IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 71-1332

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

vs.

DEMETRIO P. RODRIGUEZ, et al.,
Plaintiffs-Appellees.

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

MOTION FOR LEAVE TO FILE BRIEF FOR JOHN SERRANO, JR. AND JOHN ANTHONY SERRANO AS AMICI CURIAE IN SUPPORT OF APPELLEES

Amici hereby respectfully move for leave to file the attached brief urging affirmance of the decision of the lower court in the above-entitled case. Amici have consent of appellees to the filing of this brief; appellants have refused consent. The interests of amici and their reasons for requesting leave to file the attached brief are as follows:

John Serrano, Jr. and John Anthony Serrano are father and son respectively. The son, age 12, is a

student in the 7th grade in Dexter Junior High in Whittier School District in Los Angeles County, California. For many years, the elder Serrano has striven to secure quality public education for the son and for the younger Serrano children. To this end in 1968 he and his son joined other parents and their children as original plaintiffs in the class action known as *Serrano v. Priest,* 5 Cal.3d 584, 487 P.2d 1241 (1971). That action challenging discrimination by wealth in the California school finance system is still pending before the state courts of California and could be seriously affected by the resolution of the instant appeal. The Serranos and all families in similar circumstances look to this Court for final judgment upon the systems of school finance which have so long visited inferior education upon their children.

Amici have considered the issues of national significance presented in this case. They have concluded that the decision below is constitutionally correct and that the standard therein adopted is judicially manageable. Amici, therefore, respectfully request that this Court grant leave to file the attached brief which focuses upon that standard.

Dated, August 18, 1972.

Respectfully submitted,

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SUMMARY OF ARGUMENT

Texas school districts vary widely in their taxable resources per pupil and thus in their ability to raise money for education. Texas districts also vary in their level of spending per child. The holding below challenges the impact of the former and not the existence of the latter; spending differences are at stake only insofar as they are linked to district wealth.

Texas has in fact made spending for public education a function of the taxable property wealth per

pupil of its school districts; this is undisputed by appellants. Amici will argue that such state designed wealth classification burdens an interest—education—which is constitutionally fundamental; indeed, this interest significantly affects "freedoms guaranteed by the Bill of Rights". *Dandridge v. Williams,* 397 U.S. 471, 484 (1970). Amici will emphasize that the victims of the consequent wealth discrimination are children and in no sense responsible for their own plight. Their political impotency makes judicial intervention specially appropriate.

Given these circumstances the defendants must demonstrate that discrimination by wealth of the district is necessary to advance a compelling interest of the State. There is, however, no legitimate interest of the State served by the present use of district wealth as a criterion of dollars spent upon a child's education. Even if local control of school taxing and spending were an interest held by the State and were thought to be "compelling", that interest could be served—and served better—by permitting locally chosen tax effort, but not local wealth, to determine spending.

The constitutional standard recognized below is simply that the quality of public education may not be a function of wealth other than the wealth of the State as a whole. As a constitutional rule it is clear, simple, and effective. It forbids nothing which is educationally rational. It permits any degree of interdistrict spending variation based upon specific educational considerations or cost differences or upon local

choice not affected by wealth differences. Practically speaking it offers a way to achieve greater autonomy and variety in local government. It has been well received in disinterested quarters, but, in any event, would be easily enforced without engaging the courts in educational policy making.

Amici regret the length of this brief. It is largely the consequence of the emphasis by defendants and defendants' amici upon the published work of counsel herein. Misinterpretations of this work by defendants' advocates are understandable and unresented. Yet their number and magnitude entail patient clarification of what is, underneath it all, a fairly simple lawsuit.

ARGUMENT

INTRODUCTION:
TEN MISCONCEPTIONS CONCERNING FISCAL NEUTRALITY

The standard adopted below is this: "the quality of education may not be a function of wealth other than the wealth of the state as a whole." 337 F. Supp. at 284. This simple and extremely modest rule of "fiscal neutrality" has been misconstrued both by those who defend the present system and those critics who would have *Rodriguez* support broad egalitarian objectives. A summary correction of the more prominent errors will dispose of false issues and put the appeal in clearer perspective before we proceed:

1. The issue is local control over spending.

This is plainly wrong. Under the holding below the legislature remains free to let districts set their own spending levels, so long as, in the future, district differences in taxable wealth do not affect the outcome. There are many feasible systems that would accomplish this. Local control in fact seems likely to increase.

2. Uniformity of spending among districts is required.

This is incorrect. It would even be proper for Texas to increase the present range of district spending variations. For example, the State validly might decide to spend $5,000 per year per pupil in twenty experimental districts. It might do the same with gifted pupils or low achievers. It would merely be forbidden to base spending variations on district wealth.

3. Any valid system must be more (or less) expensive.

Any necessary effect of *Rodriguez* upon spending levels is purely imaginary since the principle itself suggests nothing respecting the level of spending. If the legislature wishes, total cost could be reduced. Of course the legislature can spend more if it pleases. Its total discretion is illustrated by the difficulty defendants' amici have in deciding which way spending will go. Consider two pictures of tomorrow drawn from the same brief submitted by a number of affluent school districts and State attorneys general. The first picture: "That the end result of a Rodriguez rule,

and the regime of full state funding enforced by it will be a reduction in total educational spending is apparent." Brief of Liebman et al., at 54. Forty-five pages later the same amici insist: "The relief sought by Plaintiffs will result in staggering costs to already heavily burdened state governments." *Id.* at 99. Both these predictions are argued vigorously and at length —that spending will surely go down (pp. 48-54) and that spending will surely go up (pp. 99-107). Their fellow amici pack this all into one sentence. They say *Rodriguez* ". . . can only result in an irrational upward or downward leveling of educational expenditures . . ." Brief of Clowes et al., at 57. There is of course a third possibility. We confess ignorance of the likeliest outcome; the political process will decide.

4. Compliance will destroy public education.

If anything can save public education, it will be the minimal respect for rationality and justice represented in fiscal-neutrality. In fact, the rule has been excoriated by one critic precisely because it will save public education which he regards as objectionable on ideological grounds. Spring, "Equal Opportunity and the Mythology of Schooling", *Educational Theory,* 347 (Summer, 1971).

5. Rodriguez is part of an "egalitarian revolution".

As now should be clear, the standard adopted is scarcely egalitarian. It guarantees neither equal spending nor any spending. It merely rejects those spending differences now based upon district wealth.

6. The property tax is threatened.

So far as amici can ascertain, no plaintiff in the school finance cases has even alleged the invalidity of the property tax, at either the state or local level. Certainly nothing in the *Rodriguez* record or opinion would suggest it.

7. Rodriguez is a poor man's complaint.

It is true and relevant to the nature of their injury that plaintiffs are poor; pupils from poor families living in poor districts suffer most from the present system. However, the evil here attacked is district poverty—it represents a systematic governmental discrimination affecting children whose families are of all income classes.

8. Rodriguez will help (or hurt) private schools.

Rich district amici argue that *Rodriguez* is an assault upon *Pierce v. Society of Sisters,* 268 U.S. 510 (1925), Brief of Liebman et al., at 11, and mistakenly attribute to counsel in the instant brief the suggestion that ". . . the right to private education should be further burdened" (at 50).[1] The fact is that

[1]Having published a book arguing for the legislative extension of the *Pierce* right, counsel can scarcely be accused of being anti-private schools. Coons and Sugarman, *Family Choice in Education: A Model State System for Vouchers* (Berkeley, The Institute of Government Studies, 1971). See also Coons, "Recreating the Family's Role in Education", 3-4 *Inequality in Education* 1 (1970); Coons, Clune, and Sugarman, *Private Wealth and Public Education,* 256-68 (Cambridge, Harvard University Press, 1970) (hereafter "Private Wealth"); Coons, "Community-Controlled Schools: Some Theoretical and Economic Problems", 23 Stan. L. Rev. 846 (1971); Coons and Sugarman, "Family Choice Systems: A Report to the New York State Commission on the Cost, Quality, and Financing of Elementary and Secondary Education" (1971).

the rule adopted below has nothing whatsoever to do with schools that are not publicly financed.

9. Big cities will be hurt.

Perhaps it is enough to note that this suggestion comes from Grosse Pointe, Bloomfield Hills, and Montgomery County. Brief of Liebman et al., at 83-99. Big cities themselves are in this appeal as amici for plaintiffs in support of the ruling below. This is not to suggest that *Rodriguez* will help all cities. Some cities are presently very poor and will automatically be helped; some are relatively well off and *could* be hurt. The outcome for these latter cities depends entirely upon the formula adopted by the legislature to respond to special urban burdens. Of course some cities might have preferred a constitution standard guaranteeing their "needs", but they are satisfied with a rule of constitutional neutrality which leaves them free to persuade the legislature respecting those needs. This is precisely why San Francisco, which appeared as plaintiffs' amicus in *Serrano v. Priest,* 5 Cal.3d 584, 487, P.2d 1241 (1971), is now before the legislature of California lobbying for a formula responsive to urban problems and permitting local choice of spending level. Brief of Liebman et al., pp. 94-95.

10. Minorities will be hurt.

Minority persons will be helped or hurt according to the taxable wealth of their district and the new spending systems adopted. As with any neutral constitutional principle, the point is not to reward a par-

ticular class or to determine in advance who shall be the beneficiaries. If one is inclined to let minorities speak for themselves, the most reliable statement of their interest is appellees' brief in chief, signed by counsel for one of the largest national minority organizations.

The effective antidote to all such phantasmagoria is a reading of the amicus submissions of parties particularly interested in school bonds. See Brief of Bond Counsel and Brief of Republic National Bank of Dallas et al. These documents, prepared with meticulous care and sobriety of tone, represent the opinion of dozens of the nation's most distinguished and experienced school bond counsel and their respective firms. They demonstrate two crucial conclusions: First, school districts can readily adjust to the *Rodriguez* rule so long as it is prospective only; second, legislative discretion and local choice are in no wise threatened. The brief of the Texas Banks in support of the Jurisdictional Statement illustrates specifically, at pp. 20-22, a number of decentralized systems that these experienced school counsel and their clients regard as feasible.

The short of it is that fiscal neutrality is a constitutional standard of extraordinary restraint. Far from confining the legislature it liberates a political system long deadlocked by the very structure of educational finance. This prospect is fearful only to those who would shun the democratic process.

PART I. THE FACTS: TEXAS MAKES THE QUALITY OF EDUCATION A FUNCTION OF WEALTH

Defendants would have the Court ponder subtle and distracting questions of economics and social science, but amici will demonstrate the vanity of these inquiries. The only relevant facts are those simple and undisputed fiscal data which manifest the powerful relation between district wealth and district spending.

The discussion emphasizes three points:

(1) School spending per pupil is largely determined by district wealth.

(2) District property wealth is real wealth; if a district's property wealth does not correspond in every instance to its collective personal wealth, the State is not thereby vindicated.

(3) Doubt concerning the relationship of dollars to educational quality is for the state and school districts—not the children—to resolve. Plaintiffs object only to the double standard: one guess for poor districts, another for rich.

(1) Texas law makes spending for each child's public education a function of district wealth.

The Texas school finance system favors wealthy districts—those with greater taxable resources per pupil to draw upon. Above the dollar level of the state-assisted minimum plan Texas invites such districts to raise and spend money at levels closed to the poor. Since the differences in wealth among districts are enormous, the consequent differences in district expenditure levels are enormous, and the children of the poorer districts are the victims. The statutory mech-

anism responsible for this outcome assigns uniform responsibility for education to districts which, however, are given wildly varying tax ability; spending is tied to the accident of local wealth per pupil. Local wealth for these purposes is property value since it is the property tax which the state has assigned to school districts for use in financing public education.

The ranges of wealth and spending in Texas are gigantic. Data provided to plaintiffs by the Texas Education Agency show that in 1967-68, among districts with over 500 pupils, market value of taxable property ranged from an estimated $7,000 per pupil to more than $500,000 per pupil. Spending (without federal funds) for current operations ranged from below $200 to over $900 per pupil. Of those 79 districts with over 5,000 pupils the richest enjoyed twenty-three times the wealth of the poorest; the former spent $754, the latter $215 (without federal funds).

The following table lists the 15 highest spending and the 15 lowest spending of Texas' 79 districts which in 1967-68 had more than 5,000 pupils. The table lists 1967-68 per pupil expenditures for current operations (without federal funds) and estimated market value of taxable property per pupil. The wealth-spending relationship could not be much clearer; all 15 high spenders have substantially more wealth than have all 15 low spenders.

Texas School Districts With Over 5000 Pupils in Average Daily Attendance in 1967-68: Wealth and Spending Comparisons of 15 Highest and 15 Lowest Spending Districts.

District	15 Highest Spending Districts Expenditure Per Pupil (Without Federal Funds)	Estimated Market Value Per Pupil
Deer Park	$754	$144,685
Highland Park	604	102,401
Brazosport	576	82,454
Goose Creek	572	74,453
Calhoun	543	107,565
Texas City	526	60,836
Midland	525	39,467
Galena Park	522	42,798
Ector	519	66,747
South Park	519	62,113
West Orange	519	58,332
LaMarque	517	57,568
Port Arthur	515	67,844
Port Neches	511	65,902
Clear Creek	502	97,978

District	15 Lowest Spending Districts Expenditure Per Pupil (Without Federal Funds)	Estimated Market Value Per Pupil
Laredo	$210	$10,250
Edgewood	215	6,239
So. San Antonio	251	11,572
San Benito	284	10,097
Killeen	293	13,474
Ysleta	296	13,874
Weslaco	302	11,207
Harlandale	304	11,706
Brownsville	307	12,098
Northside	325	22,727
Pharr-San Juan	329	14,617
Northeast Houston	341	14,213
Mesquite	342	16,928
Texarkana	348	27,910
San Antonio	350	22,418

This picture is mirrored in plaintiffs' table V (App. 208) set out in Brief of Appellants at p. 12, which we summarize as follows:

Market Value Per Pupil	Average State and Local Revenues Per Pupil
10 Districts Above $100,000	$815
26 Districts $100,000-$50,000	544
30 Districts $50,000-$30,000	484
40 Districts $30,000-$10,000	461
4 Districts Below $10,000	305

In Texas the connection between district wealth and district spending is inescapable, and the magnitude of its effects upon spending is significant.

It is sometimes suggested that the reason that some districts spend more on their pupils than do others is that they "care" more and hence make more of a tax effort. It is true of course that different local tax efforts do have a bearing on district spending levels. However, measuring tax effort by the tax rate that the district is willing to impose, it is clear that, if anything, the poor "care" more in Texas, because they tend to have higher tax rates than do the rich districts. In short what is really happening, in general, is that the richest districts are coasting, taxing their immense wealth at a low rate. The poorest districts, though they carry higher rates, cannot overcome the wealth advantages of the rich.

This is shown by plaintiffs' Table II (App. 205) which we reproduce below.

Table II

The Relationship of District Wealth to Tax Effort and Tax Yield
Texas School Districts Categorized by Equalized Property Values, Equalized Tax Rates, and Yield of Rates

Categories Market Value of Taxable Property Per Pupil	Equalized Tax Rates on $100	Yield per pupil (Equalized Rate Applied to District Market Value)
Above $100,000 (10 Districts)	$.31	$585
$100,000-$50,000 (26 Districts)	.38	262
$50,000-$30,000 (30 Districts)	.55	213
$30,000-$10,000 (40 Districts)	.72	162
Below $10,000 (4 Districts)	.70	60

We have not yet said anything about the Texas "state aid" plan. This is because it is not this part of the finance scheme which gives rise to the system's unconstitutionality. In fact, Texas could distribute the same amount of "state aid" far more fairly (i.e., more to the poorer districts, less to the rich). Thus, while defendants' statement that state aid "has a mildly equalizing effect" (Brief of Appellants, p. 3) is probably a reasonable interpretation of the facts, this is hardly to the State's credit. The Texas plan could be much improved if some of its anti-equalizing

features were removed.[2] Improved, yes, but invidious and significant wealth discrimination will continue, for, as presently constituted, state subventions are structurally inadequate to deal with the system's bizarre maldistribution of resources.

(2) Appellants misunderstand the respective relevance of personal and district wealth.

Defendants argue at length (pp. 20-25) that the court's finding of a coincidence of district poverty and low family income is disputable and that the result below, therefore, is bottomed on an "unsound factual assumption." They imagine, for reasons undisclosed, that the "wealth" revelant to the constitutional rule adopted below is the income of district residents. But,

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[2]1. The "Available School fund" program should be eliminated; this provides money to districts which are too rich to receive aid under the "Minimum Foundation Plan" and hence neutralizes much of what the foundation plan might do to benefit the poor.

2. The "Minimum Foundation Plan" guarantees should be calculated in terms of student needs rather than be based on teacher salary schedules; giving greater state subventions to districts which hire teachers having advanced degrees means giving more money to the rich districts which can afford to employ a greater number of such persons.

3. It is not surprising, then, to find out how little (if at all) the state subventions help the poor districts in Bexar County where plaintiffs reside. We reproduce selections from Plaintiffs' Table VII (App. 216) which is printed at Brief of Appellants, pp. 12-13.

District	1967-68 Market Value of Property Per Pupil	1967-68 State Aid Per Pupil
Edgewood	$ 5,960	$ 222
Harlandale	11,345	250
North Side	20,794	248
San Antonio	21,944	219
North East	28,202	233
Alamo Heights	49,478	225

as the court below held, it is district poverty which is constitutionally crucial, for this is the barrier which operates to deprive plaintiffs of their rights. That the wealth of a collectivity is relevant for constitutional purposes is further discussed in Part II below.

As for the court's finding regarding the relation between district poverty and low family income, while it is unnecessary to determine the legal wrong, it does confirm the common expectation that those in fact injured by the system tend more to be children of the poor than the rich.

As we are here concerned with alleged factual disputes, we will now imagine that defendants' puzzling argument is refined to suggest that real property value in a district is an untenable measure of district wealth. Even so such an argument is without merit.

First, as defendants themselves elsewhere note (Brief of Appellants, p. 13), the standard of district wealth accepted below is simply the one adopted officially by the Texas legislature in establishing the apparatus of the local educational property tax—that is, market value of taxable property per pupil. If there is an "unsound factual assumption" in this, it has been supplied by the State. Further, there is certainly no indication that the legislature adopted this standard with the quaint expectation that high property value districts would be low spenders. Obviously, the property tax is made available under the assumption that rich districts will more easily be able to raise funds if they so desire.

Secondly, it is plain from the record itself that assessed property wealth—whatever its faults—is in fact an excellent measure of district ability to spend for schools. The powerful empirical correlations shown between property values and spending permit no reasonable doubt of their interdependence.

Thirdly, any argument that ability to spend should be measured only by personal income ignores the enormous amount of industrial and commercial property which the property tax makes available to the schools.

The income of families is, of course, relevant to the character of the injury. Children of the poor living in poor districts do suffer more than their nonpoor neighbors because they cannot escape to private schools. Yet this does not by any means confine the injury to the poor. Children of the middle class and the rich often prefer those values which are represented in *public* education and to which they are entitled. When such families living in poor districts feel they must choose private schools out of desperation rather than native preference, they have suffered substantial injury. Possibly this argument is "sophisticated", as defendant complains (Brief of Appellants, p. 20); but it is also true.

(3) The quality of education is diminished by district poverty.

The court below found that, because of their greater spending power, affluent districts can provide a "higher quality education". 337 F. Supp. at 285. In their Jurisdictional Statement, defendants em-

phasized this same relation between expenditure and educational quality; it is the basis of their prediction of rich district reaction to a neutral system: "It is unlikely that those whose children now enjoy high quality education would sit happily by as the quality of their education is reduced." Jur. St., p. 8.

Again, in their brief now before this Court, defendants note that ". . . [D]ecisions on a statewide basis about spending levels, would . . . promote uniform mediocrity." Brief of Appellants, p. 46. Thus, throughout several rounds of pleadings, a full trial, a jurisdictional statement and portions of the briefs the parties have shared common ground concerning the nature and reality of the injury to plaintiff-children from the current system. These pupils had fewer of the educational goods and services—the educational inputs—that money buys; their opportunities were to that extent impaired. The record abounds with plaintiffs' proofs and defendants' admissions of the objective differences between rich and poor districts.

Now, at the eleventh hour—elsewhere in the same brief—defendants change course. They announce that the injury found below is unproved, only an assumption—and an "unsound" one at that (pp. 16-20). They are joined in this new and inconsistent argument by affluent amici districts—Grosse Pointe, Montgomery County, Beverly Hills, and others. See Briefs of Liebman et al, and Clowes et al. One is tempted to sarcasm by an argument from rich districts that higher spending buys no additional education. None-

theless the Court should be assured that the view taken below is in fact responsible and correct, and amici will treat the point seriously.

Here is the sole sentence in defendants' brief by which they seek to justify raising this question: "There was conflicting testimony before it [the court below] on whether quality of education can be measured by dollars spent (Graham and Stockton Depositions)." Brief of Appellants, pp. 17-18.

It is our unpleasant responsibility to note that this statement is flatly—though surely inadvertently—incorrect. There is simply *nothing* in either of the depositions cited which suggests the inefficacy of money; there is a great deal in the Graham deposition which flatly asserts the opposite—and these were defendants' witnesses.[3] As the testimony in the margin suggests, *all* parties and the court did share one assumption. This is that if a school has better facilities, better teachers, more teachers, a broader curriculum, a counseling program, and/or the multitude of other educational goods and services that dollars buy, it will—on the average—provide a superior educational opportunity. With the President's Commission

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[3]Dr. Stockton had literally nothing to say on the subject. See Stockton deposition, Doc. No. 178. Mr. Graham's testimony included the following:

> "Q. . . . [B]asically the amount of money, considering other factors to be equal, has an important effect on the quality of education?
>
> A. Yes, if all other factors . . . were absolutely equal, then you would have to say the amount of money would affect it rather markedly . . ." Graham deposition, p. 46. Doc. No. 177.

the parties until this point ". . . recognize[d] that money builds schools, keeps them running, pays their teachers, and, in crucial if not clearly defined ways, is essential if children are to learn". President's Commission on School Finance, *Schools, People, and Money: The Need for Educational Reform,* xi (1972).

Amici's own view on the cost/quality question—like that previously held by defendants—is that the State is properly judged by its own actions and not by the subjective individual pupil response thereto. This has been the historic approach of the Supreme Court which faced this question in a parallel form nearly a quarter of a century ago in another case from Texas. In *Sweatt v. Painter,* 339 U.S. 629 (1950), the issue was the objective educational "equality" of racially separate law schools. The Court specified the goods and services that extra money can buy—more facilities, distinguished teachers, more teachers, variety of courses, specialization, a larger library. *Id.* at 633-34. It decided that the Negro school was unequal, because it had less of these purchasable things. "It is difficult to believe that one who had a free choice would consider the question close." *Id.* at 634. This approach is confirmed in dictum in *Brown v. Board of Education,* 347 U.S. 483, 492 (1954). For the Supreme Court equality in the racial cases has always been measured in terms of the opportunity to learn. The question has not been, for example, whether black children scored at a particular level in a specific skill, but rather whether the state had systematically provided Negroes with inferior opportunity. The test is one of *inputs*

by the State, not of performance by pupils on a narrowly focussed battery of tests. Even if black children were literally incapable of improving their test scores, this would not justify the input discrimination.

This view that input and opportunity define quality is imbedded in the legislated structure of Texas school financing. The statutes of Texas empower Alamo Heights to spend at its present high level only because the district continues to buy education with every dollar. The teachers and facilities procured by rich Alamo Heights, whatever their number or specialty, all represent part of that district's fulfillment of its one statutory responsibility—to educate. The Texas "state aid" program presently reinforces this point by supporting higher salary levels for more experienced and better educated teachers. The State cannot disavow the effects of these expenditures. As the district court noted in *Van Dusartz v. Hatfield,* 334 F. Supp. 870, 873 (D. Minn. 1971), ". . . the Legislature would seem to have foreclosed this issue to the State by establishing a system encouraging variation in spending." It is, of course, conceivable that certain teachers in Alamo Heights and similar districts are compensated for engaging in activities with no educational objective or effect: it is further possible that rich districts are systematically inefficient. There is, however, no suggestion of either in the record, nor would this be a common sense assumption. Even if it were assumed without evidence that the State is less certain that spending in higher ranges is equally efficacious, it should resolve that uncertainty even-

handedly. It is unfair that only children of rich districts be given insurance against the unknown. Plaintiff children ask only to be included in the State's calculation of money's worth; they do not challenge it.

The plaintiffs have made a prima facie showing of injury by proving disparities in spending. As in *Sweatt v. Painter supra* they have gone further and in a multitude of ways shown the effect of these disparities upon the objective character of education. See e.g., Deposition of Berke, App. 220. The State itself has defined the school districts' function as education. Even if there were an issue, under *Sweatt v. Painter, supra* the defendants in such circumstances would necessarily carry the burden of demonstrating that spending above some absolute level is educationally wasteful. Indeed, they are the only parties in a position to supply proof on such a question. Since none was offered, the issue is pretermitted.

Nevertheless, the defendants persist in the effort to cast the burden upon plaintiffs, heedless of the absurdity to which this leads. Concerning the "asumption" below of the relation between spending and quality they say: "It is enough that these assumptions are not demonstrably true and that they remain fighting matters among those concerned about these things. In connection with whether obscenity has a harmful effect, the Court has noted that there is a growing consensus that while a casual (sic) link has not been demonstrated it has not been disproved either. In that situation, the Court said, legislation that proceeds on the premise that obscenity is harmful has a ra-

tional basis." Brief of Appellants, at 25. Precisely so; but this supports the children, not the defendants, for *it is the legislature's own assumption of fact that the children here assert.* It is they, not defendants, who credit the Texas legislature with an educational purpose when it established the education code. This is not a case in which the statutory premise is challenged by individuals, but a unique historic instance in which the State itself brazenly seeks to repudiate the assumption upon which its own legislation is grounded. And for what purpose? To legitimate it! It is hard to know what to say about such a legal argument. Even if it succeeded, it would demonstrate only that the system was utterly irrational, hence void on other grounds.

This burden is on the defendants even if the Court were at this late stage of the case, as defendants urge, to consider the constitutional standard only in terms of subjective or "output" measures of quality. That is, since the legislature has naturally and reasonably assumed that children are affected by the schools in various beneficial ways, by defendants' own rationale they carry the burden of proving the assumption unsound. On this point, however, the defendants merely cite social scientists to demonstrate that the linkages of money to test scores "remain fighting matters among those concerned about these things". Brief of Appellants, at 25. For two kinds of reasons this is insufficient, even apart from the fact that defendants properly should be forbidden to pursue this statistical quiddity at this stage of the litigation.

First, defendants have hardly carried their burden by pointing to disputes among experts about money and test scores.[4] Second, test scores scarcely constitute

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[4]However, lest misunderstanding be risked, amici will respond on the merits. There is statistical evidence from the very scholars and professionals relied on by defendants that money does count —and even for the narrow purpose of test scores. Indeed, Professor James Coleman is himself the author of the lengthy and favorable "Introduction" to *"Private Wealth"*. His support is not surprising. The justly famous "Coleman" Report which accidently spawned the statistical debate over the ability of money to raise test scores was itself not designed to answer such a question. Office of Education, U.S. Dept. of Health, Education and Welfare, *Equality of Educational Opportunity* (1966) at iii-iv. Coleman's purpose was to measure the consequences of being black in the public schools. His concern with spending was confined to avoiding statistical misadventures with his racial data. Hence, only the crudest information on spending was gathered; for example, there is simply no fiscal data in the Coleman Report which ties spending to the child himself as he moves through school (or from school to school); the data are school and district data only. Therefore, Professor Marshall Smith concludes, "We cannot estimate from the information given in the Report what the achievement of a student might be if he were exposed to a particular set of school resources and not to some others." And, again, ". . . if the survey had gathered data on the utilization of the school resources differentially among students within schools, the conclusions of the Report might have been very different." Smith, "Equality of Educational Opportunity: The Basic Findings Reconsidered", in Mosteller and Moynihan (eds.), *On Equality of Educational Opportunity*, 239 and 249 (New York, Random House, 1972). (Hereafter "Mosteller and Moynihan")

It is precisely the absence of specific and "longitudinal" information which has invited the academic logomachy among statisticians. Smith, in *Mosteller and Moynihan* at 247, 315-316. Professors Hanushek and Kain note that the methodology employed in fact blocks any assessment of the effect of additional resources: "It does not even give the direction, let alone the magnitude, of the effect that can be expected from a change in inputs." "On the Value of *Equality of Educational Opportunity* as a Guide to Public Policy," at 135, in *Mosteller and Moynihan*. These authors conclude: "As a pioneering piece of social science research, the *Report* deserves considerable praise. However, as a policy document, it must be evaluated differently. In this guise it is potentially dangerous and destructive." Id. at p. 138.

Finally, notwithstanding the criticism of the Coleman Report, the Coleman data indicate ". . . that the quality of teaching does

the whole of education. This Court itself has had sufficient recent experience with standardized tests to be sensitive not only to their unreliability in measuring skills, but also to the limited scope of the skills tested. *Griggs v. Duke Power Co.,* 401 U.S. 424 (1971).

Hence even if the statistical debate about money and test scores some day were made satisfying and complete—and even if it turned out that the absence of a connection between money and scores on particular tests were "proved"—the conclusion here would be unchanged. It is simply false to the nature of education to suppose that its substance is exhausted by a child's response to standardized tests. "In education the 'product' consists of the knowledge, skills, attitudes, and values that pupils choose to build into *themselves.* These products are not readily specifiable, nor, in a pluralistic society, is it altogether clear who should do the specifying." Dyer, in *Mosteller and Moynihan,* at 388. Professor Marshall Smith would add the following: *"Verbal Achievement,* may in no way be representative of the outputs that the resources are intended to affect. Science laboratories might be

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indeed make for differences in the quality of pupil learning." Dyer, "Some Thoughts About Future Studies", in *Mosteller and Moynihan* at 412. Since good teachers in general can command higher salaries, the connection to money is made. (see Deposition of Graham, p. 48); since teachers salaries consume approximately 80% of the current budget in Texas schools (see Texas Education Agency, Estimates and Projections for Texas Public Schools, Tables XI and XIII (1972)) the connection to *Rodriguez* is made. That is, it could be made if that were the issue.

effective for teaching a way of thinking—experienced teachers may exercise a more acceptable form of control over potentially unruly classes. Neither 'resource' may contribute to the skills tapped by conventional standardized tests of achievement." Smith, in *Mosteller and Moynihan,* at 314-15.

Thus we conclude that, whatever his test score, a child—and society—have much to gain or lose from the total school experience, if it be only the child's opportunity to acquire "acceptable social values and behavior norms". B. Weisbrod, *External Benefits of Public Education,* 28 (1964). A family which somehow is able to move from Edgewood to Alamo Heights may not add a point to its child's test score. Nevertheless, it has added to his *education* some very specific skills and experiences that Edgewood could never provide. His exposure to carefully selected teachers, adequate facilities, personal attention in uncrowded classes, and a choice of courses from a broader curriculum represent educational values of the highest order—even if inexpressible in statistics. The chance to learn a foreign language, to paint, to play the cello, to construct a table, or merely to attend school in a decent physical environment may help to get the young person a satisfying job, to ennoble his spirit, and to make him a better citizen. Perhaps if poor districts were better financed this is precisely where the extra money would go. Amici believe such aspects of education to be enormously important. And, as Professor Karst observes: "If a wealthy district can afford an astronomical observatory and a poor district

cannot, the luxury item in the wealthy school may make little difference to achievement test scores. But it will stand as a continuing reminder to the students in the adjoining poor high school that society does not think their aspirations should reach so high. In the separate-but-equal era, after all, school boards sometimes argued that the schools set aside for blacks offered some courses that were not available at the white schools—such as bricklaying." Karst, *"Serrano v. Priest: A State Court's Responsibilities and Opportunities in the Development of Constitutional Law,"* 60 Calif. L. Rev. 720, 750-51 (1972).

Finally, it would be strange to suppose that the forms taken by education today are beyond mutation in ways that might be assisted by money. With virtual revolutions under way in a half dozen scientific, technological, and sociological fields of inquiry, the conclusion that mankind has reached a dead end in education does not commend itself as a ground for constitutional decision. See generally, Gilbert and Mosteller, "The Urgent Need for Experimentation," in *Mosteller and Moynihan,* at 371. We embrace the view of this matter taken by the rich school districts of Los Angeles County in their brief for defendants before this Court: "Our concepts of educational services to be provided are by no means static; they are in this modern area (sic) undergoing revolutionary changes." Brief of Clowes et al., at 37. "Thus not only the techniques but basic concepts of education are in the process of rapid innovative changes (sic)." *Id.* at 40.

PART II. THE LEGAL ARGUMENT: THE FIRST AND FOURTEENTH AMENDMENTS GUARANTEE FISCAL NEUTRALITY IN PUBLIC EDUCATION.

Amici's constitutional argument for fiscal neutrality is supported by several distinct considerations.

(1) Discrimination by School District Wealth Triggers Close Judicial Scrutiny.

(2) Education is a First Amendment Value Entitled to "Fundamental" Status Under the Equal Protection Clause.

(3) The Infancy of the Victims Supports the Application of the Compelling Interest Test.

(4) No Interest of the State is Threatened by Fiscal Neutrality Which Leaves Vast Discretion in the Legislature.

(1) Discrimination by school district wealth triggers close judicial scrutiny.

Amici will not restate the nature and gravity of the injury to plaintiffs, described in Part I, which arises from the wealth classification in this case. It is clear that plaintiffs are hurt by the unevenhanded state system.

This Court has frequently and without deviation declared that classifications based upon wealth are suspect and require close judicial scrutiny. Dozens of cases since *Griffin v. Illinois,* 351 U.S. 12 (1956) have treated classification by wealth either as a signal of irrationality *(Lindsey v. Normet,* 405 U.S. 56, 79 (1972)) or as an intolerable burden upon a "funda-

mental" interest (*Harper v. Virginia,* 383 U.S. 663 (1966)). Amici will not canvass the many relevant decisions. It will be sufficient to emphasize that, contrary to defendants' assertions (Brief of Appellants, at 20), this case is not the first before this Court in which the relevant poverty was that of a group rather than an individual. In *Bullock v. Carter,* 405 U.S. 134, 144 (1972), the impact of the discrimination fell upon the class of "voters supporting a particular candidate".

In any event, the other (principally earlier) wealth cases should not be read to limit the principle to individual poverty. The Court has avoided any such suggestion, and it would be peculiar to suppose that persons deserve special protection simply because of their general economic vulnerability. It is not the general life circumstances of the injured person but his inability to pay for the protected interest that is suspect. The poor man may constitutionally be excluded from the swimming pool for want of the admission price; but the poll tax is invalid even as applied to a rich man temporarily without funds. At ground the principle is simply that it is grossly unreasonable to condition fundamental rights upon ability to pay. Poor school districts lack the ability to pay; it is their wealth which determines the level of spending for education. Not even a rich man can buy good public education; for this there are no individual purchasers. There are only individual victims of a district's collective lack of purchasing power. It would be absurd to question the relevance of collective poverty in this case.

If this is not the first example of discrimination by wealth against groups of persons, it is the first in which the relevant poverty is an artifact of the legislative scheme itself. It is difficult to imagine a more appropriate circumstance for close judicial scrutiny. The special invidiousness of this discrimination by wealth was put very directly by the opinion in *Van Dusartz*:

> . . . [t]he objection to classification by wealth is in this case aggravated by the fact that the variations in wealth are State created. This is not the simple instance in which a poor man is injured by his lack of funds. Here the poverty is that of a governmental unit that the State itself has defined and commissioned. The heaviest burdens of this system surely fall *de facto* upon those poor families residing in poor districts who cannot escape to private schools, but this effect only magnifies the odiousness of the explicit discrimination by the law itself against all children living in relatively poor districts. 334 F. Supp. at 875-76.

In *Serrano* the California court rejected the suggestion that such wealth discrimination was merely "de facto":

> . . . [w]e find the case unusual in the extent to which governmental action *is* the cause of the wealth classifications. The school funding scheme is mandated in every detail by the California Constitution and statutes. Although private residential and commercial patterns may be partly responsible for the distribution of assessed valuation throughout the state, such patterns are

> shaped and hardened by zoning ordinances and other governmental land-use controls which promote economic exclusivity. [citation] Governmental action drew the school district boundary lines, thus determining how much local wealth each district would contain. [citations] Compared with *Griffin* and *Douglas*, for example, official activity has played a significant role in establishing the economic classifications challenged in this action. 5 Cal.3d at 603, 487 P.2d at 1254.

Amici do not insist that, by itself, discrimination by wealth is decisive. No court has so held. Rather, it is the conjunction of the suspect classification with a fundamental interest—here education—which bespeaks the constitutional rule adopted below.

(2) Education is a first amendment value entitled to "fundamental" status under the equal protection clause.

The conclusion below that education is "fundamental" serves two functions in constitutional analysis. First, it is what entitles the plaintiffs to relief, unless the State can show a compelling interest to support its discrimination (a matter discussed below) *Bullock v. Carter, supra.* Simultaneously it distinguishes education from nonfundamental interests, thereby suggesting appropriate limits to future judicial action.

Over recent years the boundaries of fundamentality have become clearer. On the one hand the Court has refused to abandon the traditional test of rationality when it reviews purely "social and economic" regu-

lation; the opinions in *Dandridge v. Williams, supra,* and *Lindsey v. Normet, supra,* seem to relegate welfare and housing respectively to such a category of commonplace interests. Meanwhile, however, the Court has repeatedly reaffirmed the fundamentality of voting and political association. *Dunn v. Blumstein,* 405 U.S. 330 (1972); *Bullock v. Carter, supra; Williams v. Rhodes,* 393 U.S. 23 (1968). In which category does education stand?

This Court has spoken to the question in a number of instances, most notably in *Brown v. Board of Education, supra.* All are familiar with the famous paragraph which concludes that ". . . the opportunity of an education . . . where the state has undertaken to provide it, is a right which must be made available to all on equal terms." *Id.* at 493. While *Brown* was a "race" case as its subsequent career emphasizes, it is equally true that for the Court the nature of the interest at stake—education—played a primary and independent role in the decision. The Court emphasized that, whatever may have been the constitutional status of education when the Fourteenth Amendment was adopted: "We must consider public education in the light of its full development and its present place in American life throughout the Nation. Only in this way can it be determined if segregation in public schools deprives these plaintiffs of the equal protection of the laws." *Id.* at 492-93. Thus, the Court's analysis implicated the fundamental interest concept in the case of "the most important function of state and local governments." *Id.* at 493.

While this independence and special significance of the educational interest was naturally obscured by the emphasis upon race in the later school cases, it has appeared frequently in other work of the Court.[5] In the Court's most recent term, in *Weber v. Aetna Casualty & Surety Co.*, 92 S.Ct. 1400, 1405 (1972) education was recognized in the majority opinion as a "fundamental personal right".

Defendants nonetheless argue that education is not a fundamental interest, relying upon the broadest interpretation of *Dandridge v. Williams, supra.* Even accepting this severest test of fundamentality, amici will show that education is easily and properly in-

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[5]It is manifested in language from a wide range of nonracial cases. In *McCollum v. Board of Education,* 333 U.S. 203 (1948), Mr. Justice Frankfurter, concurring, described the public school as "the most powerful agency for promoting cohesion among heterogeneous democratic people. . . ." *Id.* at 216. "The public school is at once the symbol of our democracy and the most pervasive means for promoting our common destiny." *Id.* at 231.

In *Abingdon School District v. Schempp,* 374 U.S. 203, 230 (1963), Mr. Justice Brennan, concurring, noted that "Americans regard the public schools as a most vital civic institution for the preservation of a democratic system of government. It is therefore understandable that the constitutional prohibitions encounter their severest test when they are sought to be applied in the school classroom."

Recently in *Palmer v. Thompson,* 403 U.S. 217, 229 (1971), Mr. Justice Blackmun concurred in permitting the closing of previously segregated municipal pools but added that "The pools are not part of the city's educational system. They are a general municipal service of the nice-to-have but not essential variety."

Finally in *Wisconsin v. Yoder,* 92 S.Ct. 1526, 1532 (1972), the Chief Justice writing for the majority suggested that, "Providing public schools ranks at the very apex of the function of a State." For general discussions of the fundamentality question see *Serrano v. Priest, supra,* and *Private Wealth* at 364-366, 370-373, 387-390, 397-419. Given the general importance of education and the language of past decisions there is little doubt that the fundamentality of education is already a part of our constitutional jurisprudence.

cluded among the inner circle of cherished rights. Speaking for the majority in *Dandridge* Mr. Justice Stewart suggested a division between purely social and economic regulation on the one hand, and, on the other, ". . . regulation . . . affecting freedoms guaranteed by the Bill of Rights. . . ." 397 U.S. at 484.

In terms of the present case *Dandridge* thus asks: *Does education "affect" speech, voting, political association or other freedoms guaranteed by the Bill of Rights?* Amici insist that it does; education stands squarely planted on the constitutional feet of politics and speech.[6] It is at once a political activity of the first order and *the* primary and deliberate influence of the state upon the intellectual life of its citizens.

Education as an Intellectual Right. The particular burdens here imposed by wealth discrimination fall

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[6]This Court has already described education specifically as a right encompassed by the First Amendment's guarantee of freedom of speech, tracing the relevant judicial history to the 1920's. Thus in *Griswold v. Connecticut,* 381 U.S. 479 (1965), the Court states that ". . . By *Pierce v. Society of Sisters, supra,* the right to educate one's children as one chooses is made applicable to the states by the force of the First and Fourteenth Amendments". 381 U.S. at 482. In *Tinker v. Des Moines School District,* 393 U.S. 503 (1969), the Court again interpreted *Pierce v. Society of Sisters, supra* and *Meyer v. Nebraska,* 262 U.S. 390 (1923) as based upon the First Amendment and spoke of the rights of students, as students, arising thereunder. 393 U.S., at 506-07. See also *Epperson v. Arkansas,* 393 U.S. 97 (1968).

Technically, it may have been stretching a point for the Court to cite *either Pierce* or *Meyer* as First Amendment cases. Each is, formally speaking, an example of substantive due process, and neither specifically mentions the First Amendment. Nevertheless, the Court is clearly correct in its modern interpretation of these cases, for their very core is the recognition that education's impact upon the personality, intelligence, and loyalties of children raises fundamental issues of freedom of the mind. It is not surprising that *Pierce* and *Meyer* show a current vitality uncharacteristic of substantive due process decisions generally.

upon the child's right to know and to receive information. That right has been repeatedly declared by this Court. Thus *Sweazy v. New Hampshire,* 354 U.S. 234, 250 (1957), speaks of the right of students ". . . to inquire, to study and to evaluate, to gain new maturity and understanding . . .", and *Keyishian v. Board of Regents,* 385 U.S. 589, 603 (1967) describes the classroom as a unique example of the "marketplace of ideas". The right to receive information is sufficiently precious that it moved this Court in *Lamont v. Postmaster General,* 381 U.S. 301 (1965) to the first invalidation in history of a federal statute on First Amendment grounds. In a unanimous judgment the *Lamont* decision struck down the federal act and regulations which required addressees of communist political propaganda to specifically request such mail before it would be delivered by the postal authorities. Not only was the intended recipient of speech there recognized as the locus of the First Amendment right, but the protection of the flow of ideas extended even to unsolicited information. *Lamont v. Postmaster General,* 229 F. Supp. 913, 916 (S.D.N.Y. 1964).

The school child surely qualifies as an intended audience as easily as the addressee in *Lamont.* Indeed, the State here has created a multi-billion dollar information system which is justified precisely by its specific and powerful influence upon the child's mind. The State views the flow of the particular information in this system as so important that it conscripts the infant audience. But conscription aside, the nature of the thing is perfectly clear: public education is a

system of speech, and there is no way to avoid the First Amendment implications when the audience asserts objections to discrimination in its provision.

The protection of the right here asserted is supported by every consideration which has historically moved this Court in speech cases. Education and speech share the common objective that inquiry and debate in our nation remain informed and vigorous. It is even false to their nature to separate the two by the conjunction; education *is* speech, just as speech is always a form of education. And, if speech be precious, the full measure of judicial concern must likewise focus on those in our schools for whom the message of public education is designed.

Education as an Aspect of First Amendment Political Rights—The Child as Future Citizen. There exists an important relation between what is happening to the child in the Texas schools and what can be expected of him later as a decision maker in a democratic society. This, of course, includes his behavior as a voter. However, preparation for intelligent voting, though important (and even by itself decisive under the *Dandridge* formula) represents but a fraction of education's meaning for the political life of the *civis* in a democratic society.

Let us first offer a constitutional context for the discussion. This Court has identified a wide variety of political expression and associational activity specially protected under the First and Fourteenth Amendments. These "recognized rights" have a common

quality—all are designed to protect the citizen's role in the democratic political process by assuring both his access to ideas and his opportunity within the law to associate to promote such ideas as he supports. What is clear from a consideration of these rights is that it is the *total system of free political discussion* that is crucial; and it is the frustration of that system by government that is forbidden. And if it be the case that public education is indispensable to full and fruitful political intercourse, then the character of its dispensation is a First Amendment issue of grave consequence.

Education is not only important to political intercourse; it is the very gateway to all effective participation. It is that human activity which alone can justify the epistemological assumptions of a political democracy. Without it the constitutional dependence upon popular participation is merely absurd. Truly, when the state provides education it is engaging the child in perhaps his first—and certainly his first organized—political experience. On a mass basis the state deliberately—and, within limits, properly—affects the character of our political life in two distinct but related ways. First, through prescribed curricula the state largely fixes the major concepts and content of our political discourse. Indeed, as this Court emphasized in *Wisconsin v. Yoder, supra,* the state attempts to ". . . 'save' a child from himself or his . . . parents . . ." by enlisting his allegiance to the common beliefs and values of our society. 92 S.Ct. at 1541. See also *Pierce v. Society of Sisters, supra,* at 534.

Secondly, and equally important, the acquisition of skills and general culture through education powerfully conditions the young citizen's general capacity for effective participation in the life of his society, including government. *Serrano v. Priest, supra,* makes much of this political aspect of education:

> At a minimum, education makes more meaningful the casting of a ballot. More significantly, it is likely to provide the understanding of, and the interest in, public issues which are the spur to involvement in other civic and political activities.
>
> The need for an educated populace assumes greater importance as the problems of our diverse society become increasingly complex. The United States Supreme Court has repeatedly recognized the role of public education as a unifying social force and the basic tool for shaping democratic values. 5 Cal.3d at 608, 487 P.2d at 1258.

By transmitting the deposit of learning to the young, education enables our pluralistic society to identify itself as a people with a common destiny. As shaper of the child's capacity for civic contribution, education is indistinguishable from and an integral part of the rights of speech and association. When the State discriminates against children in the provision of education, it corrupts the very sources of free discussion and civic virtue.

Focussing exclusively as they do upon the social and economic aspects of education, all this is lost upon the defendants. Their sanguine and resolute emphasis upon the welfare and housing decisions causes them to miss the point. If anything is plain in the instant

case, it is that the discrimination is not limited to social welfare. A child's mind is constitutionally distinguishable from his stomach. *Dandridge* may reject "economic needs of impoverished human beings", as the criterion of fundamentality, 397 U.S. at 485, but this scarcely implies that discrimination respecting development of human intelligence is of the same order. Indeed, *Dandridge* actually stands for the opposite, citing *Shelton v. Tucker,* 364 U.S. 479 (1960), as an example of a general area in which the Court's intervention would be appropriate. 397 U.S. at 484. *Dandridge* is further distinguished from the present case by the absence therein of any wealth classification.

James v. Valtierra, 402 U.S. 137 (1971) is an inappropriate analogy for a like reason. The interest at stake in that case was housing. One may readily concede the *importance* of that interest to the affected individuals without conceding its constitutional relevance. Conversely its non-fundamentality tells us nothing about the issue here. Housing and welfare both being almost purely economic and social interests, any conclusion based thereon with respect to education is simply a non-sequitur.

A Note Concerning the Injury to First Amendment Rights. Nowhere have amici argued that the State must support or supply education any more than it must subsidize newspapers or provide loudspeakers. The State has no duty to promote the flow of ideas to children or anyone else. This, however, is no answer to the present complaint any more than to that in *Brown v. Board of Education, supra,* or even

Sweatt v. Painter, supra. So long as the State chooses to subsidize the flow of knowledge it is subject to elemental rules of fairness in its distribution. For example, it is plausible that a State could subsidize the costs of political campaigns, but it would raise an equal protection problem to do so for one party only. Nearer to home, this Court noted in *Shapiro v. Thompson,* 394 U.S. 618, 633 (1969) that the State could not exclude the poor from its schools irrespective of the rationality of such a policy. Nor could it offer the use of its streets for the purveyance only of approved ideas. *Cox v. Louisiana,* 379 U.S. 536, 579-580 (Mr. Justice Black concurring). See the Court's explicit adoption of Justice Black's view in *Police Department of City of Chicago v. Mosley,* 92 S.Ct. 2286, 2291 (1972).

The injury here is, of course, somewhat different from these latter examples. Plaintiff children are injured not by total exclusion but by relative deprivation. For all that, the damage is no less real, as the *Brown* and *Sweatt* results make clear. Indeed, there is even a special quality of invidiousness in the relative deprivation here condemned. The State is operating a program of compulsory training systematically different in scope and quality for haves and have-nots among Texas districts. This form of division of its citizens is uncomfortably suggestive of the deliberate creation of intellectual classes. The reality of this view is confirmed by the emotional intensity with which the discrimination is defended by the affluent districts. Their anxiety is understandable; in fact it

buttresses our central point. Every decision concerning the distribution of education represents a choice about the locus of political influence in succeeding generations.

(3) The infancy of the victims supports the application of the compelling interest test.

The interests of children have traditionally been favored by the courts in a multitude of ways. This is in large part based upon the child's helplessness to change his station. For him each burden or discrimination imposed by the State is as inescapable as the laws of nature. In a recent decision involving discrimination against illegitimate dependents this Court has said:

> ". . . [V]isiting this condemnation on the head of an infant is illogical and unjust. . . . [I]t is contrary to the basic concept of our system that legal burdens should bear some relationship to individual responsibility or wrongdoing. Obviously no child is responsible for his birth . . . [T]he Equal Protection Clause does enable us to strike down discriminatory laws relating to the status of birth where . . . the classification is justified by no legitimate state interest—compelling or otherwise." *Weber v. Aetna Casualty and Surety Co.,* 92 S.Ct. at 1406-7.

In *Rodriguez* the offending classification is not one of age. That is, the discrimination is within and among the general class "children" rather than between children and adults; it is only the children of poorer districts who suffer. This, however, does not dis-

tinguish *Weber* which also involved merely a subclassification of the general class of children. The point of the *Weber* language and its result seems to be simply that the Court will be especially solicitous of the rights of *all* children, since by nature they can have no "responsibility" for their status.

This preference for children has deep historic roots. Special judicial rules for the protection of minors formed a significant part of what the common law knew as the law of "Persons". See generally Blackstone, *Commentaries* (Jones ed.), Book I, Chs. XVI-XVII, 446-466 (San Francisco, Bancroft-Whitney, 1915). Today most of these protections have been codified. This special solicitude of the law for children is parallel to and harmonious with the historic application of the 14th Amendment to specially protect racial and similar minorities. *Yick Wo v. Hopkins,* 118 U.S. 356 (1886); *Graham v. Richardson,* 403 U.S. 365 (1971).

Children are simply excluded from the democratic process; they are the disenfranchised minority par excellence. Nor can it be supposed that children do not need the aid of courts because they are "represented" politically by their parents. The truth is that many children do not have voting parents, a neglect of their interest which these children are helpless to alter. Further, the parent who does vote must consider many needs and objectives of government that compete with those of the child. It would be unrealistic to assume that, on educational issues, parents vote as would their children if those children were franchised and aware

of their self interest. Any "proxy" suffrage, therefore, is seriously defective.[7]

Finally, the minority status of the victims is also relevant to the decision on the merits of plaintiffs' claim. Bearing in mind that the "compelling interest" rationale is involved, it may be useful to make a distinction between a child's rights on the one hand and a child's welfare (or "interests") on the other. Often these may clash, as in *Prince v. Massachusetts*, 321 U.S. 158 (1944), where a State law intended to protect the child's *welfare* forbade his exercising his *right* of speech under certain conditions. The court was torn by the dilemma but held 5-4 that the law protecting the child from his own or his parents wishes was valid. The *Rodriguez* case by contrast is not an instance of the State's assertion of the child's welfare clashing with the child's assertion of any inconsistent right. Here the dilemma of *Prince* is resolved, for the right and the interest—both being asserted by the child—are perfectly harmonious, leaving the State nothing to assert but tradition and

[7]There is another reason for the political impotency of the plaintiffs which would exist even if all parents of school children not only voted but voted solely for the best interests of their children. The predicament of the children living in poor school districts of Texas resembles that of the voters in underrepresented electoral districts prior to reapportionment. *Cf. Baker v. Carr*, 369 U.S. 186 (1962). Not only are rich districts politically potent, but their power to resist change is augmented by the relative neutrality of districts of middling wealth. Only the poor districts have seen reform as an unalloyed blessing; but such districts are politically as puny as the under-represented cities of Georgia rescued by the Court in *Gray v. Sanders*, 372 U.S. 368 (1963). It is quite understandable that none of the forty-nine states which originally adopted a system based in any degree upon local wealth has managed to eliminate wealth discrimination.

administrative convenience, if that. The State is in the embarrassing position of actually opposing the child's best interest in an activity—education—which the State regards so highly it has made compulsory. This conclusion may have no independent constitutional significance; however, it illuminates the absence of any compelling interest of the State that might justify the injury visited upon the children plaintiffs. *Shapiro v. Thompson, supra.*

(4) No interest of the state is threatened by fiscal neutrality which leaves vast discretion in the legislature.

The inquiry now becomes whether the present discrimination by district wealth is "necessary to promote a compelling state interest." *Kramer v. Union Free School District, No. 15,* 395 U.S. 621, 627 (1969). As the Court put it last term, ". . . [I]n all equal protection cases . . . the crucial question is whether there is an appropriate governmental interest suitably furthered by the differential treatment." *Police Dept. of City of Chicago v. Mosley, supra,* at 2290. Discussion will be in three parts. First, we must identify the interest asserted by the defendants and evaluate its importance. Second, assuming the asserted interest is "compelling", we will inquire whether the present discrimination is necessary to its protection. Third, the spectrum of legislative options available under fiscal neutrality will be identified.

What Interest Does Texas Assert and is it "Compelling"? Defendants would justify the present system on the basis of an interest of the State in local control

over educational budgets. Just how the Texas law advances this objective is never specified; that it is so advanced appears to be merely assumed by the defendants. Their obscurity on this point is understandable. There would be grave difficulty in specifying just how the current structure qualifies as a *system* of local control. No doubt rich Alamo Heights enjoys this supposedly cherished State interest, but it would be a grim joke to speak of local control with respect to Edgewood. A more realistic description would be that Texas has created *two* systems—one centralized, one local. This is the purpose and effect of the foundation program itself. Once the poorer districts have complied with State-mandated programs at the guaranteed spending level, they have little if anything left, and even the size of that remainder depends upon the extremity of their poverty; the margin of local discretion in any event is so narrow as to approximate for them a centralized state system. It is the rich districts alone whose high spending provides the wide margin of discretion that justifies the label "local control".

The courts which have spoken to this issue have seen this plainly. Thus, in regard to the similar Minnesota system the district court remarked:

> Whether this interest of the State is constitutionally compelling . . . need not be decided. . . . By its own acts, the State has indicated that it is not primarily interested in local choice in school matters. In fact, rather than reposing in each school district the economic power to fix its own level of per pupil expenditure, the State has so

> arranged the structure as to guarantee that some districts will spend low (with high taxes) while others will spend high (with low taxes). To promote such an erratic dispersal of privilege and burden on a theory of local control of spending would be quite impossible. 334 F.Supp. 876.

See also *Serrano v. Priest,* 5 Cal.3d at 611, 487 Pac.3d at 1260.

That the State's interest is in confining local control to the rich is actually conceded by appellants: "[The System] leaves it to individual districts to go beyond that minimum as their desires and resources permit." Brief of Appellants at 6.

Amici note that the defendants also assert an interest of Texas in maintaining local autonomy over non-fiscal matters. There is little in the record concerning the present degree of freedom in educational policy accorded the Texas districts by the State, and it is difficult to comment. Amici, however, willingly assume that Texas has such an interest and protects it in practice; control over such matters is not here at issue. Obviously fiscal neutrality would in no way affect autonomy in non-fiscal matters, except perhaps, as noted, to make it possible for the first time for all districts to enjoy a margin of discretion over and above State-mandated programs.

Wealth Discrimination is Not Necessary to Local Control. Let us now assume that Texas truly wishes to establish local control over spending. Would the rule below interfere? Is spending by district wealth the only means of maintaining the supposedly

cherished autonomy? By no means. As we shall show in the next section, an endless variety of decentralized fiscal systems would comply. Again the *Van Dusartz* opinion clearly states the matter:

> The second reason for ignoring the question of whether the State's interest is compelling is that, under the constitutional standard here adopted, if the state chooses to emphasize local control, it remains free to do so to whatever degree it wishes. In fact, it is the singular virtue of the *Serrano* principle that the State remains free to pursue all imaginable interests except that of distributing education according to wealth. The State makes the argument that what plaintiffs seek here is uniformity of expenditure for each pupil in Minnesota. Neither this case nor *Serrano* requires absolute uniformity of school expenditures. On the contrary, the fiscal neutrality principle not only removes discrimination by wealth but also allows free play to local effort and choice and openly permits the State to adopt one of many optional school funding systems which do not violate the equal protection clause. 334 F. Supp. at 876-77.

The court below (and the other courts which accept fiscal neutrality)[8] likewise gave uncompromising approval to local choice concerning spending. The banks and bond counsel—amici for defendants—recognize that local choice would be unimpaired. The authors who suggested the test did so precisely because they

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[8]With the possible exception of the New Jersey Court deciding *Robinson v. Cahill*, 118 N.J. Super. 223, 287 A.2d 187 (1972).

cherish local choice and wished at last to see it realized, *Private Wealth,* at 202-03; far from seeking to centralize choice they have even urged that the family itself be permitted to play a greater role. Coons and Sugarman, *Family Choice in Education,* 59 Calif. L.Rev. 321 (1971). Critics who prefer centralized decision have complained for the very reason that fiscal neutrality encourages local choice. Wise, "School Finance Equalization Lawsuits: A Model Legislative Response", 2 Yale Rev. of Law and Social Action 123 (1971); Karst, *supra;* Berke and Callahan, *"Serrano v. Priest,* Milestone or Millstone", 21 J. Public Law 23 (1972). It is difficult in the face of all this to grasp the point of the endless remonstrations of defendants and their amici in favor of keeping local choice constitutional. Apparently everyone on both sides is in agreement on this point. However, lest doubt remain amici hereby embrace and commend to the Court the ringing declaration of defendants' brief:

> To impose on Texas and the other states a constitutional straitjacket that would prevent localities from spending additional sums on education as they see fit would destroy the important value of local autonomy and would have dangerous consequences for the public schools. Brief of Appellants at 6.

What strange manner of justification the present system has inspired. Its defenders praise it for the quality it lacks and reject the very principle which could make those qualities flourish.

The Variety of Legislative Options Exemplified. Far from imposing a "constitutional straitjacket" the

holding below liberates the legislature from its current straitjacket to consider on the merits whatever otherwise valid criteria for spending it chooses; it is forbidden only to allow district wealth to affect spending. Different amounts per pupil could, for example, be based upon any of the following factors: the level of district tax efforts; age or grade differences; intellectual gifts of a child; level of a child's achievement (high or low); cultural disadvantage; curriculum differences; area cost differences; transportation needs; experimentation; and reward for district efficiency.

If the legislature permits the first of these spending criteria—local tax effort—to operate, it has adopted a decentralized system, probably what school finance people have lately called *"district power equalizing"*;[9] if local effort is not permitted to vary then the legislature has chosen *"full state assumption."* Each

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[9]As we will make clear in describing "district power equalizing" it is usually seen as a plan designed to make districts constructively equal in taxable wealth (i.e., through "state aid"). Of course they could all be made *actually* equal in wealth and could be left on their own to fix the local tax and raise *all* their own revenue. Spending would then be totally a function of local voters' preferences; by their nature districts would be power equalized regarding public education. And districts could in fact be made very nearly equal in taxable wealth by a number of common techniques. One is the removal of industrial, commercial, and mineral property from the school district tax base; it is the clustering of such property that currently produces the freakish differences in district wealth. Another available approach to tax-base equalization is the familiar tool of redrawing district lines. A combined application of these two techniques by the legislature could approach a system of quintessential local control—all local tax, locally chosen, and locally spent with each district enjoying equal capacity.

of these two general "solutions" is fully consistent with spending differences among districts, schools, and children, based by the legislature (or its district delegate) upon any or all of the other nine factors listed (plus many others). For example, neither full state assumption nor district power equalizing implies either the existence or lack of special programs and aid for educationally needy children. Such programs will exist or not as a result of a state (or district) decision independent of full state assumption and district power equalizing. In short, the two "solutions" only describe part of any school finance package.

Defendants have attacked both full state assumption and district power equalizing on policy grounds. Amici will defend neither as the "best" solution; obviously they represent opposing value judgments sincerely held by intelligent men. One would emphasize the virtues of a uniform policy; the other would create variety and local autonomy. What is plain, however, is that each represents an approach—unlike the present system—both feasible and evenhanded.

The many possible variations of full state funding are easily imagined. It may, however, be helpful if amici briefly illustrate how district power equalizing might be given effect in a simple system. (The figures used are arbitrary and might or might not be realistic in any given state.) Suppose that, from general statewide revenue the State provides a flat grant of $500 per elementary student for every district. The State also invites the districts to add to this $500 in the following manner: For every "mill" ($.001) it levies

upon local property the district may *spend* an additional $25 per child. Thus a district wishing to spend $1,000 per pupil would levy at 2% (20 "mills" × $25 = $500 add-on); a district wishing to spend $1200 would levy at 2.8% (28 mills × $25 = $700 add-on). This level of spending would be made possible through the traditional form of subvention to those districts with property wealth less than $25,000 per pupil; for example, a district with $15,000 market value per pupil would raise only $15 per child with each added mill and thus would qualify for a $10 subvention. Districts, if any, above $25,000 in wealth would generate a surplus with each mill; this surplus could not be spent locally and would provide a portion of the subventions.

The result is what Secretary Richardson has described as the "American ideal of labor rewarded". Address to the United States Conference of Mayors, June 20, 1972. Each district making the same tax effort would spend at the same level, but each would be free to choose its own level. All that would be altered in the present system is the opportunity of wealthy districts to spend more for a *lower* tax rate. Under this "district power equalizing" system, those who wished to spend more could continue to do so—but now all would be on the same tax terms.

Defendants seem to argue that a neutral decentralized structure of the sort described is not feasible —that the only living option is that between the existing dispensation and full state funding (Brief of Appellants at 44-47). They offer three kinds of arguments

for such a curious conclusion: District power equalizing is unpopular; it has disadvantages; it is unconstitutional.

The popularity of "district power equalization" is relevant only to show that it is a reasonable alternative, now undergoing serious consideration as a system of school finance. In fact district power equalizing has strong support; in California, for example, an elaborate legislative study has recommended it.[10] The President's Commission on School Finance felt that power equalizing was one of the methods "deserving of most serious consideration", supra at 31.

The substantive flaws in power equalizing alleged by defendants are three. First, it is said that the same tax rate for the same spending may be ". . . a heavier burden in an urban district, where other taxes are high". (Brief of Appellants at 45) This is true, but, a legislature is, of course, free under the *Rodriguez* standard to make adjustments in the power equalizing formula to account for those variations in the burden it perceives. See *Private Wealth,* at 232-42.

The defendants' second objection relates to the factor of "marginal utility" and may be handled in precisely the same fashion as the first—should a legislature desire to do so. Indeed, there is no counsel of

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[10]See California State Senate Select Committee on School District Finance, Final Report, June 12, 1972 (Charles S. Benson, Staff Director) (In press, California State Printing Office) pp. 225-235 (in ms.). (hereinafter "Benson Report") See also, The Urban Institute, Paying for Public Schools: Issues of School Finance in California (1972).

economic perfection that may not be given expression in the adjustments of a power equalized system. As Professor Michelman puts it, under district power equalizing, ". . . [A] marvelous group of variations, refinements, and qualifications are available to make the system respond to all manner of imaginable state policies." "Foreword: On Protecting the Poor Through the Fourteenth Amendment", 83 Harv. L. Rev. 7, 51 (1969).

Defendants' other substantive objection is that poor districts ". . . would be under great pressure to tax themselves at a high rate in order to receive the maximum state aid . . .", and thus will stint other public services (Brief of Appellants at 45). Since the poor districts today typically tax themselves at high rates for education, it is difficult to treat this objection seriously. It would be at least equally credible that poor districts now would reduce their educational rate, freeing money for other municipal services, because they could now do so while still spending at the old level or even higher. If they chose not to change rates, however, they would be no worse off in their ability to support other public services and—in a system based upon tax effort—would for the first time be rewarded for their dedication to education. Defendants assert that district power equalizing ". . . does not . . . provide equality without sacrificing freedom" (Brief of Appellants at 45). We would be grateful to learn what freedom has been lost when a poor district presently awash in a sea of taxation is given the choice of maintaining or even raising its school spending at a lower tax rate.

As to the constitutionality of district power equalizing the answer is simple indeed. The only objections on this ground have come from constitutional egalitarians who would "homogenize" district spending by judicial fiat and who argue that the problem with the *Rodriguez* standard is that it allows the state too much freedom. See the articles cited in Brief of Appellants at 46. Seemingly the theory of such critics involves two steps. First, if education is truly a fundamental interest, children prima facie should not be subjected to the varying choices of voters in their district; second, the state's interest in permitting local choice is not by comparison "compelling". Of course, this argument simply ignores all the many advantages to school children that arise out of and depend upon local control. In any case, however, this Court has given any such notion its quietus with the ringing endorsement of local control of schools in *Wright v. Council of City of Emporia,* 92 S.Ct. 2196 (1972).

Maintaining local control through district power equalizing, or some other fiscally decentralized system, offers the legislature an opportunity to give flesh and reality to the grass roots democracy cherished in American political and constitutional theory, but sometimes—as in Texas—reserved in reality only for some. In the words of this Court, neutrality in financing 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. . . . It gives them a voice in decisions that will affect the future development of

their own community." *James v. Valtierra,* 402 U.S. at 143. See also dissenting opinion of Burger, C.J. in *Wright v. Council of City of Emporia, supra* at 2211.

The *Van Dusartz* opinion applied this language of *Valtierra* to the school finance problem: "Valtierra actually supports the 'fundamentality' of the interest in education. The Court there emphasized the special importance of the democratic process exemplified in local plebiscites. That perspective here assists pupil plaintiffs who ask no more than equal capacity for local voters to raise school money in tax referenda, thus making the democratic process all the more effective." 334 F. Supp. at 875, n. 9.

If doubt should remain as to the constitutionality of district power equalizing the Court need only affirm the decision below to end it. It will "be buying future litigation" (Brief of Appellants at p. 46) only if it gives plaintiffs a result they have neither sought nor been offered.

To repeat, local control of budget is merely valid and not constitutionally necessary. The state would remain as free as today to centralize decision making in whole or part. However, it should be clear that the term "centralization" has no single meaning, and that full state assumption does not automatically terminate all local choice. The legislature could provide all the money the districts spend and yet, to the degree desired, leave the districts free in terms of curriculum, teacher certification, and other aspects of administration. That this is a likely possibility is shown by an Urban Institute study of a number of states which

revealed "no important differences in the degree of local administrative control associated with differences in the degree of state financing". Bateman and Brown, "Some Reflections on Serrano v. Priest," 49 J. Urban L. 701, 704-05 (1972). Even in fiscal matters districts functioning under full state assumption may be given varying degrees of discretion in determining the actual use of whatever funds are given them by the state. Indeed, even though a state provides all funds from the state level it may yet encourage very substantial decentralization by delivering the money directly to the school rather than to the district as recommended by the New York State Commission on Elementary and Secondary Education.

Defendants have spoken loosely of discouraging experimentation in education and "leveling down" of spending, and perhaps a last word is in order to make the issue of spending differences absolutely clear. If it be important to Texas to continue even the present highest levels of spending (for example, in order to encourage experimentation), it is perfectly free to do so. All that is required is that the fortunate districts be selected upon some non-invidious and rational basis. Many such criteria can be imagined. District wealth, however, is not among them.

PART III. AFFIRMANCE RAISES NO SERIOUS ISSUES OF ACHIEVING COMPLIANCE

Affirmance of the judgment below will not involve the courts in a prolonged and vexing monitoring of complex state systems. Nor will the judiciary ever be required to make judgments concerning educational policy or the allocation of revenues to competing educational uses. There are several reasons to be confident of this. One is the essential modesty and simplicity of the *Rodriguez* standard which even critics concede to be "judicially manageable". Brest, Book Review, 23 Stan.L.Rev. 591, 592 (1971). Fiscal-neutrality is an objective economic test with little of the frustrating ambiguity of "racial discrimination" or "obscenity;" nor does it constrict legislative discretion as much as it broadens it.

Nevertheless, to insure compliance even the clearest and most restrained standards may require either public acquiescence or judicial enforceability. See Kurland, "Equal Educational Opportunity: The Limits of Constitutional Jurisprudence Undefined", 35 U. of Chi. L.Rev. 583, 597-98 (1968). The *Rodriguez* result enjoys both, as amici will shortly suggest. In considering remedy it will also be important to bear in mind that state courts have already manifested willingness to share the burden of enforcement. *Serrano v. Priest, supra; Hollins v. Shofstall,* Civ. No. C-253652 (Super. Ct., Maricopa County, Ariz. Jan. 13, 1972); *Sweetwater County Planning Comm. for the Organization of School Dists. v. Hinkle,* 491 P.2d 1234 (Wyo. 1971), 493 P.2d 1050 (Wyo. 1972); *Robinson v. Cahill, supra.*

Compliance is assured by a widespread public and official support. As one critic has observed, the judicial action coincides with a "growing public eagerness for its result" (Goldstein, "Interdistrict Inequality in School Financing: A Critical Analysis of Serrano v. Priest and Its Progeny," 120 U.Pa.L.Rev. 504 (1972)), an attitude shared in official circles. The California reaction is a good example of what may be expected. There, two of the major defendants in *Serrano* (men of opposite political parties) have embraced the outcome; both the State Superintendent of Public Instruction and the State Controller appear here as amici in support of the result below. See amicus briefs of Riles and Flournoy. Numerous bills before the present session of the California legislature represent favorable responses to *Serrano*. See e.g., A.B. 1283; S.B. 1351. The State Senate has appointed a select committee with a $120,000 budget to develop alternatives that do comply. Senate Rules Committee Res. 505, adopted October 6, 1971. That committee's staff has now reported a set of alternatives which meet the standard. See Benson Report. Meanwhile an initiative known popularly as "The Watson Initiative" has won a place on the November ballot by petition with over 575,000 signatures. Sec. of State, official count. Given 1971-72 district wealth statistics, the Watson Initiative would comply with *Serrano* in every respect other than a very slight wealth discrimination favoring approximately 1100 students (out of four million) in two rural counties.

The national scene is similar. The Secretary of Health, Education and Welfare has praised the *Rodri-*

guez decision, stating: ". . . [w]e have for too long tolerated a system through which we raise money for schools unfairly. . . [w]e have for too long distributed money for schooling in a manner that mocks the American ideal of labor rewarded . . ." Address to the U.S. Conference of Mayors, June 20, 1972.[11]

The President's Commission on School Finance; the United States Commissioner of Education (N.Y. Times, Sept. 1, 1971, at 17, Col. 1); the "Fleischmann" Commission in New York (See Report of the New York State Commission on Quality Cost and Financing of Elementary and Secondary Education); and a gubernatorial commission in Michigan (See School Finance Reform in Michigan (1971)) all have given unreserved support. Governors from a number of

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[11]The rest of the Secretary's language is noteworthy:

Simultaneous with the burgeoning financial crisis, the courts—in Texas, California and elsewhere—have taken actions that may force us at long last to alleviate the terrible inequities deriving from our traditional over-reliance on local property taxes as the principal source of public school education funding.

But in handing us that challenge, I believe the courts also have presented us with a moral mandate—a mandate to achieve true equality of educational opportunity.

The California Supreme Court, upholding the plaintiff in the first successful challenge of a property tax-based school financing system, caught the very essence of this inequity when it wrote:

> "Affluent districts can have their cake and eat it too; they can provide a high quality education for their children while paying lower taxes. Poor districts, by contrast, have no cake at all."

I believe we have for too long tolerated a system through which we raise money for schools unfairly, placing excessive burdens on property owners and renters.

And I believe we have for too long distributed money for schooling in a manner that mocks the American ideal of labor rewarded, since certain communities must sacrifice twice as much as others for less than half the results.

Therefore, I am personally hopeful that the Supreme Court will uphold the U.S. District Court in the San Antonio case.

states have supported the plaintiffs as amici curiae in this very appeal. Even the Texas banks and security dealers and the nation's leading bond counsel —ostensibly amici for the defendants—have refused to criticize the result, seeking only to avoid retroactive effect, Brief of Republic National Bank of Dallas et al. at 2; Brief of Bond Counsel at 30-31. Finally, the Texas State Board of Education has pledged itself to prepare a plan complying with the *Rodriguez* rule when the decision is affirmed. (N.Y. Times, Jan. 9, 1972, at 62, col. 1).

Given this support and/or acquiescence the very affirmance of the decision below would itself constitute the most significant step toward enforcement; such a declaration of principle would automatically alter the balance of power in favor of legislative compliance. There are structural and historical considerations which further support this prediction. In the past the system has been impervious to legislative reform principally because of the self-interest of districts of moderate wealth. See *Private Wealth* at 292-94, 454. Such districts have had little to expect from reform; to the contrary, since most "reformers" historically have promoted centralizing solutions, these districts rightly have feared loss of local control. See e.g., Wise, *Rich Schools, Poor Schools* (1968); *McInnis et al. v. Shapiro et al.,* 293 F.Supp. 327 (N.D. Ill. 1968).

Rodriguez would alter this perception of district self-interest by preserving the State's power to decentralize budget decisions. Middle-wealth districts will be encouraged by the standard adopted below to enter

the legislative debate and to stump for prompt and reasonable forms of compliance which establish local control for the first time on a fair basis. This political support by the middle-wealth districts for prompt legislative compliance should be decisive. Such an outcome should also be assisted (if quite adventitiously) by the powerful concerns of taxpayers. Professor Karst nicely summarizes the probable result of these factors: "A new legislative alliance, teaming poor districts with districts that are neither poor nor wealthy but whose residents now sense the possibility of tax reform, seems likely to emerge." Karst, *supra,* at 752. There seems little prospect that the judicial stick will ever prove necessary to secure compliance.[12]

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[12]Even assuming legislative resistance, in no instance need the courts intrude into the administrative or educational judgments of school districts. They would be spared both the abrasive and highly contingent judgments involved in racial desegregation and the application of an extremely confining rule to the legislature itself, as in reapportionment. *Rodriguez* will never require courts to allocate resources to specific educational uses or even to specific institutions as in *Hobson v. Hansen,* 327 F. Supp. 844 (D.D.C. 1971).

After all, the evil here identified is not differences in expenditure; rather, it is differences in taxable resources. As to this, the court has a number of ready, simple, and effective initial remedies. We will describe one in detail. It would simply restrain the local authorities from mingling educational tax revenues derived from industrial and commercial property with educational revenues derived from residential property. The industrial and commercial revenues from all districts (or selectively) might be sequestered abiding the introduction of a new system; better, perhaps, this pool could be declared available to the state for all purposes consistent with the constitutional standard. It would be very useful to the state, for example, as a support for a temporary program of expanded equalization during any switchover period in which residential property served as the local base (more districts would now qualify for foundation aid). Most im-

CONCLUSION

This Court should affirm the holding of the three judge district court that the Texas system for financing public elementary and secondary education is invalid, specifically because it makes the level of spending for any child's education a function of his

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portant, however, district differences in taxable wealth per pupil would have shrunk to a small fraction of their previous range.

Compliance with such an order would be simple for the court to monitor; real property is already classified in Texas. Records thus would disclose all the information needed. Further, the court could enlist the aid of plaintiffs in identifying improper allocations of collections or reclassifications of property.

This first step would represent a basic amelioration of fiscal discrimination without visiting serious structural injury upon the Texas system. Districts would continue to operate as independently as before *Rodriguez;* further, because of the Texas equalization program, all districts could continue to enjoy that measure of expenditure which the defendant's Jurisdictional Statement describes as "intended to assure every child in the state of at least a minimum foundation education." (Jur. St., p. 5).

Finally, it should be noted that the tax roll may be split in additional ways to approach full compliance more closely. The court might, for example, order the sequestration of collections from all multiple-family dwellings and/or from properties exceeding an absolute market value—e.g., $75,000. This latter approach—excluding highly valuable properties from the local base—might be useful to ameliorate the effect of extreme concentrations of purely residential wealth. Such districts would remain unaffected by the separation of only industrial and commercial property.

Note that in all these cases no individual tax bills would be affected in any way by the decree; nor would the court be forbidding any district to spend what it pleases if it were merely willing to impose additional taxes in the manner historically familiar to poor and average-wealth districts. Meanwhile no district would fall below the minimum spending level now approved by the State.

Splitting the tax roll is but one example drawn from the arsenal of appropriate remedies available to state and federal courts within their traditional equity jurisdiction. Some remedies clearly would be more intrusive than others, but none need substitute the judgment of the court for that of educators in allocating funds to particular uses, and none need involve the court in imposing new taxes.

school district's wealth. The matter should be remanded to the district court for consideration and determination of the time and character of whatever action, if any, is necessary and proper to secure compliance in addition to the order of that court in this case dated December 23, 1971.

Dated, August 18, 1972.

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