IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1972

NO. 71-1332

SAN ANTONIO INDEPENDENT SCHOOL DISTRICT, ET AL.,
Appellants,

v.

DEMETRIO P. RODRIGUEZ, ET AL.,
Appellees.

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

BRIEF FOR APPELLANTS

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INDEX

AUTHORITIES

Cases cited: Page

UNITED STATES STATUTES:

Other Authorities *(continued)* Page

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BRIEF FOR APPELLANTS

Appellants appeal from the judgment of the United States District Court for the Western District of Texas entered on December 23, 1971, and from the clarification of that judgment entered on January 26, 1972.

Opinion Below

The opinion of the District Court for the Western District of Texas is reported at 337 F.Supp. 280. The opinion and judgment and the clarification of the original opinion and judgment are in the separately-bound Appendix (App. 259).

Jurisdiction

This suit was brought under 28 U.S.C. §§ 1331 and 1343 for a declaratory judgment and an injunction against enforcement of Article VII, § 3, of the Texas Constitution and the sections of the Texas Education Code relating to the financing of education. A statutory

three-judge court was convened pursuant to 28 U.S.C. § 2281. On December 23, 1971, that court entered its judgment granting an injunction as prayed for by the plaintiffs. A motion for clarification was filed by the defendants on December 28, 1971, and on January 26, 1972, a new judgment was entered on behalf of the three-judge court to make clear that the judgment does not affect the validity or enforceability of outstanding school district bonds or of those that may be issued in the next two years. Notice of appeal was filed in the District Court on February 16, 1972. The jurisdiction of this Court to review this decision by direct appeal is conferred by 28 U.S.C. §§ 1253 and 2101(b). Probable jurisdiction was noted on June 7, 1972. — U.S. —.

Question Presented

Whether Section 3 of Article VII of the Constitution of the State of Texas and the sections of the Texas Education Code relating to the financing of education violates the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States?

Constitutional and Statutory Provisions

The relevant provisions of the Constitution and statutes of the State of Texas are set out in the Appendix (App. 276.)

Statement of the Case

This action was brought as a class action on behalf of Mexican-American school children and their parents who live in the Edgewood Independent School District in Bexar County, Texas, and on behalf of all other children throughout Texas who live in school districts with low property valuations. Numerous state and local officials and school districts were named as defendants. Plaintiffs claimed that the present system

of financing public schools in Texas is discriminatory because it makes the quality of education received by students a function of the wealth of their parents and neighbors as measured by the tax rate and property values of the school district in which they reside. They further claimed that the system discriminates against school districts in which there is a high percentage of Mexican-Americans.

Although the details of the Texas system for financing public education are extremely complex, the general plan can be fairly readily described. It is of the sort known to educators as a "foundation plan." In essence, it is a combination of ad valorem taxes levied by school districts with a state contribution that is intended to assure that every child in the state has at least a minimum foundation education. The state contribution is calculated in a fashion that has a mildly equalizing effect.

The heart of the Texas system is the Minimum Foundation Program. TEXAS EDUCATION CODE §§ 16.01 *et seq.* Under that program more than a billion dollars a year is provided to cover the costs of salaries of professional personnel, school maintenance, and transportation. Eighty percent of the amount to which a school district is entitled under the Minimum Foundation Program is paid by the state from general revenue. The balance of the cost of the minimum program comes from the school districts under the Local Fund Assignment. TEXAS EDUCATION CODE §§ 16.71-16.73. An economic index is used so that each county's contribution to the Local Fund Assignment approximates that county's percentage of statewide taxpaying ability. TEXAS EDUCATION CODE §§ 16.74, 16.76. Within each county the portion of the Local Fund Assignment that each school district is expected to contribute is the percent-

age of the county's assignment that the value of the property in the school district is of the value of all of the property in the county. TEXAS EDUCATION CODE § 16.76. Thus, while the state contributes, on an overall basis, 80% of the cost of the Minimum Foundation Program, in some districts that lack the ability to raise substantial funds by local effort the state contribution is in excess of 98% of the cost of the Minimum Foundation Program while in districts with greater ability to pay the state contribution is less than 80%.

Each district is then free to supplement the minimum program with additional funds raised by local ad valorem taxes. TEXAS EDUCATION CODE §§ 20.01 *et seq.* In combination, the Texas plan assures every child in the state of a certain minimum level of education on a nondiscriminatory basis but allows each local school district to provide educational benefits above the minimum to the extent that the district wants them and can afford them.

The court below ignored, quite properly, the claim of discrimination against Mexican-Americans. It accepted, however, the plaintiffs claim that the Texas plan is unconstitutional because "wealthy" school districts can and do spend more per child for education than do "poor" school districts. It held that the Equal Protection Clause of the Fourteenth Amendment embodies a standard of "fiscal neutrality," which means that "the quality of public education may not be a function of wealth, other than the wealth of the state as a whole." The court enjoined enforcement of the Texas laws on the financing of education "insofar as they discriminate against plaintiffs and others on the basis of wealth other than the wealth of the State as a whole." It ordered defendants to reallocate the funds available for financial support of the school system, including local

ad valorem taxes, in a fashion consistent with what it thought to be required by the Equal Protection Clause. It stayed its mandate for two years to give the defendants and the legislature an opportunity to take all steps reasonable feasible to make the school system comply with the applicable law as it had declared it and included language in the clarification of its judgment intended to make it clear that its order does not affect the validity of school bonds and similar financial obligations already issued or that may be issued within the two year period of the stay.

Summary of Argument

In a book published two years ago three scholars announced what they called Proposition I, "the quality of public education may not be a function of wealth other than the total wealth of the state." COONS, CLUNE, & SUGARMAN, PRIVATE WEALTH AND PUBLIC EDUCATION (1970). The District Court has held that that proposition is required by the Equal Protection Clause. Because it found that in Texas there is a correlation between the value of taxable property per student and the amount spent per student, it held that Proposition I was violated and that the Texas system of school finance, which is in essence the same as that used in at least 48 other states, is unconstitutional.

The decision below combines unsound factual assumptions with erroneous law. The District Court assumed, without discussion, that "quality is money" and that per student expenditures are an adequate measure of the quality of a student's education. There is no proof that this is so and much reason to think it is not so. The District Court found as a fact that there is a positive relation between taxable value per student and income in a district and thus that the figures on taxable value are an adequate indicator of ability to

pay. The evidence it cited does not support that finding and there is much evidence to show that this is not the case.

On the law, the District Court accepted the simplistic argument that education is a "fundamental" interest and that wealth is a "suspect classification." From this it concluded that the Texas system could be upheld only if a "compelling state interest" supported it, which it found not to be the case. There is, as the inventors of Proposition I recognize, no direct authority that education is a "fundamental" interest in this sense or that wealth is a "suspect classification." Such recent cases as *Dandridge* v. *Williams,* 397 U.S. 471 (1970), *James* v. *Valtierra,* 402 U.S. 137 (1971), *Gordon* v. *Lance,* 403 U.S. 1 (1971), *Lindsey* v. *Normet,* 405 U.S. 56 (1972), *Wisconsin* v. *Yoder,* 92 S.Ct. 1526 (1972), and *Jefferson* v. *Hackney,* 92 S.Ct. 1724 (1972), are contrary to the legal premises of the decision below and support the view that the orthodox "rational basis" test is the measure under the Equal Protection Clause of state legislation in the area of economics and social welfare, even when that legislation bears on the most basic needs of the poor.

The Texas finance system has a rational basis. It assures every child an adequate education and leaves it to individual districts to go beyond that minimum as their desires and resources permit. 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.

Argument

The court below has extracted from the Equal Protection Clause a new constitutional standard of "fiscal

neutrality," which requires that "the quality of public education may not be a function of wealth, other than the wealth of the state as a whole" (337 F.Supp. 280, App. 259). Measured against this standard the method of school financing used in Texas—and in most or all of the other states—has been found wanting and stricken down as unconstitutional.

The proposition announced by the court below is one discovered only recently. Indeed it is said that the first suggestion of the unconstitutionality of school financing systems did not appear in the literature until 1965,[1] but it has since been promoted by a "wave of consciously activist scholarship, written with an avowed bias, and aimed at producing specific legal results." Goldstein, *Interdistrict Inequalities in School Financing: A Critical Analysis of* Serrano *v. Priest and Its Progeny,* 120 U.PA.L.REV. 504, 512 (1972). The most influential product of that scholarship has been an engaging and provocative book by Professors John E. Coons, William H. Clune, III, and Stephen D. Sugarman, PRIVATE WEALTH AND PUBLIC EDUCATION (1970)[2] (cited hereafter as PRIVATE WEALTH). In that book they an-

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[1]A commentator friendly to the new development has described its origin:

> In February 1965 a short notice by Arthur E. Wise entitled "Is Denial of Equal Educational Opportunity Constitutional?" appeared in *Administrator's Notebook.* Although the subject generally was in the air, this appears to be the first published suggestion that the present system of financing public education is unconstitutional. There followed a rash of articles, dissertations, books and book reviews—criticizing, developing, and sharpening the analysis, and providing new materials and ideas.

Shanks, *Educational Financing and Equal Protection: Will the California Supreme Court's Breakthrough Become the Law of the Land?,* I J. LAW & EDUC. 73, 81 (1972).

[2]While PRIVATE WEALTH was at the press a shortened form of it appeared as Coons, Clune, & Sugarman, *Educational Opportunity: A Workable Constitutional Test For State Financial Structures,* 57 CALIF.L.REV. 305 (1969).

nounced what they called Proposition I, that "the quality of public education may not be a function of wealth other than the total wealth of the state." *Id.* at 304.

The argument of Professor Coons and his associates was accepted by the California Supreme Court in the celebrated case of *Serrano* v. *Priest,* 5 Cal.3d 584, 487 P.2d 1241 (1971). It has had successes elsewhere. In the present case, the court below has taken Proposition I, with only an insignificant verbal change, as the exact measure of what the Equal Protection Clause requires in this area. Rarely, if ever, in the history of the Republic has a novel idea proceeded in such a short time from announcement by imaginative scholars to enshrinement in the Constitution of the United States.

PRIVATE WEALTH is a splendid scholarly achievement. It has been the catalyst for widescale rethinking of the problems of financing public education. Its analysis of what its authors perceive as the flaws in existing financing schemes and its presentation of the remedy they propose might well prove persuasive to legislators. The issue here, however, is whether these ideas, and those of similar contemporary critics, must be accepted by constitutional mandate.

Because of the unusual background of this case, and of the constitutional principle it announces, it does not lend itself readily to the usual form of appellate brief, in which Roman-numbered topic sentences proceed in syllogistic splendor to the inevitable conclusion. Instead, after stating the nature of the problem and of the critics' argument directed to it, we will consider the unsound factual assumptions on which that argument is based, the fatal weakness of the legal analysis offered in its support, and the dangerous consequences that would follow if it were to be read into the Constitution.

I. The Problem

The proper financing of public education has long been a vexing problem in this country. In almost every state the pattern has been one of constantly increasing expenditures on education coupled with much soul-searching as legislatures have sought to assure that the money is equitably distributed and wisely spent and that each child receives an adequate education. Throughout the country between 1960 and 1970 expenditures for public education increased 153% while enrollment was increasing only 30%. Select Committee on Equal Educational Opportunity, United States Senate, 92d Cong., 2d Sess., The Financial Aspects of Equality of Educational Opportunity and Inequities in School Finance 7 (Comm.Print. 1972). In Texas, the increase in expenditures in that period was from $750 million to $2.1 billion, while the number of students increased only 37%, so that expenditures per student doubled from $416 to $855. Texas Research League, Public School Finance Problems in Texas 2 (1972).

The vast sums involved have caused the states, the federal government, and many interested persons and groups to take very hard looks at how this money is allocated and spent. "Dissatisfaction, crisis, urgency—these words have become painfully common in the lexicon of American education. No one who has observed or participated in education recently need be told how frequently, how widely, and how aptly they are used." President's Commission on School Finance, Schools, People, & Money 6 (1972). The dramatic changes that have taken place in American life have intensified these looks but the pattern of periodic re-examination of the school finance system and of changes in it to conform to new needs and to take advantage of new insights is an American tradition.

Texas is fully in accord with this tradition. When Texas was admitted to the Union in 1845, its first state constitution authorized state financial support for a system of free schools and the system by which this support is provided has been revised repeatedly over the years. For the last half-century every decade has seen the legislature commission at least one special committee to evaluate the public schools and make recommendations concerning them. The system now in use in Texas the result of the work of the Gilmer-Aikin Committee in 1948, though changes have been made in response to the findings of the Hale-Aikin Committee in 1958, and the Governor's Committee on Public School Education in 1968. GOVERNOR'S COMMITTEE ON PUBLIC SCHOOL EDUCATION, THE CHALLENGE AND THE CHANCE 2 (1968). Nor has the process of self-examination stopped. The Texas Education Agency has task forces studying five different aspects of public education in Texas, and other studies by highly qualified groups are being made under the auspices of a Texas Senate Committee, the Texas State Teachers Association, and the Texas Research League. TEXAS RESEARCH LEAGUE, PUBLIC SCHOOL FINANCE PROBLEMS IN TEXAS 19 (1972). Whatever else may be said about school finance in Texas, it is not a subject that suffers from lack of attention. The commitment in Texas to educational excellence for all of the public school children in the state is a strong one. Indeed the subtitle of the 1968 report of the Governor's Committee on Public School Education was: "To Make Texas A National Leader in Public Education."

In Texas, as in every state except perhaps Hawaii,[1]

[1]Hawaii, in which there is only one school district operated by the state Department of Education, is frequently cited as an exception. E.g., PRIVATE WEALTH 149; Shanks, *Book Review,* 84 HARV.L.REV. 256, 257 n. 14 (1970). But in 1968, "in order to allow counties to go above and beyond the State's

local school districts administer the schools and local taxes, raised by the school districts, pay at least a part of the costs of education. It did not require the publication of PRIVATE WEALTH to demonstrate that there are wide variations in the taxable property in different school districts and thus that the amount districts can raise through ad valorem taxes differs from one district to another. This has been the reason for the many studies in Texas, as in other states. The state has repeatedly sought to find a formula for state aid that would assure a sound education for each child while taking into account the differences in ability to pay of different districts.

No one familiar with the Texas system would contend that it has yet achieved perfection. Indeed, a principal impetus for the ongoing effort in Texas to refine and improve the system is a frank recognition that there are still defects in it. See, e.g., GOVERNOR'S COMMITTEE ON PUBLIC SCHOOL EDUCATION, THE CHALLENGE AND THE CHANCE 58-69 (1968). But Texas does not stand condemned by the court below because it has failed to achieve the goal that it, in company with other states, has set for itself. Plaintiffs do not claim, nor did the District Court find, that they are not receiving an adequate education. Nor does the attack center on the imperfections and anomalies in the complicated formulae by which the state assists public education. Instead the contention, and the holding below, is that ever since the adoption of the Fourteenth Amendment in 1868 the state has been pursuing an unconstitutional goal. The state must abandon its effort to provide an

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standards and provide educational facilities as good as the people of the counties want and are willing to pay for," Hawaii authorized counties to use their funds to supplement state funds for the construction of school improvements, maintenance of school facilities, and transportation of school children. Act 38, Haw. Sess. Laws (1968).

adequate education for all, with local autonomy to go beyond that as individual school districts desire and are able, and instead must turn on to the recently-charted trail of "fiscal neutrality."

2. The Critics' Position

The heart of the argument now being advanced against traditional methods of school financing is that the number of dollars per pupil available to a school district is correlated with the market value of taxable property per pupil in that district. Plaintiff's Table V (App. 208), based on 1967-68 figures for a sample of 110 districts, makes the point, showing, on a per pupil basis, the market value of taxable property in the districts and the amount and sources of revenue:

Market Value	Local	State	State & Local	Federal	Total
Above $100,000 (10 Districts)	$610	$ 205	$815	$ 41	$856
$100,000-$50,000 (26 Districts)	287	257	544	66	610
$50,000-$30,000 (30 Districts)	224	260	484	45	529
$30,000-$10,000 (40 Districts)	166	295	461	85	546
Below $10,000 (4 Districts)	63	243	305	135	441

Plaintiffs' Table X (App. 219) offers similar figures for selected districts in Bexar County, with the market value per pupil in each of those districts added from Plaintiffs' Table VII (App. 216)

Alamo Heights ($49,478)	$333	$225	$558	$ 36	$594
North East ($28,202)	182	233	415	53	468

San Antonio ($21,944)	134	219	353	69	422
North Side ($20,794)	114	248	362	81	443
Harlandale ($11,345)	73	250	323	71	394
Edgewood ($5,960)	26	222	248	108	356

As will be discussed in the next section, plaintiffs assume that dollars per student is a measure of the quality of education and that market value of taxable property per student is a measure of the wealth of the district. On these assumptions, plaintiffs argue, and the District Court has found, that the quality of education a child in Texas receives is a function of the wealth of his district[1] and find this to be constitutionally impermissible.

The constitutional argument is a simple one. Education, so it is said, is a "fundamental interest." Wealth is a "suspect classification." The critics, and the court below, then invoke "the converging persuasions of the 'fundamental interest' and 'suspect classifica-

[1]This is not an inevitable conclusion, even given the required assumptions. It may well be that both market value per student and the amount spent per student are a function of a third variable, such as the number of students in a district. The following figures are taken from Table XIX in GOVERNOR'S COMMITTEE ON PUBLIC SCHOOL EDUCATION, FINANCING THE SYSTEM 55 (Research Report No. 5, 1969). They show, in terms of school district size, the market value per student, the amount of state aid per student, and the total cost per student of the Minimum Foundation Program.

Fewer than 500	$121,000	$318	$415
500-1,599	79,000	271	346
1,600-2,599	51,000	258	318
2,600-4,999	48,000	255	312
5,000-9,999	43,000	232	304
10,000-39,999	28,000	242	290
More than 40,000	36,000	219	287
STATE TOTALS	47,000	245	309

tion' test—classification by wealth of school districts is constitutionally suspect when it affects the enjoyment of a fundamental interest * * *." Coons, Clune, & Sugarman, *A First Appraisal of Serrano,* 2 YALE REV. OF LAW & SOCIAL ACTION 111, 113 (1971). The system, on these premises, can stand only if it is justified by a "compelling state interest." Since the state cannot meet that rigorous burden, the system is unconstitutional.

To this point the critics, and those courts that have adopted their argument, make common cause. It is less clear what is to happen to a state when it has been told that Proposition I is the supreme law of the land. This has not been a problem for the courts. The court below told Texas that it might choose "from a wide variety of financing plans" (337 F.Supp. at 285, App. 259), without pausing to specify what they might be. Another federal judge thought that Proposition I "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." *Van Dusartz* v. *Hatfield,* 334 F.Supp. 870, 877 (D.Minn. 1971). The literature abounds with helpful suggestions. The leading authors are able to list "twelve examples" of financing schemes that they would think consistent with Proposition I.

Unfortunately "[a]lternatives are deceptive. Their very statement conveys the impression that one possibility is as effective as the next." *Wolf* v. *Colorado,* 338 U.S. 25, 41 (1949). Many of the commentators, for example, have listed as a possible remedy redrawing district lines so that each school district in a state would have the same amount of taxable property within its borders. Fortunately no one takes this possibility—compared to which legislative reapportionment is child's play—seriously.

Undoubtedly a great many variations in detail are possible but the literature indicates that there are only two principal kinds of solutions that might satisfy the principle of "fiscal neutrality." One would be for the state to draw on the resources of the state as a whole and allocate funds to schools or school districts. This could, but need not necessarily, mean "one kid, one buck." Apparently the state could take account in its allocation such factors as the differing cost of high school and of grade school education, special programs required for the disadvantaged, varying living costs throughout the state, the need for transportation where it exists, and like matters. But the important point with regard to this solution—for which Professor Arthur Wise has been the leading advocate, e.g., WISE, RICH SCHOOLS, POOR SCHOOLS: THE PROMISE OF EQUAL EDUCATIONAL OPPORTUNITY (1969); Wise, *School Finance Equalization Lawsuits: A Model Legislative Response,* 2 YALE REV. OF LAW & SOCIAL ACTION 123 (1971)—is that only the amount allocated by the state, by whatever formula, could be spent and that no district would be permitted to supplement this subvention from its own resources.

Professor Coons and his associates opt for a different solution, which they call "district power equalizing." PRIVATE WEALTH 201-242. Under this plan each district would decide for itself the rate at which it wishes to tax for education. The state would guarantee a stated number of dollars per pupil for any given tax rate (and might set a minimum or a maximum rate or both). If in a particular district the chosen rate failed to produce the number of dollars promised in the state formula the state would make up the difference, while it would recapture the surplus from other districts in which that rate produced more than the necessary dollars.

As we shall see later, there is sharp division among the prophets, seers, and revelators of the new dispensation about these competing solutions. Professor Wise and those aligned with him think that "district power equalizing" would be unconstitutional[1] while Professor Coons and his associates are almost equally critical of the solution pushed by Professor Wise.[2] For present purposes, it is enough merely to note that these are the two kinds of ways in which scholars have suggested a state might comply with Proposition I.

3. The Unsound Factual Assumptions

Before turning to analysis of the legal argument made in support of Proposition I, it is well to consider some of the factual assumptions on which the argument rests, for the ruling of the court below takes the courts deep into a "thorny fiscal and educational thicket." Select Committee on Equal Educational Opportunity, United States Senate, 92d Cong., 2d Sess., The Financial Aspects of Equality of Educational Opportunity and Inequities in School Finance 34 (Comm. Print 1972).

It is central to the argument of the reformers that, as they succinctly put it, "quality is money." Private Wealth 25. All of the elaborate tables and computer printouts are meaningless unless dollars spent per student are an adequate measure of educational quality. Thus, though Professor Coons and his friends recognize that "the basic lesson to be drawn from the experts at this point is the current inadequacy of social science to delineate with any clarity the relation between cost and quality," *Id.* at 30, their thesis requires that they continue "to assume that dollar expenditures

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[1]See pp. 45-46 below.

[2]See p. 44 below.

per pupil constitute a reasonable measure of quality in education." *Id.* at 304.

It is not, however, the custom of courts to let assumption substitute for proof when they are asked to decide great issues. The California Supreme Court recognized that there is "considerable controversy" about the assumption but was able to avoid the problem on procedural grounds. The case before it arose on demurrer and the court ruled that, in that posture, the demurrer admitted the allegation of the complaint about the relation between quality and money,[1] *Serrano* v. *Priest,* 5 Cal.3d 584, 601 n. 16, 487 P.2d 1241, 1253 n. 16 (1971). The case in federal court in Minnesota arose on a motion to dismiss for failure to state a claim and there too the court was able to hold that the allegation of the pleading was admitted. *Van Dusartz* v. *Hatfield,* 334 F.Supp. 870, 873 (D.Minn. 1971). It is interesting, however, that when the Minnesota court announced its adoption of Proposition I it stated it in terms of "the level of spending for a child's education," *id.* at 872, rather than "the quality of public education," as it is put in the Coons' book and by the court below.[2]

The District Court in the present case could not avoid this issue by a procedural device, since it was giving judgment on the merits rather than passing on a pleading motion. There was conflicting testimony before it on whether quality of education can be meas-

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[1]See Goldstein, *Interdistrict Inequalities in School Financing: A Critical Analysis of* Serrano *v.* Priest *and Its Progeny,* 120 U.PA.L.REV. 504, 520-521 (1972), suggesting that a conclusory allegation of the sort in question is not admitted by demurrer.

[2]One commentator says that *Van Dusartz* "improved on the original proposition" because it dropped "the subterfuge about quality * * *." Dimond, *Serrano: A Victory of Sorts for Ethics, Not Necessarily for Education,* 2 YALE REV. OF LAW & SOCIAL ACTION 133 n. 7 (1971).

ured by dollars spent (Graham and Stockton Depositions). It chose to ignore the problem. Although its opinion assumes that "quality is money," that issue is never discussed.

It is reasonable to suppose that there is some minimum sum of dollars beneath which a sound education cannot be had. Brest, *Book Review,* 23 STAN.L.REV. 591, 610 (1971). Beyond that minimum it cannot be assumed that more dollars means better education—and there is considerable reason to doubt that there is any relation between the two. The Coleman Report, made in response to direction by Congress in the Civil Rights Act of 1964 and one of the largest surveys in the social sciences in recent time, could not find evidence of the relation:

> Differences in school facilities and curriculum, which are the major variables by which attempts are made to improve schools, are so little related to differences in achievement levels of students that, with few exceptions, their effects fail to appear even in a survey of this magnitude.

OFFICE OF EDUCATION, EQUALITY OF EDUCATIONAL OPPORTUNITY 316 (1966). Naturally that report aroused controversy among professional educationists, who were unhappy at having doubt cast on their long-cherished beliefs, but its conclusions have not been shaken. See Mosteller & Moynihan, *A Pathbreaking Report,* in ON EQUALITY OF EDUCATIONAL OPPORTUNITY 36 (Mosteller & Moynihan eds. 1972; Jencks, *The Coleman Report and the Conventional Wisdom,* in *id.* at 69.

A recent Presidential Commission could not make the leap that the court below made in the present case. It said:

> The relationship between cost and quality in education is exceedingly complex and difficult to document. Despite years of research by educators and

economists, reliable generalizations are few and scattered.

PRESIDENT'S COMMISSION ON SCHOOL FINANCE, SCHOOLS, PEOPLE & MONEY x (1972). That same Commission again cast doubt on what everyone "knows" to be true when it said that "[t]he conviction that class size has an important or even a measurable effect on educational quality cannot presently be supported by evidence." *Ibid.* Another scholar has recently summarized studies showing that "class size has no impact on learning" and that "the *higher* the expenditures per pupil—and the *smaller* the class size—the *lower* are pupil achievements—and vice versa." Freeman, *Should Local School Support Be Abolished?,* 38 VITAL SPEECHES 465, 467 (1972) (emphasis in original).

A state trial court in Michigan, sitting in effect as a special master for the Michigan Supreme Court, was charged with finding the facts about school finance so that the appellate tribunal might pass on a school financing case. The evidence presented to it reflected a negligible correlation between educational spending and educational achievement but a substantial correlation between social class and educational achievement, confirming in this respect the findings of the Coleman Report. The court found that "there is a low statistical relationship between monetary inputs and achievement output." *Milliken* v. *Green,* No. 13664-C (Mich. Cir. Ct., Ingham County, May 8, 1972). A consultant to the Senate's Select Committee on Equal Educational Opportunity draws the following conclusion from the research studies thus far conducted: "The magnitude of school expenditures, per se, has not been shown to correlate significantly with pupils' academic performance." Schoettle, *The Equal Protection Clause in Public Education,* 71 COL.L.REV. 1355, 1387 (1971). Two officers of the Urban Institute tell us that "with our

present knowledge, there seems to be little reason to believe that increased expenditures per pupil are sufficient conditions for improved educational opportunity. Whether they are necessary conditions is also unclear." Bateman & Brown, *Some Reflections on* Serrano *v.* Priest, 49 J. URBAN L. 701, 703 (1972).

The unproven assumption that "quality is money" in itself is a fatal flaw in the argument for Proposition I. But there is almost as much reason to doubt the other assumption of the argument for Proposition I, that the market value of taxable property per pupil is an adequate measure of "wealth." Professor Coons and his associates have noted that "it is very difficult to specify the degree to which personal and school district wealth coincide." Coons, Clune, & Sugarman, *A First Appraisal of Serrano,* 2 YALE REV. OF LAW & SOCIAL ACTION 111, 114, (1971). In their book they make a sophisticated argument that it is not neccesary to demonstrate a relationship here, and that discrimination against a district that is "poor" in terms of taxable property is unconstitutional even if the families in the district are individually rich. PRIVATE WEALTH 152-156.

That argument weakens the general case for Proposition I, however, since the contention that "wealth" is a "suspect classification" is drawn from cases that are concerned with individual wealth, not with the collective wealth of a territorial subdivision. The District Court on this point, in contrast with its failure to discuss the relation between quality and money, made a finding favorable to the plaintiffs. It said:

> As might be expected, those districts most rich in property also have the highest median family income and the lowest percentage of minority pupils, while the poor property districts are low in income and predominately minority in composition.

(337 F.Supp. at 282, App. 259.) This finding was based on Table VII in Plaintiffs' Exhibit VIII, presented in an affidavit from plaintiffs' expert, Professor Joel S. Berke. The table is as follows:

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

We cannot improve on the comment on this table, and what it does or does not establish, of Professor Stephen R. Goldstein, and accordingly quote his comment:

> The 5 category breakdown of school districts seems to be arbitrary, and it is only this breakdown which appears to produce the correlation of poor school districts and poor people. Even on this breakdown, however, the correlation is doubtful. Note the very small number of districts in the top and bottom categories. Even more significant is the apparent inverse relationship between property value and median income in the three middle districts, where 96 of the 110 districts fall. While the family income differences among the 3 groups of districts are small, they may be even more significant if categories are weighed by the number of districts in each. At the very least, the study does not support the affirmative correlation of poor school districts and poor people stated by the court and the affiant; this is, however, the study the

> court relied upon, and it is apparently the only study which purports to show such correlation.

Goldstein, *Interdistrict Inequalities in School Financing: A Critical Analysis of* Serrano *v.* Priest *and Its Progeny,* 120 U.PA.L.REV. 504, 524 n. 67 (1972).

There is also evidence on this point elsewhere that casts further doubt on the determination on this point by the District Court. That evidence may properly be considered by this Court since the supposed correlation between poor people and "poor" districts is a question of "legislative fact," properly the matter of judicial notice, rather than a question of "adjudicative fact." MCCORMICK, EVIDENCE § 331 (2d ed. Cleary et al. 1972).

The results of a study of the situation in Kansas are presented in Ridenour & Ridenour, *Serrano* v. *Priest: Wealth and Kansas School Finance,* 20 KAN.L.REV. 213 (1972). The conclusion there is that

> there exists in Kansas almost an inverse correlation: districts with highest income per pupil have low assessed value per pupil, and districts with high assessed value per pupil have low income per pupil.

Id. at 225. In addition to figures drawn from a large sample, the authors draw a particularly interesting contrast between two selected school districts, one in a fast-growing urban area (Shawnee Mission) and the other in a rural area that is losing population (Kendall). Shawnee Mission has an equalized value per pupil of $9,522. Despite a tax rate of 51.1 mills, and somewhat more state aid than Kendall, it is able to spend only $664 per pupil. Kendall, with a valuation of $79,672 per pupil, taxes at a rate of only 14.71 mills, but still is able to spend $1,573 per pupil. This sounds like the prototype of the situation that the court below

held to be unconstitutional, discrimination "on the basis of wealth by permitting citizens of affluent districts to provide a higher quality education for their children, while paying lower taxes * * *" (337 F.Supp. at 285, App. 259). But other facts change the picture. In Shawnee Mission the taxable income per pupil is $8,765 while in Kendall it is only $3,260. Kendall spends far more per pupil than does Shawnee Mission—as is probably inevitable in a very small school district with no economies of scale—but it does so only by paying 19% of its citizens' adjusted gross income in property tax, while in Shawnee Mission only 6% of income goes for this purpose. *Id.* at 225-226.

The Kansas authors point also to an earlier study of California counties, testing the assumption that assessed valuation per pupil is a measure of ability to pay taxes. That study showed no direct correlation between "wealth" per pupil and income per pupil, and found that counties with high "wealth" in terms of assessed valuation can raise equivalent sums of money only by apportioning a relatively greater share of income to taxes. *Id.* at 222-223, citing Davies, *The Challenge of Change in School School Finance,* in NATIONAL EDUCATIONAL ASSOCIATION, 10TH ANNUAL CONFERENCE ON SCHOOL FINANCE 199 (1967).

Since in the same sentence in which the District Court purported to find a correlation between family income and district assessed valuation it also announced an inverse relation between district "wealth" and percentage of minority pupils, it will be convenient to dispose of that point here. The court did not rely at all on racial considerations in its determination of unconstitutionality and it was wise not to do so. The determination of a racial correlation again rested on

Table VII of Plaintiffs' Exhibit VIII, which we have reproduced above.[1]

> Again, however, the validity of this conclusion based on the study's figures is doubtful. The "correlation" only exists for the 10 richest and 4 poorest districts. This pattern disappears in the middle groups which include 96 of the 110 districts. Whatever correlation there is between the percentage of minority people and the tax base wealth of a school district in Texas may reflect the rural nature of Texas minority life or some other state peculiarity.

Goldstein, *Interdistrict Inequalities in School Financing: A Critical Analysis of* Serrano *v.* Priest *and Its Progeny,* 120 U.PA.L.REV. 504, 525 n. 71 (1972).

Professor Coons and his associates speak forcefully to this point:

> Finally, an easy association of poverty with black people is the incessant theme of public utterance. It is not surprising that even the present litigation is understood by many of its close supporters as a racial struggle.
>
> The fact is otherwise. There is no reason to suppose that the system of district-based school finance embodies racial bias. * * * No doubt there are poor districts which are basically Negro, but it is clear almost by definition that the vast preponderance of such districts is white.

PRIVATE WEALTH 356-357. They present also figures from an unpublished study by the California State Department of Education showing that in that district 59% of minority students live in districts that are above the median assessed valuation per pupil. *Id.* at 357 n. 47.

In order to reverse the judgment below it is not necessary for this Court affirmatively to reject the un-

[1]P. 21 above.

sound factual assumptions that "quality is money" or that assessed valuation per pupil is an adequate measure of a district's ability to pay or of the income of its residents. 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 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 rational basis. *Ginsberg* v. *New York,* 390 U.S. 629, 641-643 (1968). Given the limitations of knowledge on these difficult questions of school finance, the Constitution does not require that the states be bound by assumptions that cannot be proven.

4. The Flaws in the Legal Argument

The legal argument in support of Proposition I is in a great American tradition. From the earliest days there has been pressure on this Court—to which it has sometimes succumbed—to find in the Constitution a mandate for the majority of the Court to substitute their judgment of wise policy for that of legislative bodies.

In the great leading case of *Fletcher* v. *Peck,* 6 Cranch (10 U.S.) 87 (1810), Chief Justice Marshall asked "whether the nature of society and of government does not prescribe some limits to the legislative power * * *." *Id.* at 135. His decision ultimately rested in the alternative on the Contract Clause or on "general principles which are common to our free institutions * * *." *Id.* at 139. Justice Johnson based his concurring vote "on the reason and nature of things: a

principle which will impose laws even on the deity." *Id.* at 143.

As the bar developed more experience with constitutional argument, it found that contentions of this kind could be fitted readily enough within the generalities of specific clauses of the Constitution.

In Marshall's day the Contract Clause served this purpose. As it came to be cut back in scope during the years of Chief Justice Taney, arguments based on the negative aspect of the Commerce Clause came to the fore. The post-Civil War amendments gave new scope for imaginative counsel. Although John Archibald Campbell's audacious attempt to turn the Privileges and Immunities Clause into a general supervisory power over state legislation—and particularly legislation produced by Reconstruction legislatures—received its just deserts in the *Slaughterhouse Cases,* 16 Wall. (83 U.S.) 36 (1873), the essence of his argument ultimately was written into law, attached to the Due Process Clause.[1] It had been supposed that that unhappy episode in constitutional law had been buried in 1937, but there will always be those who chafe at the slowness of the legislative process and who hunt for a shortcut by which society can be changed by constitutional construction.

Today the favorite vehicle for efforts of this kind is the recently-developed doctrine that if a "suspect" classification affects "fundamental" rights, a "compelling state interest" is required to justify the legislation. It is not coincidence that Professor Coons and his collaborators, who think "[l]ittle is to be expected

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[1]The most fascinating account of this development, and one of the masterpieces of legal essays, is Hamilton, *The Path of Due Process of Law,* in THE CONSTITUTION RECONSIDERED 167 (Conyers ed. rev. 1968).

from the political process in its legislative mode," PRIVATE WEALTH xx, dedicate their book "To nine old friends of the children." *Id.* at v. These authors are charmingly candid about the new constitutional requirement they have discovered:

> Concededly, Proposition I is no logical extension of any existing doctrine, and the argument for it will rely more upon policy than syllogisms.

Id. at 396. For such an argument the new Equal Protection doctrine is well suited since, as a distinguished commentator sympathetic to the doctrine admits, determinations of "the relative invidiousness of the particular differentiation" and "the relative importance of the subject with respect to which equality is sought" are "largely subjective judgments." Cox, *Foreword: Constitutional Adjudication and the Promotion of Human Rights,* 80 HARV.L.REV. 91, 95 (1966). To the extent that that is true, it provides an easy way to bridge the gap from statistical comparisons of the Edgewood School District with the Alamo Heights School District to the conclusion that the Texas system of school finance is unconstitutional.

The reasoning of the court below, echoing what the reformers have written in the literature is that

> [m]ore than mere rationality is required, however, to maintain a state classification which affects a "fundamental interest", or which is based upon wealth. Here both factors are involved.

(337 F.Supp. at 282, App. 259).[1] In fact neither factor is involved.

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[1]If the use of the alternative "or" in the first sentence suggests that one of these factors standing alone would be enough, it is in error. "The invariable formulation of the doctrine as applied to wealth classification requires both wealth classification and impairment of a fundamental interest in some varying combination." Goldstein, *Interdistrict Inequali-*

We fully agree with the statement by the District Court about "the very great significance of education to the individual" (337 F.Supp. at 283, App. 259). But that does not mean that it is "fundamental" in the sense that makes applicable the "compelling state interest" or "rigid scrutiny" test. The cases on this point have been so clearly analyzed by Judge Alexander Harvey, II, of the District Court in Maryland, that we quote his discussion:

> Clearly, the stricter test is applied where the right to vote has been at issue. *Reynolds* v. *Sims,* 377 U.S. 533, 562 (1964); *Carrington* v. *Rash,* 380 U.S. 89, 96 (1965). Similarly, where a case has involved the right of a defendant in a criminal case to receive a fair trial, such right has been treated as a fundamental interest subject to strict scrutiny. *Griffin* v. *Illinois,* 351 U.S. 12 (1956); *Douglas* v. *California,* 372 U.S. 353 (1963). More recently, the right to travel, recognized as a basic right under the Constitution, has been included in this list. *Shapiro* v. *Thompson,* 394 U.S. 618, 631 (1969). Classifications because of race have been treated as suspect at least since *Brown* v. *Board of Education,* 347 U.S. 483 (1954). Unique historical considerations have been recognized as requiring the stricter test for racial classifications inasmuch as the equal protection clause was a product of the desire to eradicate legal distinctions founded on race. *Shapiro* v. *Thompson, supra,* at 659 (Harlan J., dissenting) *Dandridge* v. *Williams,* [397 U.S. 471, 489 (1970)] (Harlan J., concurring). Classifications based on alienage are likewise suspect. *Korematsu* v. *United States,* 323 U.S. 214, 216 (1944).
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> These and similar opinions suggest the following (1) that those interests heretofore labeled funda-

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ties in School Financing: A Critical Analysis of Serrano *v.* Priest *and Its Progeny,* 120 U.PA.L.REV. 504, 511 n 22 (1972); Note, 23 HAST.L.J. 365, 389-391 (1972).

mental are few and are rooted in some provisions of the Constitution, and (2) that no decision of the Supreme Court has held that education is a fundamental interest of the type requiring the application of the more rigid test to legislative classifications dealing with the subject. In *Brown* v. *Board of Education, supra,* the Supreme Court did state that education is "perhaps" the most important function of state and local governments. (347 U.S. at 483). However, this statement was made in connection with the Court's assessment of the effects of racial segregation on children during their formative years in school. The strict scrutiny test was applied in *Brown* not because education is a fundamental interest but because classification by race is clearly suspect. * * *

That education is important and a vital concern of state and local government cannot be denied. But this is far from saying that education is so vital as to be called a "fundamental" interest from a constitutional point of view and thus made subject to a much more rigorous constitutional test than that applied in other areas of state concern. Can it reasonably be said that education is a more fundamental interest than health or welfare? Millions of young people in the United States are, of course, immediately and vitally affected by educational policies and expenditures. Millions of the aged on the other hand are more immediately and vitally affected by state expenditures for health care. Public welfare, which provides "the most basic economic needs of impoverished human beings" (*Dandridge* v. *Williams,* supra, at 485), undoubtedly would be viewed by large numbers of underprivileged and disabled citizens as a matter of more fundamental and immediate concern than either health or education. This Court concludes that when state statutory programs dealing with education, health or welfare as to be examined under the equal protection clause, there is no essential difference in any of these three vital areas of state concern.

* * *

> To hold that the strict scrutiny test applies to legislation of this sort would be to render automatically suspect every statutory classification made by state legislatures in dealing with matters which today occupy a substantial portion of their time and attention. If the test which plaintiffs seek to apply is the appropriate standard here, then a state, on each occasion that a similar Fourteenth Amendment attack were made against a statute dealing with health, education or welfare, would be required to bear the burden of proving the existence of a compelling state interest. This Court cannot conclude that state legislatures are to be strait-jacketed by such recently evolved constitutional theory in areas that have traditionally been the exclusive concern of the state.

Parker v. *Mandel,* Civ. No. 71-1089-H (D.Md., June 14, 1972). For other analyses rejecting the notion that education is "fundamental" in the sense in which that term is here used, see Brest, *Book Review,* 23 STAN.L. REV. 591, 604-608 (1971); Note, 23 HAST.L.J. 365, 391-396 (1972).

Nor is the argument for Proposition I strengthened by reliance on such cases as *Harper* v. *Virginia Board of Elections,* 383 U.S. 663 (1966), *Bullock* v. *Carter,* 405 U.S. 134 (1972), *Griffin* v. *Illinois,* 351 U.S. 12 (1956), and *Douglas* v. *California,* 372 U.S. 353 (1963), for the proposition that wealth is a "suspect classification." The concern of those cases seems to be not with wealth—or, more accurately, ability to pay, Shanks, *Educational Financing and Equal Protection: Will the California Supreme Court's Breakthrough Become the Law of the Land,* 1 J. LAW & EDUC. 73, 89 (1972)—but with the interests in fair criminal procedure and in voting that were at stake. Michelman, *Foreword: On Protecting the Poor Through the Fourteenth Amendment,*

83 HARV.L.REV. 7, 25 (1969). They deal with individual ability to pay, not with the ability to pay of a collectivity, such as a school district. They teach that there are certain rights—voting, a lawyer, a transcript—that cannot be denied entirely. An indigent person in the Edgewood area of San Antonio has a constitutional right to be provided with counsel if he is charged with a crime but the Constitution does not require the state to provide him with a lawyer of the same distinction as the man in Alamo Heights will retain if he runs afoul of the law. The proponents are right to concede that "however they may be interpreted, the poverty cases by themselves are insufficient as a base for our position." PRIVATE WEALTH 375.

In its eagerness to write Proposition I into the Fourteenth Amendment, the District Court did not see fit to discuss recent decisions of this Court, then available to the court below, that are contrary to the legal position it took. Such cases as *Dandridge* v. *Williams,* 397 U.S. 471 (1970), *James* v. *Valtierra,* 402 U.S. 137 (1971), and *Gordon* v. *Lance,* 403 U.S. 1 (1971), were not given so much as a passing mention. To these may now be added decisions of this Court that have come down since the decision below, such as *Lindsey* v. *Normet,* 405 U.S. 56 (1972), *Wisconsin* v. *Yoder,* 92 S.Ct. 1526 (1972), and *Jefferson* v. *Hackney,* 92 S.Ct. 1724 (1972).

Perhaps the most important of these, in terms of its implications for the present case is *Dandridge.* There the Court upheld a state regulation that put an absolute limit on welfare payments for dependent children regardless of the size of the family or its actual need. The Court stated that the era in which it struck down state laws because they might be unwise, improvident, or out of harmony with a particular school of thought

had "long ago passed into history." 397 U.S. at 485. It stated the classic constitutional doctrine:

> In the area of economics and social welfare, a State does not violate the Equal Protection Clause merely because the classifications made by its laws are imperfect. * * *
>
> To be sure, the cases cited, and many others enunciating this fundamental standard under the Equal Protection Clause, have in the main involved state regulation of business or industry. The administration of public welfare assistance, by contrast, involves the most basic economic needs of impoverished human beings. We recognize the dramatically real factual difference between the cited cases and this one, but we can find no basis for applying a different constitutional standard. * * * And it is a standard that is true to the principle that the Fourteenth Amendment gives the federal courts no power to impose upon the States their views of what constitutes wise economic or social policy.

397 U.S. at 485-486.

A portion of that passage from *Dandridge* was quoted recently by the Court in *Jefferson,* another welfare case. In *Jefferson* the Court then added the following comment:

> So long as its judgments are rational, and not invidious, the legislature's efforts to tackle the problems of the poor and the needy are not subject to a constitutional straitjacket. The very complexity of the problems suggests that there will be more than one constitutionally permissible method of solving them.

92 S.Ct. at 1731.

The welfare cases were far more likely candidates than the present case for the "rigid scrutiny" test. They involved real dollars for real individuals, not the statistical abstractions that are the substance of the

present case. They were concerned with "the most basic economic needs of impoverished human beings," while education, vitally important as it is, is an interest that on occasion must yield to other things, as *Wisconsin* v. *Yoder* has recently taught. If Maryland can say to a hungry family that $250 per month is enough for it to live on, no matter how many children there are or what the circumstances of the family may be, why is it unconstitutional for Texas to determine that the amount spent per pupil in the Edgewood School District is enough to provide an adequate education?

The need of the poor for housing was involved in *Lindsey* v. *Normet*. There the argument was made that a more stringent test of equal protection should be applied because "the need for decent shelter" and the "right to retain peaceful possession of one's home" are "fundamental interests which are particularly important to the poor" and cannot be infringed except on the basis of a compelling state justification. 405 U.S. at 73. This Court thought otherwise, and applied the orthodox "rational basis" test to uphold the statute. It said:

> We do not denigrate the importance of decent, safe and sanitary housing. But the Constitution does not provide judicial remedies for every social and economic ill. * * * Absent constitutional mandate, the assurance of adequate housing and the definition of landlord-tenant relationships is a legislative not a judicial function.

405 U.S. at 74.

James v. *Valtierra* and *Gordon* v. *Lance* evidence the value that the Constitution, and this Court, place on local self-determination even when so "fundamental" a right as education or so "suspect" a classification as poverty are implicated. The state constitutional

provision requiring approval by referendum for low-rent housing projects in *James* referred in terms to "persons of low income." It was a *de jure* classification in terms of wealth, rather than a *de facto* classification in terms of ability to pay, which is the most that is even arguably involved here. The Court was not persuaded by the argument of the dissenters that this was "an explicit classification on the basis of poverty—a suspect classification which demands exacting judicial scrutiny * * *." 402 U.S. at 144-145. It distinguished *Hunter* v. *Erickson,* 393 U.S. 385 (1969), since that involved a racial classification and on that ground was "constitutionally suspect." 402 U.S. at 140-141. It upheld the state provision.

> This procedure ensures that all the people of a community will have a voice in a decision which may lead to large expenditures of local governmental funds for increased public services and to lower tax revenues. It gives them a voice in decisions that will affect the future development of their own community. This procedure for democratic decisionmaking does not violate the constituional command that no State shall deny to any person "the equal protection of the laws."

402 U.S. at 143.

The challenge in *Gordon* was to a requirement that 60% of the voters must approve the issuance of bonds. The bonds in question were for building schools and thus involved the supposedly "fundamental" right to an education. But neither that fact nor the fact that the requirement gave disproportionate power to a minority of voters was enough to run afoul of the Equal Protection Clause.

> That the bond issue may have the desirable objective of providing better education for future generations goes to the wisdom of an indebtedness

> limitation: it does not alter the basic fact that the balancing of interests is one for the State to resolve.

403 U.S. at 6-7. Texas has chosen a system that gives to the people of each community "a voice in decisions that will affect the future development of their own community" and their own children. It may not be a wise or desirable system, but that balancing of interests is for the state to resolve.

The court below thought that the choice Texas gives to school districts was illusory since "poor" districts in reality have no choice. Even though they tax themselves heavily they cannot raise much money (337 F.Supp. at 284, App. 259). But this is not like *Hargrave* v. *Kirk,* 313 F.Supp. 944 (N.D.Fla. 1970), *vacated* 401 U.S. 476 (1971), where the state made it impossible as a matter of law for a poor family or school district to provide an expensive education. Here the state has assured every child in every school district an adequate education. It leaves to the people of each district the choice whether to go beyond the minimum and, if so, by how much. In fact, every district in the state does go beyond the minimum foundation program (App. 57). Thus the people of each district do in fact have a choice and have exercised it.

The real objection of the plaintiffs is not that they have no choice but that the choice is easier for some districts than for others. Those districts with large amounts of taxable property can produce more revenue at a lower tax rate[1] and will provide their children with a more expensive education. The foundation program in Texas, like that in a majority of the states, puts a floor under educational spending but imposes no

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[1]Though quite possibly as a higher percentage of income. See pp. 22-24 above.

ceiling on it. Plans of this kind are the outgrowth of the pioneering work of Strayer and Haig in 1923. STRAYER & HAIG, FINANCING OF EDUCATION IN THE STATE OF NEW YORK (1923). They guarantee an equal right to an education even if not a right to an equal education. They do "not preclude any particular community from offering at its own expense a particularly rich and costly educational program" so long as there is "an adequate minimum offering everywhere." *Id.* at 173.

Ten years after the birth of the foundation plan a national group of educators issued a "School Finance Charter," which has been "frequently cited * * * as the authoritative expression of professional education on the issue of equality of opportunity." PRIVATE WEALTH 474. Its third plank was: "For every school district the right to offer its children an education superior to state minimum standards and to seek and develop new methods intended to improve the work of the schools." REPORT OF THE NATIONAL CONFERENCE ON THE FINANCING OF EDUCATION 10 (1933), quoted in PRIVATE WEALTH 474-475. A few years later the League of Women Voters called for equality of educational opportunity, but said: "Equalization leaves room for local initiative where the community raises more than the minimum amount." NATIONAL LEAGUE OF WOMEN VOTERS, SCHOOL FINANCE AND SCHOOL DISTRICTS 27 (1936), quoted in PRIVATE WEALTH 476-477. As recently as 1965 reputable writers asserted that in educational finance "equalization" does not mean the same level of expenditure in all school systems but merely "reduc[ing] the difference by raising the level of support in areas of low wealth." HARRISON & MCLOONE, PROFILES IN SCHOOL SUPPORT 85 (1965).

This feeling persists. Mention was made earlier of the fact that Hawaii is frequently cited as the only

state in which school finance is handled on a state-wide basis and in which Proposition I is apparently satisfied. Yet in 1968 Hawaii amended its law to permit its counties to use their own funds to supplement state funds for construction of schools, maintenance of facilities, and transportation of children. Section 1 of the statutes, stating the reasons for its enactment, is of interest:

> Prior to Act 97, Session Laws of Hawaii 1955, each county in the State was responsible for the construction of school improvements, maintenance of public school facilities and grounds and the transportation of school children within the county. Act 97 stripped the counties of the responsibility involving this whole area.
>
> Under existing law, counties are precluded from doing anything in this area, even to spend their own funds if they so desire. This corrective legislation is urgently needed in order to allow counties to go above and beyond the State's standards and provide educational facilities as good as the people of the counties want and are willing to pay for. Allowing local communities to go above and beyond established minimums to provide for their people encourages the best features of democratic government.

Act 38, § 1, Haw. Sess. Laws (1968).

The Texas plan is not the result of mere happenstance. It is not the product of invidious discriminations. It is the result of repeated studies within the state.[1] It is consistent with what most states have chosen to do and with what most educators for the last half century have thought is the most enlightened approach to the problem. Even one of the advocates of the new enlightenment recognizes the rationality of systems like that in Texas.

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[1]See pp. 10-11 above.

> After examining the educational and financial programs within a state, the Court might well conclude that substantial equality does exist. The Court might note that all school districts make available twelve years of schooling and, by this standard, conclude that there is substantial equality. Or the Court might note that all the school children of the state are supported at a specified minimum and conclude that this constitutes substantial equality. These possibilities are very real, and comport with traditional understandings of the term "equality of educational opportunity."

WISE, RICH SCHOOLS, POOR SCHOOLS: THE PROMISE OF EQUAL EDUCATIONAL OPPORTUNITY 191 (1967).

It has never been supposed prior to now that it is unconstitutional to allow local governmental entities to spend their funds locally. "The use of taxes in the county where the taxed property is located does not, of itself, constitute an invidious discrimination or unreasonable classification." *Board of Education of Independent School District No. 20 Muskogee, Okla.* v. *Oklahoma,* 409 F.2d 665, 668 (10th Cir. 1969). "* * * [W]e have held that the Equal Protection Clause relates to equality between persons as such, rather than between areas and that territorial uniformity is not a constitutional prerequisite." *McGowan* v. *Maryland,* 366 U.S. 420, 427 (1961). See also *Griffin* v. *County School Board of Prince Edward County,* 377 U.S. 218, 231 (1964); *Salsburg* v. *Maryland,* 346 U.S. 545, 552 (1954).

The special circumstances that bring into play the "compelling state interest" test are not present here. The applicable standard is the "rational basis" test. It would be doctrinaire in the extreme to hold that there is no rational basis for continuing a system that has worked well and been widely hailed for 50 years in preference to immediate adoption of some new scheme,

on which the reformers themselves cannot agree, based on a premise that has only been conceived in the last few years.

5. Practical Consequences of the Decision Below

Under Points 3 and 4 we have shown that the decision below resulted from applying to unsound factual assumptions a view of the Equal Protection Clause that is contrary to that announced in recent and authoritative decisions of this Court. That is all that we need demonstrate to obtain reversal. Whether school finance systems ordered in accordance with Proposition I would be better or worse than those currently employed is not for this Court to decide. The only legitimate inquiry here is whether the District Court's adoption of Proposition I is required by the Constitution. "If it is not, its virtues, if it have any, cannot save it; if it is, its faults cannot be invoked to accomplish its destruction." *Home Building & Loan Assn.* v. *Blaisdell,* 290 U.S. 398, 483 (1934) (Sutherland, J., dissenting). But in the interest of completeness we think it not inappropriate to take brief note of some of the consequences that would follow from affirmance of the decision below.

It is quite apparent that a state required to comply with a decree like that entered below would be compelled either to increase by a vast amount the money it spends on education, in order to bring every other district even in dollars per student with the richest district, or to redistribute the funds now spent on education so that all of the districts would be even. Few, if any, states could afford to follow the former course. The Andrews School District in Texas spent $1,708 per student in 1970-71 and was at the 99.9% level in this regard among all Texas districts. To raise spending in

every district in Texas to the level in Andrews would add more than $2.4 billion to the total cost—and it still would not have reached 36 districts that spend even more. TEXAS RESEARCH LEAGUE, PUBLIC SCHOOL FINANCE PROBLEMS IN TEXAS 17 (1972). All state governments today are hard pressed financially. It is very unlikely that the state could produce a sum of that magnitude, more than double the total amount currently spent in Texas on public education, to satisfy the mandate of the District Court. If the state could produce that kind of money, it is highly doubtful that it would be wise public policy to commit to education at a time when society has many other urgent needs and inadequate funds to meet them. This is especially true in view of the absence of proof that these increased expenditures would increase the quality of the education provided.[1] A response of this kind would be bad news for the taxpayers, mean no change for the school children, and be a cause of jubilation for school teachers. Professor Moynihan, who thinks that decisions of this kind will result in a rise in educational expenditures, observes that "the only certain result" of this will be "that a particular cadre of middle-class persons in the possession of certain licenses—that is to say teachers—will receive more public money in the future than they do now." Moynihan, *Can Courts and Money Do It?*, N.Y. Times, Jan. 10, 1972, § E, at 24, col. 1.

The other alternative, taking money away from some districts in order to bring every district to the present average, is more likely but hardly more promising. To equalize at the average level throughout the state would require $131.5 million to be taken away from 622 districts and given to 527 other districts. TEXAS RESEARCH LEAGUE, PUBLIC SCHOOL FINANCE PROBLEMS IN TEXAS 15 (1972). We leave it to others to say how the newly-

[1]See pp. 18-20 above.

affluent districts would find ways to spend their money, how the districts from which the money is taken would adjust, what would happen to the tenure of teachers for whom there would no longer be jobs in the community in which they reside, how districts that have issued large amounts of bonds in reliance on their revenues under the present system of finance would pay off those bonds, and other such practical details.

Some of the huzzahs that have greeted the opinion below and the other lower court decisions that preceded it have been from those who are concerned about the problems of city schools and who have seen in Proposition I a device that will funnel vast new sums into those schools. This is almost certainly an illusion. In a sample of 223 school districts in eight states the National Education Finance Project found that in 1967 major urban core cities had higher market value of property per pupil than any other type of school district. JOHNS ET AL., ALTERNATIVE PROGRAMS OF FINANCING EDUCATION 91 (1971). Similar results have been reported in the press from a massive and sophisticated examination by the Urban Institute of the way that school financing actually works. It has reported on 1968-69 experience in California.

> The Urban Institute compared the resources of five types of community—rapidly growing suburbs, stable suburbs, central cities, small cities, and rural districts. The rapidly-growing suburbs had the lowest tax base per child, $37,138, compared with $53,222 in the slow-growth suburbs and $56,428 in the central cities. Teachers in the rapidly growing suburbs generally had less experience than those in the other types of district, and a lower proportion of those teachers had advanced degrees. Experience levels were highest, on the average, in the central cities and the stable suburbs.

> Advanced training was most common among big city teachers.

Anderson, *Financing Schools: Search for Reform,* Washington Post, May 31, 1972, at A16, col. 5.

Professor Joel Berke was the principal expert witness for the plaintiffs in the present case. He is also a consultant for the Senate Select Committee on Equal Educational Opportunity. In the latter capacity he has published a monograph in which he says:

> Despite the widespread enthusiasm that the California, Minnesota, and Texas cases have raised throughout the Nation, it is our belief that finance reform of the type just described will not result in removing the major inequities in American educational finance and on the contrary may well exacerbate the problems of a substantial proportion of urban schools.

SELECT COMMITTEE ON EQUAL EDUCATIONAL OPPORTUNITY, UNITED STATES SENATE, 92D CONG., 2D SESS., THE FINANCIAL ASPECTS OF EQUALITY OF EDUCATIONAL OPPORTUNITY AND INEQUITIES IN SCHOOL FINANCE 66 (Comm. Print 1972).

As we pointed out in the preceding section, the argument of plaintiffs and those who agree with them is not they are denied an adequate education but that others more fortunately situated get a more expensive education. We pointed out there that that situation, far from being irrational, is in accord with the best educational thinking from 1923 on, that the state should provide funds to set a floor but that local communities should be free to spend more than that amount.[1] It is not only educators who think that this is the wisest system. Editorials in newspapers not usually thought of as unduly conservative have recently expressed a similar view.

[1]Pp. 36-37 above.

The New York Times, praising the decision of the California Supreme Court along these lines, concluded that there should be centralized state financing but "without discouraging additional investments by education minded communities in the betterment of their schools." N.Y. Times, Sept. 2, 1971, at 32, col. 1. The editorialists for the Washington Post want all schools brought up to a strong national standard, but say: "If some districts have the resources and dedication to exceed that standard, they are entitled to reach higher." Washington Post, May 31, 1972, at A16, col. 2.

Professor Coons and his associates offer a way in which this can be done, consistent with Proposition I, through "district power equalizing." The state, by taking funds from "richer" districts and giving them to "poorer" districts, would guarantee that a particular tax rate would provide a stated number of dollars per student, regardless of the tax base of the particular district. Thus each district would remain free to decide how much it would spend on education by setting its tax rate. This would preserve local freedom of choice—or, as these authors call it "subsidiarity,"—PRIVATE WEALTH 15. They are right in thinking that this element of local choice is of great importance. This "preference for low level decision-making has furnished the common coin of political discourse in America since 1789." *Id.* at 14. "* * * [P]ersons seeking better schools through centralized 'equality' often overlook the fact that the achievement of such an equality guarantees not better but only similar schools." *Id.* at 17. Subsidiarity in education is "a school for democracy." *Id.* at 18.

> Educational administration is not noticeably overpopulated with philosopher kings. Even if it were, education is too important to be left to profession-

> als whose plenary control under a centralized system would be difficult to avoid.

Ibid.

> Of all public functions, education in its goals and methods is least understood and most in need of local variety, experimentation, and independence.

Coons, Clune, and Sugarman, *A First Appraisal of Serrano,* 2 YALE REV. OF LAW & SOCIAL ACTION 111, 119 (1971).

With these, and all similar recognitions of the importance of local autonomy and freedom of choice, we agree. See, e.g., Freeman, *Should Local School Support Be Abolished?,* 38 Vital Speeches 465, 469 (1972); Schoettle, *The Equal Protection Clause in Public Education,* 71 COL.L.REV. 1355, 1399 (1971). A similar recognition seems to lie at the heart of *James* v. *Valtierra,* 402 U.S. 137 (1971). Both the majority and dissenting opinions in *Wright* v. *Emporia City Council,* 40 L.WK. 4806 (June 22, 1972), recognize that "[d]irect control over decisions vitally affecting the education of one's children is a need that is strongly felt in our society * * *," *id.* at 4812, and that "[l]ocal control is not only vital to continued public support of the schools, but it is of overriding importance from an educational standpoint as well." *Id.* at 4815 (Burger, C. J., dissenting). To the extent that "district power equalizing" would permit local school districts to decide how much they will spend it makes Proposition I far more palatable, though still hardly constitutionally compelled.

The difficulty is that Professor Coons and his associates seem to have persuaded no one except themselves that "district power equalizing" is either desirable or constitutional.

The recent Presidential Commission said of "district power equalizing" that "we do not find this a sat-

isfactory solution to the problem of disparities for a number of reasons." PRESIDENT'S COMMISSION ON SCHOOL FINANCE, SCHOOLS, PEOPLE & MONEY 33 (1972). Those reasons have been amply developed in the literature. The Coons plan does not in fact provide equality without sacrificing freedom. Districts with relatively low property values would be under great pressure to tax themselves at a high rate in order to receive the maximum state aid. Communities that wish to emphasize services other than education, and that have property values lower than the state average, would be inhibited from doing so, since tax for education would produce a grant from the state while a tax for a park or a library would not. Bateman & Brown, *Some Reflections on* Serrano *v.* Priest 49 J. URBAN L. 701, 706-708 (1972). The same tax rate for schools may in fact be a heavier burden in an urban district, where other taxes are high in order to pay for other needed services, than in another district where those services are not required. Brest, *Book Review,* 23 STAN.L.REV. 591, 594-596 (1971). Because of the marginal utility of the dollar, it requires less effort for a person who is rich, either in terms of income or of capital, to pay a tax of a given rate than it does for a poor person to pay a tax of the same rate. Indeed there was specific testimony to that effect by Professor Berke in the present case. (App. 193). Not everyone will accept the debonair suggestion that this is a point on which "principle must yield to pragmatism * * *." PRIVATE WEALTH 222.

Indeed several writers have argued that "district power equalizing" departs so far from the principle of "fiscal neutrality" or "equal educational opportunity" that it would itself violate the Equal Protection Clause. "If it is children who are entitled to equal protection, then it is difficult to understand how the quality of a child's education could be subjected to a vote of his

neighbors." Wise, *School Finance Equalization Lawsuits: A Model Legislative Response,* 2 YALE REV. OF LAW & SOCIAL ACTION 123, 125 (1971). See also Silard & White, *Intrastate Inequalities in Public Education: The Case for Judicial Relief under the Equal Protection Clause,* 1970 WIS.L.REV. 7, 29-30; Michelman, *Foreword: On Protecting the Poor Through the Fourteenth Amendment,* 83 HARV.L.REV. 7, 50-56, (1969).

Thus a state that adopted "district power equalizing" as a response to a decree of the sort entered below would at best be buying future litigation. It is those who think Proposition I is constitutionally compelled who should say whether power equalizing is consistent with that principle, or with the Constitution, but it is difficult to see why the same arguments that are made against present financing plans cannot also be made against a plan based on power equalizing.

The alternative, centralized decisions on a statewide basis about spending levels, would destroy local autonomy, with all the values this brings to the system. It would discourage experimentation and promote uniform mediocrity. It would be a crippling blow to education at a time when it is already under heavy pressure from those who resist desegregation. As the author of the Coleman Report has said:

> Any technique to create equality of financial resources for education in the presence of family income inequalities must have some means by which those with higher income can aid their child's education, or else they will use that income to do so outside the system of public education.

Coleman, *Foreword,* in PRIVATE WEALTH xiii. So long as *Pierce* v. *Society of Sisters,* 268 U.S. 510 (1925), remains authoritative, a ready alternative is at hand for those with comfortable means. The decision below

would encourage flight away from the public schools at a time when those schools are the principal hope of achieving a society that is not divided by artificial barriers of race or class or wealth.[1]

Conclusion

Twice before this Court has summarily affirmed decisions of district courts that had rejected challenges to the system of public school financing similar to the challenge that has been made in the present case. *McInnis* v. *Ogilvie,* 394 U.S. 322 (1969); *Burruss* v. *Wilkerson,* 397 U.S. 44 (1970). Because of the interest that has subsequently arisen in this subject, and decisions, such as the decision below, that have refused to follow *McInnis* and *Burruss,* the Court was wise to hear full argument in this case, in order that the Court's view of the matter may be made unmistakably clear to the profession after plenary consideration. The result, however, should be the same.

What the Court said in *Dandridge* v. *Williams,* 397 U.S. 471, 487 (1970), and reiterated in *Jefferson* v. *Hackney,* 92 St.Ct. 1724, 1734 (1972), states the approach that should be decisive of the present case:

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[1]In the same year in which Hawaii, which had been the only state to have complete centralized financing of its schools, amended its statutes to restore some measure of local control, see note 1 p. 5 above. Its Supreme Court described the state of its public schools:

> The gap in the quality of education provided by public schools and the quality of education provided by private schools is still reflected today in the ratings given to the various high schools in the State by the Accrediting Commission for Secondary Schools of the Western Association of High Schools and Colleges. About 44 per cent of the nonpublic high schools received the highest rating possible while none of the public high schools received such a rating.

Spears v. *Honda,* 51 Haw. 1, 7 n. 5, 449 P.2d 130, 135 n. 5 (1968).

> We do not decide today that the Maryland regulation is wise, that it best fulfills the relevant social and economic objectives that Maryland might ideally espouse, or that a more just and humane system could not be devised. Conflicting claims of morality and intelligence are raised by opponents and proponents of almost every measure, certainly including the one before us. But the intractable economic, social, and even philosophical problems presented by public welfare assistance programs are not the business of this Court.

For all of the foregoing reasons, the judgment below should be reversed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Pat Bailey, one of the attorneys for the Appellants, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 20th day of July, 1972, I served three copies of the foregoing Brief for Appellants, together with three copies of the Appendix in this cause, upon the Appellees by depositing same in the United States Mail, postage prepaid, and addressed to Appellees' attorneys of record as follows: Mr. Arthur Gochman, 313 Travis Park West, 711 Navarro, San Antonio, Texas 78224, and Mr. Mario Obledo, 145 9th Street, San Francisco, California 94103.

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