

**TX 3RD CT. OF APPEALS. KIRBY VS.
EDGEWOOD ISD. BRIEF FOR THE STATE
OF TEXAS**

NO. 3-87-190-CV

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

WILLIAM N. KIRBY, et al.,
Appellants

VS.

EDGEWOOD INDEPENDENT SCHOOL DISTRICT, et al.,
Appellees

BRIEF FOR THE STATE OF TEXAS,

WILLIAM N. KIRBY, TEXAS COMMISSIONER OF EDUCATION, TEXAS
STATE BOARD OF EDUCATION, HON. WILLIAM CLEMENTS, GOVERNOR OF
TEXAS, HON. ROBERT BULLOCK, COMPTROLLER OF TEXAS, HON. JIM
MATTOX, ATTORNEY GENERAL OF TEXAS,

ORAL ARGUMENT REQUESTED

JIM MATTOX
Attorney General of Texas

MARY F. KELLER
Executive Assistant

JAMES C. TODD
Chief, General Litigation
Division

JOHN DAVID THOMPSON, III
General Counsel
Texas Education Agency

KEVIN T. O'HANLON
Assistant Attorney General
P. O. Box 12548
Capitol Station
Austin, Texas 78711-2548
512-463-2120, ext. 220

GREAT CONSTITUTIONAL PROVISIONS MUST BE ADMINISTERED WITH CAUTION. SOME PLAY MUST BE ALLOWED FOR THE JOINTS OF THE MACHINE, AND IT MUST BE REMEMBERED THAT LEGISLATURES ARE THE ULTIMATE GUARDIANS OF THE LIBERTIES AND WELFARE OF THE PEOPLE IN QUITE AS GREAT A DEGREE AS THE COURTS.

Justice Oliver Wendall Holmes
Missouri, Kansas & Texas Ry.
Co. v. May
24 S.Ct. 638, 639 (1904)

INDEX TO BRIEF

SUBJECT INDEX.....	ii
CERTIFICATE OF PARTIES.....	v
REQUEST FOR ORAL ARGUMENT.....	ix
INDEX OF AUTHORITIES.....	x
POINTS OF ERROR.....	xix
STATEMENT CONCERNING POINTS OF ERROR.....	xxii
STATEMENT OF FACTS.....	xxiii
ARGUMENT AND AUTHORITIES.....	1
Summary Of Argument.....	1
POINT OF ERROR NUMBER 6: (The trial court erred in finding that the Texas School Finance System does not provide for an adequate education.).....	
I. The Constitution Expressly Delegates To The Legislature The Authority To Define The Educational Entitlement.....	5 7
II. The Legislature Has Provided For A Definition Of A Suitable Public Education.....	12
III. The Legislative Delegation Of The Task Of Defining The Appropriate Curriculum To The State Board Of Education Was Proper.....	13
IV. The State Board Of Education Has Appropriately Defined The Educational Entitlement.....	17

A.	The Curriculum.....	17
B.	Textbooks.....	19
C.	Accreditation.....	21
D.	TEAMS Test Results.....	22
V.	State Guaranteed Expenditure Levels Are Sufficient To Provide The Educational Entitlement.....	25
VI.	The Evidence In This Case Requires A Finding Of Fact That All Texas Public Education Students Have Access To The State Mandated Entitlement.....	28
 POINT OF ERROR NUMBER 7 (The trial court erred in holding that the equal protection clause of the Texas Constitution mandates equal access to funds by local school districts).....		
I.	The Standard Of Review.....	33
II.	The System Of Classification To Which Equal Protection Analysis Is To Be Applied Does Not Encompass District Wealth.....	40
III.	Article VII §3 Of The Texas Constitution Governs Educational Financing - The Historical Analysis.....	43
IV.	The Separation Of Powers' Doctrine of Article II §1 Precludes Judicial Review Of District Lines.....	59

V.	Article I §2 Requires Judicial Deference To Popular Votes On The Acts Of Elected Representatives In Fixing Boundaries.....	69
VI.	Conclusion.....	72
	POINT OF ERROR NUMBER 8 (The trial court erred in defining equal protection in terms of the standing of school districts rather than the rights of students.).....	73
I.	Plaintiff School Districts Have No Standing To Assert "Constitutional Violations".....	74
II.	The Implementation Of The Final Judgment As Written Would Not Insure Equal Per Student Funding.....	78
	POINT OF ERROR NUMBER 9 (The trial court erred in finding that the Texas School Finance System violated the due process clause of the Texas Constitution, art. I, §19 and 29, since there is no evidence, or alternatively, insufficient evidence to support such a finding.....	81
	PRAYER.....	82
	CERTIFICATE OF SERVICE.....	83

NAMES OF PARTIES

The following list is a complete list of all parties to the action:

PLAINTIFFS

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

ADOLFO PATINO, on his own behalf and as next friend of ADOLFO PATINO, JR.
ANTONIO Y. PINA, on his own behalf and as next friend of ANTONIO PINA, JR., ALMA MIA PINA and ANA PINA
REYMUNDO PEREZ, on his own behalf and as next friend of RUBEN PEREZ, REYMUNDO PEREZ, JR., MONICA PEREZ, RAQUEL PEREZ, ROGELIO PEREZ and RICARDO PEREZ
DEMETRIO RODRIGUEZ, on his own behalf and as next friend of PATRICIA RODRIGUEZ and JAMES RODRIGUEZ
LORENZO G. SOLIS, on his own behalf and as next friend of JAVIER SOLIS and CYNTHIA SOLIS
JOSE A. VILLALON, on his own behalf and as next friend of RUBEN VILLALON, RENE VILLALON, MARIA CHRISTINA VILLALON and JAIME VILLALON

PLAINTIFF-INTERVENORS

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

MISSION INDEPENDENT SCHOOL DISTRICT
NAVASOTA INDEPENDENT SCHOOL DISTRICT
ODEM-EDROY INDEPENDENT SCHOOL DISTRICT
PALMER INDEPENDENT SCHOOL DISTRICT
PRINCETON INDEPENDENT SCHOOL DISTRICT
PROGRESSO INDEPENDENT SCHOOL DISTRICT
RIO GRANDE CITY INDEPENDENT SCHOOL DISTRICT
ROMA INDEPENDENT SCHOOL DISTRICT
ROSEBUD-LOTT INDEPENDENT SCHOOL DISTRICT
SAN ANTONIO INDEPENDENT SCHOOL DISTRICT
SAN SABA INDEPENDENT SCHOOL DISTRICT
SANTA MARIA INDEPENDENT SCHOOL DISTRICT
SANTA ROSA INDEPENDENT SCHOOL DISTRICT
SHALLOWATER INDEPENDENT SCHOOL DISTRICT
SOUTHSIDE INDEPENDENT SCHOOL DISTRICT
STAR INDEPENDENT SCHOOL DISTRICT
STOCKDALE INDEPENDENT SCHOOL DISTRICT
TRENTON INDEPENDENT SCHOOL DISTRICT
VENUS INDEPENDENT SCHOOL DISTRICT
WEATHERFORD INDEPENDENT SCHOOL DISTRICT
YSLETA INDEPENDENT SCHOOL DISTRICT
CONNIE DEMARSE
H. B. HALBERT
LIBBY LANCASTER
JUDY ROBINSON
FRANCES RODRIGUEZ
ALICE SALAS

DEFENDANTS

WILLIAM N. KIRBY, INTERIM TEXAS COMMISSIONER OF EDUCATION
THE TEXAS STATE BOARD OF EDUCATION
MARK WHITE, GOVERNOR OF THE STATE OF TEXAS
ROBERT BULLOCK, COMPTROLLER OF THE STATE OF TEXAS
THE STATE OF TEXAS
JIM MATTOX, ATTORNEY GENERAL OF THE STATE OF TEXAS

DEFENDANT-INTERVENORS

ANDREWS INDEPENDENT SCHOOL DISTRICT
ARLINGTON INDEPENDENT SCHOOL DISTRICT
AUSTWELL TIVOLI INDEPENDENT SCHOOL DISTRICT
BECKVILLE INDEPENDENT SCHOOL DISTRICT
CARROLLTON-FARMERS BRANCH INDEPENDENT SCHOOL DISTRICT
CARTHAGE INDEPENDENT SCHOOL DISTRICT
CLEBURNE INDEPENDENT SCHOOL DISTRICT
COPELL INDEPENDENT SCHOOL DISTRICT
CROWLEY INDEPENDENT SCHOOL DISTRICT
DESOTO INDEPENDENT SCHOOL DISTRICT
DUNCANVILLE INDEPENDENT SCHOOL DISTRICT
EAGLE MOUNTAIN-SAGINAW INDEPENDENT SCHOOL DISTRICT
EANES INDEPENDENT SCHOOL DISTRICT

EUSTACE INDEPENDENT SCHOOL DISTRICT
GLASSCOCK INDEPENDENT SCHOOL DISTRICT
GRADY INDEPENDENT SCHOOL DISTRICT
GRAND PRAIRIE INDEPENDENT SCHOOL DISTRICT
GRAPEVINE-COLLEYVILLE INDEPENDENT SCHOOL DISTRICT
HARDIN JEFFERSON INDEPENDENT SCHOOL DISTRICT
HAWKINS INDEPENDENT SCHOOL DISTRICT
HIGHLAND PARK INDEPENDENT SCHOOL DISTRICT
HURST EULESS BEDFORD INDEPENDENT SCHOOL DISTRICT
IRAAN-SHEFFIELD INDEPENDENT SCHOOL DISTRICT
IRVING INDEPENDENT SCHOOL DISTRICT
KLONDIKE INDEPENDENT SCHOOL DISTRICT
LAGO VISTA INDEPENDENT SCHOOL DISTRICT
LAKE TRAVIS INDEPENDENT SCHOOL DISTRICT
LANCASTER INDEPENDENT SCHOOL DISTRICT
LONGVIEW INDEPENDENT SCHOOL DISTRICT
MANSFIELD INDEPENDENT SCHOOL DISTRICT
MCMULLEN INDEPENDENT SCHOOL DISTRICT
MIAMI INDEPENDENT SCHOOL DISTRICT
MIDWAY INDEPENDENT SCHOOL DISTRICT
MARANDO CITY INDEPENDENT SCHOOL DISTRICT
NORTHWEST INDEPENDENT SCHOOL DISTRICT
PINETREE INDEPENDENT SCHOOL DISTRICT
PLANO INDEPENDENT SCHOOL DISTRICT
PROSPER INDEPENDENT SCHOOL DISTRICT
QUITMAN INDEPENDENT SCHOOL DISTRICT
RAINS INDEPENDENT SCHOOL DISTRICT
RANKIN INDEPENDENT SCHOOL DISTRICT
RICHARDSON INDEPENDENT SCHOOL DISTRICT
RIVIERA INDEPENDENT SCHOOL DISTRICT
ROCKDALE INDEPENDENT SCHOOL DISTRICT
SHELDON INDEPENDENT SCHOOL DISTRICT
STANTON INDEPENDENT SCHOOL DISTRICT
SUNNYVALE INDEPENDENT SCHOOL DISTRICT
WILLIS INDEPENDENT SCHOOL DISTRICT
WINK-LOVING INDEPENDENT SCHOOL DISTRICT

REQUEST FOR ORAL ARGUMENT

Appellants request
Oral Argument upon submission of this Cause.

INDEX OF AUTHORITIES

<u>CASES</u>	<u>PAGE</u>
UNITED STATES SUPREME COURT:	
<u>Ashwander v. Tennessee Valley Authority,</u> 297 U.S. 288, 56 S.Ct. 466.....	77
<u>Chappell Chemical Co. v. Sulphur Mines,</u> 172 U.S. 474, 19 s.Ct. 268 (1899).....	36
<u>Cherokee Nation v. Georgia,</u> 5 Pet. 1.....	65
<u>City of Trenton v. New Jersey,</u> 262 U.S. 182, 43 S.Ct. 534, (1923).....	75
<u>Dandridge v. Williams,</u> 397 U.S. 471, 90 S.Ct. 1153 (1970).....	39
<u>Fahey v. Malowce,</u> 332 U.S. 245, 67 S.Ct. 1552 (1968).....	77
<u>Foster v. Neilson,</u> 2 Pet. 253.....	65
<u>Garcia v. Lee,</u> 12 Pet. 511.....	65
<u>Marbury v. Madison,</u> Cranch's Reports 137 (1803).....	64, 65
<u>Massachusetts Board of Retirement v. Murgia,</u> 427 U.S. 307, 96 s.Ct. 2562 (1976).....	39
<u>McGinnis v. Royster,</u> 410 U.S. 263, 93 S.Ct. 1055, (1973).....	38
<u>McGowan v. Maryland,</u> 366 U.S. 420, 81 S.Ct. 1101, (1961).....	36, 39
<u>Middleton v. Texas Power and Light Co.,</u> 249 U.S. 152, 39 S.Ct. 227 (1919).....	36
<u>Miller v. Wilson,</u> 236 U.S. 373, 35 S.Ct. 342, (1915).....	39

<u>Missouri v. Lewis,</u> 101 U.S. 22 ___ S.Ct. ___ (1879).....	36
<u>Ocampo v. United States,</u> 234 U.S. 91, 34 S.Ct. 712 (1914).....	36
<u>San Antonio Independent School District v. Rodriguez,</u> 411 U.S. 1, 93 S.Ct. 1278 (1973).....	5, 6, 36, 37, 38
<u>Town of Lockhart v. Citizens for Community Action,</u> 430 U.S. 259, 97 S.Ct. 1047 (1977).....	34
<u>Toyota v. Hawaii,</u> 226 U.S. 184, 33 S.Ct. 47 (1912).....	36
<u>United States v. Arredondo,</u> 6 Pet. 691.....	65
<u>United States v. City and County of San Francisco,</u> 310 U.S. 16 60 S.Ct. 749 (1940).....	77
<u>Williams v. Council of Baltimore,</u> 289 U.S. 36, 53 S.Ct. 431, (1983).....	75
OTHER FEDERAL:	
<u>Brown v. McGarr,</u> 774 F.2d 777 (7th Cir. 1985).....	81
<u>Ferrell v. Dallas I.S.D.,</u> 392 F.2d 697 (5th Cir. 1968).....	11
<u>Jimenez v. Hidalgo County Water Improvement No. 2,</u> 68 F.R.D. 668 (S.D. Tex. 1975), aff'd, 424 U.S. 950, 965 S.Ct. 1423, (1976).....	67
<u>School Board of the Parish of Livingston, Louisiana v. Louisiana State Board of Elementary and Secondary Education,</u> 830 F.2d 563 (5th Cir. 1987).....	6

TEXAS:

<u>Alum v. Aluminum Company of America,</u> 717 S.W.2d 588 (Tex. 1986).....	31
<u>Austin Fire and Police Departments v.</u> <u>City of Austin,</u> 228 S.W.2d 845 (Tex. Civ. App. - Austin 1950).....	68
<u>Beneficial Finance Company of Midland</u> <u>v. Miskell,</u> 424 S.W.2d 482 (Tex. Civ. App. - Austin 1968, writ ref'd n.r.e.).....	78
<u>Bonner v. Belstering,</u> 104 Tex. 432, 138 S.W. 571 (Tex. Sup. 1911).....	71
<u>Bullock v. Hewlett-Packard Company,</u> 628 S.W.2d 754 (Tex. 1982).....	15
<u>Browning-Ferris, Inc. v. Texas Department</u> <u>of Health,</u> 625 S.W.2d 764 (Tex. Civ. App. - Austin 1981, writ ref'd n.r.e.).....	14
<u>Cain, et al. v. Bain,</u> 709 S.W.2d 175 (Tex. 1986).....	33
<u>Carl v. South San Antonio Independent</u> <u>School District,</u> 561 S.W.2d 560 (Tex. App. - Waco, 1978 writ ref'd n.r.e.).....	36, 39
<u>Carter v. Hamlin Hospital District,</u> 538 S.W.2d 671 (Tex. Civ. App. - Eastland 1976, writ ref'd n.r.e.).....	67
<u>Carthers v. Harnett,</u> 67 Tex. 127, 2 S.W. 523 (1886).....	66
<u>Chemical Bank & Trust Company v. Falkner,</u> 369 S.W.2d 427 (Tex. 1963).....	66
<u>City of Corpus Christi v. Public Utility</u> <u>Commission</u> 572 S.W.2d 290 (Tex. 1978).....	14

<u>City of Humble v. Metropolitan Transit Authority,</u> 636 S.W.2d 484 (Tex. App. - Austin, 1982, no writ).....	39
<u>City of Marshall v. Elgin,</u> 143 S.W. 670 (Tex. Civ. App. - Texarkana 1912, no writ).....	67
<u>Colony Municipal Utility District No. 1 of Denton County v. Appraisal District of Denton County,</u> 626 S.W.2d 930 (Tex. App. - Fort Worth 1982, writ ref'd n.r.e.).....	76
<u>Ex Parte Cooper;</u> 3 Tex. App. 489 (Tex. App. 1878).....	45
<u>Ex Parte Giles,</u> 502 S.W.2d 774 (Tex. Cr. App. 1973).....	64
<u>Ex Parte Miers,</u> 64 S.W.2d 778 (Tex. Cr. App. 1933).....	64
<u>Ex Parte Rice,</u> 162 S.W. 891 (Tex. Cr. App. 1914).....	64
<u>Ex Parte Towles,</u> 48 Tex. 413 (1877).....	66
<u>Lloyd A. Fry Roofing Company v. State,</u> 541 S.W.2d 639 (Tex. Civ. App. - Dallas 1976, writ ref'd n.r.e.).....	14
<u>Funderburk v. Schulz,</u> 293 S.W.2d 803 (Tex. Civ. App. - Galveston 1956, no writ).....	68
<u>Gerst v. Oak Cliff Savings and Loan Assoc.,</u> 432 S.W.2d 702 (Tex. 1968).....	15
<u>Gillespie v. Lightfoot,</u> 103 Tex. 359, 127 S.W. 799 (Tex. 1910).....	55
<u>Green v. State,</u> 589 S.W.2d 160 (Tex. Civ. App. - Tyler 1979, no writ hist.).....	26

<u>Harrell v. Lynch,</u> 65 Tex. 146 (1885).....	66
<u>Hatcher v. State,</u> 125 Tex. 84, 81 S.W.2d 499 (1935).....	66
<u>Hidalgo County v. Pate,</u> 443 S.W.2d 80 (Tex. Civ. App. - Corpus Christi 1969, writ ref'd n.r.e.).....	26
<u>Hill v. Texas Water Quality Board,</u> 568 S.W.2d 738 (Tex. Civ. App. - Austin 1978, writ ref'd n.r.e.).....	76
<u>Holley v. Watts,</u> 629 S.W.2d 694 (Tex. 1982).....	31
<u>Jenkins v. Tanner,</u> 166 S.W.2d 167 (Tex. Civ. App. - Amarillo 1942, no writ hist.).....	26
<u>Kettle v. City of Dallas,</u> 80 S.W. 874, 877 (Tex. Civ. App. - Dallas 1904, no writ).....	67
<u>Key Western Life Insurance Co. v. State Board of Insurance,</u> 350 S.W.2d 839 (Tex. 1961).....	34
<u>Kindred v. Con/Chem, Inc.,</u> 650 S.W.2d 61 (Tex. 1983).....	32
<u>Lee v. City of Dallas,</u> 267 S.W. 1014 (Tex. Civ. App. - Dallas 1925, no writ).....	68
<u>Lewis v. Independent School District of Austin,</u> 161 S.W.2d 450 (Tex. 1942).....	67
<u>Lofton v. Texas Brine Corporation,</u> 720 S.W.2d 804 (Tex. 1986).....	32
<u>Love v. City of Dallas,</u> 120 Tex. 351, 40 S.W.2d 20 (1931).....	66
<u>Lytle v. Halff,</u> 75 Tex. 128, 12 S.W. 610 (1889).....	61, 62

<u>March v. State,</u> 44 Tex. 64 (Tex. Sup. 1875).....	64
<u>Massachusetts Indemnity and Life Insurance Company v. Texas State Board of Insurance,</u> 685 S.W.2d 104 (Tex. App. - Austin 1985, no writ).....	78
<u>McGregor v. Clawson,</u> 506 S.W. 2d 922 (Tex. Civ. App. - Waco 1974, writ ref'd n.r.e.).....	75
<u>McPhail v. Tax Collector of Van Zandt County,</u> 280 S.W. 260 (Tex. Civ. App. -- Dallas 1925, writ ref'd).....	64
<u>Mumme v. Marrs,</u> 120 Tex. 383, 40 S.W.2d 31 (1931).....	10, 11, 37, 47-50, 72
<u>National Life and Accident Insurance Company v. Blass,</u> 438 S.W.2d 905 (Tex. 1969).....	32
<u>Neel v. Texas Liquor Control Board,</u> 259 S.W.2d 312 (Tex. Civ. App. - Austin 1953, writ ref'd n.r.e.).....	78
<u>Norris v. Waco,</u> 57 Tex. 635 1882.....	67
<u>Parks v. West,</u> 102 Tex. 11, 111 S.W. 726 (Tex. 1909).....	52, 54-55
<u>Passel v. Fort Worth I.S.D.,</u> 429 S.W. 2d 917 (Tex. Civ. App. - Fort Worth 1968 rev'd on other grounds 440 S.W. 2d 61).....	11
<u>Pool v. Ford Motor Company,</u> 715 S.W.2d 629 (Tex. 1986).....	58
<u>Railroad Commission of Texas v. Shell Oil Company,</u> 161 S.W.2d 1022, 139 Tex. 66 (1942).....	14
<u>Snodgrass v. State,</u> 150 S.W. 162 (Tex. Cr. App. 1912).....	64

<u>Southwestern Bell Telephone Company v. Public Utilities Commission,</u> 618 S.W.2d 130 (Tex. Civ. App. - Austin 1981, writ <u>dism'd</u>).....	13
<u>Spring Branch I.S.D. v. Stamos,</u> 695 S.W. 2d 556 (Tex. 1985).....	8, 11, 81
<u>Stafford v. Stafford,</u> 726 S.W.2d 14 (Tex. 1987).....	31
<u>State v. Brownson,</u> 94 Tex. 436, 61 S.W. 114 (Tex. 1901).....	53-64, 64
<u>State v. Project Principal, Inc.,</u> 724 S.W.2d 387 (Tex. 1987).....	81
<u>State ex rel Grimes County Taxpayers Association v. Texas Municipal Power Agency,</u> 565 S.W.2d 258 (Tex. App. - Houston [1st Dist.] 1978, no writ).....	67
<u>Stauffer v. City of San Antonio,</u> 344 S.W. 2d 158, 160 (Tex. 1961).....	13
<u>Sullivan v. University Interscholastic League,</u> 616 S.W.2d 170 (Tex. 1981).....	40
<u>Terrell v. Clifton Independent School District,</u> 5 S.W.2d 808 (Tex. Civ. App. - Waco 1928 writ ref'd).....	63
<u>Texas Industrial Traffic League v. Railroad Commission of Texas,</u> 628 S.W.2d 187 (Tex. App. -- Austin 1982), rev'd on other grounds, 633 S.W.2d 821, on remand 672 S.W.2d 548 (Tex. App. - Austin 1984, writ ref'd n.r.e.).....	66
<u>Texas National Guard Armory Board v. McGraw,</u> 126 S.W.2d 627 (1939).....	34
<u>Texas State Board of Examiners in Optometry v. Carp,</u> 412 S.W.2d 307 (Tex. 1967), <u>cert. denied</u> , 389 U.S. 88 S.Ct. 241, 52.....	14

<u>Texas State Teachers' Ass'n v. State,</u> 711 S.W. 2d 421 (Tex. App. - Austin 1986, writ ref'd n.r.e.).....	11
<u>Texas Women's University v. Chayklintaste,</u> 530 S.W.2d 927 (Tex. 1975).....	34
<u>Travelers Insurance Co. v. Cason,</u> 122 S.W.2d 694 (Tex. Civ. App. - El Paso 1939, error ref'd).....	68
<u>Vista Chevrolet, Inc. v. Lewis,</u> 709 S.W.2d 176 (Tex. 1986).....	31
<u>Underwood v. State,</u> 12 S.W.2d 206 (Tex. Cr. App. 1927).....	64
<u>Webb County v. Board of School Trustees of Laredo,</u> 95 Tex. 131, 65 S.W. 878 (Tex. 1901).....	58
<u>Western Construction Co. v. Valero Transmission Co.,</u> 655 S.W.2d 251 (Tex. Civ. App. - Corpus Christi 1983, no writ hist.).....	26
<u>Whitworth v. Bynum,</u> 699 S.W.2d 194 (Tex. 1985).....	40
 CONSTITUTIONS	
TEX. CONST. art. I § 2.....	70
TEX. CONST. art. I § 19.....	81
TEX. CONST. art. II § 1.....	60-61
TEX. CONST. art. III § 56.....	51, 69
TEX. CONST. art. VII § 1.....	7, 17
TEX. CONST. art. VII § 3.....	52
TEX. CONST. art. VII § 3 (1876, amended 1883).....	45
TEX. CONST. art. VII § 3 (1876, amended 1909).....	55

TEX. CONST. art. VII § 3 (1876, amended 1918)....	19, 46, 56
TEX. CONST. art. VII § 3 (1876, amended 1920).....	46
TEX. CONST. art. VII § 3 (1876, amended 1927).....	63
TEX. CONST. art. VII § 3 (1876, amended 1967).....	56-57
TEX. CONST. art. VII § 3 (a).....	51
TEX. CONST. art. VII § 8.....	13
TEX. CONST. art. X § 1 (1836).....	9
TEX. CONST. art. X § 1 (1845).....	9

STATUTES

TEX. EDUC. CODE ANN. § 11.24(b) (Vernon 1972).....	16
TEX. EDUC. CODE ANN. § 11.26 (a).....	16
TEX. EDUC. CODE ANN. § 11.26 (c) (5).....	16
TEX. EDUC. CODE ANN. § 12.01 <u>et seq</u>	17, 20
TEX. EDUC. CODE ANN. § 13.031 <u>et seq</u>	16
TEX. EDUC. CODE ANN. § 16.005.....	16
TEX. EDUC. CODE ANN. § 19.01 <u>et seq</u>	70
TEX. EDUC. CODE ANN. § 21.101.....	12
TEX. EDUC. CODE ANN. § 21.101 (d).....	12, 28
TEX. EDUC. CODE ANN. § 21.751.....	16
19 T. A. C. § 75 (Ch. 75).....	18

MISCELLANEOUS

THE FEDERALIST, No. 47, p. 301 (C. Rossiter ed. 1961).....	68
---	----

POINTS OF ERROR

POINT OF ERROR NO. 1

The trial court erred in apply strict scrutiny to evaluate the Texas School Finance System; since neither a fundamental right nor a suspect classification is implicated by the Texas system, it was improper for the court to apply this standard of review. (Findings, p. 11 at Tr. Vol. III, p. 546)

POINT OF ERROR NO. 2

The trial court erred in holding that education is a fundamental right under the Texas Constitution, since, for purposes of equal protection analysis, education is not a fundamental right under Texas law so as to subject a governmental classification to strict scrutiny. (Findings, II, p. 4-11 at Tr. Vol. III, p. 539-546; Findings, Nos. 1 and 2, p. 12 at Tr. Vol. III, p. 547; Findings, No. 1, p. 57 at Tr. Vol. III, p. 592)

POINT OF ERROR NO. 3

The trial court erred in holding that wealth is a suspect category, since, for purposes of equal protection analysis, classifications based upon wealth are not suspect classifications so as to subject a governmental classification to strict scrutiny. (Findings, No. 14, p. 7 at Tr. Vol. III, p. 542)

POINT OF ERROR NO. 4

The trial court erred in entering judgment that the Texas School Finance System violated the equal protection clause of the Texas Constitution on the basis of its finding that no rational basis exists for the Texas School Finance System, since there is no evidence, or in the alternative, insufficient evidence to support this finding. (Findings, No. 4, p. 14 at Tr. Vol. III, p. 549; Findings, III, p. 59-63 at Tr. Vol. III, p. 594-598; Findings, D and F, p. 63 at Tr. Vol. III, p. 63)

POINT OF ERROR NO. 5

The trial court erred in entering judgment that the Texas School Finance System is not an efficient system of free public schools as required by Texas Constitution art. VII, §1. (Findings, IV, p. 64-68 at Tr. Vol. III, p. 599-603)

POINT OF ERROR NO. 6

The trial court erred in finding that the Texas School Finance System does not provide for an adequate education. (Findings, No. 7, p. 23-28 at Tr. Vol. III, p. 558-573)

POINT OF ERROR NO. 7

The trial court erred in holding that the equal protection clause of the Texas Constitution mandates equal access to funds by local school districts. (Judgment, p. 5 at Tr. Vol. III, p. 502; Findings, p. 7 at Tr. Vol. III, p. 538)

POINT OF ERROR NO. 8

The trial court erred in defining equal protection in terms of the standing of school districts rather than the rights of students. (Motion for Summary Judgment at Tr. Vol. 1, p. 88-91, overruled at Tr. Vol. III, p. 536; Judgment, p. 6 at Tr. Vol. III, p. 503)

POINT OF ERROR NO. 9

The trial court erred in finding that the Texas School Finance System violated the due process clause of the Texas Constitution, art. I, § 19 and 29, since there is no evidence, or alternatively, insufficient evidence to support such a finding. (Judgment, p. 6 at Tr. Vol. III, p. 503; Findings, p. 74 at Tr. Vol. III, p. 609)

POINT OF ERROR NO. 10

The trial court erred in finding that boundary lines of school districts in Texas are irrational and unconstitutional, since boundaries are a political question not subject to judicial review. (Judgment, p. 5 at Tr. Vol. III, p. 502; Findings, No. 1-9, p. 38-40 at Tr. Vol. III, p. 573-575)

POINT OF ERROR NO. 11

The trial court erred in holding that all school taxes are state taxes since art. VIII, § 1 of the Texas Constitution prohibits a state ad valorem tax. (Findings, No. 1, p. 12 at Tr. Vol. III, p. 547)

POINT OF ERROR NO. 12

The trial court erred in finding that the Texas School Finance System services no compelling state interest because such a finding is incorrect as a matter of law, or alternatively, is against the great weight and preponderance of the evidence. (Findings, D, p. 40-56 at Tr. Vol. III, p. 575-592)

**STATEMENT CONCERNING ADOPTION OF ARGUMENT
GERMANE TO POINTS OF ERROR NOT ADDRESSED IN THIS BRIEF**

Although State Appellants join in all of Appellants in a joint adoption of all Points of Error, in an effort to avoid unnecessary duplication, the points of error have been assigned to various appellants for purpose of argument. State Appellants hereby adopt the arguments of their fellow appellants as they relate to points of error not argued in this brief.

STATEMENT OF FACTS

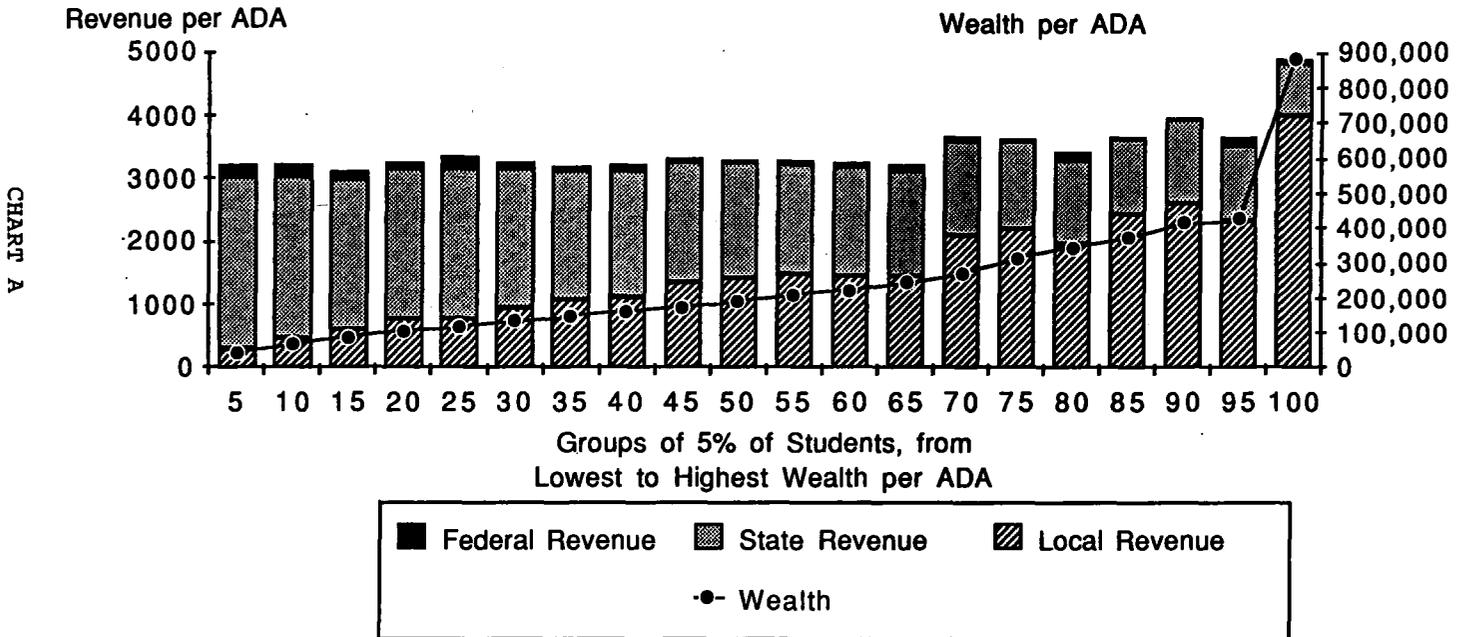
The procedural history of this case is the brief of Appellant Irving I.S.D. (white binding). Significant discussion of the facts are contained in the briefs of Appellants Eanes I.S.D., et al. (blue binding) and Andrews I.S.D., et al. (black binding). Those factual procedural statements are adopted herein by reference and need not be repeated.

A review of the Texas School Finance System requires a review of the revenues available to school districts from various sources, test scores and their relation to revenues and the presence of low income students within various the school districts. In an effort to summarize these factors in a form that is more readily understandable than the mere recitation of endless numbers, Appellants have organized the data into two charts for review by this Court. It should be noted that in an effort to make the case manageable, all parties agreed to try this lawsuit based upon an agreed data set of revenue, expenditure testing and other figures available from the 1985-1986 academic year. The data set came from computer files of the Texas Education Agency which were made available to all parties in the suit. The data are themselves not in dispute.

Chart A which is displayed on the following page (together with its supporting data on the page following) displays and demonstrates the revenues available to students from local, state and federal sources. It is displayed by grouping students (as opposed to districts) in increments of 5% of total student population and computing averages for those groups. Grouping by students instead of districts is appropriate since, as will be argued later in this brief, any educational rights are student rights and not those of school districts. Secondly, H.B. 72 significantly changed the structure of school finance in Texas from a system based upon personnel units to a system based upon student units. This change was hailed by all witnesses at trial as being a positive step in the refinement of school finance in Texas because it focuses the funding decisions upon the needs of students, rather than solely upon circumstances in the district such as its size. Finally, grouping students as opposed to districts, provides a uniformity of sizes of the groupings not possible when looking at districts. Each column in Chart A represents approximately 150,000 school-aged children in the state and these groupings are uniform in size to facilitate comparisons.

Also displayed on Chart A is a line graph that shows the wealth per average daily attendance in these groupings. Even a cursory review of Chart A demonstrates the enormous

Comparison of Wealth per ADA and Revenue per ADA by Source



T E X A S E D U C A T I O N A G E N C Y
 DISTRICTS GROUPED INTO APPROXIMATELY 20 WEALTH CATEGORIES
 WITH APPROXIMATELY EQUAL REFINED ADA IN EACH GROUP
 WEALTH ORDER LOW TO HI WITH .05 * RADA AS CUTOFF

NBR OF DISTS	RANGE OF WEALTH	REFINED ADA	LOCAL REVENUE PER ADA	STATE REVENUE PER ADA	FEDL REVENUE PER ADA	TOTAL REVENUE PER ADA	AVG PCT MAST
21	UNDER \$51,956	146,269	311	2,741	195	3,247	40.38
68	\$51,956 - \$81,132	139,885	489	2,642	207	3,259	49.67
73	\$81,133 - \$96,082	145,766	615	2,403	133	3,151	55.63
106	\$96,083 - \$116,701	145,020	803	2,384	119	3,275	57.60
34	\$116,702 - \$121,175	145,822	607	2,367	189	3,363	52.18
97	\$121,176 - \$142,768	143,641	973	2,207	108	3,287	56.89
54	\$142,769 - \$156,876	137,389	1,098	2,038	88	3,219	62.94
36	\$156,877 - \$166,834	145,346	1,144	1,991	102	3,237	64.69
52	\$166,835 - \$181,310	150,153	1,370	1,804	78	3,352	64.06
58	\$181,311 - \$200,759	148,048	1,451	1,825	90	3,325	64.70
45	\$200,760 - \$216,608	146,118	1,483	1,748	55	3,283	67.41
50	\$216,609 - \$235,180	143,416	1,487	1,785	62	3,274	66.57
25	\$235,181 - \$250,107	158,517	1,486	1,652	87	3,225	56.52
49	\$250,108 - \$289,578	145,176	2,102	1,512	67	3,682	67.23
50	\$289,579 - \$332,100	154,805	2,205	1,406	51	3,664	69.66
19	\$332,101 - \$348,180	224,020	1,991	1,329	138	3,458	53.96
29	\$348,181 - \$402,524	145,531	2,459	1,193	32	3,684	76.30
16	\$402,525 - \$422,525	102,593	2,828	1,324	54	4,005	62.36
32	\$422,526 - \$478,340	145,606	2,348	1,200	135	3,682	50.20
148	OVER \$478,340	109,225	4,027	801	85	4,913	68.05

		2,919,445					

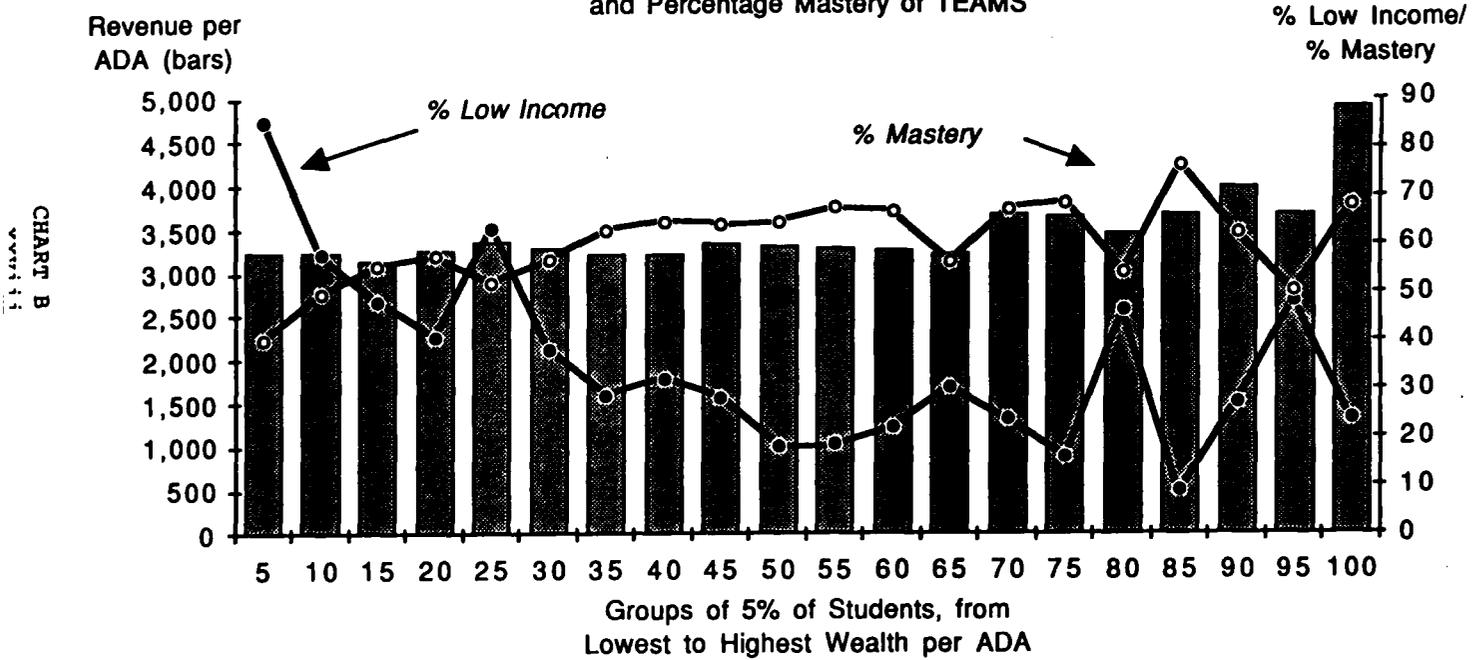
N= 20

property wealth differences in this State. The chart, however, clearly demonstrates that as local property wealth rises, the State provides proportionately less aid for support of education and the local district provides progressively more revenue from local sources. This is the essence of equalized funding which attempts to distribute funds to those districts which can least afford to raise money on their own. A review of the chart also demonstrates the relative importance of federal funding for education in the State.

Also apparent from looking at Chart A is that the revenue disparities that do exist are not extreme over the entire system. This evidences a well-conceived system of finance.

Chart B, which is displayed on the following page, displays the same aggregate revenue figures as were displayed on Chart A (although not broken into component parts) and superimposes line graphs showing the percentage of low income students within each grouping and the percentage of students in the district showing mastery of the State's basic skills testing program (TEAMS). Low income students are defined as those students which are eligible for free and reduced price lunches under the federal guidelines. These same guidelines are used under

Comparison of Revenue, Percentage Low Income, and Percentage Mastery of TEAMS



T E X A S E D U C A T I O N A G E N C Y
 DISTRICTS GROUPED INTO APPROXIMATELY 20 WEALTH CATEGORIES
 WITH APPROXIMATELY EQUAL REFINED ADA IN EACH GROUP
 WEALTH ORDER LOW TO HI WITH .05 * RADA AS CUTOFF

NUMBER OF DISTRICTS	RANGE OF WEALTH	REFINED ADA	TAXABLE VALUE 1985	WEALTH	PERCENT LOW INCOME STUDENTS	TOTAL REVENUE PER ADA	DIST AVG. PCT. MASTERY
21	UNDER \$51,958	148,289	6,811,184,488	45,199	85.26	3,247	40.38
68	\$51,958 - \$81,132	139,885	9,455,811,228	87,595	57.93	3,259	49.87
73	\$81,133 - \$98,082	145,768	12,908,529,935	88,583	48.27	3,151	55.83
108	\$98,083 - \$118,701	145,020	15,512,825,847	106,970	40.51	3,275	57.60
34	\$118,702 - \$121,175	145,822	17,393,893,222	119,280	63.43	3,383	52.19
97	\$121,176 - \$142,768	143,641	19,250,837,819	134,019	38.25	3,287	56.89
54	\$142,769 - \$158,878	137,389	20,414,543,882	148,589	28.74	3,219	62.94
36	\$158,877 - \$188,834	145,348	23,488,809,077	181,807	32.28	3,237	64.89
52	\$188,835 - \$181,310	150,153	26,234,713,002	174,720	28.22	3,352	64.08
58	\$181,311 - \$200,759	148,048	28,199,852,482	193,088	18.15	3,325	64.70
45	\$200,760 - \$218,808	148,118	30,549,888,833	209,076	18.42	3,293	67.41
50	\$218,809 - \$235,180	143,418	32,194,938,844	224,488	21.92	3,274	68.57
25	\$235,181 - \$250,107	158,517	38,907,880,550	245,447	30.18	3,225	58.52
49	\$250,108 - \$289,578	145,178	39,890,575,733	273,396	23.65	3,882	67.23
50	\$289,579 - \$332,100	154,905	48,832,237,749	315,240	18.00	3,864	68.88
19	\$332,101 - \$348,180	224,020	77,532,022,704	348,094	48.18	3,458	53.96
29	\$348,181 - \$402,524	145,531	54,420,297,338	373,943	8.91	3,684	78.30
18	\$402,525 - \$422,525	102,593	42,781,852,422	416,811	27.30	4,005	62.38
32	\$422,526 - \$478,340	145,808	62,387,581,523	428,489	48.12	3,682	50.20
149	OVER \$478,340	108,225	95,918,484,435	886,288	23.73	4,913	68.05
		=====	=====				
		2,919,445	702,664,838,491				

N= 20

XIXX

the new pupil unit student as the benchmark for entitlement for increased State funding under its compensatory education program. Each student meeting this definition is considered for funding purposes to be 1.2 students and therefore draws an increment 20% larger for State funds for educational services.

Percentage of TEAMS mastery is defined as those students which pass all portions of the basic skills test which they are administered. When looking at the last column on Chart B which shows 68% demonstrating TEAMS mastery, it is not true that 32% of students did not pass any part of TEAMS, but that 32% of the students could not pass at least one part of the test.

A review of the Chart clearly demonstrates that there is very little relationship between test scores and revenues. There is, however, a high relationship between test scores and low income students. A critical component of the current school finance system which allocates in excess of \$600 million dollars annually for compensatory education. It is by far the largest State compensatory education commitment in the nation. It directs funds on the basis of student need as opposed to being solely based on district configurations.

It is this system that the trial court found to be unconstitutional. It will be discussed in greater detail in the body of this brief. Appendix A of this brief (red binding) contains a non-technical outline of the features of the school finance system. Chapter 16 of the Texas Education Code contains the specific formulae for aid distribution.

ARGUMENT AND AUTHORITIES

SUMMARY OF ARGUMENT

The trial court erred in finding that low wealth districts do not provide an adequate education due to lack of funding (Findings of Fact Nos. 2(1) p. 13; 4(8) p.17; 7 (8 & 9) p. 25; 7 (16 & 17) p. 26. as such finding is not supported by factually or legally sufficient evidence.

When the trial judge found that the Texas system of school finance does not provide adequate support for public education of its school children, he was simply wrong. Although Appellants concede that witnesses called by Plaintiffs did mouth the words that funding was inadequate, their testimony was based on personal experiences and anecdotal incidents and did not reflect a thoughtful or an even quasi-scientific review of state-wide conditions. The testimony adduced by Plaintiffs and Plaintiff-Intervenors at trial discussed adequacy as a relative concept rather than as an absolute term with any defined standard. Their testimony that the financing system was inadequate was based upon the fact that per student expenditures were not equal among all districts, and that because of the differences in

the local property tax bases, all districts are not able to raise the same amounts of money for a given tax rate above the level of the Foundation School Program. This conclusion misses the point of the Foundation School Program which equalizes funding and accounts for variances in fiscal abilities up to a level sufficient to provide the State mandated educational requirements. See Testimony of Dr. Billy Don Walker, R XI pp. 1933-1952. The system guarantees every district a minimum level of per capita funding regardless of its fiscal circumstances. The level of guaranteed funding is sufficient for each district in the state to meet all State statutory and regulatory requirements (Plaintiff- Intervenors, Ex. 212, p. 12) For 1985-86, the school year upon which the case was tried, that guaranteed level was \$2,764 per student on the average, even in the poorest 10% of school districts in the State. (Defendant's Exhibit 52) Therefore, as set forth below in more detail, this Court must engage in two separate and distinct inquiries that cannot be merged.

First, the Court must determine whether State provides all students in the State access to an adequate education. This inquiry requires a reviewing court to fix the constitutional standard of the educational entitlement.

Second, the Court must determine whether or not the Constitution requires equality of funding in all districts,

regardless of the level of expenditures the local taxpayers are willing to support through ad valorem taxes. This entirely separate inquiry must review the very structure of the State financing system.

As Appellants will demonstrate later in this brief, the structure of the school financing system is not governed by Article VII §1 at all. Article VII §3 of the Texas Constitution governs the financial structure and must be considered separately. Upon close examination of this provision, with its heavy reliance upon an independent local taxing authority for revenue, it is readily apparent that the current system of finance was itself created by the Constitution. It is hardly possible to say that it violates the very document which created it.

When properly reviewed in context of the appropriate legal standard, the evidence shows that all students have access to the State defined program. This fact required the trial court to find that an adequate education is being provided as a matter of law. The evidence of inadequacy was not legally or factually sufficient to sustain the judgment in this case, as it amounted to less than a mere scintilla and must be reversed. In arriving at its conclusion on this ultimate fact, the trial court refused to look at state-wide data on curriculum, accreditation status, test scores, or cost studies conducted by educational researchers, including

many of Plaintiffs' experts. Further, in arriving at its ultimate conclusion of inadequacy based upon funding only, the trial court refused to even attempt to define the nature of the educational entitlement or review the propriety of the State's definition of that entitlement. "This Court, however, does not sit to resolve disputes over educational theory...." (Findings of Fact, p. 3) This fact finding is nothing less than an attempt by the Court to avoid making hard decisions about the nature of the educational entitlement. Indeed, to some extent every issue in this case is a matter of "educational theory." Instead of directly addressing the issue, the court simply found that ability to raise or spend money equals an education (FF p.4) rather than attempting to review educational results directly, even though presented with ample evidence to do so. This failure to find that an adequate educational opportunity exists for each student in the State of Texas was an error as a matter of law, entitling Appellants to a reversal and rendition of the judgment in their favor. Alternatively, since the factual sufficiency standard is subsumed in the legal sufficiency standard, Appellants are at the very least entitled to a reversal and remand.

In determining that the Constitution was violated because totally equal access to funding does not exist, the court wholly ignored the long history of development of the

funding provisions in Article VII §3 as well as the intent of the drafters of the Constitution. This failure also requires reversal and rendition of judgment that Plaintiffs take nothing by this suit.

POINT OF ERROR NUMBER 6

**THE TRIAL COURT ERRED IN FINDING
THE TEXAS SYSTEM OF SCHOOL FINANCE
DOES NOT PROVIDE FOR AN ADEQUATE EDUCATION**

Any discussion of "adequacy" must first answer the rhetorical question: Adequate for what? Adequate is defined by Webster's Ninth New Collegiate Dictionary as "sufficient for a specific requirement." In its discussion of educational adequacy in the Rodriguez case, Justice Powell speaking for the majority of the court wrote:

Even if it were conceded that some identifiable quantum of education is a constitutionally protected prerequisite to the meaningful exercise of either right [speech or the right to vote], we have no indication that the present levels of educational expenditures in Texas provide an education that falls short. Whatever merit appellees' argument might have if a State's financing system occasioned an absolute denial of educational opportunities to any of its children, that argument provides no basis for finding an interference with fundamental rights where only relative differences in spending levels are involved and where--as is true in the present case--no charge fairly could be made

that the system fails to provide each child with an opportunity to acquire the basic minimal skills necessary for the enjoyment of the rights of speech and of full participation in the political process.

San Antonio School District v. Rodriguez, 411 U.S. 1, 36-37, 93 S.Ct. 1278, 1298-99 (1973)

The necessity for determining adequacy as a predicate for judicial review was echoed by the Fifth Circuit in a recent decision upholding the Louisiana school financing system.

Our standard for testing the plaintiff's equal protection challenges to Louisiana's system of funding public school education hinges upon the nature of the rights affected by the classification scheme at issue here. This is not a case where the state has failed to provide schoolchildren in the plaintiff parishes with a minimally adequate education. Although the plaintiffs so complain on appeal, they made no attempt to prove before the district court that any child received an inadequate education. Furthermore, the record contains no evidence whatever that any Louisiana schoolchild was deprived of a minimally adequate education because of insufficient funds. School Board of the Parish of Livingston, Louisiana v. Louisiana State Board of Elementary and Secondary Education, 830 F2d 563 (5th Cir. 1987).
(emphasis added)

Any discussion of equal protection regarding the Texas school finance system must as a starting point define that "quantum of education" that constitutes the educational entitlement.¹ The trial court erred when it failed to review and adopt the State's definition of the educational entitlement, which was unchallenged by the Plaintiffs and Plaintiff-Intervenors in the case. It also erred when it failed to make the findings required by the evidence in this case as set forth below that those standards were being met by all districts irrespective of local property wealth.

I

**THE CONSTITUTION EXPRESSLY DELEGATES
TO THE LEGISLATURE THE AUTHORITY
TO DEFINE THE EDUCATIONAL ENTITLEMENT**

Article VII §1 of the Texas Constitution specifically provides:

"A general diffusion of knowledge being essential to the preservation of the liberties and rights of the people, it shall be the duty of the Legislature to establish and make suitable provision for the support and maintenance of an

¹A definition of the educational entitlement is required regardless of whether the court deems education a fundamental right requiring strict scrutiny or analyzes the system under the rational basis test. For an in-depth review of the legal standards to apply to this case. See Brief of Appellants Eanes ISD, et al. (Blue Binding)

efficient system of public free schools."

If this constitutional provision is the genesis of a constitutional entitlement to education (Findings of Fact, p. 2), it is necessary to examine this provision in some detail to determine the nature of the entitlement. Not every aspect of the total program offered to students by school districts involves "fundamental rights." The Texas Supreme Court has recently held, for example, that participation in extracurricular activities did not involve fundamental rights. Spring Branch I.S.D. v. Stamos, 695 S.W.2d 556 (Tex. 1985). The trial court refused to delineate or define the educational entitlement, although specifically requested to do so. See Defendant's Proposed Findings of Fact. This failure was error which infected the entire balance of the trial court's judgment. Without a definition of the educational entitlement, there is no benchmark against which the State's compliance with the constitutional mandate may be measured. Without having defined the constitutional entitlement, the trial court chose to look at the tax bases of the individual independent school districts as an indirect way to measure equality of education under the explicit assumption that money equals education. (Findings of Fact p. 4) The trial judge used this approach exclusively despite the fact that direct

measures of district and student performance (i.e. accreditation status and student test scores) were available for review. As will be shown below, this approach by the court is error.

Article VII §1 of the Texas Constitution clearly places the responsibility for creation and maintenance of the public school system upon the Legislature. This delegation of constitutional obligation did not originate in the constitution of 1876, but was a continuation of the obligation delegated to the legislative branch in the Constitution of Texas of 1836 which stated:

"It shall be the duty of Congress, as soon as circumstances will permit, to provide by law a general system of education."

The language of Article VII §1 remains essentially unchanged from its original formulation in Article X §1 of the original State Constitution.² (Const. 1845). See Appendix C of this Brief.

Texas courts have had opportunities to construe the meaning of Article VII § 1. Mumme v. Marrs 120 Tex. 383, 40 S.W.2d 31 (1931), was an early case involving a challenge to

²Appellants' Brief submitted by Irving Independent School District contains a full scale discussion of the history and origins of Article VII §1. (White Binding)

statutes providing for equalization to financially weak school districts. The Court was called upon to construe the meaning of Article VII of the Texas Constitution and the Legislature's responsibilities to interpret and implement its provisions.

The history of educational legislation in this state shows that the provisions of Article 7, the Education Article of the Constitution have never been regarded as limitations by implication on the general power of the Legislature to pass laws on the subject of education...

Under our Constitution, public education is a division or department of the government, the affairs of which are administered by public officers, and in the conduct of which the Legislature has all legislative power not denied it by the Constitution. ...

The purpose of this section as written was not only to recognize the inherent power in the Legislature to establish an educational system for the state, but also to make it the mandatory duty of that department to do so. ... The Constitution, having made it the mandatory duty of the Legislature to "make suitable provision for the support and maintenance of an efficient system of public free schools," necessarily conferred the power to make the mandate effective. ... Since the Legislature has the mandatory duty to make suitable provision for the support and maintenance of an efficient system of public free schools, and has the power to pass any law relative thereto, not prohibited by the Constitution, it necessarily follows that it has a choice in the selection of methods by which the object of the organic law may be effectuated. The Legislature alone is to judge what means are necessary and appropriate for

a purpose which the Constitution makes legitimate. The legislative determination of the methods, restrictions, and regulations is final, except when so arbitrary as to be violative of the constitutional rights of the citizen.

(emphasis added)

Nor is the Mumme case an aberration in the development of case law in Texas. Subsequent cases have ratified and affirmed this position. "We think it well within the police power of the State to adopt standards to guide the Administration of our public school system...." Passel v. Fort Worth ISD, 429 S.W. 2d 917 (Tex. Civ. App. Fort Worth 1968, rev'd on other grounds 440 S.W.2d 61); Ferrell v. Dallas ISD, 392 F.2d 697 (5th Cir. 1968); Stamos v. Spring Branch ISD, 695 S.W.2d 556 (Tex. 1985); Texas State Teachers' Ass'n. v. State 711 S.W.2d 421 (Tex. App. - Austin 1986, writ ref'd n.r.e.). In sum, the Legislature has the clear constitutional right and responsibility to determine the nature of the "Diffusion of Knowledge" set forth in Article VII §1 of the Texas Constitution or stated alternatively, the "quantum of education" discussed in the Rodriguez decision of the United States Supreme Court.

II.

THE LEGISLATURE HAS PROVIDED FOR A DEFINITION OF A SUITABLE PUBLIC EDUCATION

Texas has appropriately defined by legislative and administrative rule what is an appropriate education. The Legislature has often acted in this regard, and over the years has mandated that any number of items be placed in the State's curriculum.³ The most recent and far-reaching change occurred with the adoption of H.B. 246 in 1981. H.B. 246 is codified at Art. 21.101, Tex. Educ. Code and mandates a well-balanced curriculum in twelve content areas. It also in Sections (b) & (c) delegates authority to the State Board of Education to set out specific course requirements and essential elements of those content areas. Significantly the statute also provides a thoughtful definition of the purpose behind public education in Section (d), which provides in part:

"A primary purpose of the public school curriculum in Texas shall be to prepare thoughtful, active citizens who understand the importance of patriotism and can function productively in a free enterprise society with appreciation for the basic democratic values of our state and national heritage."

³For a summary of the highlights of legislative enactments involving education, see Appendix C this Brief. (Red Binding)

III.

THE LEGISLATIVE DELEGATION OF THE TASK OF DEFINING THE APPROPRIATE CURRICULUM TO THE STATE BOARD OF EDUCATION WAS PROPER

The State Board of Education is an administrative body that is required by Article VII §8 of the Texas Constitution which provides:

The Legislature shall provide by law for a State Board of Education, whose members shall be appointed or elected in such a manner and by such authority and shall serve for such terms as the Legislature shall prescribe not to exceed six years. The said Board shall perform such duties as may be prescribed by law.

An administrative agency has such powers as are expressly granted to it by statute, together with those necessarily implied from authority conferred or duties imposed. Stauffer v. City of San Antonio, 344 S.W.2d 158, 160 (Tex. 1961); Southwestern Bell Telephone Company v. Public Utilities Commission, 618 S.W.2d 130 (Tex. Civ. App.-Austin 1981, writ dismissed), vacated 623 S.W.2d 316. An administrative agency is created to centralize expertise in a given regulatory area, and courts will give the agency

broad latitude in choosing the methods to accomplish its regulatory function. City of Corpus Christi v. Public Utility Commission, 572 S.W.2d 290, 297 (Tex. 1978). Administrative regulations are presumed to be valid, and the burden of proof is on the party challenging the regulation. Railroad Commission of Texas v. Shell Oil Company 161 S.W.2d 1022, 139 ex. 66 (1942); Lloyd A. Fry Roofing Company v. State, 541 S.W.2d 639 (Tex. Civ. App.-Dallas 1976, writ ref'd n.r.e.; Browning-Ferris, Inc. v. Texas Department of Health, 625 S.W.2d 764 (Tex. Civ. App.-Austin 1981, writ ref'd n.r.e.). In both Lloyd A. Fry Roofing Company and Browning-Ferris, Inc., supra, the main issue was definition or construction of statutory terms by Texas administrative agencies.

The Texas Supreme Court has broadly construed the power of administrative agencies to adopt rules and regulations. In Texas State Board of Examiners in Optometry v. Carp, 412 S.W.2d 307 (Tex. 1967), cert. denied, 389 U.S. 52, 88 S.Ct. 241, the Texas Supreme Court reversed the court of appeals, which had held that the Board exceeded its regulatory authority in adopting the Professional Responsibility Rule. The Supreme Court noted that the rule, although not specifically referenced in the statute, was in harmony with the general objectives of the statute and was consistent with one or more statutory provisions. Simply because the

subject of the rule had been considered, but not adopted by the Legislature, did not render it improper for regulatory consideration by the administrative agency.

In Gerst v. Oak Cliff Savings and Loan Association 432 S.W.2d 702 (Tex. 1968), the Texas Supreme Court again reversed the court of appeals, which had held that an administrative rule exceeded the agency's statutory authority. The Court stated that a rule giving the Savings and Loan Commissioner discretionary authority to approve applications for branch offices was in harmony with the general provisions of the statutes. The Court further observed that the Court of Appeals had used an overly restrictive test to determine if a rule was within the agency's rulemaking authority, and that a broad grant of statutory authority foreclosed any thought that the Legislature intended to spell out all details of operations in the statutes.

In Bullock v. Hewlett-Packard Company 628 S.W.2d 754 (Tex. 1982), the Texas Supreme Court once again reversed the Court of Appeals' determination that a particular rule exceeded an agency's rulemaking authority. At issue was a regulation established by the Comptroller setting a deadline for companies to apply to use an alternative method for computing their franchise taxes. The Court held that courts must uphold "legislative" administrative rules if they are

not unreasonable and if they are based on some legitimate position by the administrative agency involved. The Court further stated that courts must presume the existence of facts which justify a rule's promulgation.

The State Board of Education was created by the Texas Legislature as "the policy-forming and planning body for the public school system of the state." Section 11.24(b), Section 11.26(a), Tex. Educ. Code. It is given broad authority by the Legislature to adopt policies, enact regulations, and establish general rules to carry out duties placed on it by the Legislature. Section 11.24(b), Tex. Educ. Code. The Board is responsible for setting standards for certification of school personnel, Section 13.031 et seq., Tex. Educ. Code for implementing and administering the Foundation School Program, Section 16.005, Tex. Educ. Code, for accrediting schools, Section 11.26(c)(5), Section 21.751 et seq., Tex. Educ. Code, and for performing other important functions relating to the public school system. Therefore, the State Board of Education was and is the proper body for the Legislature to delegate the task of specifically designing the State's education curriculum.

IV.

THE STATE BOARD OF EDUCATION HAS APPROPRIATELY DEFINED THE EDUCATIONAL ENTITLEMENT

Since Article VII, §1 of the Texas Constitution recognizes a "general diffusion of knowledge as being essential to the preservation of the liberties and rights of the people" (emphasis added), an examination of the educational entitlement created by the Texas Legislature must begin with the curriculum being used in the schools. The curriculum represents the knowledge being diffused, and it is the basic building block upon which the entire system rests. (R. XXXIV p. 6263) Teacher training and in-service programs, the textbook adoption program, the student testing program, and the district accreditation program all rest on the curriculum. (R, XXXV pp. 6298-6306)

A. The Curriculum

In 1981, the 67th Texas Legislature passed House Bill 246 (codified as Tex.Educ.Code § 21.101), which required all public schools to provide a well-balanced curriculum that includes a broad range of twelve different content areas. The State Board of Education was empowered by rule to adopt essential elements for the required well-balanced curriculum. The process of developing the basic curriculum was one of the most comprehensive development efforts ever

done in public education (R. XXXIV pp. 6264-6265; R. XXXI p. 5691). After two and one-half years of study, debate, and revision, and after consulting hundreds of educators assembled for the task of defining an appropriate curriculum, the State Board of Education adopted 19 T.A.C. §75 (Chapter 75) in March 1984. (R. XXXV pp. 6291-6294). The basic curriculum contained in Chapter 75 constitutes the most comprehensive and detailed state-mandated curriculum in the United States (R. XXXV p. 6329). The full curriculum consists of approximately three hundred and fifty pages; it was admitted in the record as Defendant's Exhibit 23.

The balanced curriculum required of all public school districts includes all courses necessary for a sound elementary education, high school graduation requirements, plus additional enrichment courses. For example, all districts must offer at the high school level at least nine different English courses, seven different mathematics courses, five different science courses, four different social studies courses, economics, physical education, health education, five arts courses, business education, vocational education, computer science, and foreign languages. (DX 23, pp. 318- 319).

The state-mandated basic curriculum is not a static document that was prepared once and then stuck on a shelf. Curriculum by its very nature is dynamic, and must change

over time as societal needs change (R. XXXV pp. 6295-6296). Consequently, the Texas Education Agency continues to meet with hundreds of educators from all parts of Texas and from all types and sizes of school districts to update the curriculum (R. XXXV pp. 6295-6297). As the curriculum is refined, it recognizes the diversity of Texas as a state, and the diversity of students within the state. It includes realistic instructional time requirements. (R. XXXIV pp. 6273-6275).

In spite of its comprehensiveness, the state-mandated curriculum is not intended to preempt all curriculum decisions at the state level. The state-mandated curriculum is intended to fill about 60 percent of the available instructional time, with 40 percent available for local districts and individual teachers to supplement the basic curriculum. (R. XXXIV pp. 6274-6275). Local district control and participation is an important consideration in the development of the curriculum (R. XXXIV pp. 6275-6276).

B. Textbooks

Article VII §3 of the Texas Constitution was amended in 1918 to provide for free textbooks.

"...and it shall be the duty of the State Board of Education to set aside sufficient amount out of the said tax to

provide free textbooks for the use of children attending the public free schools of this State..."

This constitutional policy is implemented through the statutory provisions of Chapter 12, Tex. Educ. Code which provides for the adoption of textbooks for statewide use and their free distribution to all students in the State. It is significant to note that textbooks are distributed free to all pupils attending public schools in the State, Section 12.01, Tex. Educ. Code, and therefore district wealth does not factor into textbook acquisition at all. Textbooks are tied to the curriculum mandated by Chapter 75. (R. XXXV p. 6301)

"So, every textbook, now, that is developed for the students in Texas, from here on in, will have, as its core, the mandate that it must include coverage of the appropriate essential elements. And it must take those essential elements and provide, not only experiences for introducing that essential element, but for reinforcing it, and teaching it in a remedial way, if the student doesn't catch it the first time, and assistance for the teacher, are different ways of addressing our essential elements. so, the core of every proclamation, since 1984, has been the essential elements."

Testimony of Dr. Victoria Bergin, Deputy Commissioner of Curriculum and Program Development, Texas Education Agency
(R XXXV p. 6302, 11 11-23)

C. Accreditation

The accreditation program is the state's quality control process to ensure that basic educational quality standards are being met by local school districts (R. XXXIV p. 6257). The accreditation program involves regular on-site evaluation of districts, with intensive examination of personnel files, student records, financial records, student test scores, and instructional programs. (R XXXIV p. 6258). General accreditation principles include community support, compliance with statutory and regulatory requirements, educational effectiveness and improvement, instructional efficiency, quality and training of personnel, and quality of facilities.⁴ The accreditation process plays an important role in improving the quality of instruction offered in Texas public schools. (R. XXXV pp. 6350-6355). The most common circumstance affecting a district's accreditation status is not wealth, but is the quality of leadership and governance in a district. (R. XXXV pp. 6358-6365). Although a few wealthy and poor districts have had accreditation problems because of a lack of strong

⁴See Appendix A to this Brief (Red Binding) for a more detailed discussion of the accreditation process and principles.

leadership, (R. XXXV p. 6358) no linkage has been determined between a district's accreditation status and the district's geographical location, type, or its wealth. (R. XXXV pp. 6363-6364). How a district chooses to use its resources, as reflected in the district's instructional program and accreditation status, is just as important as the level of resources available to the district. (R. XXXV p. 6364). There are no districts in Texas that cannot offer an accredited program if they use their available resources wisely. (R. XXXV pp. 6364- 6365). The current level of funding provided through the Foundation School Program allows districts to meet all statutory and regulatory requirements. (Plaintiff- Intervenors' Exhibit #212, Accountable Costs Advisory Committee Report, October 1986, page 12).

D. TEAMS Test Results

The State of Texas has implemented a comprehensive program of student testing, commonly known as TEAMS, to measure student performance and to increase the accountability of school districts. The TEAMS program is administered at grades one, three, five, seven, nine and eleven in the areas of reading, mathematics, and language arts and the test is specifically designed to test those

skills identified in the curriculum. (R. XXVII p. 4867). The performance of students on TEAMS has been compared to a variety of variables in school districts, using accepted analytical techniques by Dr. Deborah Verstegen of the University of Virginia Department of Education Leadership and Policy Studies. In Dr. Verstegen's analysis, economic factors of districts, such as their property wealth, tax rates, and Price Differential Index, did not explain any significant portion of the variation between districts in TEAMS scores. (R. XXVII p. 4871). The results of Dr. Verstegen's statistical analysis are displayed on page 39 of Defendant's Exhibit 48.⁵

Test scores underline the basic adequacy of the State's school finance system. If there were insufficient revenues available to teach the State-mandated curriculum upon which

⁵The single factor explaining the greatest variation in TEAMS scores is the percentage of low income students in school districts. (R. XXVII pp. 4871-4873). There is no significant relationship between the wealth of a school district and the percentage of low income students in a district. In other words, poor students are as likely to be found in wealthier school districts, and not just in poor districts. (R. XXVII p. 4878). The Texas Foundation School Program is designed to target state funds on this one characteristic, low income background, that has the highest correlation with academic success by children. As the percentage of low income students in a district increases, the state share of the district's Foundation School Program tends to increase. (R. XXVII pp. 4877-4878). See Chart B in STATEMENT OF FACTS at the front of this Brief.

the Texas scores are based, one would expect to see a relationship between per capita expenditures and test scores. However, when Dr. Verstegan performed such a correlational analysis, she discovered that the correlation coefficient obtained by comparing test scores and per pupil operating costs was $R=0.005$, Defendants' Ex. 48 p. 38. This led Dr. Verstegan to conclude in her report that

"This latter correlation underscores the point made with regard to wealth, that higher revenues do not exhibit any relationship to test scores."

This correlation led Dr. Verstegan to testify in response to a question regarding how much of a difference operating expenditures made in TEAMS test scores. "It's so miniscule, as you can't discern what it is, it's so small." (R XXIV p. 4256 ll. 4-5)

Even when the very lowest spending districts in Texas are analyzed, there is no relationship between their spending levels and their students' TEAMS scores. In fact, the fourteen lowest spending districts had TEAMS scores above both the state and national averages. (R. XXXII pp. 5737-5741 and Defendant-Intervenors Ex. No. 27) When one looks at the ten districts that have the lowest TEAMS test scores, each district spends significantly above the State average per pupil. In fact, the districts with the lowest test scores spend an average of \$806.00 per pupil or 24%

above the state average. (Defendant-Intervenors Ex. 27 and R. XXX II pp. 5745-5747) So even at the extremes of test scores and expenditures, there is no relationship between expenditures and test scores. Again, the use of resources by districts appears to be at least as important as the availability of resources, in terms of direct measures of student performance.

V.

**STATE GUARANTEED EXPENDITURE LEVELS
ARE SUFFICIENT TO PROVIDE THE EDUCATIONAL ENTITLEMENT**

The explanation for the lack of any relationship between expenditures and student performance is that the State guaranteed levels of district expenditures provide the program mandated by the State curriculum (R. XXXV pp. 6364-65) Plaintiffs and Plaintiff-Intervenors are bound to this finding by the introduction of Plaintiff-Intervenors' Exhibit 212 into evidence as an unlimited offer. (R I p.87) Exhibit 212 is the report of the Accountable Costs Advisory Committee to the State Board of Education and represents an effort to define the necessary expenditures for education. At page 12 of the Report the Committee finds:

"The accountable cost study results indicate that the estimated average cost of a regular education program that meets the minimum standards established in statute and State Board rule varies

within the range of \$1,958 and \$2,284 per pupil. If these costs estimates are compared to the current adjusted basic allotment of \$2,064 presented in Table 1, it appears that current levels in law are providing funding to support programs meeting minimum standards in statute and State Board Rule."

This documentary evidence must be held to be conclusive against the party introducing it. Western Construction Co. v. Valero Transmission Co., 655 S.W.2d 251 253 (Tex. Civ. App.-Corpus Christi 1983 no writ hist) It may not be repudiated or contradicted, Jenkins v. Tanner, 166 S.W.2d 167, 168 (Tex. Civ. App. - Amarillo 1942 no writ hist.) and Plaintiffs are bound by the facts recited in that evidence. Green v. State, 589 S.W.2d 160 (Tex. Civ. App.-Tyler 1979 no writ hist); Hidalgo County v. Pate, 443 S.W.2d 80 (Tex. Civ. App.-Corpus Christi 1969, writ ref'd n.r.e.).

Nor does Exhibit 212 materially differ with the testimony of Plaintiff's school finance expert, Dr. Richard Hooker, who testified that he participated in a number of studies on the costs of providing basic education and that cost estimates ranged from \$1,800 to \$2,414. (R. II pp. 210-220) Dr. Hooker went on to testify that the current financing system yields revenues to all districts sufficient to meet those expenditure requirements in the \$2,300.00 to \$2,500.00 range (R. II, p. 230)

In summary, the trial court by focusing only on expenditures and refusing to consider available qualitative measures of educational outcomes, simply used the wrong definition to discuss the education entitlement contemplated by Article VII, §1 of the Texas Constitution. The amount of money that districts have available is not the issue. A proper discussion of the education entitlement should focus on those elements that contribute to "a diffusion of knowledge." Particular emphasis must be given to the state-mandated well-balanced curriculum, the state textbook program, student test scores, teacher training programs, and the state accreditation program. The evidence presented at trial shows no variation in these elements as a function of the wealth of a particular school district. Consequently, there is no showing that the state has failed in its responsibility to guarantee all districts with sufficient revenues to teach the state mandated program. Conversely, the State conclusively demonstrated that all elements of the state entitlement are available to all students in the state.

A review of the trial record in its entirety clearly demonstrates that neither Plaintiffs nor Plaintiff-Intervenors attempted to challenge the sufficiency or the appropriateness of the State's curriculum as being an appropriate definition of the educational entitlement.

Therefore, the trial court was bound as a matter of law to accept the requirements of Chapter 75 as the appropriate "quantum of education" against which to measure the State's performance. The failure to so find constitutes error requiring reversal and rendition of a factual finding on this issue by this court.

VI.

**THE EVIDENCE IN THIS CASE REQUIRES A FINDING
OF FACT THAT ALL TEXAS PUBLIC EDUCATION STUDENTS
HAVE ACCESS TO THE STATE MANDATED ENTITLEMENT**

Having defined the nature of an appropriate education, and having determined that the local school districts have the financial wherewithal under the school finance system, drawing from all fiscal resources available to them, to meet their educational obligations, this Court must find that there is access to an adequate education. Art. 21.101(d), Tex.Educ.Code places the burden upon local districts to insure exposure to the curriculum when it provides:

"The responsibility for enabling all children to participate actively in a balanced curriculum which is designed to meet individual needs rests with the local school districts."

If the educational system did not provide sufficient revenues for local districts to substantially meet the

state's requirements, an adequacy argument might have merit. This, however, is not the case. The trial court's findings of lack of adequacy are premised upon an intuitive notion, rather than upon the facts adduced at trial. The trial judge's intuitive assumption was most clearly stated at Finding of Fact p. 4 where he found:

"If one district has more access to funds than another district, the wealthier one will have the best ability to fulfill the needs of its students."

While this notion is enticing and was opined by some of Plaintiffs' witnesses, neither those opinions offered nor the trial court's findings are supported by the facts. The trial court chose to ignore direct measures of the quality of district educational programs (i.e. accreditation status and student test scores) and relied instead upon expenditures as an indirect measure of a district's performance. Such approach was simplistic and erroneous.

As set forth above in the section dealing with the definition of the educational entitlement, both the accreditation process and student testing are keyed to the required curriculum set forth in Chapter 75 and provide direct measures of performance. If there were a significant underfunding of education in the poorer districts one would expect to see lower performance by the poorer districts and/or their students. Defendants demonstrated that there

is no pattern of underperformance by the so-called poorer districts or their students, and if the constitutional entitlement is to an adequate education as defined by the Legislature, as opposed to any particular expenditure level, no equal protection violation has been demonstrated.

The evidentiary standards of review under which this Court must determine the propriety of the trial court's findings of fact and judgment require reversal and rendition of the judgment in favor of Appellants, and will be detailed below.⁶

As set forth in Sections I-IV of the Argument under Point of Error No. 6 of this brief, the definition of the educational entitlement is a matter for the Legislature and the State Board of Education, and is not a legitimate subject for judicial review. The trial court erred in failing to accept the definition of the educational entitlement provided by the legislative branch of government. Such failure was error requiring reversal of the judgment.

Even if the definition of the educational entitlement developed by the legislative branch is deemed subject to

⁶A review of the case authorities setting forth the standards of review necessary to hold a statute unconstitutional are detailed in the Brief of Appellants Irving I.S.D. (White Binding)

judicial review, Plaintiffs offered no evidence at trial to challenge the propriety of the State's definition. When reviewing a "no evidence" challenge, an appellate court must only consider the evidence and reasonable inferences drawn therefrom, which when viewed in their most favorable light support the court finding. Stafford v. Stafford 726 S.W.2d 14, 16 (Tex. 1987); Alum v. Aluminum Company of America, 717 S.W. 2d 588, 593 (Tex. 1986). Even against this exacting standard, Appellants must prevail since the state mandated curriculum was unchallenged throughout the trial. Therefore, this Court, when reviewing the testimony supporting the State curriculum, must find that appellants have established its propriety as a matter of law. Holley v. Watts, 629 S.W.2d 694, 696 (Tex. 1982). Having sustained Appellants on the legal sufficiency point, this Court should reverse the trial court and render at least a partial judgment that the State has established the appropriate definition of education to wit: 19 Tex. Educ. Code, Chapter 75. Vista Chevrolet, Inc. v. Lewis, 709 S.W.2d 176 (Tex. 1986).

Having rendered judgment on the propriety of the State's definition of the educational entitlement, this Court must then determine whether the entitlement is being provided. Appellants aver that the reasons set forth above (i.e., the availability of sufficient funding to operate an

accredited program together with the lack of any statistical relationship between test scores and expenditures) establish that as a matter of law an adequate educational program is available to all students in the state. The trial court's findings to the contrary are supported by no more than a scintilla of evidence. The evidence offered by Plaintiffs and relied upon by the trial court is of such a conclusory nature and is so weak as to do no more than create a mere surmise or suspicion of the State's failure to provide sufficient educational revenues to all districts. As such, the evidence supporting the trial court's judgment is no more than a scintilla and in legal effect, is no evidence since reasonable minds cannot differ in concluding that the State system is adequate. Kindred v. Con/Chem, Inc., 650 S.W.2d 61, 63 (Tex. 1983). Therefore, the trial court's judgment and findings of fact on lack of adequacy should be reversed and rendered by this Court in favor of Appellants. National Life and Accident Insurance Company v. Blagg, 438 S.W.2d 905, 909 (Tex. 1969).

Alternatively, the trial court's finding of lack of adequacy is premised on factually insufficient evidence and must be reversed. In reviewing a trial court's judgment for factual sufficiency, this Court must examine all the evidence in the record as a whole. Lofton v. Texas Brine Corporation, 720 S.W. 2d 804, 805 (Tex. 1986). Having

examined all the evidence this Court may set aside the trial court's factual findings and the judgment premised thereon where it is so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust. Cain, et al. v. Bain, 709 S.W.2d 175, 176 (Tex. 1986). For the reasons set forth above, the evidence taken as a whole demonstrate the trial court's findings to be clearly wrong.

Therefore, this court should reverse the trial court's findings on lack of adequacy and render judgment for Appellees. Alternatively, if this Court finds more than a scintilla of evidence to support Appellees herein, it should reverse the trial court and demand the case for retrial using the proper legal standard as set forth herein.

POINT OF ERROR NUMBER 7

**THE TRIAL COURT ERRED IN HOLDING THAT THE
EQUAL PROTECTION CLAUSE OF THE TEXAS CONSTITUTION
MANDATES EQUAL ACCESS TO FUNDS BY LOCAL SCHOOL DISTRICTS**

I.

THE STANDARD OF REVIEW

When reviewing the constitutionality of the Texas school finance system or any legislative enactment, the established standards for judicial review place a difficult

burden upon a litigant.⁷ A statute is presumed to be constitutional. The Supreme Court of Texas in Texas National Guard Armory Board v. McCraw, 126 S.W.2d 627, 634 (1939); quoting Middleton v. Texas Power and Light Co., 249 U.S. 152, 39 S.Ct. 227, (1919) held:

"[t]here is a strong presumption that a legislature understands and correctly appreciates the needs of its own people, that its laws are directed to problems made manifest by experience, and that its discriminations are based upon adequate grounds."

See also Town of Lockhart v. Citizens for Community Action, 430 U.S. 259, 272, 97 S.Ct. 1047 (1977).

The reviewing court is obligated to construe a statute in such a manner as to sustain its constitutionality, if at all possible. Key Western Life Insurance Co. v. State Board of Insurance, 350 S.W.2d 839, 849 (1961). Neither statutes nor rules duly promulgated by administrative agencies violate the equal protection guarantees of either the Fourteenth Amendment or Article I, § 3 of the Texas Constitution if no suspect class is isolated and aggrieved by the statutory classification scheme, and if there is a rational basis for the classification, Texas Women's University v. Chayklintaste, 530 S.W.2d 927, 928 (Tex. 1975).

⁷For additional briefing on the appropriate standards of review, please see briefs of Appellants Eanes I.S.D. (Blue Binding), and Irving (White Binding) I.S.D. on file in this case.

The trial court specifically found at page 10 of its Final Judgment that: "The Texas school system of finance does not violate Article I, § 3 or Article I, § 3a by discriminating against Mexican-Americans." There were no allegations in the suit that the school finance system discriminated against blacks or any other protected group. Thus, the standard of review applicable to this case should be the "rational basis" test, unless some other factor such as the declaration of a fundamental right, mandates a higher standard of review.⁸ As was demonstrated in the argument of Point of Error No. 6 of this brief, Appellants have shown that the evidence failed to reveal deprivation of the right to an appropriate education, if that is the nature of the constitutional entitlement. All children in the State of Texas have access to a public education that meets the mandates of the State program. What Appellees demonstrated was unequal access to monies raised from the local property tax base present within the districts by virtue of variations in local district wealth.

⁸The trial court also found wealth to be a suspect class. There is no legal basis for this finding as discussed in the Brief of Appellants Eanes I.S.D., et al. (Blue Binding)

The Texas Constitution does not require territorial uniformity.

"The Equal Protection Clause relates to equality of persons as such rather than between areas, and territorial uniformity is not a constitutional prerequisite."

Carl v. South San Antonio Independent School District, 561 S.W.2d 560 (Tex. App. - Waco, 1978 writ ref'd n.r.e.) citing, McGowan v. Maryland, 366 U.S. 420, 81 S.Ct. 1101, 6 L.Ed.2d 393 (1961). Accord, Missouri v. Lewis, 101 U.S. 22 (1879); Ocampo v. United States 234 U.S. 91, 34 S.Ct. 712 (1914); Chappell Chemical Co. v. Sulphur Mines, 172 U.S. 474, 19 S.Ct. 268 (1899); Toyota v. Hawaii, 226 U.S. 184, 33 S.Ct. 47 (1912).

This Court has never doubted the propriety of maintaining political subdivisions within the States and has never found in the Equal Protection Clause any per se rule of "territorial uniformity."

San Antonio Independent School District v. Rodriguez 411 U.S. 1, 53, 93 S.Ct. 1278, 1307, n. 110 (1973).

The Texas Supreme Court, in the first school finance case, discussing the variations in wealth among the school districts in the State, specifically attributed variations to "natural causes," not to any act of classification by the

State. Mumme v. Marrs, 120 Tex. 383 40 S.W.2d 31 (Tex. 1931).

The Texas Supreme Court's holding in Mumme v. Marrs, supra presaged the United State Supreme Court's ruling in the San Antonio Independent School District v. Rodriguez, 411 U.S. 1, 53, 93 S.Ct. 1278, 1307 (1973), where Justice Powell, writing for the majority found:

Appellees further urge that the Texas system is unconstitutionally arbitrary because it allows the availability of local taxable resources to turn on "happenstance." They see no justification for a system that allows, as they contend, the quality of education to fluctuate on the basis of the fortuitous positioning of the boundary lines of political subdivisions and the location of valuable commercial and industrial property. But any scheme of local taxation--indeed the very existence of identifiable local governmental units--requires the establishment of jurisdictional boundaries that are inevitably arbitrary. It is equally inevitable that some localities are going to be blessed with more taxable assets than others. Nor is local wealth a static quantity. Changes in the level of taxable wealth within any district may result from any number of events, some of which local residents can and do influence. For instance, commercial and industrial enterprises may be encouraged to locate within a district by various actions--public and private.

Moreover, if local taxation for local expenditures were an unconstitutional method of providing for education then it might be an equally impermissible means of providing other necessary services customarily financed

largely from local property taxes, including local police and fire protection, public health and hospitals, and public utility facilities of various kinds. We perceive no justification for such a severe denigration of local property taxation and control as would follow from appellees' contentions. It has simply never been within the constitutional prerogative of this Court to nullify statewide measures for financing public services merely because the burdens or benefits thereof fall unevenly depending upon the relative wealth of the political subdivisions in which citizens live....

One also must remember that the system here challenged is not peculiar to Texas or to any other State. In its essential characteristics, the Texas plan for financing public education reflects what many educators for a half century have thought was an enlightened approach to a problem for which there is no perfect solution. We are unwilling to assume for ourselves a level of wisdom superior to that of legislators, scholars, and educational authorities in 50 States, especially where the alternatives proposed are only recently conceived and nowhere yet tested. The constitutional standard under the Equal Protection Clause is whether the challenged state action rationally furthers a legitimate state purpose or interest. McGinnis v. Royster, 410 U.S. 263, 270, 93 S.Ct. 1055, 35 L.Ed.2d 282 (1973). We hold that the Texas plan abundantly satisfies this standard. (emphasis added)

Thus, where there is neither a fundamental right being denied, nor a suspect class whose rights are being violated, the Legislature may make classifications without including all cases which it might possibly reach. The Legislature is

free to recognize degrees of need and confine its restrictions to those perceived needs. Miller v. Wilson, 236 U.S. 373, 35 S.Ct. 342, 59 L.Ed 628, (1915).

"where rationality is the test, a State 'does not violate the Equal Protection Clause merely because the classifications created by its laws are imperfect ...'"

Massachusetts Board of Retirement v. Murgia, 427 U.S. 307, 316 96 S.Ct. 2562 (1976), quoting Dandridge v. Williams, 397 U.S. 471, 485 90 S.Ct. 1153 (1970).

A rational basis for statutory classification exists if any state of facts may be reasonably conceived to justify the scheme. Carl v. South San Antonio Independent School District, 561 S.W.2d 560, 563 (Tex. Civ. App. -- Waco 1978, writ ref'd n.r.e.) (quoting McGowan v. Maryland, 366 U.S. 420, 81 S.Ct. 1101 (19610). See also, City of Humble v. Metropolitan Transit Authority, 636 S.W.2d 484 (Tex. App. -- Austin 1982, no writ). This standard of review requires a substantial deference to the legislative process, which is proper given the legislative department's independent responsibility to interpret the Texas Constitution.

II.

THE SYSTEM OF CLASSIFICATION TO WHICH EQUAL PROTECTION ANALYSIS IS TO BE APPLIED DOES NOT ENCOMPASS DISTRICT WEALTH

The determination of the legal test by which to measure or review legislative enactments does not end the inquiry. The obvious next question to ask and answer is, to which system of classification should the reviewing court apply equal protection analysis?

The Texas Supreme Court has provided recent guidance in this respect in its review of the State's guest statute in Whitworth v. Bynum 699 S.W.2d 194, 197 (Tex. 1985).

"A court begins by presuming a statute's constitutionality, whether the basis of the constitutional attack is grounded in due process or equal protection [citation omitted]. Even when the purpose of a statute is legitimate, equal protection analysis still requires a determination that the classifications drawn by the statute are rationally related to the statute's purpose. Sullivan v. University Interscholastic League, 616 S.W.2d 170, 172 (Tex. 1981). Under the rational basis test of Sullivan, similarly situated individuals must be treated equally under the statutory classification unless there is a rational basis for not doing so." (emphasis added)

The Sullivan case speaks in terms of the rule which creates the system of classification. Sullivan, 616 S.W.2d at 172. The distinction between a set of classifications drawn by

statute (Chapter 16, Tex. Educ. Code), and the constitutional system of school finance which includes the statutory finance scheme and the very existence of independent political bodies, becomes critical in the analysis of this case. As will be demonstrated more fully below, the focus of the reviewing court must be on the statutory scheme set up in Chapter 16, and not upon the entire constitutionally established system.⁹ This distinction follows the language of Whitworth v. Bynum, and properly limits the scope of judicial review to the constitutionality of legislative enactments, rather than subjecting the system envisioned by the constitution itself to a review which is beyond the provinces of the courts. Even if the structural change in the constitutional system envisioned by Plaintiffs and the trial court is deemed to be a desirable social policy goal, the Constitution simply does not delegate to the courts the power to change the Constitution by judicial fiat.

⁹Both Plaintiffs and Plaintiff-Intervenors apparently felt this way at the time their pleadings were drafted, as their definition of the school finance system was consistently stated as Art. 16.001 et seq., Tex. Educ. Code and both groups of Plaintiffs refused to amend their pleadings to comport either with their argument or the trial court's final judgment. Defendants timely objected to evidence outside the pleadings.

The conclusion reached in the trial court's judgment follows a fundamental misperception of the mandates of the Texas Constitution regarding the provision of education in the State of Texas. The trial court was able to reach the conclusion that the system of school finance was unconstitutional, not because there was no rational basis or compelling state interest for the statutory classifications contained in Chapter 16 of the Education Code, but only because it was "implemented in conjunction with local school district boundaries that contain unequal taxable property wealth for the financing of public education (Final Judgment, pp. 4, 5, 6, 7). Indeed, on page 5 of the Final Judgment, the Court holds

"During the course of the trial, the Court heard substantial evidence in the State's taking into consideration legitimate cost differences in its funding formula. The Court is persuaded that legitimate cost differences should be considered in any funding formula and would encourage the State to continue to do so."

This sentiment is echoed in finding II (E)(g) (Findings and Conclusions, p. 59) where the trial court finds the H.B. 72 a "generous and thoughtful" effort to rectify the disparities in district property wealth.

The attribution of local district taxing ability to the State system violates the original intent of the framers of

the Texas Constitution.¹⁰ Its subsequent interpretations by the Texas Legislature and by votes of the people over the years in amending the school funding provisions of the Texas Constitution as well as by the Constitutional Convention of 1974 make the original intent clear. The attribution of the local tax base to the State system of public school finance is not in accordance with historical analysis as established both by the testimony offered in this case by Plaintiffs' own historical expert, Dr. Billy Don Walker, and the existing case law precedents.

III.

ARTICLE VII §3 OF THE TEXAS CONSTITUTION GOVERNS EDUCATIONAL FINANCING - THE HISTORICAL ANALYSIS

As originally written, the Constitution of 1876 did not envision any additional legislative contribution from the State's General Revenue Fund for educational purposes other than that set out in Article VII § 3. It is important to note that the financing of public education has always been governed by a separate constitutional provision, to wit Art.

¹⁰For a complete historical analysis of the Constitution of 1876, see Brief of Irving I.S.D. (White Binding). The original intent is also made clear by the commentators at the Constitutional Convention in 1974, also analyzed in Irving's Brief.

VII § 3. The original purpose of "constitutionalizing" the finance system was to limit legislative discretion in funding education. That is, given the original intent of the framers and their reaction to the high taxes required under the 1864 Constitution, together with their requirement of "efficiency," the drafters of the Constitution of 1876 wanted to insure that the Legislature would not be able to impose high taxes on the citizens without amendment to the Constitution. In fact, the financing provisions of the constitution have been amended numerous times since its adoption in 1876. These amendments will be detailed below and are summarized in Appendix C of this brief. The constitutional system of State aid distribution is governed by Article VII § 5 which defines the mandatory distribution of the available school fund. It is clear that the Legislature could permissibly direct the State's 5.5 billion dollar annual appropriation for public education to the available school fund. This is the system that was constitutionally mandated until a constitutional amendment in 1918. Having designated the legislative funding as part of the available school fund, its distribution would be governed by the provisions of Article VII § 5 which directs a per capita distribution.

As originally conceived, the available school fund was funded by 1) income from the Permanent School Fund, and 2) a

maximum of one-fourth of the general revenue tax. See Plaintiffs-Intervenors' Exhibit 235, p. 4. The Court of Appeals in Ex parte Cooper, 3 Tex. App. 489 (Tex. App. 1878) heard a challenge that the Legislature was limited only to those methods specifically enumerated in Article VII §3 for providing for educational funding. The Court of Appeals refused this challenge holding that the Legislature could authorize additional dedicated taxes for the provision of education. However, the constitutionally mandated taxes had to be distributed on a per capita basis through Art. VII §5

In 1883, authorization for a statewide property tax was added to Article VII § 3 of the Texas Constitution. The Amendment was adopted in August 14, 1883, proclaimed on September 25, 1883, and changed the Article to add:

"... in addition thereto, there shall be levied and collected an annual ad valorem state tax of such an amount not to exceed twenty cents on the one-hundred dollars' valuation, as, with the available school fund arising from all other sources, will be sufficient to maintain and support the public free schools...."

Tex.Jt.Res. 5, Acts 18th
Legis, 1883, p. 134

The tax was actually promulgated in the school law of 1884 (R. XII, 2065), and was distributed on a per capita basis through the available school fund.

Other than the designated taxes distributed through the available school fund, there was no constitutional provision for supplemental appropriations from the Legislature until 1918, when an amendment to Article VII §3 authorized an increase in the ad valorem property tax by an additional 15 cents. (Proclamation Nov. 5, 1918) At that time the Legislature was authorized to augment the dedicated taxes from general revenue funds to pay for any shortfall from the expense of providing free textbooks for all scholastics (R. XII, p. 2066).

Article VII §3 was again amended in 1920 (Proclamation, Nov. 2, 1920) to remove the constitutional limitations on local district taxation because:

"In 1920, it was recognized that the State was bearing an undue portion of the burden of financing the schools, and, thus the limited taxation which local school districts might levy was abolished."

V.A.T.S. Const. Article VII §3
interpretative commentary

Accord (R XII p. 2067)¹¹

¹¹A summary of the history of amendments to Article VII of the Texas Constitution is set forth in Appendix C to this Brief.
(Red Binding)

It was against this background that the Texas Legislature passed the first equalization statute for small rural districts in 1915 at the insistence of Governor Ferguson (R XI, p. 1929) This first statutory scheme was likely unconstitutional until the constitutional amendment of 1918 (R XII, pp. 1930-31) After the amendment in 1919 under the leadership of Governor William P. Hobby, the first broad scale special legislative appropriation for school financing was passed by the Legislature to assist school districts through a period of depression within the state. (Plaintiff-Intervenors, Ex. 235, p. 88) The practices of legislative appropriation has continued to the present day culminating in H.B. 72 which is under scrutiny in this case. The progeny of these rural aid statutes was what was at issue in the case of Mumme v. Marrs, 40 S.W.2d 31 (Tex. 1931). The Supreme Court's analysis of the problems inherent in school finance was incisive and is as applicable to the instant fact situation as it was at the time.

...The general and basic classification made by the act before us divides the schools of the state into two classes; namely, small and financially weak school districts, and those which are not so small and weak financially as to need aid to bring their schools up to the average standard of education afforded by our system. This classification undoubtedly has a natural basis, one which actually exists. The inequality of educational opportunities in the main arises from natural

conditions. Texas is a large state, with approximately 262,000 square miles of territory, much of it sparsely populated; its lands not equally productive, and the taxable wealth of its communities existing in great inequality. The type of school which any community can have must depend upon the population of the community, the productivity of its soil and generally its taxable wealth. The constitutional allocation of the available school fund according to the scholastic population of counties has heretofore resulted in the same inequality of opportunity or discrimination that the natural factors produce, and the general purpose of the Rural Aid Act was to relieve in some measure these natural inequalities by appropriations from a source other than the "available school fund" as defined in the Constitution.

Referring now to the basis of the Act, that the Legislature has the right to give aid from the general revenue to financially weak schools, we think the constitutional mandate that the Legislature shall make "suitable provision for the support and maintenance of an efficient system of public free schools," ample authority.

The word "suitable," used in connection with the word "provision" in this section of the Constitution, is an elastic term, depending upon the necessities of changing times or conditions, and clearly leaves to the Legislature the right to determine what is suitable, and its determination will not be reviewed by the courts if the act has a real relation to the subject and object of the Constitution.

As to whether or not a law secures due process and equal protection as required by the Constitution depends upon the subject on which it operates and the character of rights which it affects. The constitutional guarantee does not forbid the state from adjusting

its legislation to differences in situation. Equal protection of laws is secured if the statutes do not subject the individual to arbitrary exercise of the powers of government. It is well settled that legislation is not open to objection if all who are brought under its influence are treated alike in the same circumstances. 9 Texas Jurisprudence, p. 553 §117. In the very nature of society, with its manifold occupations and contacts, the Legislature must have, and clearly does have, authority to classify subjects of legislation, and, when the classification is reasonable--that is, based upon some real difference existing in the subject of the enactment--and the law applies uniformly to those who are within the particular class, the act is not open to constitutional objection.

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

their constitutional power of taxation, than from the law itself.

Tested by the principles stated, we do not think the act before us is discriminatory, arbitrary, or unreasonable.

That rural aid appropriations have a real relationship to the subject of equalizing educational opportunities in the state, and tend to make our system more efficient, there can be no doubt. ... (emphasis added)

Mumme, Id. at 36-37.

In sum, Article VII, §1 of the Texas Constitution was a general purpose provision to proclaim broadly the obligation of the Texas legislature to "make suitable provision for" public schools. While Article VII §1 has been read to authorize legislative discretionary aid to districts outside the available school fund after the 1918 Amendment, it was never intended to govern the mandatory funding of public education. The funding of public education is now and always has been governed by Article VII §3 of the Texas Constitution. The trial court has interpreted Article VII §1 to require a certain legislative funding from the General Revenue Fund so as to equalize wholly spending by local districts. This is not only not required by §1, but it is diametrically opposed to the original intent of the framers of the Constitution, who originally contemplated that all funding would be on a per capita basis through the available

fund.¹² The trial court's judgment, therefore, stands the Texas Constitution on its head to achieve a social policy goal that is properly and exclusively the role and province of the Legislature and the voters by means of constitutional amendment to determine and implement. As such, it violates all rules of constitutional construction and must be reversed.

The state system of school finance is a shared system, composed of the State and its political subdivisions, the independent school districts. The existence of school districts is constitutionally provided for in Article VII §3 of the Texas Constitution, which governs their creation and power to tax, and Article III §56, which prohibits specific legislative interference with matters of local governance. Further, Article VII, §3(a) of the Texas Constitution passed in 1909, raises the existence of school districts to a constitutional dimension by constitutionally validating their existence.¹³ Article VII §3(a) was made necessary by

¹²See Historical Analysis of Constitution of 1876 contained in Brief of Appellant Irving I.S.D. (White Binding)

¹³Although Article VII §3(a) was repealed by vote of the people in 1969, the repealer, H.J.R. No. 3, Acts 1969, 61st (eg. p. 3230) makes it clear that it was superfluous as a validating act but that "it being specifically understood
(Footnote Continued)

the Texas Supreme Court's decision in Parks v. West 102 Tex. 11, 111 S.W. 726 (Tex. 1909) which construed the provisions of Article VII §3 (Const. 1883), providing for formation of school districts within counties, to prohibit the formation of school districts that crossed county lines.

While the trial court focused upon Article VII § 1 of the Texas Constitution as creating a "right" to education, it has wholly ignored the provisions of Article VII § 3 of the Texas Constitution, which is the provision that has always governed educational funding. No discussion of school finance as a Texas constitutional issue makes any sense without reference this provision.

Article VII § 3 as originally adopted in 1876 provided:

"There shall be set apart annually not more than one-fourth of the general revenue for the State, and a poll tax of one dollar on all male inhabitants in this State between the ages of twenty-one and sixty years for the benefit of free schools."

Const. 1876

In 1883, the Constitution was amended to provide that the Legislature could provide for the formation of school districts. This provision was forcefully construed by the

(Footnote Continued)

that the repeal of these sections shall not in any way make any substantive changes in our present constitution."

Texas Supreme Court in State v. Brownson, 94 Tex. 436, 61

S.W. 114 (Tex. 1901) which held:

In 1883 an amendment of Section 3 of Article 7 was adopted by a vote of the people, which, among other provisions, contained the following: "And the legislature may also provide for the formation of school districts within all or any of the counties of this state, by general or special law, without the local notice required in other cases of special legislation." Four legislatures had assembled under the constitution when this amendment was submitted to the popular vote; and it seems obvious that when submitted it was considered that, under the then existing limitations upon the legislature with reference to the public schools, the varied needs of special localities could not be met, and that the purpose of the provision quoted was to give the legislature a free hand in establish independent school districts. Being the last expression of the will of the people, any provisions of the constitution previously existed must, if in conflict, yield to it. We do not see that there were any save that as to special and local legislation, if that be one, and that restriction is expressly removed. But it is argued that the language, "The legislature may provide for the formation of school districts," does not authorize them to create directly a school district. But we do not concur in this proposition. It is clear that the provision was intended to empower the legislature to establish separate school districts, and, in order to provide for them, they must first be created. We see no reason why they might not be created by direct act of the legislature, just as a society government may be created in our state for any city having 10,000 inhabitants or more. The fact that the legislature was empowered to act by

special law shows that it was contemplated that it might be desirable to pass an act creating one district only. The separate school district in question was provided for when the legislature fixed the limits of the territory, and declared that it should constitute an independent district, and provided a governing board for the management of its affairs.

Id. at 115.

In Parks v. West, supra, the Texas Supreme Court acknowledged the broad grant of authority set forth in State v. Brownson, but noted:

It was further said in that opinion: "The present Constitution as originally adopted, with but few exceptions, gave the Legislature unlimited power over the distribution and management of the school fund" --which is true; but...the Constitution has, itself, said what the fund should consist of and how it may be raised, and the amendment of 1883, part of which is quoted above, made provision in addition to that which had previously existed for the purpose of increasing the fund, and granted the power to authorize local taxation in the school districts to be formed as provided for. While it may be true that before that amendment was adopted the Legislature had power to provide for the application of the school fund in localities as it should deem best, it does not follow that it had power to impose other school taxes, either generally or locally, than those specified in the Constitution... Hence, the power was given to make further provision than the Constitution, itself, made by forming districts and investing them with the power of taxation to the extent prescribed. The language of the amendment is pregnant

with the thought that it grants a power that did not, under the Constitution, exist without it. It is to authorize "an additional tax *** for the further maintenance of public free schools." Being of this character, it is a provision which authorizes the doing of the prescribed things in the way defined and not otherwise.

In response to the Parks v. West decision, Article VII § 3(a) was passed and became effective in 1909. In addition to the provision of Article VII, § 3(a), Article VII § 3 of the Texas Constitution was amended to delete the language "within all or any of the counties of this state" upon which the decision in Parks v. West was premised. H.J.R. 6 Acts Thirty-First Legislature 1909, p. 250.

In Gillespie v. Lightfoot, 103 Tex. 359, 127 S.W. 799, 801, (Tex. 1910), the Supreme Court noted the effect of these constitutional amendments on their previous holding

"The Amendment of the Constitution is an exertion of the sovereign power of the people of the State to give their expressed will the force of law supreme over every person and every thing in the State...."

In so noting, the Court determined the effect of the Amendment was to undo the Parks v. West decision, and expand

the Legislature's prerogative in the creation of school districts.¹⁴

The Constitution was also amended in 1918 to raise the State ad valorem tax from twenty to thirty-five cents per \$100.00 valuation, primarily for the purposes of providing free textbooks. HJR 27 Acts 35th Legislature 1918, p. 503. It was the amendment of 1918 which for the first time authorized the Legislature to provide additional educational support above the original constitutional limitation by the following language "provided, however, that should the limit of taxation herein named be insufficient the deficit may be met by appropriation from the general funds of the State."

The most recent amendment to Article VII §3 of the Texas Constitution was proposed by the Texas Legislature S.J.R. No. 32 Acts 60th Legislature - Regular Session 1967, p. 2972. This constitutional amendment proposed the gradual elimination of the State ad valorem property tax over a period of time in the following terms:

"2. The State ad valorem tax authorized by Article VII, Section 3, of this Constitution shall be imposed at the following rates on each One Hundred Dollars (\$100.00) valuation for the years 1968 through 1974; On January 1,

¹⁴It should be noted that the Constitutional limitation on the amount general revenue funding was originally present in Article VII §3 was omitted in 1908.

1968, Thirty-five Cents (35¢); on January 1, 1968, Thirty Cents (30¢); on January 1, 1970, Twenty-five Cents (25¢); on January 1, 1971, Twenty Cents (20¢); on January 1, 1972, Fifteen Cents (15¢); on January 1, 1973, Ten Cents (10¢); on January 1, 1974, Five Cents (5¢); and thereafter no such tax for school purposes shall be levied and collected. An amount sufficient to provide free text books for the use of children attending the public free schools of this State shall be set aside from any revenues deposited in the Available School Fund, provided, however, that should such funds be insufficient, the deficit may be met by appropriation from the general funds of the State.

The proposed amendment passed by a popular vote on November 5, 1968. Acts 61st Legislature 1969, Regular Session, p. LXIII-LXIV. Thus, by constitutional amendment, the people of the State of Texas significantly reduced the amount of dedicated tax revenue available to the State of Texas for the provision of public education. If, for example, the thirty-five cent (35¢) tax rate per one hundred dollar tax valuation were applied to the 1985-86 statewide assessed property value of \$702 billion dollars, the State's available school fund would have received approximately 2.457 billion dollars in revenue for the provision of public education in 1985-1986. However, these funds would still be required under the mandate of Article VII § 5 of the Texas Constitution to be distributed on a per capita basis as a part of the available school fund.

"Section 5 also declares, in effect, that the annual income derived from the permanent fund, together with the tax provided for in Section 3, shall constitute the available school fund of the State, by which is meant the fund which may be appropriated annually to the maintenance of the schools.

Webb County v. Board of School Trustees of Laredo, 95 Tex. 131 65 S.W. 878, 880 (Tex. 1901).

To summarize, the provisions of Article VII §§1 and 3 must be harmonized. The duty of a reviewing court is to give effect to both provisions. The history of these provisions must be read to mean that funding provisions are governed by Article VII §3. The trial court sought to eliminate an apparent conflict by elevating Article VII §1 to require a specific kind of funding not recognized by the various amendments to Article VII §3. In doing so the trial court erred.

"If a constitutional conflict exists, it remains to the electorate of this state to eliminate the conflict..."

Pool v. Ford Motor Company
715 S.W. 2d 629, 634 (Tex. 1986)

IV.

**THE SEPARATION OF POWERS' DOCTRINE OF
ARTICLE II §1 PRECLUDES
JUDICIAL REVIEW OF DISTRICT LINES**

The trial court held that the State's partial reliance upon the local independent school districts' ability to raise funds, violates Article I §3 and §3(a) (equal protection) and Article VII §1 of the Texas Constitution (TR. finding of fact VII, p. 74). This conclusion results from the inference that school district boundaries are themselves somehow an issue in this case and that Article VII §1 of the Texas Constitution governs the provision of funds to the local school districts. Both of these conclusions are erroneous, as will be set forth below.

The Trial Court found the State system of school finance (Art. 16.001 et. seq. Tex. Educ. Code) to be unconstitutional, because it was "implemented in conjunction with local school district boundaries that contain unequal taxable property wealth for the financing of public education" (Final Judgment, pp. 4, 5, 6, 7). This attribution of unequal property wealth among the several school districts is critical to the Court's determination of the unconstitutionality of the State system.

"In order to determine the constitutionality of the Texas System of funding public education, it is necessary to examine the system in its entirety, including both State funding formulas as

well as local district configurations and the wealth of those districts and how those factors interact to create the State system of funding public education."

(Conclusion II(E) 2, p. 57)

see, Conclusion II(E) 44, pp. 57-58

In arriving at the conclusion, the trial court answered in the negative the rhetorical question posed in Conclusion III, (a)5, p. 61 to wit:

"The question becomes, does the random and often chaotic allocation of wealth among school districts and the resulting discrimination against students in the provision of education rationally serve the stated purposes of Article VII, Section 1?"

see Conclusion IV, c 1, p. 66 and Conclusion VI, B4, p. 73.

Finally, the Court concluded that school district boundaries do not follow any articulated policy (Conclusion II b 12(1) and the State finance system must fully compensate for disparities in local district wealth in order to be constitutional (Conclusion II E9, p. 59).

For the reasons set out below, the Courts may not within the scope of their constitutional powers rely upon local district wealth for the finding of a constitutional violation.

Article II, Section I of the Texas Constitution provides:

The powers of the Government of the State of Texas shall be divided into

three distinct departments, each of which shall be confided to a separate body of magistracy, to wit: Those which are Legislative to one, those which are Executive to another, and those which are judicial to another; and no person, or collection of persons, being of one of these departments, shall exercise any power properly attached to either of the other, except in instances herein expressly permitted.

An early case dealing with the legislative creation of geographically limited entities dealt with the creation of a second District Court in Bexar County, Texas. In that case, the Texas Supreme Court was called upon to construe the implied constitutional powers of the Legislature. In looking at the legislative powers, Chief Justice Stayton wrote:

"It has frequently been said that an act of the legislature must be held valid unless some superior law, in express terms or by necessary implication, forbade its passage. A prohibition of the exercise of the power cannot be said to be necessarily implied unless, looking to the language and purpose of the Constitution, it is evident that without such implication, the will of the people as illustrated by careful consideration of all its provisions cannot be given effect.

Lytle v. Halff, 75 Tex 128, 12 S.W. 610, 611 (1889)

The Court went on to hold that the provisions of Article 5 §14 of the Texas Constitution, which gave the

legislature the power to create judicial districts,
evidenced

"an intention to leave with the legislature full power to require district courts to be created as frequently as may be necessary to dispose of the business of the county with reasonable dispatch...."

Lytle, Id. at 612.

The court further held that any limitation of the power of the Legislature must clearly evidence the intention of the people to so deny and that

"all legislation power, except insofar as this power is restricted by constitutional limitations, rests with the department of government to which the law-making power is confided."

Id. at 613.

Similar to the provision of Article 5 §14 the legislature and the legislature alone was given the power to create school districts by amendment to the Constitution in 1883.

"...the Legislature may also provide for the formation of school districts within all or any of the counties of this State, by general or special law, without the local notice required in other cases of special legislation..."

As in the case of Lytle, supra, there is no constitutional limitation upon the Legislature's power in this regard. It

should be noted that this power to create school districts by general or special law survived amendment to Article VII § 3 in 1908, 1918, and 1920. On November 20, 1926, the citizens of the State changed this power by eliminating the provisions for formation of districts by special law and permitted their formation by general laws only. Proclamation January 20, 1927 see V.A.T. Constitution, v. 2 historical note to Article VII §3, p. 386. The significance of this change and its implications are significant. After 1926 even the Legislature was limited in its ability to tamper with local school districts, keeping in mind the specific limitations contained in Article 3 §56 of the Texas Constitution.

It is clear that the power to create school districts is one that was specifically delegated to the legislature by the Texas Constitution and "... invests the Legislature with plenary power with reference to the creation of school districts." Terrell v. Clifton Independent School District, 5 S.W.2d 808, 810 (Tex.Civ.App.- Waco 1928 writ ref'd);

"The present constitution as originally adopted, with but few exceptions gave the Legislature unlimited power over the management and distribution of the free-school fund...

and

... the purpose of the provision quoted [the authority in Art. VII §3 (1883) to create school districts] was to give the legislature a free hand in establishing independent school districts. Being the

expression of the will of the people,
any provisions of the Constitution
previously existing must, if in
conflict, yield to it."

State v. Brownson 94 Tex. 436,
437, 61 S.W. 114 (Tex. Sup.
1901)

See, McPhail v. Tax Collector of Van Zandt County, 280 S.W.
260, 263 (Tex.Civ.App. -- Dallas 1925, writ ref'd)

A specially delegated power may be lodged wherever the people determine by the Constitution but once conferred it may not be exercised by another branch of government Underwood v. State, 12 S.W. 2d 206 (Tex.Cr.App. 1927); Ex parte Miers, 64 S.W.2d 778 (Tex.Cr.App. 1933). Further, a power which has been granted to one department of government may be exercised only by that branch, to the exclusion of others. Snodgrass v. State, 150 S.W. 162 (Tex.Cr.App. 1912). Any attempt by one department to interfere with the powers specifically delegated to another department is null and void. Ex parte Rice, 162 S.W. 891 (Tex.Cr.App. 1914); Ex parte Giles, 502 S.W. 2d 774 (Tex.Cr.App. 1973); March v. State, 44 Tex. 64 (Tex. sup. 1875). The principle that powers specifically delegated by the Constitution are exclusive was recognized by Chief Justice Marshall in Marbury v. Madison, Cranch's Reports 137 (1803). In the very case that established a significant judicial power by

creating the doctrine of judicial review, Chief Justice Marshall wrote:

"By the Constitution of the United States the President is invested with certain important political powers, in the exercise of which he is to use his own discretion, and is accountable only to his country in his political character, and to his own conscience."

In a later case dealing specifically with the justiciability of political boundaries, the United States Supreme Court, in United States v. Arredondo, 6 Pet. 691, 711, referring to its earlier holding in Foster v. Neilson, 2 Pet. 253, 307, 309, held that:

"This Court did not deem the settlement of boundaries a judicial, but a political, question; that it was not its duty to lead, but to follow the action of the other departments of the government."

These same principles were recognized in Cherokee Nation v. Georgia, 5 Pet. 1, 21 and in Garcia v. Lee, 12 Pet. 511, 517.

Hence, the determination of the necessity for the creation of independent school districts requires the consideration of public policy questions which are the province of the Legislature. This is similar to the determination of "public necessity" for the issuance of a bank charter, which the Texas Supreme Court held to be an exclusively legislative, and not a judicial, matter.

"The determination of "public necessity" by the State Banking Board involves the determination of public policy which is a matter of legislative discretion which cannot constitutionally be given to the judiciary. That would be a violation of Article II §1 of the Constitution of Texas..."

Chemical Bank & Trust Company v. Falkner 369 S.W.2d 427
(Tex. 1963)

Thus, it has been long held that the judicial department of the State of Texas may not decide political questions. Texas Industrial Traffic League v. Railroad Commission of Texas, 628 S.W.2d 187, 196 (Tex.App.--Austin 1982), rev' on other grounds, 633 S.W.2d 821, on remand 672 S.W.2d 548 (Tex.App.--Austin 1984, writ ref'd n.r.e.). As early as 1877 the Texas Supreme Court decided in Ex parte Towles, 48 Tex. 413 (1877), that not even the Legislature could even delegate to the Courts the power to review political decisions by creating "appeal" rights for private citizens in cases involving political decisions such as the location of county seats. See, Carthers v. Harnett, 67 Tex. 127, 2 S.W. 523 (1886); Harrell v. Lynch, 65 Tex. 146 (1885).

The same applies to school districts which are political subdivisions of the State. Love v. City of Dallas, 120 Tex. 351, 40 S.W.2d 20 (1931); Hatcher v. State, 125 Tex. 84, 81 S.W.2d 499 (1935); Lewis v.

Independent School District of City of Austin, 161 S.W.2d 450 (Tex. 1942).

The political question doctrine which acts to preclude judicial review, also applies to boundaries of political subdivisions.

"The determination of the boundaries of a political subdivision of the State is a "political question" solely within the power prerogative and discretion of the Legislature and not subject to judicial review."

State ex rel Grimes County Taxpayers Association v. Texas Municipal Power Agency, 565 S.W.2d 258, 274 (Tex.App.--Houston [1st Dist.] 1978, no writ); Carter v. Hamlin Hospital District, 538 S.W.2d 671 (Tex.Civ.App.--Eastland 1976, writ ref'd n.r.e.); Jimenez v. Hidalgo County Water Improvement No. 2, 68 F.R.D 668 (S.D. Tex. 1975), aff'd, 424 U.S. 950, 965 S.Ct. 1423, 47 L.Ed.2d 357 (1976). Nor is this a new constitutional doctrine:

"What properly shall be embraced within a municipal corporation or taxing district and whether it shall be taxed for municipal purposes, are political questions, to be determined by the lawmaking power, and an attempt by the judiciary to revise the legislative action would be usurpation."

Kettle v. City of Dallas, 80 S.W. 874, 877 (Tex.Civ.App.--Dallas 1904, no writ); Accord, Norris v. Waco, 57 Tex. 635 (1882); City of Marshall v. Elgin, 143 S.W. 670 (Tex.Civ. App.--Texarkana 1912, no writ)

The creation of independent school districts and the fixing of their boundaries is a power that was given expressly to the Legislature by the constitutional amendment to Article VII §3, in 1883. This power operates to the exclusion of interference from other departments of the state government, and is not subject to judicial review. While it is clear that the trial court disputed the wisdom of the pattern of school districts within the State of Texas, it is simply not within the province of the courts to become a juristocracy.

"[t]he accumulation of all powers, legislative, executive and judiciary in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny."

THE FEDERALIST, No. 47, p. 301
(C.Rossiter ed. 1961)

Nor may a Court sit as a super legislature to determine the wisdom of legislative enactments. Lee v. City of Dallas, 267 S.W. 1014 (Tex.Civ.App.--Dallas 1925, no writ); Travelers Insurance Co. v. Cason 122 S.W.2d 694, (Tex.Civ.App.-- El Paso 1939, error ref'd); Austin Fire and Police Departments v. City of Austin, 228 S.W.2d 845 (Tex. Civ.App.--Austin 1950); Funderburk v. Schulz, 293 S.W.2d 803 (Tex.Civ.App.-- Galveston 1953, no writ)

V.

**ARTICLE I §2 REQUIRES JUDICIAL DEFERENCE
TO POPULAR VOTES ON THE ACTS OF ELECTED
REPRESENTATIVES IN FIXING BOUNDARIES**

As stated above, the voters of the State of Texas amended the language of Article VII § 3 of the Texas Constitution in 1926 to remove the provision that authorized the Legislature to create independent school districts by special law. This change, along with specific provisions of Article 3 § 56 of the Texas Constitution which prohibit the Legislature (unless otherwise provided in the Constitution) from passing local or special laws authorizing: "...the affairs of...school districts; on regulating the management of public schools, the building or repairing of school houses, and the raising of money for such purposes," effectively precluded the Legislature from further direct involvement in the formation of school districts or the fixing of their boundaries. Today the statutory provisions regulating the formation of school districts, and the annexation or detachment of territory to or from the districts, are set forth in Chapter 19 of the Texas Education Code. That chapter provides for the creation of districts, or change in school district boundaries, generally through the elective process. Although Plaintiffs complain of irrational results from the elective process,

due to disparate wealth within the boundaries of the several school districts, the sanctity of the results of the elective process is guaranteed by the Article 1 §2 of the Texas constitution, which provides:

"All political power is inherent in the people, and all free governments are founded on their authority, and instituted for their benefit. The faith of the people of Texas stands pledged to the preservation of a republican form of government, and, subject to this limitation only, they have at all times the inalienable right to alter, reform or abolish their government in such manner as they think expedient."

The provisions of Chapter 19, Tex. Educ. Code, evince a clear legislative recognition of that right. Plaintiffs offered no evidence whatsoever of any alleged impermissible intent, or indeed any evidence at all involving the creation or boundary change of a single school district. Their "evidence" on the irrationality of district boundaries was limited solely to physical configurations as shown by district maps in Plaintiffs' Ex. 1 and the variations in local wealth between districts. These proffers of evidence are by themselves insufficient as a matter of law to overcome the presumptive validity of legislative enactments or popular votes. Defendants timely objected to the trial of the rationality of district boundaries without the presence of the districts themselves as necessary parties to

the litigation under Rule 39 T.R.C.P. This objection was overruled. (R. XXVIII p. 5125-5126)

In 1911, the Texas Supreme Court was called upon to construe Article 1 §2 in a case involving the Dallas public schools. Bonner v. Belstering, 104 Tex. 432, 138 S.W. 571 (Tex. Sup. 1911) In discussing the meaning of the term "republican form of government," the court accepted the definition of Thomas Jefferson, who wrote:

"Indeed, it must be acknowledged that the term 'republic' is of very vague application in every language. Were I to assign to this term a precise and definite idea, I would say, purely and simply, it means a government by its citizens in mass, acting directly and not personally, according to rules established by the majority; and that every other government is more or less republican in proportion as it has in its composition more or less of this ingredient of the direct action of the citizens. * * * On this view of the import of the term 'republic,' instead of saying, as has been said, that it may mean anything or nothing, we may say with truth and meaning that governments are more or less republican as they have more or less of the element of popular election and control in their composition; and believing, as I do, that the mass of the citizens is the safest depository of their own rights, and especially that the evil flowing from the duperies of the people are less injurious than those from the egotism of their agents, I am a friend to that composition of government which has in its the most of this ingredient."

Id. at 574

In sum, the political subdivision boundaries in this State are where they are because the citizens of this State, either through the direct electoral process or through their elected representatives, have decided that that is where they should be. No further rational basis need be stated. The present configuration of school districts in the State of Texas includes variations in wealth. This situation has always existed in the history of the State. But this variation in wealth flows from natural conditions, arising from (1) the population of the community, (2) the productivity of the soil, (3) and the taxable wealth in the community. Mumme v. Marrs, 40 S.W.2d 31, 36 (Tex. 1931). The existence of these disparities is no more the result of an impermissible legislative classification now than it was in 1931. The reliance upon the courts to address this problem violates the express constitutional limitations of Article I §2 and Article II §1 of the Texas Constitution.

VI.

CONCLUSION

In sum, the trial court erred in applying the doctrine of judicial review to political questions which are beyond the power of the court to review. It also failed to account

for the impact of Article VII §3 on educational financing in this state. Therefore, the judgment and related findings on these issues must be reversed.

Because Appellants have clearly demonstrated that disparities in educational funding in this state exist because of the Texas Constitution and not despite it, and because the court clearly does not have the power to rewrite the map of school districts in the state to cure that which was created by the Constitution itself, this Court must determine that any inequality that exists in funding does not rise to the level of an equal protection violation. Therefore, judgment on this issue should be rendered in Appellants' favor that Plaintiffs take nothing since there exists no factual issue that would need to be resolved on remand.

POINT OF ERROR NUMBER 8

**THE TRIAL COURT ERRED IN DEFINING
EQUAL PROTECTION IN TERMS OF THE STANDING
OF SCHOOL DISTRICTS RATHER THAN THE RIGHTS OF STUDENTS**

The trial court found at page 5 of the Final Judgment that the school financing system:

**"is UNCONSTITUTIONAL AND UNENFORCEABLE
IN LAW because it fails to insure that**

each school district in this State has the same ability as every other district to obtain, by State legislative appropriation or by local taxation, or both, funds for educational expenditures, including facilities and equipment, such that each student in the State, limited only by discretion given local districts to set tax rates...."

This finding does allow for significant variations in actual spending depending upon local district tax rates. It in effect states that the rights to educational dollars are the districts' rights to dollars and not the students' rights. Under the present school finance system, many low wealth school districts voluntarily leave large amounts of potential state on the table simply because they do not tax at high enough rates to maximize their state aid entitlements. The court's standard of equity as expressed in the Final Judgment would not necessarily change this situation.

I.

**PLAINTIFF SCHOOL DISTRICTS HAVE NO STANDING
TO ASSERT "CONSTITUTIONAL VIOLATIONS"**

As a threshold issue this Court must determine whether some of the original Plaintiff school districts, and all of the Plaintiff-Intervenors, have standing to bring their claim. All of the school districts, including Plaintiff and Plaintiff-Intervenor Districts, were created by legislative authorization (either general or special law) and operate

pursuant to the Constitution and statutes of the State of Texas. As set forth in this brief in the discussion of separation of powers, school districts are political subdivisions of the State created to carry out the governmental function of providing public education to the school children of their respective districts. The independent school district Plaintiffs exist solely by virtue of the exercise of the power of the State, acting through the Legislature. Texas courts have expressly held:

"An agency created by the State for the better ordering of government has no privileges, immunities, or rights under the State and Federal Constitutions which it may invoke in opposition to the will of its creator. See Williams v. Council of Baltimore, (1983) 289 U.S. 36, 53 S.Ct. 431, 432, 77 L.Ed. 1015; City of Trenton v. New Jersey, (U.S. Sup. Ct. 1923) 262 U.S. 182, 43 S.Ct. 534, 537, 67 L.Ed. 937. In other words, a State has no standing to assert that one of its very own Legislative enactments denies it constitutional due process or deprives it of equal protection of laws. The same applies to the State's agencies." (emphasis added)

McGregor v. Clawson, 506 S.W.2d 922, 929 (Tex.Civ.App.--Waco 1974, writ ref'd n.r.e.)

Similarly, the Austin Court of Appeals found that in a suit against a state agency which was exercising governmental functions, even the Texas Attorney General was without standing to allege constitutional violations.

"Although the Attorney General, in his brief, refers to the "unconstitutional" action of the Board, the only way that the Board's action could be remotely suspect under the Constitution of either the State or the Federal Government would be a violation of equal protection due, as alleged by the Attorney General, to its arbitrary, capricious, and unreasonable action. This contention must fail as equal protection is a constitutional guaranty afford only to "persons" and the State does not have standing to raise the claim." (emphasis added)

Hill v. Texas Water Quality Board, 568 S.W.2d 738, 739 (Tex. Civ.App.--Austin 1978 writ ref'd n.r.e.).

Nor does the doctrine apply only to agencies of statewide jurisdiction. In Colony Municipal Utility District No. 1 of Denton County v. Appraisal District of Denton County, 626 S.W.2d 930 (Tex.App.--Fort Worth 1982, writ ref'd n.r.e.), the no standing doctrine was applied to a municipal utility district. "The right of Equal Protection of Laws and Due Process are rights vested only in persons - not in political subdivisions" Id. at 932.

Nor shall Plaintiff school districts be allowed standing to raise the constitutionality of the statutes through jus Tertii. This is not a case where individuals are unable to assert their rights. The original suit was filed primarily by individuals. Indeed, as will be shown below the alleged rights of the districts and those of students

may actually conflict under a literal interpretation of the Final Judgment in this case.

Even if Plaintiff districts were construed to have standing to bring their lawsuit, they should not be allowed to question the constitutionality of statutes under which they receive billions of dollars in direct benefits. This principle is known as equitable estoppel and was announced by the United States Supreme Court in Fahey v. Malowee, 332 U.S. 245, 67 S.Ct. 1552 (1968) as follows:

"It is an elementary rule of constitutional law that one may not 'retain the benefits of the Act while attacking the constitutionality of one of its important conditions' United States v. City and County of San Francisco, 310 U.S. 16, 29, 60 S.Ct. 749, 756, 84 L.Ed. 1050, 1059. As formulated by Mr. Justice Brandeis, concurring in Ashwander v. Tennessee Valley Authority, 297 U.S. 288, 348, 56 S.Ct. 466, 483, 80 L.Ed. 688, 711. 'The Court will not pass upon the constitutionality of a statute at the instance of one who has availed himself of its benefits.'"

There is no question but that the school districts in Texas, including the Plaintiff and Plaintiff-Intervenors school districts, are the beneficiaries of billions of dollars in annual state educational allotments. (See e.g. H.B. 20, Acts. 69th Legis. 1985), yet these same districts seek by this lawsuit to challenge the very laws by which they receive state aid. The principle announced in Fayhe,

supra has been adopted by Texas courts as well. Neel v. Texas Liquor Control Board, 259 S.W.2d 312 (Tex.Civ.App. --Austin 1953, writ ref'd n.r.e.); Beneficial Finance Company of Midland v. Miskell, 424 S.W.2d 482 (Tex.Civ. App.--Austin 1968, writ ref'd n.r.e.).

In sum, Plaintiff school districts have neither constitutional rights nor standing in this suit, and even if they had standing, principles of equitable estoppel preclude governmental subdivisions from "biting the hand that feeds them," in a suit such as this. Massachusetts Indemnity and Life Insurance Company v. Texas State Board of Insurance, 685 S.W.2d 104 (Tex.App.--Austin 1985, no writ).

To summarize, Plaintiff Independent School Districts, be they original Plaintiffs in this suit or Plaintiff-Intervenors, are not "persons" within the purview of the Texas constitutional violations of which they complain. Any permissible judgment declaring a constitutional right may not be premised on a school district entitlement.

II.

THE IMPLEMENTATION OF THE FINAL JUDGMENT AS WRITTEN WOULD NOT INSURE EQUAL PER STUDENT FUNDING

The trial court found variations in local district tax rates from between \$.09 to \$1.55 per \$100 valuation in the State at the time of trial. Finding of Fact 5(1) p. 17. As

set forth above, the trial court's order does not mandate equal per pupil expenditures; it only requires that any district have equal revenues for any given tax rate. This provision may in fact exacerbate existing expenditure disparities. Even if one assumes that the State can find the vast sums of money necessary to implement such a system, it will not necessarily change expenditure variations.

For purposes of discussion, Appellants will assume that the new system has an ameliorating impact upon the present tax rate disparities and that the variation is reduced to tax rates between \$.50 and \$1.00 per \$100.00 valuation. This reduces existing tax rate disparities by approximately 300 percent. Let us further assume for purposes of illustration that the state system guarantees every district an equal amount from a combination of state and local sources of \$50.00 for every 1¢ in tax rate. This new court-imposed system would yield \$2500 in educational dollars for the district that chooses to tax itself at \$.50 and \$5,000 in educational dollars for the district which chooses to tax itself at \$1.00. This variation in per pupil expenditures is permissible under the trial court's proposed constitutional system, and would do little to reduce disparities among students under the current system as demonstrated in Defendant's Exhibit 48, using the restricted range ratio most commonly used in school finance analysis. It should be

noted that the current system of school finance is an equitable one under current national academic definitions of school finance equity (R. XXIV p. 4287) It is by no means clear that the trial court's vision of the school finance system would meet these tests.

Thus, if the perceived problem is variation in per student expenditures (and it could hardly be conceived as anything else since the educational "entitlement," if any, that is created by Article VII §1 must be that of the student and not of the entity that is created for the purposes of providing the entitlement), the Trial Court's Final Judgment does not address the problem and may in fact make the problem more intractable, and given the range of the rates likely to occur, expenditure disparities based on local tax rates will continue to exist and will likely increase.

In sum, the trial court erred in defining the equal protection violation in terms of a district's access to funding (subject to its own discretion) and must be reversed.

POINT OF ERROR NUMBER 9

**THE TRIAL COURT ERRED IN FINDING
THE TEXAS SCHOOL FINANCE SYSTEM VIOLATED
THE DUE PROCESS CLAUSE OF THE TEXAS CONSTITUTION**

The Trial Court at page 6 of its Final Judgment found inter alia that the privileges and immunities that flow from Article 1 §19 of the Texas Constitution were violated by the Texas school finance system. Although the balance of the Final Judgment makes it unclear how due process is implicated, Article 1 §19 was not violated in this case.

Article 1 §19 of the Texas Constitution provides:

No citizen of this State shall be deprived of life, liberty, property, privileges or immunities, or in any manner disenfranchised, except by the due course of the law of the land.

The standards and analysis for the course of law under the Texas Constitution are identical to those for due process under the 14th Amendment of the United States Constitution. Spring Branch I.S.D. v. Stamos, 645 S.W.2d 556, 560-61 (Tex. 1985). Under both the state and federal constitutions, the basis for review under the due process clause was whether the statutes under review were "justified by a rational legislative purpose" State v. Project Principle, Inc., 724 S.W.2d 387, 391 (Tex. 1987) citing Brown v. McGarr, 774 F.2d 777, 784 (7th Cir. 1985). This is the same "rational basis" test that has been argued in Appellants' briefs and need not be repeated here. If the

Texas school finance system passes muster under a rational basis test for equal protection purposes, it must ipso facto meet the corresponding due process standard. For the reasons previously argued concerning the rational basis for the State scheme, the Trial Court erred in finding a due process violation, and its judgment should be reversed and rendered in this regard.

PRAYER

WHEREFORE STATE APPELLANTS pray this Court reverse the judgment entered in the trial court and render judgment that the current school finance system is constitutional and that Plaintiffs and Plaintiff-Intervenors take nothing by this suit.

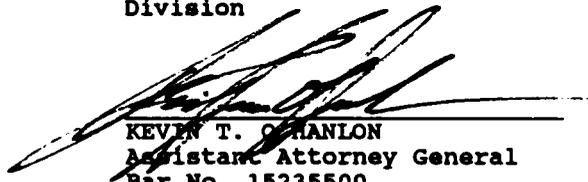
Alternatively, State Appellants pray that in the event Plaintiffs or Plaintiff-Intervenors have raised a factual issue that this court determines should be tried under the proper legal definitions, this Court should reverse the trial court's errors in legal analysis and the factual findings which rest upon them and remand the case for trial under the proper legal standards.

Respectfully submitted,

JIM MATTOX
Attorney General of Texas

MARY F. KELLER
Executive Assistant

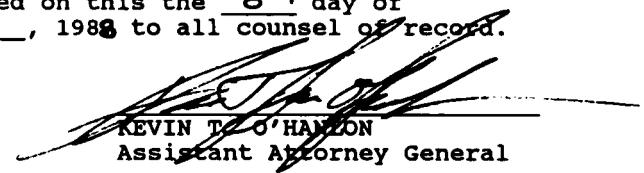
JAMES C. TODD
Chief, General Litigation
Division



KEVIN T. O'HANLON
Assistant Attorney General
Bar No. 15235500
P. O. Box 12548
Capitol Station
Austin, Texas 78711-2548
512-463-2120, ext. 220

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing instrument has been sent via U.S. Mail, certified, return receipt requested on this the 8th day of JANUARY, 1988 to all counsel of record.



KEVIN T. O'HANLON
Assistant Attorney General