berke, Table X; United States Commission on Civil Rights, The Texas School Finance System, pp. 25-31 (1972) (the page cites are to the Commission-approved typewritten copy; publication in printed form is expected in June, 1972) [hereinafter cited as Commission Report].

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Defendants filed notice of appeal to this Court and, on April 17, 1972, filed their jurisdictional statement to which Amici now respond.

STATEMENT OF FACTS

Since at least 1845, when Texas was admitted to the United States, the Texas constitution has provided for the support of public education for the State's children.[3] Although the State has varied its financing methods over the years—originally the schools were to be supported by a state property tax and proceeds from the sale of public lands—Texas has for some time supported its public schools primarily with funds raised from school district property taxes. The present case raises in this Court the discrimination which flows from the methods by which Texas finances its educational system. This discrimination arises solely because Texas has chosen to provide revenue based upon a factor—the wealth of the district in which the children reside—which has no relation to any educational goal.

As noted, basic to the Texas school financing scheme is the local *ad valorem* tax based upon the property value of the school district. According to the statistics assembled by the Texas Governor's Committee on Public School Education, there is a wide range of ability of the local school districts to raise funds for the education of their children. For example, the Edgewood District in which Plaintiffs reside has a

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[3] 5 Governor's Committee on Public School Education, The Challenge and the Chance: Public Education in Texas—Financing the System, pp. 11-17 (1969) [hereinafter cited as Public Education in Texas]. The provisions for school financing now appear as Article 7, §§ 2 and 3 of the Texas Constitution.

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property tax base of $6,239 per pupil while the Deer Park school district has a base of $144,685 per pupil. Similarly, of the 79 districts with more than 5,000 students, the richest has more than 23 times as much property per pupil as does the poorest. Stated in other words, in order for the poorest and richest districts to raise the same amount for their schools out of local funds, the poorest district must tax itself at a rate 23 times higher than does the richest.

This inequity is not alleviated by the state aid with which Texas supplements the income of the local school districts. The two most important state monies made available to the local school districts are the flat grant (the "Available School Fund") paid to every district, rich or poor, on a per capita basis and the so-called "equalization" grant (the "Foundation Program").

As noted, the calculation of the Available School Fund grant is simple: in 1968-69 it paid each district $97.75 for every child in average daily attendance.[4] The Foundation Program grant is in its particulars very intricate, but its general operation is clear: after subtraction of the $97.75 flat grant given each district under the Available School Fund and a local district share dependent upon the district's tax paying ability, the Foundation Program provides a state subsidy up to a level determined separately for each district. While this Foundation Program is theoretically a partial "equalizer" between the poor and rich districts, the level of the state subsidy bears no particular relation to actual costs and, in addition, is keyed primarily to the qualifications of the teachers employed in the district. Since the wealthier districts tend to

[4] Public Education in Texas 35.

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have the resources to attract the more highly-qualified teachers, the level of their state subsidy is higher than that of the poorer districts so that they get more than their fair share and in many instances actually receive more in State "equalizing" funds than do the poor districts.[5] Very rich districts, whose share determined by tax paying ability is greater than the subsidy level determined by the State, get no Foundation grant, but these districts are few. Furthermore, the effect of the Available School Fund flat grant per child is to aid only these few very wealthy districts (since the flat grant is subtracted from the Foundation program grant given the poor districts and in the absence of the flat grant the poorer districts would still receive enough funds from the Foundation program to attain the State subsidy level).

Texas has, in addition, several minor funds available to aid local schools, mainly on a matching basis. The effect of these funds, such as the grant for educational television, is to aid only the rich districts, since the poor districts cannot afford their share of the matching grants. Thus, for example, the Edgewood District obtained no funds under these grants while the richer neighboring districts received thousands of dollars.

The total effect of the state aid to the local districts is succinctly summed up by the statistics for San Antonio, the area from which the case at bar came. Alamo Heights, a rich district which in 1969-70 raised $412 per pupil from its local property tax, received $250 in state aid, while the Plaintiffs' Edgewood District, the poorest in San Antonio, could generate only

[5] See Commission Report, pp. 23-31.

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$37 per pupil in local funds but was given only $242 in state aid. Thus, the total effect of the State program is, rather than equalizing the burden, to further advantage the rich at the expense of the poor.[6] This type of system, as Amici note below, is not only unconstitutional, but could be replaced without great practical difficulties.

ARGUMENT[7]

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

As the decision of the court below clearly demonstrates, the Texas system of financing public education results in widely differing amounts of funds being available to local school districts for expenditure on public education, depending on the value of the taxable property located in the districts. The higher the value

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[6] See note 2, *supra*. See also Commission Report, pp. 25-31.

[7] In light of Appellants' acknowledgement that summary reversal in this case would be inappropriate, Amici would not normally consider it necessary to file a brief on the merits at this stage in the proceedings. However, an amicus brief written by counsel for the State of Maryland and Montgomery County, Maryland, and signed by various other State Attorneys General and additional counsel recommends summary reversal of the lower court decision in this case. Because Amici, in their capacity as Governors of States, the educational systems of which suffer in varying degrees from the same infirmities exhibited by the Texas system at issue here, are strongly convinced that summary reversal of this case would both be erroneous as a matter of constitutional interpretation and have disastrous consequences on the burgeoning movement to reform state educational financing systems, they feel obligated to present their views on the merits to the Court at this time.

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of the property in a district, the more money is available for education at any given level of local tax rates. The Appellants have never contended otherwise.

It is also undisputed that the local school districts and their boundaries, and hence the aggregate value of the property they contain, are entirely the creation of and their maintenance is the responsibility of the State of Texas.[8] Furthermore, the detailed regulation of public education financing by Texas and its active participation through the Available School Fund and the Foundation Program demonstrate that public education in Texas, as elsewhere, is a state not a local responsibility. Indeed, the school districts have the power to raise funds for education only as a result of delegation by the State of its own power to tax for the general welfare.[9]

Thus, the issue in this case is simply whether it is constitutionally permissible for a State to fulfill its self-imposed duty of providing a free education to the children of its citizenry in a manner which discriminates against children and taxpayers who live in poorer school districts. The discrimination occurs because in poor districts the taxpayers are confronted with the alternative of either taxing themselves at rates much higher than those enjoyed by richer districts or of having less tax revenue available to spend on their childrens' education. And an even more invidious discrimination occurs in the case of the poorest districts

[8] Indeed, there are no less than 385 different articles (sections) in the Texas Education Code dealing with the creation and regulation of school districts down to the minutest detail. 8A Tex. Stat. Ann. pp. 8-24 (index).

[9] See Tex. Stat. Ann. arts. 2802g, 2802h, 2802i, and 2802i-1—2802i-31.

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because they cannot raise the necessary revenues by even the most strenuous taxing efforts due to the small amount of taxable property per school-age child and state-imposed maximum tax limits.[10] In short, the poorest Texas school districts, which, as noted above, would have to tax themselves 23 times as hard as the richest to obtain the same revenues because of the inequalities of the system, are prevented by Texas law from making that effort.

It should be re-emphasized that none of the briefs filed on the appeal herein have made any attempt to controvert any of the lower court's findings recited above as to the manner in which the Texas system operates to the disadvantage of children in poorer districts. The reason is apparent: those findings are incontrovertible. Rather, the contentions of those who ask this Court to overturn the decision of the lower court are that there is no federal constitutional impediment to the existing discrimination and that a contrary holding by this Court would produce chaos in public education in the United States. Amici will show that both of these contentions are devoid of merit.

We start from the premise that the Equal Protection Clause of the Fourteenth Amendment applies to state-supported public education. As this Court stated in *Brown* v. *Board of Education,* 347 U.S. 483, 493 (1954): "Such an [educational] opportunity, where the state has undertaken to provide it, is a right which must be available to all on equal terms." In *Brown,* the Court struck down state statutes requiring segre-

[10] The statutory maximum allowed for local taxing efforts varies according to the size of the school district, but is in most cases around $1.75 per $100 assessed valuation. Tex. Stat. Ann. arts. 2802g, 2802h, 2802i, and 2802i-1—2802i-31.

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gation of the races in the public schools as violative of the Equal Protection Clause. Subsequently, in *Harper* v. *Virginia State Board of Elections,* 383 U.S. 663 (1966), the Court struck down the Virginia poll tax on the ground that it had the effect, if not the intent, of discriminating against the poor. The Court there stated: "lines drawn on the basis of wealth or property, like those of race [citation omitted] are traditionally disfavored." 383 U.S. at 668.

Read together, *Brown* and *Harper* stand for the proposition that a State may not discriminate against the poor in affording education to its citizenry. Moreover, as *Harper* demonstrates, the discrimination need not be intentional to be unconstitutional if it is the natural outcome of a statutory scheme and if there is no compelling state interest which requires the discrimination. See also *Bullock* v. *Carter,* 40 U.S.L.W. 4211 (1972).

To place the present case in perspective, Amici submit that if Texas were to appropriate monies from general revenue for purposes of education it could not, consistent with the Fourteenth Amendment, distribute that revenue to local districts in direct proportion to the value of the property within each district.[11] Such

[11] James v. Valtierra, 402 U.S. 137 (1971), is not to the contrary. In that case, the Court held that a provision for local referendums on whether low-cost public housing should be constructed in a community was not violative of the Fourteenth Amendment on the ground that the referendum procedure was one which provided for "democratic decisionmaking" on matters which will "affect the future development of their own community." 402 U.S. at 143. In the present case, in contrast, the State's creation and maintenance of school districts with widely varying tax bases ensures that "democratic decisionmaking" by the inhabitants thereof with respect to their educational needs will be rendered illusory.

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a discriminatory distribution of State funds would be unconstitutional because it would have no rational relationship to the goal of providing an education to all the students in the State. *Compare Harper, supra,* at 666, where the Court struck down a State poll tax on the ground that "voter qualifications have no relation to wealth nor to paying or not paying this or any other tax," and *Bullock, supra,* at 4215, where the Court struck down a system establishing high filing fees for primaries, noting that if the "fee requirement is intended to regulate the ballot by weeding out spurious candidates, it is extraordinarily ill-fitted to that goal."

Since the State could not discriminate directly against students residing in poorer localities, it should not be permitted to accomplish the same result by dividing its responsibility for equal education with local school districts and failing to supplement the funds raised by the school districts sufficiently to eliminate discrimination.[12]

It is particularly striking to note that although Appellants and the Amici who support them are requesting this Court to reverse the lower court decision holding the Texas system unconstitutionally discriminatory against children in poorer school districts, they do not seek to show that the system is nondiscrimina-

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[12] Compare Griffin v. County School Board, 377 U.S. 218 (1964). While a State may delegate certain of its functions to smaller subdivisions such as cities or counties, it cannot escape accountability for their actions. Such subdivisions are "created as convenient agencies for exercising such of the governmental powers of the State as may be entrusted to them. . . . The number, nature, and duration of [their] powers . . . and the territory over which they shall be exercised rests in the absolute discretion of the State." Hunter v. City of Pittsburg, 207 U.S. 161, 178 (1907).

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tory or that there is any rational basis for the system which relates to its purpose of providing education.[13]

Yet such a showing is required even in cases where what is at issue is regulation of business.[14] Where "sensitive and fundamental personal rights" are involved,[15] particularly where discrimination against the poor is at issue,[16] a more thorough judicial review of the Constitutional validity of the policies supposedly supporting the classification is required. "The essential inquiry in all the foregoing cases, is however, inevitably a dual one: What legitimate state interest does the classification promote? What fundamental rights might the classification endanger?" *Weber* v. *Aetna Cas. & Sur. Co.,* 40 U.S.L.W. 4460, 4462 (1972). See also *Williams* v. *Rhodes,* 393 U.S. 23, 30 (1968); *Carrington* v. *Rash,* 380 U.S. 89, 96 (1965); *Reynolds* v. *Sims,* 377 U.S. 533, 575 (1964).

The right to education in a State which provides public education is a fundamental personal right. The aspirations and character of every individual are thoroughly dependent on the education he is able to acquire. Education, like free speech and voting, lies

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[13] In fact, the Texas Governor's Committee on Public School Education found the Texas financing system in question here to be one "which almost defies comprehension." Public Education in Texas 57.

[14] *E.g.,* Allied Stores v. Bowers, 358 U.S. 522 (1959).

[15] Weber v. Aetna Cas. & Sur. Co., 40 U.S.L.W. 4460, 4462 (1972); Eisenstadt v. Baird, 40 U.S.L.W. 4303, 4308 (1972).

[16] *E.g.,* Harper v. Virginia State Board of Elections, 380 U.S. 663 (1966); Douglas v. California, 372 U.S. 353 (1963); Griffin v. Illinois, 351 U.S. 12 (1956).

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near the heart of the democratic enterprise.[17] All, or nearly all, States have recognized the peculiar importance of education in this regard and it is for this reason that virtually every State constitution contains a provision similar to the one quoted here from Article 7, § 1 of the Texas Constitution:

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

This recognition of the fundamental importance of education by virtually every State, and the resulting State constitutional provisions, eloquently demonstrates the distinction between the significance of education and that of other types of services provided by State and local governments, for no other service is so greatly the subject of State concern. Indeed, for the law's recognition of the special importance of education, there is no better citation than the familiar passage in this Court's historic opinion in *Brown* v. *Board of Education,* 347 U.S. 483, 493 (1954):

> Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foun-

[17] It is for these reasons that States require that individuals undergo education, and that courts uphold these requirements. Meyer v. Nebraska, 262 U.S. 390, 402 (1923).

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> dation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education.

Given this unique importance of education, more than unsubstantiated assertions of rationality are required to sustain a system which operates to discriminate against children residing in poor districts solely because of their district's lack of wealth. Compare *Weber* v. *Aetna Cas. & Sur. Co.,* 40 U.S.L.W. 4460 (1972); *Bullock* v. *Carter,* 40 U.S.L.W. 4211 (1972). This burden the Appellants have not satisfied; indeed, they cannot because not only is no compelling State interest served by the present system, but the system is irrational and unnecessary to achieve any legitimate State purpose. Furthermore, the present system could be replaced without great burden, as Amici show below. Thus, the present system constitutes a clear case of denial of equal protection, as a number of recent court decisions have recognized in cases decided upon both federal and state constitutional grounds. *Serrano* v. *Priest,* 5 Cal. 3d 584, 487 P. 2d 1241 (1971); *Sweetwater County Planning Committee* v. *Hinkle,* 491 P.2d 1234 (Wyo. 1971), 493 P.2d 1050 (Wyo. 1972); *Van Dusartz* v. *Hatfield,* 334 F. Supp. 870 (D. Minn. 1971); *Robinson* v. *Cahill,* 118 N.J. Super. 223, 287 A.2d 187 (1972); *Hollins* v. *Shofstall,* No. C-253652 (Ariz. Super. January 13, 1972).[18]

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[18] Compare Eisenstadt v. Baird, 40 U.S.L.W. 4303 (1972); Lindsey v. Normet, 40 U.S.L.W. 4148 (1972); Reed v. Reed, 404

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Appellants evidently base their case for reversal as a matter of law principally on this Court's previous summary affirmances of three-judge district court decisions in *McInnis* v. *Shapiro,* 293 F. Supp. 327 (N.D. Ill. 1968), *aff'd mem. sub nom. McInnis* v. *Ogilvie,* 394 U.S. 322 (1969); and *Burruss* v. *Wilkerson,* 310 F. Supp. 572 (W.D. Va. 1969), *aff'd mem.,* 397 U.S. 44 (1970). Appellants' reliance on *McInnis* and *Burruss* is, however, sorely misplaced.

In *McInnis,* the court interpreted the plaintiffs' complaint as attacking the constitutionality of the Illinois system of financing public education on the ground that "*only* a financing system which apportions public funds according to the educational needs of the students satisfies the Fourteenth Amendment." 293 F. Supp. 337. The court held with respect to the claim so stated that: "There is no Constitutional requirement that public school expenditures be made only on the basis of pupils' educational needs without regard to the financial strength of local school districts. Nor does the Constitution establish the rigid guideline of equal dollar expenditures for each student." 293 F. Supp. at 336. In *Burruss* the contentions were similar. 310 F. Supp. at 574.

Amici do not quarrel with the holdings of the *McInnis* and *Burruss* courts set forth above. The difficulty for Appellants, however, is that the present case involves neither a holding that public school

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U.S. 71 (1971). In Dandridge v. Williams, 397 U.S. 471 (1970), the Court found that the Maryland welfare regulations there at issue were "rationally based and free from discrimination." 397 U.S. at 487. That decision offers no support for overturning the lower court's decision here because the Texas system both discriminates against the poor and lacks a rational basis for so doing.

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expenditures must be based solely on pupils' educational needs nor a requirement of equal dollar expenditures per student. In fact, the present case involves no requirement concerning *expenditures* at all. All the lower court held here is that there is no rational basis to support a system of financing of public education in a manner which concededly operates to the disadvantage of children who live in poorer districts. It is to be noted that the court left the State of Texas free to adopt whatever system of financing it prefers, so long as it does not discriminate on the basis of wealth. This holding, Amici submit, is both correct and constitutionally required for the reasons discussed above.

Appellants and the Amici supporting their position seek to avoid the impact of the constitutional requirements by assertions that an affirmance of the lower court decision would have catastrophic effect on State public education. Amici are in a particularly good position, as State Governors active in the area of school finance reform, to evaluate the accuracy of these predictions and have no hesitation in stating to this Court that such predictions are without merit. Appellants make the following arguments, which Amici will discuss seriatim:

1. It is asserted that the lower court decision "would adversely affect the quality of public education in the state." (Ap. Br., p. 8). According to this assertion (no factual data is adduced in support), Texas would be confronted with a choice between providing each district with the same amount of funds available to the richest district in the State or in cutting back on the funds available to schools in the richest districts (which are described by Appellants as the "best"

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schools) so as to transfer funds to schools in the poorer districts (the "worst" schools, according to Appellants). Appellants' assertions here are based upon the premise that "equalizing amounts spent on education on a state-wide basis would almost certainly be done at a level that would not significantly increase the overall expenditure for education." (Ap., Br., p. 8).

This line of argument is without merit, for a number of reasons. First, it depends on the assumption that statewide taxation of property, for example, would raise funds equal to or less than those currently raised. That is by no means clear since even if the statewide tax rate were no higher the average rate currently imposed by the school districts, the increased revenue from the wealthy districts which pay very light taxes under the current system might well outweigh any loss from the currently overtaxed poor districts and make more funds available than under the present system.[19]

Second, it is assumed that if an equalized system would in fact result in less funds for the wealthier districts, the State would lose interest in increasing expenditures for education. In light of the fact that the inhabitants of the wealthier school districts are by and large the persons who control political power in any State, an assumption that they will not exercise that power to increase educational expenditures statewide to a level that will provide their own children with the funds they consider necessary for good education seems unwarranted.

Third, this contention assumes that Texas would be required, under the lower court decision, to pay a per pupil dollar amount equal in each district. That is not

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[19] See 1 New York State Commission on the Quality Cost and Financing of Elementary and Secondary Education, Report 2.26 (1972).

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so, as Amici point out below. What Texas cannot do is pay a school district an amount based solely upon the district's wealth. There is nothing to prevent Texas, if it so chooses, from conditioning equal payments on equal local taxing effort, for example, which would leave the local community to decide whether it wished to pay for "quality" schools.

Finally, it should be noted that the Appellants' argument, in its essentials, is that the poor can be discriminated against so that the rich may be better off. This is not and cannot be a principle of constitutional law. The "good" (wealthy) schools presently receive more State funds for education than they are entitled to. No court decision, including that of the court below, bars or will bar a State from affording "quality" education to *all* of its children. And unsupported contrary assertions by Appellants and others will not change this fact.

2. Alternatively, and inconsistently, those who would have this Court reverse the decision below maintain that nondiscrimination would involve a tremendous increase in educational expenditures. This is not so. While it is true that if a State chooses to equalize all schools at the level of spending now enjoyed only by the wealthiest districts there would be an increase in educational outlays—although not a tremendous one—a State is free to choose the level of equalization to insure that there is little cost increase. The President's Commission on School Finance has recently completed a study of this subject which included a thorough analytical treatment of the cost factors involved.

According to the President's Commission, Texas, which currently spends over $1.5 billion annually on

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its schools, would increase costs no more than $40 million by converting to equalized schools if it chose to equalize payments at the 50th percentile.[20] This amounts to an increase of around 2.6%—less than that required annually from inflation alone. Nationwide, the figures are similar. Thus, in the United States, which spends $45 billion annually on education,[21] the additional costs involved in equalizing at a 50th percentile level amount to $1.3 billion, an increase in outlay of less than 3%. Of course, if States choose to equalize at higher levels—that is, in Appellants' terms, decide to make high quality education available for all—the costs will increase. But even so, the increases required are not prohibitive. Thus, if Texas chooses to equalize at the 70th percentile, its increase in costs would be $92 million (6.1%) and at the 90th percentile that increase would be $263 million (17.5%). Similarly, nationwide, the cost if all States choose to equalize at the 70th percentile would increase by $2.5 billion (6%) and at the 90th percentile by $6 billion (15%).[22]

While Amici do not submit that these are necessarily small figures, they do show that the order of magnitude of expenditures necessary to equalize our schools even at the level of the very best is not overwhelming and that to maintain a school system in which the overall quality is higher than the average now but which does not discriminate against the poor

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[20] 2 Staff Report, President's Commission on School Finance Reform, Review of Existing State School Finance Programs 15 (1972) [hereinafter cited as Staff Report].

[21] President's Commission on School Finance, Schools, Money & People: The Need for Educational Reform 11 (1972).

[22] Staff Report 15.

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need cost almost nothing more than we are presently paying.

3. Appellants also raise the spectre of a mass flight from the public schools by the children of those who already object to having their children attend school with blacks and other members of minority groups. Not only is it singularly unattractive to propose that this Court trade off discrimination against the poor in exchange for eliminating racial discrimination, but this contention is factually erroneous.

First, perpetuating discrimination against the poor in education financing will hardly promote the use of the public schools to achieve "a society that is not divided by artificial barriers of race or class or wealth." (Ap. Br., p. 9). On the contrary, it is precisely the existence of school districts in which high property values, low tax rates and ample funding for public education coincide that is the principal cause of the creation of residential enclaves from which the black and the poor are excluded. Second, as the attempts to avoid desegregation have shown, the fact that persons who place their children in private schools are still taxed to support public schools operates as a substantial deterrent to "flight away from the public schools" by all but the richest.

4. There are, in addition, references to the effect of the lower court decision on local control of schools, private property rights, continued viability of the State governments, and so forth. While Amici do not believe that these points require any lengthy discussion, it is appropriate here to point out that the court decision below and the standard it finds constitutionally required do not interfere with local admin-

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istrative control of the schools in any way. What the court below held is merely that the State must provide for financing in a non-discriminatory manner. This in no way deprives local school districts of such control over curriculum, personnel, and other academic decisions as the State may choose to grant to the districts. Indeed, under the standard adopted by the court below the poor school districts will for the first time have the chance for the meaningful local control which the lack of resources due to financial discrimination under the present system has made impossible.

In closing this section of their Brief, Amici would re-emphasize that the constitutional standard adopted by the court below—correctly in our view—does nothing more than require the State to stop using a system which discriminates against the children residing in poor districts. It does not require that the State utilize any particular means of financing. Rather, it sets forth the basic constitutional standard and quite properly leaves it to the State to make the policy decisions as to which of the many ways of school financing it will adopt.

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

1. A uniform formula, whereby the State grants each district the same amount per pupil;
2. "Power equalizing," whereby the State assures that each district receives equal funds for equal local tax effort;

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3. Variation by cost of services, whereby the State pays more to those districts (generally urban ones) where costs are higher;

4. Combination formulae, whereby the State pays a uniform amount under either formula 1 or formula 3 above and allows the districts additional leeway to spend more, for example, under formula 2.

The four formulae mentioned above are merely a few of those available. There are, in addition, many other factors that the State could consider in adopting a particular financing program. These include variations in educational need (such as programs for the handicapped), educational innovation and experimentation, and municipal overburden (that is, since urban areas are harder pressed to provide all the necessary municipal services than are rural areas, the urban areas may require additional aid). None of the formulae suggested above, nor the variations thereon, are of great administrative difficulty and any of them could, based upon a State's policy decision as to how best to spend the funds available to it, form the basis of an adequate and constitutional school financing system.

CONCLUSION

The principal interest of Amici in filing this brief is to insure that this Court in the present case does not, in effect, endorse the existing defects in the financing of public education in the various States, including those governed by Amici. Amici believe, and the court below recognized, that the discrimination against poor children which results from such a system of school

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

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