FINANCING THE AMERICAN DREAM: EQUALITY AND SCHOOL TAXES

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The right to equal educational opportunity is the American Dream incarnate as constitutional law.¹ That every child should have a fair opportunity to rise above his humble origins and claim the rewards that his efforts and abilities deserve is perhaps our most widely shared idea. It is deeply engrained in Judeo-Christian ethics and in the most durable of western philosophies. It is the message of hope that is engraved on the Statue of Liberty, and the feature of our national life which has most excited the admiration of other peoples around the world. It is an idea that was powerfully activated by the events surrounding World War II, events which caused us to react against the despotic racism of our adversaries and to take heart that we might collectively, as well as individually, overcome almost any obstacle and attain almost any goal.

We have accustomed ourselves to the expression of this ennobling ideal by the most exalted of our political institutions. Even the entablature of the Supreme Court building proclaims the Court's commitment to "equal justice under law."² It was therefore a disappointment to many when the Supreme Court rejected an argument for equality of educational opportunity in *San Antonio Independent School District v. Rodriguez*,³ refusing to invalidate a Texas school finance law which allegedly denied equal educational opportunity to the children of poor school districts. Some have assumed that this decision was a major reversal of the Court's commitment to the egalitarian ideal. Some may have found confirmation of this assumption in the fact that the five justices who composed the majority were all Republicans, and included the four justices appointed by President Nixon. Despite this appearance, there are a number of reasons to believe that the Court's decision is not the result of unfeeling reaction, but of an awareness that the assumption underlying the plaintiffs' arguments are questionable and that the practical consequences of a contrary decision are undesirable, and possibly even self-defeating. There is reason to hope that a more modest assault on existing modes of school finance will yield more constructive results.

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1. For an historical treatment of the dream, see H. PERKINSON, *THE IMPERFECT PANACEA: THE AMERICAN FAITH IN EDUCATION, 1865-1965* (1968).

2. Emphasis added.

3. 411 U.S. 1 (1973).

I. DOCTRINAL PREDICATES

A. *The Right to Equal Educational Opportunity*

The right to equal educational opportunity is derived from the clause of the fourteenth amendment that forbids the states to deny their citizens equal protection of the laws. In the aftermath of the Civil War, the amendment was adopted for the rather explicit purpose of assuring that state laws would not disadvantage the newly freed black citizens in the South.⁴ Its terms are unusual in that it grants no particular rights to anyone, but instead restricts the power of the states to classify citizens for the purpose of conferring particular rights or duties.

The equal protection clause was little used until the Warren Court gave it vitality. And it was perhaps the most important decision of the Warren Court, *Brown v. Board of Education*,⁵ that first expressed the right to equal educational opportunity. Chief Justice Warren described the importance of education in these still valid terms:

Today, education is perhaps the most important function of state and local government. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms.⁶

The Chief Justice further explained that the separation of black children by the state "generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone."⁷ It was clear that the Court regarded the educational system as the linchpin of the caste system that the fourteenth amendment was intended to dislodge.

Brown was, of course, more than a judicial decision. It was also a battle cry for a social movement which touched us all. Schools and children have been a central focus of that movement. Many of us still recall the peroration of the movement's greatest leader when in 1963, standing on the steps of the Lincoln Monument, he prophesied that children black and white would soon

4. J. TEN BROEK, *THE ANTISLAVERY ORIGINS OF THE FOURTEENTH AMENDMENT* (1951).

5. 347 U.S. 483 (1954).

6. *Id.* at 493.

7. *Id.* at 494.

join hands to sing a hymn to their mutual liberation. That symbol expressed not only the theme of the civil rights movement, but of traditional American idealism as well.

By the time of his death five years ago, Martin Luther King's movement had changed its course. The Civil Rights March gave way to the Poor People's March. King's presence in Memphis at the side of the garbage workers bore testimony to his own change of goals. He had learned, with many others, that social and political change could not proceed without accompanying economic change.⁸ With this change in direction, the movement exchanged its sharp focus for a broader constituency that included Chicanos, Indians, Appalachians, and the urban poor.

While the Court did not march in any processions, its insights grew and its values changed, too. In particular, its comprehension of the equal protection clause was altered by events. The change was signaled by a series of decisions upholding the equal rights of indigents.⁹ Those decisions made it apparent that the Court would some time have to consider the applicability of the right to equal educational opportunity to the circumstances of poor children.

B. *The "New Equal Protection"*

The applicability of the "new equal protection" to school finance, first suggested in the early 1960's, received popular attention in 1968, the year of the Poor People's March, in Arthur Wise's book, *Rich Schools, Poor Schools*.¹⁰ The problem to which Wise pointed was not new. The almost universal tradition in this country has been to rely upon the local property tax to finance public education.¹¹ Since local tax resources are more plentiful in some places than others, schools are funded more easily and fully in some places than others. Since the second decade of this century, state legislatures have provided by various methods for the schools of underfinanced districts.¹² The Texas legislature was a latecomer when it enacted the Gilmer-Aiken Act of 1949,¹³ which assured a minimum level of expenditure in poor dis-

8. For a thoughtful rejection of the distributive goals of the "war on poverty," see Winter, *Poverty, Economic Equality and the Equal Protection Clause*, 1972 SUP. CT. REV. 41.

9. E.g., *Griffin v. Illinois*, 351 U.S. 12 (1956); *Douglas v. California*, 372 U.S. 353 (1963).

10. The subtitle is *THE PROMISE OF EQUAL EDUCATIONAL OPPORTUNITY*. For a discussion of the Wise book, see Kurland, *Equal Educational Opportunity: the Limits of Constitutional Jurisprudence Undefined*, 35 U. CHI. L. REV. 583 (1968).

11. P. MORT & W. REUSSER, *PUBLIC SCHOOL FINANCE* 3 (1951); R. FREEMAN, *TAXES FOR THE SCHOOLS* 102-04, 222-32 (1960).

12. The state aid movement was heralded by E. CUBBERLEY, *SCHOOL FUNDS AND THEIR APPORTIONMENT* (1905). One rather carefully developed plan was enacted in New York in 1922. See generally G. STRAYER & R. HAIG, *FINANCING OF EDUCATION IN THE STATE OF NEW YORK* (1923).

13. R. STILL, *THE GILMER-AIKEN BILLS* (1950). The Texas development is retold briefly by the Court. *San Antonio Independent School District v. Rodriguez*, 411 U.S. at 27-30.

tricts. Despite such legislative efforts, disparities in school spending have been increasing in many states due to two apparent causes.¹⁴ First, differences in improved land values have increased due to industrialization and urbanization, thus magnifying the differences in district wealth.¹⁵ Second, the proliferation of elite suburban districts has facilitated high levels of spending by schools that serve populations with large appetites for school services and the wherewithal to satisfy them. The assumption was obvious, although unproved, that the children receiving low-cost schooling (often as little as half or one third the cost borne by elite districts)¹⁶ were poor children who were most in need of educational help.¹⁷ Poor schools were thus seen as a reinforcement of class lines. Such an assumption seemed to influence Congress when, in 1964, it directed the Civil Rights Commission¹⁸ to make the massive study of school inequality which produced the justly famous Coleman Report on *Equal Educational Opportunity*.¹⁹

In 1966, Harold Horowitz urged that the disparities in school finance were a deprivation of equal protection to those needy children who were required to make do with cheap schooling.²⁰ Early legal efforts to pursue this suggestion, repeated in Wise's book, were unsuccessful. Counsel representing school districts that served the urban poor filed several suits seeking to compel the states to provide additional funds for the education of poor children,²¹ a plea sound in theory but difficult, if not impossible, to apply. What levels of funding would result in equal educational opportunities for different children, of different backgrounds, in different communities? This flaw proved fatal. The first ruling on the theory, by a three-judge district court in Illinois, rejected it, finding that there was no rational basis for

14. J. COONS, W. CLUNE, S. SUGARMAN, *PRIVATE WEALTH AND PUBLIC EDUCATION* 48-49 (1970) [hereinafter cited as *PRIVATE WEALTH*]; E. CUBBERLEY, *supra* note 12, 21-27.

15. Cf. E. CUBBERLEY, *supra* note 12, at 21.

16. See generally B. LEVIN, T. MULLER, W. SCANLON, & M. COHEN, *PUBLIC SCHOOL FINANCE: PRESENT DISPARITIES AND FISCAL ALTERNATIVES* (1972) [hereinafter cited as *PRESENT DISPARITIES*]; B. LEVIN & T. MULLER, *THE FINANCING OF SCHOOLS IN ILLINOIS* (1973); B. LEVIN, T. MULLER, & W. SCANLON, *SCHOOLS AND TAXES IN NORTH CAROLINA* (1973); B. LEVIN, M. COHEN, T. MULLER, & W. SCANLON, *ISSUES OF SCHOOL FINANCE IN CALIFORNIA* (1972); B. LEVIN & T. MULLER, *THE FINANCING OF SCHOOLS IN MINNESOTA* (1973).

17. A relation between school finance and social class was implicit in J. CONANT, *SLUMS AND SUBURBS* (1961), and in *THE QUALITY OF INEQUALITY: URBAN AND SUB-URBAN PUBLIC SCHOOLS* (C. Daly ed. 1968).

18. Civil Rights Act of 1964 § 402, 78 Stat. 247.

19. See generally Mosteller & Moynihan, *A Pathbreaking Report*, in *ON EQUALITY OF EDUCATIONAL OPPORTUNITY* 3 (F. Mosteller & D. Moynihan eds. 1972).

20. *Unseparate but Unequal—The Emerging Fourteenth Amendment Issue in Public School Education*, 13 U.C.L.A. L. REV. 1147 (1966). See also Horowitz & Neitring, *Equal Protection Aspects of Inequalities in Public Education and Public Assistance Programs from Place to Place within a State*, 15 U.C.L.A. L. REV. 787 (1968).

21. E.g., *Board of Educ. v. Michigan*, Gen. Civ. No. 103342 (Wayne City Cir. Ct. 1968); *McInnis v. Shapiro*, 293 F. Supp. 327 (N.D. Ill. 1968); *Burruss v. Wilkerson*, 310 F. Supp. 572 (W.D. Va. 1969).

quantifying the relative needs of the children.²² The Warren Court summarily affirmed.²³

C. *The Emergence of the No-Wealth Principle*

Soon after the Supreme Court's affirmance, a new theory was presented by Professors John Coons, William Clune, and Stephen Sugarman.²⁴ They avoided the problem of quantifying the fiscal needs of schools by recasting the right to equal educational opportunity in a form that expressed a negative restraint on the legislatures. Their proposition was that the states might, consistent with the requirements of equal protection, use any means of raising public revenue and any formula for the distribution of public revenue, provided that the distribution not be keyed to the wealth of the district in which the children live.²⁵

The great charm of this "no-wealth" principle is evident. It can be simply stated. It is easy to apply.²⁶ It does not require the courts to appraise the sufficiency of any funding levels. It seems to leave much freedom to design new systems of school finance. And it is faithful to the rhetoric of equal educational opportunity.

In 1971, the concept was grasped by the Supreme Court of California. In *Serrano v. Priest*²⁷ a Chicano citizen complained that his children's schools were much less abundantly financed than those of the children in neighboring Beverly Hills. The trial court sustained a demurrer. On appeal, the court held that the facts alleged by Serrano would constitute a denial of equal protection under the fourteenth amendment. Despite the fact that the school finance systems of every state²⁸ but Hawaii²⁹ were thus exposed to frontal attack, the decision was widely hailed on all sides. The press, legislative groups, educators at all levels in the administrative hierarchy, and taxpayer organizations, all enthused. Civil rights adherents rejoiced at the apparent triumph of egalitarianism. Property owners rejoiced at the apparently impending demise of the local property tax.³⁰ Several courts,³¹ including a

22. *McInnis v. Shapiro*, 293 F. Supp. 327, 335-36 (N.D. Ill. 1968). *McInnis* was distinguished on this basis by the district court in *Rodriguez*, 337 F. Supp. 280, 284 (W.D. Tex. 1971).

23. *Sub nom.*, *McInnis v. Ogilvie*, 394 U.S. 322 (1969). See also *Burruss v. Wilkerson*, 397 U.S. 44 (1970).

24. PRIVATE WEALTH, note 14 *supra*.

25. *Id.* at 2, 395-433.

26. See *Rodriguez v. San Antonio Independent School District*, 337 F. Supp. 280, 284 (W.D. Tex. 1971); *Van Dusartz v. Hatfield*, 334 F. Supp. 870, 876-77 (D. Minn. 1971); Karst, *Serrano v. Priest: A State Court's Responsibilities and Opportunities in the Development of Federal Constitutional Law*, 60 CAL. L. REV. 720, 752-56 (1972).

27. 5 Cal. 3d 584, 487 P.2d 1241, 96 Cal. Rptr. 601 (1971).

28. PRESIDENT'S COMMISSION ON SCHOOL FINANCE, SCHOOLS, PEOPLE & MONEY 9 (1972).

29. Hawaii has a full-state funding system, but even it may not be immune. See PRESENT DISPARITIES, *supra* note 16, at 214-43.

30. See, e.g., N.Y. Times, Dec. 25, 1971, at 15, col. 1.

31. *Van Dusartz v. Hatfield*, 334 F. Supp. 870 (D. Minn. 1971); *Hollins v. Shafstall*,

federal district court in Texas,³² followed *Serrano*. The Texas case was decided in favor of Rodriguez, another Chicano citizen, who complained that Texas denied equal protection to his children in the Edgewood schools because it allowed nearby citizens of elite Alamo Heights to spend three times as much on their children.

The legal analysis that underlies the no-wealth principle is derived from the gloss placed on the equal protection clause by the Warren Court. The traditional test of the propriety of a legislative classification was whether the classification could be said to be rationally related to a legitimate legislative purpose.³³ If so, the courts would not examine whether in practice the law results in inequality, whether there might be a better means to achieve the legislative purpose or whether the social cost of the classification was high, or the benefit low. The Warren Court created a general exception to this permissive test by declaring that certain kinds of legislation are subject to "strict scrutiny."³⁴ Such legislation must be justified by a "compelling state interest," a justification almost impossible to supply. Strict scrutiny was to be applied to any legislative classification that affected a "fundamental interest" of the citizens classified,³⁵ or made an "invidious" or "suspect" distinction.³⁶

While both "fundamental interest" and "suspect classification" are problematic concepts, Professors Coons, Clune and Sugarman urged that traditional school finance systems involve both, and cannot withstand the strict scrutiny which requires a compelling legislative justification.³⁷ Education, they contended, is the fundamental interest of the poor children. They quoted the language of *Brown* that had proclaimed the importance (although not necessarily the fundamentality) of education. And they argued that education underlies such fundamental interests as the right to vote and the right to counsel in criminal proceedings. Education, they claimed, is essential to the exercise of such rights. Furthermore, they contended that a legislative classification which permits different levels of spending according to the wealth

No. C. 253652 (Maricopa Cty., Ariz. Sup. Ct., 1972); *Milliken v. Green*, 389 Mich. 1, 203 N.W.2d 456 (1972); *Caldwell v. Kansas*, No. 50616 (D. Kan. 1972); *Robinson v. Cahill*, 118 N.J. Super. 223, 287 A.2d 187 (1972), *aff'd on state constitutional grounds*, 62 N.J. 473, 303 A.2d 273 (1973); *Sweetwater County Planning Comm. v. Hinkle*, 491 P.2d 1234 (Wyo. 1971), *juris. relinquished*, 493 P.2d 1050 (1972). *But see* *Parker v. Mandel*, 344 F. Supp. 1068 (D. Md. 1972); *Spano v. Board of Educ. of Lakeland Central Sch. Dist. No. 1*, 68 Misc. 2d 804, 328 N.Y.S.2d 229 (Sup. Ct. 1972).

32. *Rodriguez v. San Antonio Ind. School District*, 337 F. Supp. 280 (W.D. Tex. 1971).

33. *Developments in the Law—Equal Protection*, 82 HARV. L. REV. 1065, 1120-23 (1969).

34. *Id.* See also Michelman, *The Supreme Court, 1968 Term—Foreword: On Protecting the Poor Through the Fourteenth Amendment*, 83 HARV. L. REV. 7 (1969). The development was forecast by Tussman & Ten Broek, *The Equal Protection of the Laws*, 37 CALIF. L. REV. 341 (1949).

35. *E.g.*, *Police Dep't of the City of Chicago v. Mosley*, 408 U.S. 92 (1972); *Harper v. Virginia State Board of Elections*, 383 U.S. 663 (1966).

36. *E.g.*, *Graham v. Richardson*, 403 U.S. 365 (1971); *Douglas v. California*, 372 U.S. 353 (1963); *Griffin v. Illinois*, 351 U.S. 12 (1956).

37. PRIVATE WEALTH, *supra* note 14, at 338-93.

of the district creates an invidious or suspect classification because it favors wealthier children and disfavors poorer children. This analysis prevailed in *Serrano*³⁸ and in the district court in *Rodriguez*.³⁹

II. THE NO-WEALTH PRINCIPLE IN THE SUPREME COURT

In a 5-4 decision, the Supreme Court decided that the Texas school finance law did not deny children of poor school districts equal protection of the laws. Two justices, Brennan and White, dissented on the ground that the law was not rationally related to the goal of local control.⁴⁰ Only two justices, Douglas and Marshall, accepted the no-wealth principle. In a dissent supported by Justice Douglas, Justice Marshall concluded that education is a fundamental interest and that distinctions based upon group wealth are invidious.⁴¹ On the latter point, he emphasized that group wealth discriminations are even more invidious than individual wealth discrimination,⁴² because individuals have more control over their individual financial condition than do groups. Moreover, he asserted that it is as difficult for citizens of poor districts as for indigent citizens to invoke the state's political processes to obtain redress.⁴³ Hence, Justice Marshall concluded, it is necessary to resort to the type of extraordinary judicial intervention employed under the strict scrutiny test in order to protect the interests of the disadvantaged.

In a generally cautious opinion by Justice Powell, the majority rejected the no-wealth principle. The Court first disposed of the argument that the Texas law discriminated against the plaintiffs on the basis of wealth. Earlier groups that had successfully claimed to be discriminated against were completely unable to pay for the desired benefit, and consequently, suffered an absolute deprivation.⁴⁴ Justice Powell noted that the plaintiffs not only were unable to show an absolute deprivation, but did not clearly identify what group was the disfavored class.⁴⁵ Consequently, he concluded that there was no suspect class. The Court then ruled that the plaintiffs had not been denied a fundamental interest. While it was argued that education is essential to the exercise of first amendment freedoms and the right to vote, there was no indication that the education provided by the Edgewood schools disabled the

38. 5 Cal. 3d at 584, 597, 487 P.2d 1241, 1249, 96 Cal. Rptr. 601, 609.

39. 337 F. Supp. 280 (W.D. Tex. 1971).

40. 411 U.S. at 62-70.

41. *Id.* at 70, 116, 122.

42. *See, e.g.*, *Bullock v. Carter*, 405 U.S. 134 (1972); *Williams v. Illinois*, 399 U.S. 235 (1970); *Douglas v. California*, 372 U.S. 353 (1963).

43. 411 U.S. at 123-24.

44. *See* cases cited in note 42 *supra*.

45. 411 U.S. at 19, 23-24. The Texas finance law could be regarded as discriminating against (1) poor persons with an income under some specified level, (2) those people who are relatively poorer than others, or (3) all those who, irrespective of their personal income, live in poor school districts. *Id.* at 19-20.

See text at notes 53-77 *infra*, where it is asserted that the relatively poor districts are not necessarily inhabited by the poor.

plaintiffs from meaningful exercise of such rights.⁴⁶ Justice Powell finally concluded that the Texas law was rationally, although imperfectly, related to the legitimate goal of local control of education.⁴⁷

Although Justice Powell did not state in his opinion all of the more practical reasons for the rejection of the no-wealth principle (and, in fact, asserted that such considerations should play no role in constitutional adjudication),⁴⁸ it can be fairly said that there are at least seven weaknesses in the no-wealth principle which, to various degrees, moved the Court. They are:

1. The children who would benefit from the application of the principle are not well identified, and may not be those who most need help to overcome difficulties of caste or class.
2. It is not clear that the children benefited would be helped in durably significant ways.
3. It seems likely that the primary beneficiaries of the principle would be school teachers and administrators.
4. It is probable that the secondary beneficiaries would be large taxpayers and land speculators, while the secondary losers would include some children of the urban poor.
5. The principle would almost surely operate to strain the public fisc by eliminating present revenue sources, while increasing the need for school dollars which would be diverted from other important and desirable services.
6. The application of the principle would jeopardize the vestiges of popular local control of educational policy.
7. Court-ordered enforcement of the principle might prove impossible.

These practical considerations, of necessity, are not all of equal weight. Some are of greater political than doctrinal importance. And most of them have come into sharper focus since *Serrano* was decided. Indeed, some of the adverse consequences of the no-wealth principle became apparent in the efforts of the California legislature to respond to *Serrano*,⁴⁹ and in the efforts of the New York Fleischmann Commission⁵⁰ to comply with the principle in anticipation of such a decision by the Supreme Court. As the consequences of the no-wealth analysis have become more apparent, there has been a small, but

46. *Id.* at 35-37.

47. *Id.* at 54-55.

48. *Id.* at 58.

49. REPORT TO SENATE SELECT COMMITTEE ON SCHOOL DISTRICT FINANCE (Benson, Dir., 1972) [hereinafter cited as CALIFORNIA SENATE COMMITTEE REPORT]. Cf. Post and Brandsma, *The Legislature's Response to Serrano v. Priest*, 4 PAC. L. REV. 28 (1973).

50. REPORT OF THE NEW YORK STATE COMMISSION ON THE QUALITY, COST, AND FINANCING OF ELEMENTARY AND SECONDARY EDUCATION (1972) [hereinafter cited as FLEISCHMANN REPORT]. For critical comment, see Citizens Union Committee on Education Finance, *Financing Public Education in New York State: An Analysis of the Fleischmann Commission Report*, 48 N.Y.U.L. REV. (1973).

steadily attrition in its support.⁵¹ The result of this shift is that it now seems unlikely that even a sudden change in the personnel of the Court would serve to resurrect the no-wealth principle as a principle of federal constitutional law.⁵²

III. THE WEAKNESSES OF THE NO-WEALTH PRINCIPLE

A. *The Identity of the Children and the Invidiousness of the Class*

The primary, but less noticed, finding of the Coleman Report of 1966 was that black children are not, for the most part, attending underfinanced schools.⁵³ Although this conclusion was never seriously disputed, it is nonetheless commonly assumed that poor districts are inhabited by poor, if not black, children, and that rich districts are inhabited by wealthy children. For instance, in *Serrano*, the plaintiffs alleged, but did not prove, that there is such a correlation in California.⁵⁴

There is some proof that such a correlation exists for a number of selected districts in the San Antonio urban area, including, most prominently, rich Alamo Heights and poor Edgewood.⁵⁵ The plaintiffs in *Rodriguez*, however, sought primarily to establish a general relationship between district ratable wealth and social class throughout Texas because they wished to assert rights on behalf of all poor districts, not just Edgewood. The only supporting evidence was an affidavit of Professor Berke that described his study of a large

51. Simon, *The School Finance Decisions: Collective Bargaining and Future Finance Systems*, 82 YALE L.J. 409 (1973); Bateman & Brown, *Some Reflections on Serrano v. Priest*, 49 J. URBAN L. 701 (1972); Berke & Callahan, *Serrano v. Priest: Milestone or Millstone for School Finance*, 21 J. PUB. ED. L. 23 (1972); Finn & Lenkowsky, *Serrano v. the People*, 54 COMMENTARY 68 (1972); Goldstein, *Interdistrict Inequalities in School Financing: A Critical Analysis of Serrano v. Priest and Its Progeny*, 120 U. PA. L. REV. 504 (1972); Note, *A Statistical Analysis of the School Finance Decisions: On Winning Battles and Losing Wars*, 81 YALE L.J. 1303 (1972) [hereinafter cited as Note, *A Statistical Analysis*]; Vieira, *Unequal Educational Expenditures: Some Minority Doubts on Serrano v. Priest*, 37 MO. L. REV. 617 (1972); Schoettle, *The Equal Protection Clause in Public Education*, 71 COLUM. L. REV. 1355 (1971). Cf. Moynihan, *Solving the Equal Educational Opportunity Dilemma: Equal Dollars is Not Equal Opportunity*, 1972 U. ILL. L. FORUM 259 (1972); Glickstein & Wont, *Inequality in School Financing: The Role of the Law*, 25 STAN. L. REV. 335 (1973).

52. Since *Rodriguez* was decided, the New Jersey Supreme Court held in *Robinson v. Cahill*, 62 N.J. 473, 303 A.2d 273 (1973), that the state statutes providing for the financing of the New Jersey public schools violates the state constitution, which provides:

The Legislature shall provide for the maintenance and support of a thorough and efficient system of free public schools for the instruction of all the children in this State. . . .

Art. IV, § 7, ¶ 6. The court held that the state, which provided only 28% of the total statewide current costs, had assigned its obligation under the state constitution to local municipalities without devising a plan which fulfilled its continuing obligations. 62 N.J. at —, 303 A.2d at 297. Relying on *Rodriguez*, the court rejected claims that the school finance system violates the equal protection clauses of the state and federal constitutions.

53. U.S. OFFICE OF EDUCATION, EQUALITY OF EDUCATIONAL OPPORTUNITY 9 (1966); Moynihan & Mosteller, *supra* note 19, at 8-12. Accord, R. HAVIGHURST, A PROFILE OF THE LARGE CITY HIGH SCHOOL 10 (1970).

54. 5 Cal. 3d at 600-01, 487 P.2d at 1252, 96 Cal. Rptr. at 612 (1971). There is little question that such a correlation does exist for the two districts in *Serrano*, Baldwin Park and rich Beverly Hills.

55. 411 U.S. at 11-13.

number of Texas districts.⁵⁶ Berke's study revealed that the group of richest districts served populations with higher median incomes than the other four groups in his study, and that the group of poorest districts served populations with the lowest median incomes. The differences, however, were not great, and the correlation was reversed for the middle three groups, which represented almost ninety per cent of the districts studied.⁵⁷ Thus, the second richest group of districts having the second highest expenditures per pupil, served populations with the second lowest median incomes.⁵⁸

Moreover, detailed studies of Connecticut⁵⁹ and Kansas⁶⁰ districts support this inverse relation between district wealth and income levels. The *Yale Law Journal* has concluded that "the popular belief that the poor live in poor districts is clearly mistaken."⁶¹ Certainly, there is no proven national relation between district wealth and poverty. The most that the evidence indicates is that residents of the poorest districts tend, in some states, to have somewhat lower incomes.

The no-wealth principle will not result in the allocation of more funds to the districts in which school failure is most severe, because these districts are not necessarily the poorest. For instance, the Select Senate Committee of California studied the school finance problem in 1972 and identified five urban districts as the scene of impacted failure.⁶² The funds available for general use by these districts would not have been significantly increased by either of the new systems of equalized finance proposed by the Committee.⁶³ One district, San Francisco, would undergo a substantial deprivation. The funds available for unrestricted use in San Francisco would have to be reduced from \$1700 to about \$1100 per pupil in order to bring them into line with what the state can afford to provide elsewhere.⁶⁴ Thus, it appears that the no-wealth principle cannot be applied in California without, in effect, taking some money now spent on urban San Francisco schools for use in other areas where it is less needed. This bears true for other urban areas. Estimates show that New York City, for instance, the scene of a notorious school problem, will not benefit at all from equalization.⁶⁵ And similarly, in Michigan,

56. *Id.* at 15-16, n.38. The memorandum of Professor Berke was credited by the trial court, 337 F. Supp. 282 n.3.

57. For further comment, see Goldstein, *supra* note 51 at 523-25. But see 411 U.S. at 75, n.11 (Marshall, J., dissenting).

58. 411 U.S. at 15, n.38.

59. Note, *A Statistical Analysis*, note 51 *supra*.

60. Ridenour & Ridenour, *Serrano v. Priest: Wealth and Kansas School Finance*, 20 KAN. L. REV. 213 (1972).

61. Note, *A Statistical Analysis*, *supra* note 51, at 1327.

62. CALIFORNIA SENATE COMMITTEE REPORT, *supra* note 49, at 37.

63. *Id.* at 78-79.

64. *Id.* The Committee's report, however, did urge that funds available for restricted use should be substantially increased. *Id.* at 37-42, 70-72. Additionally, the report recommended a phasing-in of districts presently accustomed to higher spending. *Id.* at 8. Together, these proposals would permit the San Francisco schools to maintain a spending level of about \$1600 per child. *Id.* at 78-79.

65. PRESENT DISPARITIES, *supra* note 16, at A 141-70.

any statewide equalization is almost certain to reduce or limit school spending in the southeastern quadrant of the state in order to make substantial relative increases in the northwestern quadrant⁶⁶ despite the fact that children in the rural northwest are achieving much greater success in mastering cognitive skills.⁶⁷

Advocates of the no-wealth principle also disregard the fact that at least part of the differences in spending between local districts is superficial. For instance, it is somewhat unrealistic to compare spending levels in different kinds of communities. Differences in living styles and expectations make such standard economic indices as assessed property valuations and median incomes much softer data than they appear. Judging by the economic indices, we should expect to find the people of New York City consuming goods and services at a much more satisfying rate than the people of North Carolina, but this is contrary to easily observed fact. An urban dollar and a rural dollar are not the same, either in economic value⁶⁸ or social significance. Some of the children represented in *Rodriguez* have nothing more serious to complain of than a superficial inequity which results from a failure to recognize that fact. To be sure, it would not violate the no-wealth principle for a legislature to make appropriate adjustments to reflect this. Nevertheless, it is not clear that the means exist to do so rationally. Furthermore, political pressures would be heavy against any apparent district distinctions made in the name of equality.

Superficial inequities also result from variations in tax assessment practices. Although all states make some effort to assure that assessment practices are reasonably even, their efforts are not uniformly successful.⁶⁹ It must be that some of the children who are members of the classes described in *Serrano* and *Rodriguez* are disadvantaged because the properties in their communities are relatively undervalued for tax purposes. Consequently the true taxable wealth of some poorer districts may be greater than that of some seemingly richer ones. It would not violate the no-wealth principle, of course, to improve the statewide equalization controls,⁷⁰ but this, too, may be easier said than done.

Finally, some of the children who reside in poor districts live there by the deliberate choice of their parents. Economic theory suggests that the differences in taxing levels within metropolitan areas are a source of efficiency

66. *Id.* at 119-51.

67. See MICH. DEP'T OF EDUCATION, LEVELS OF EDUCATIONAL PERFORMANCE IN MICHIGAN (1972).

68. PRESENT DISPARITIES, *supra* note 16, at 101-10; B. LEVIN, T. MULLER, C. SANDOVAL, THE HIGH COST OF EDUCATION IN CITIES (1973).

69. See generally U.S. ADVISORY COMMISSION ON INTERGOVERNMENTAL RELATIONS, THE ROLE OF THE STATES IN STRENGTHENING THE PROPERTY TAX 2V (1963); R. NETZER, ECONOMICS OF THE PROPERTY TAX 173-83 (1966).

70. Equalization may be required nonetheless. Cf. *Weissinger v. Boswell*, 330 F. Supp. 615 (M.D. Ala. 1971).

in the distribution of public services, because each taxpayer can choose the level of tax and service that best suits his willingness and ability to pay.⁷¹ Like most economic theories, this one assumes a level of rationality that is not always maintained. Nevertheless, many such rational decisions are made. Some people do trade off the disadvantage of living in a poor district against the benefits of lower capital cost and lower absolute tax levels. In most metropolitan areas, almost anyone desiring the benefits of living in a rich district can afford to do so if he is willing to live near industrial users of land.⁷² Perhaps partly due to this, there has been little agitation among the citizens and parents of poor districts for equalization. In any event, it is difficult to see families who knowingly choose to live in poor districts as the victims of invidious discrimination.

The strongest argument that the plaintiffs were able to mount was that poor districts do in fact serve some children who are poor, and even indigent.⁷³ Surely some poor parents who exercise little control over the lives of themselves or their children do reside in poor districts because they have or know of no other options. As a result, their children receive less school service than more fortunate children in other districts. The plight of these children inspired the dissents of Justices Marshall and Douglas. But to respond to the needs of these children by enforcing the no-wealth principle is, to say the least, inefficient, given the number and variety of other children who are included within the group for whom the benefit is sought. Moreover, it is not realistic to suppose that the state can correct all situations of this kind. The law cannot avoid creating burdens that are more heavy, or rights which are less available, to the poor than the rich.⁷⁴ Poverty, by definition, disables the individual in obtaining those services that carry a price. Property, contract, and criminal law all tend to benefit the rich and burden the poor even more directly than the law of school finance. A court, or even a legislature, which undertook to alter all the ubiquitous consequences of wealth differences would set its plow to the sea.⁷⁵

Thus, despite their efforts to establish the plight of all the children of poorer districts, the plaintiffs in the school finance cases bear little resemblance to the plaintiffs in *Brown*. The latter established that all of their class

71. Tiebout, *A Pure Theory of Local Expenditures*, 64 J. POL. ECON. 416 (1956). See also TIEBOUT, AN ECONOMIC THEORY OF FISCAL DECENTRALIZATION, PUBLIC FINANCES, NEEDS, SOURCES AND UTILIZATION 79 (Nat. Bureau Econ. Research, 1961). For critique, see Buchanan & Goetz, *Efficiency Limits of Fiscal Mobility: An Assessment of the Tiebout Model*, 1 J. PUB. ECON. 25 (1972). And see generally Note, *Equalization of Municipal Services: the Economics of Serrano and Shaw*, 82 YALE L.J. 89 (1972).

72. Thus, the richest districts in Michigan are the industrial suburbs of Ecorse and River Rouge. MICH. ASS'N OF SCHOOL BOARDS, SUMMARY OF ESTIMATED ENROLLMENT AND SELECTED FINANCIAL DATA (1972). See generally PRESENT DISPARITIES, note 16 *supra*.

73. For discussion, see PRIVATE WEALTH, *supra* note 14, at 359-87.

74. *Accord*, 411 U.S. at 60 (Stewart, J., concurring).

75. Cf. Hazard, *Social Justice Through Civil Justice*, 36 U. CHI. L. REV. 699 (1969).

was unjustly harmed by the badge of inferiority placed upon them by segregated schools.⁷⁶ As Justice Powell noted about the *Rodriguez* plaintiffs:

The system of alleged discrimination and the class it defines have none of the traditional indicia of suspectness: the class is not saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process.⁷⁷

B. *The Limited Benefit of School Spending*

Plaintiffs argued that they had been denied a "fundamental interest" because, as they reasoned, education is essential to the exercise of the basic rights specifically assured by the Constitution such as free speech and the right to vote.⁷⁸ Although Justices Marshall, Douglas, and Brennan were prepared to accept this characterization of the plaintiffs' interest as fundamental,⁷⁹ the majority was not.⁸⁰ It was less anti-egalitarian than pro-democratic for the Court to insist on proof that the plaintiffs' newly claimed fundamental interest have more than mere superficial importance.

Noting that the plaintiffs were asking for "extraordinary protection from the majoritarian political process," Justice Powell pointed out that the claim to financial equality was also a claim against political equality represented by the democratic legislative decision favoring localized school finance. And, indeed, for this reason the Court was quite right to insist on a very strong showing of fundamentality. One recalls the words of Chief Justice Warren as he expressed concern that the *Brown* children would be affected in heart and mind "in a way unlikely ever to be undone."⁸¹ The Court was obliged to ask whether the *Rodriguez* plaintiffs are plausibly so harmed.

In examining the nature of the alleged harm, Justice Powell noted that the plaintiff children were in fact receiving schooling and were not being denied an education. The state asserted that it was "adequate" schooling⁸² and the plaintiffs made no effort to show that it was inadequate in any identifiable way. What the plaintiffs sought was an education sufficiently more expensive to assure fiscal equality without regard to whether the additional expenditures would have durable consequences. In thus ignoring the educational results, the plaintiffs compared themselves with the plaintiffs in *Brown*,

76. 347 U.S. 483, 494.

77. 411 U.S. at 28. Cf. Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129 (1893).

78. While the right to vote is of course, not guaranteed by the Constitution (otherwise there would be no need for the thirteenth and nineteenth amendments), there is implicit in the Constitution the right to participate in state elections on an equal basis with other qualified voters. See *San Antonio Independent School District v. Rodriguez*, 411 U.S. at 35, n.78.

79. *Id.* at 62-63, 98-117.

80. *Id.* at 29-39.

81. 347 U.S. at 494.

82. 411 U.S. at 24.

who had protested that the *outcome* of segregated schooling was deficient, as common sense observation confirmed. In directing attention to the state's financial *input* rather than the educational outcome, the plaintiffs ignored the question: what would they get for the state's money if it were more abundant?

This question calls attention to the controversial finding of the Coleman Report that there is little relation between marginal expenditures and quality of education, at least if quality is measured in terms of the transmission of cognitive skills.⁸³ Advocates of the no-wealth principle have dismissed the Coleman Report findings with the observation that the poor should have the same right as the rich to be disappointed in the results of school spending.⁸⁴ This is not entirely reassuring.

It is implicit in the no-wealth analysis that school spending is an investment in youth which results in increased productivity. To invest more in some children than others, it is implied, produces greater lifetime earnings for the advantaged group.⁸⁵ The Coleman Report's findings with respect to the lack of relation between cost and measurable educational outcomes do not challenge the possibility that some educational expenditures do have such durable consequences on lifetime status and earnings. All that the Report calls into question is the durable economic value of marginal expenditures which educational policymakers have made in recent years. The Report has substantial methodological limitations and has been vigorously criticized, particularly by economists.⁸⁶

83. See generally ON EQUALITY OF EDUCATIONAL OPPORTUNITY (F. Mosteller & P. Moynihan eds. 1972); UNITED STATES OFFICE OF EDUCATION, DO TEACHERS MAKE A DIFFERENCE? (1970). Cf. CENTER FOR EDUCATIONAL POLICY RESEARCH, EDUCATION AND INEQUALITY: A PRELIMINARY REPORT 47-64 (1971); CENTRAL ADVISORY COUNCIL FOR EDUCATION (England), CHILDREN AND THEIR PRIMARY SCHOOLS 2V. (Plowden ed. 1967). Of course, if there is no money for basic costs, such as teachers, quality suffers.

84. PRIVATE WEALTH, *supra* note 14, at 30. The New Jersey Supreme Court in *Robinson v. Cahill*, 62 N.J. 473, 303 A.2d 273 (1973), discussed at note 51 *supra*, asserted without citing any authority:

It is nonetheless clear that there is a significant connection between the sums expended and the quality of the educational opportunity.

.....

Hence we accept the proposition that the quality of educational opportunity does depend in substantial measure upon the number of dollars invested, notwithstanding that the impact upon students may be unequal because of other factors, natural or environmental.

62 N.J. at —, 303 A.2d at 277.

85. The concept is essentially economic. An excellent symposium is EDUCATIONAL INVESTMENT IN AN URBAN SOCIETY: COSTS, BENEFITS AND PUBLIC POLICY (M. Levin & A. Shank eds. 1970). The basic work is G. BECKER, HUMAN CAPITAL: A THEORETICAL AND EMPIRICAL ANALYSIS WITH SPECIAL REFERENCE TO EDUCATION (1964). The underlying assumptions are challenged in C. JENCKS, INEQUALITY: A REASSESSMENT OF THE EFFECT OF FAMILY AND SCHOOLING IN AMERICA (1972). For a critical review see H. Levin, *Schooling and Inequality: The Social Science Objectivity Gap*, SATURDAY REVIEW OF EDUCATION, Dec. 1972, at 49.

86. E.g., Bowles & Levin, *The Determinants of Scholastic Achievement—An Appraisal of Some Recent Evidence*, 3 J. HUMAN RESOURCES 1 (1968); J. GUTHRIE, G. KLEINDORFER, H. LEVIN, R. STOUT, SCHOOLS AND INEQUALITY (1971); Hanushek & Kain, *On the Value of Equality of Educational Opportunity as a Guide to Public Policy*, in ON EQUALITY OF EDUCATIONAL OPPORTUNITY 116 (F. Mosteller & P. Moynihan eds. 1972).

Whatever its methodological shortcomings, the Coleman Report makes good sense when the conclusions are properly limited. It unveiled a fact which is readily observable to any critical observer who has not been deceived by the excesses of school millage election rhetoric. We have tended to conceal from ourselves the fact that school boards and school administrators have little or no idea how to increase cognitive skills or any other specific traits.⁸⁷ In such a state of ignorance, it is not surprising that marginal expenditures seldom accomplish these results. Children who are assembled for the purpose of learning to read and do arithmetic, and who are encouraged in those pursuits, will tend to master them, albeit with predictably uneven success. But there are no techniques, hardware, or personnel that are demonstrably likely to improve cognitive learning in significant measures, although, to be sure, there are perhaps some book publishers and toymakers, and a few doctrinaire professors of education, who would assure us otherwise.⁸⁸ Compensatory programs do strive, by concentrating resources on those most in need, to change the odds.⁸⁹ But even these very deliberate efforts produce marginal, and often doubtful results.⁹⁰ To the extent that critics of the Coleman Report assume that we do know how to spend for results, they ignore the visible.

Oh what, then, do rich schools spend their money that is denied to the children of poor districts? The California Senate Committee found that the great bulk is spent on the school payrolls.⁹¹ About two thirds of that amount is spent on lowering class size, and another fifth is spent on higher salary

87. For over a decade almost every basic issue in beginning reading instruction—how to begin, when to begin, what instructional materials to use, how to organize classes for instruction—has been debated with intense heat and considerable rancor. Laymen and self-styled reading specialists have confidently provided answers in a stream of popular books and magazines and newspaper articles. Most of these answers have been rejected. . . .

J. CHALL, *LEARNING TO READ: THE GREAT DEBATE* 1 (1967). For a demonstration of the tenacity of the issues since 1820, see C. FRIES, *LINGUISTICS AND READING* (1963).

88. It is certainly possible that such basic thinkers as Jean Piaget or Jerome Bruner can bring sudden light. A readable presentation of Piaget's work is R. BEARD, *AN OUTLINE OF PIAGET'S DEVELOPMENTAL PSYCHOLOGY* (1969). Perhaps his most basic work is *THE PSYCHOLOGY OF INTELLIGENCE* (1950). For Bruner's work, see, e.g., *TOWARD A THEORY OF INSTRUCTION* (1966).

89. For descriptions see *Hearings by the Select Committee on Equal Educational Opportunity, Compensatory Education and Other Alternatives in Urban Schools* U.S. Senate, 92d Cong., pt. 12 (1971). Theoretical and practical difficulties are identified in C. BEREITER & S. ENGELMANN, *TEACHING DISADVANTAGED CHILDREN IN THE PRESCHOOL* (1966); J. HUNT, *THE CHALLENGE OF INCOMPETENCE AND POVERTY* (1969). A famous deflation of the hope of compensatory education is Jensen, *How Much Can We Boost IQ and Scholastic Achievement?*, 39 HARV. ED. REV. 1 (1969). Jensen was criticized by Hunt and Bereiter, among others, in a series of reviews, 39 HARV. ED. REV. 273-356. Jensen's thesis that scholastic achievement is a heritable trait is enlarged by H. EYSENCK, *THE IQ ARGUMENT: RACE INTELLIGENCE AND EDUCATION* (1971) and R. HERRNSTEIN, *IQ*, ATLANTIC MONTHLY, Sept. 1971, at 43. And see A. JENSEN, *GENETICS AND EDUCATION* (1972). The literature of heritability is tellingly debunked in *RACE AND INTELLIGENCE; THE FALLACIES BEHIND THE RACE-IQ CONTROVERSY* (K. Richardson & D. Spears, eds., 1972).

90. For a balanced review of results, see J. FROST & G. ROWLAND, *COMPENSATORY PROGRAMMING: THE ACID TEST OF AMERICAN EDUCATION* (1971). See also T. RIBICH, *EDUCATION AND POVERTY* 62 (1967).

91. CALIFORNIA SENATE COMMITTEE REPORT, *supra* note 49, at 36.

scales, which tend to attract teachers with superior academic credentials.⁹² Thus, the primary advantage of attending a higher spending school seems to be that the teachers are better paid and less harried. There are also better auxiliary services, such as more school nurses and social workers. And there is a somewhat broader program in such areas as art, music, home economics and athletics.

Few candid spenders would insist that such expenditures are investments in the economic sense. To be sure, the hope is that such expenditures yield durable results for a few children. For some, a few extra minutes of contact with a favorite teacher, or an exposure to a specialized music teacher or coach, may be critical. But it is romantic to justify much public spending on such hopes. It is realistic to justify them, but only as consumption. They are pleasurable expenditures that have only marginal impact upon the adult lives of the students. Like expenditures on public museums, concerts, or stadiums, they enrich the lives of citizens more than comparable expenditures which the citizens might otherwise make in the private sector on liquor, cosmetics, or internal combustion.

Viewed in this light, it is difficult to see that the interest of the children who receive less public consumption is so fundamental as to require the Court to abort the democratic legislative process. To speak of the bulkiest item, class size, for example, as affecting the minds and hearts of students "in a manner unlikely ever to be undone," would be extravagant.⁹³ Marginal school spending is no more fundamental to the consumer than local government spending on such items as recreation; there is no more reason to equalize access to school golf programs than there is to equalize access to municipal golf programs. And, to focus on the argument embraced by Justice Marshall,⁹⁴ it is hardly likely that any adults will be less able to exercise their rights to vote and speak because they attended a school that has larger classes, or has no orchestra, or is staffed by teachers with fewer graduate degrees.⁹⁵ It would have been reasonable to dispose of *Rodriguez* on the ground that there was no showing that the *Rodriguez* children were denied an interest which was in fact substantial, much less fundamental.

In addition to making this telling point, Justice Powell went on to assert

92. It is unlikely that studies of other states would yield different data. See generally PRESENT DISPARITIES, *supra* note 16, at 81-82.

93. The literature on class size is bulky and unconvincing. See PRESIDENT'S COMMISSION ON SCHOOL FINANCE, SCHOOLS, PEOPLE & MONEY x-xi (1972). Cf. Bateman & Brown, *supra* note 51, at 701-03.

94. 411 U.S. at 112-15.

95. But cf. R. HESS & J. TORMEY, THE DEVELOPMENT OF POLITICAL ATTITUDES IN CHILDREN (1967), which measures the impact of schools on political attitudes and values. For a critique, see Koeppen, *Children and Compliance: A Comparative Analysis of Socialization Studies*, 4 LAW & SOC. REV. 545 (1970). Compare D. OLIVER & J. SHAVER, TEACHING PUBLIC ISSUES IN THE HIGH SCHOOL (1966). Politicization by schooling is put in broader perspective in R. DREEBEN, ON WHAT IS LEARNED IN SCHOOL 91-143 (1968) and B. MASSIALAS, EDUCATION AND THE POLITICAL SYSTEM (1969).

flatly that education is not a fundamental interest.⁹⁶ Perhaps moved by the spirit of "strict construction," he emphasized that education is not a right established by the federal Constitution. In making this assertion, Justice Powell went beyond the needs of the case. It was this dictum which evoked a special dissent by Justice Brennan.⁹⁷ As Justice Marshall demonstrated in his dissent,⁹⁸ the federal Constitution is none too explicit about some other interests which have been treated as fundamental by the Court. One might question whether a strict constructionist ought not be satisfied to find the right to an education in the state constitutions, inasmuch as the equal protection clause is addressed only to the manner in which the state classifies rights which it creates.⁹⁹ As Justice Marshall noted, almost every state constitution establishes a right to an education.¹⁰⁰ Perhaps Justice Powell leaves room to distinguish a case in which education is effectively denied by a statute.¹⁰¹ On the other hand, it is possible that a denial of education, or other egregious cases, might be handled by reference to a newer and more flexible test than the strict scrutiny test developed by the Warren Court. The Burger Court has seemed to be developing such a new test,¹⁰² and it was the apparent basis for the dissent of Justices White and Brennan.¹⁰³

C. *The Direct Beneficiaries of School Spending*

The lack of a fundamental interest on the part of the *Rodriguez* children should be contrasted with the presence of a very substantial interest on the part of certain adults.¹⁰⁴ This fact has no direct legal significance, unless it can help explain the failure of the Texas legislature to correct the inequity in school spending. Nevertheless, it is worthy of recognition, because it illuminates not only the limits of the children's interests which were asserted, but also the wisdom of the Court's reluctance to abort the democratic legislative process in order to reorder spending priorities.

The phenomenon is familiar to those who have sought to alleviate poverty by providing public services to the poor. There is a theory known to some *cognoscenti* in Washington as the elephant feeding principle, which dictates that he who feeds sparrows in the elephant pen must supply enough bread to

96. 411 U.S. at 33-35.

97. *Id.* at 62-63.

98. *Id.* at 98-102.

99. *But cf.* *Baker v. Carr*, 369 U.S. 186 (1962); *Calder v. Bull*, 3 Dall. 386 (1798); *PRIVATE WEALTH*, *supra* note 14, at 395, n.1. *See generally* Comment, *Rational Classification Problems in Financing State and Local Government*, 76 YALE L.J. 1206 (1967).

100. 411 U.S. at 112, n.69. Compare the near universality of compulsion to attend. STEINHILBER & SOKOLOWSKI, *STATE LAW ON COMPULSORY ATTENDANCE* (1966).

101. 411 U.S. at 37.

102. *See generally* Gunther, *The Supreme Court, 1971 Term: Foreword, In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection* 86 HARV. L. REV. 1 (1972).

103. 411 U.S. at 62-70.

104. *See* Dimond, *Serrano: A Victory of Sorts for Ethics, Not Necessarily for Education*, 2 YALE REV. OF LAW & SOCIAL ACTION 133, 137 (1971).

sate the elephants, so that there will be leftovers for the hungry sparrows. Thus, the direct beneficiaries of health programs are those who deliver medical services. The direct beneficiaries of legal services programs are lawyers. The direct beneficiaries of welfare programs are social workers. And the direct beneficiaries of school spending are teachers.¹⁰⁵ And, as mentioned above, teachers are almost the sole beneficiaries of any marginal expenditures. Teachers by and large deserve to be well paid. But a program which would equalize and improve the wages and working conditions of teachers has little to do with the aims and values of the fourteenth amendment.

It is relevant to note that almost every teacher in America earns an income above the national mean. Inasmuch as many teachers are from two-income families, it can be said that many are among the economic elite. Using public money which is available for general use to increase teachers' income does not increase the general equity of distribution in the society. Indeed, to the extent that the public fisc is derived from taxes imposed on taxpayers less fortunate than teachers, it tends toward the opposite effect.

Furthermore, compliance with the no-wealth principle would tend to raise rural and small town teaching salaries in relation to urban teaching salaries. This would tend to encourage an outmigration of teachers.¹⁰⁶ If teaching quality is substantially related to the educational outcome,¹⁰⁷ we would be moving the most expensive teachers away from the place where quality is probably most needed, a result which would hardly be consistent with the substance of the right to equal educational opportunity.

D. *Secondary Consequences of Property Tax Adjustments*

Teachers are not the only adults to be affected. Implementation of the no-wealth principle would adjust the burdens of taxpayers. A court establishing the no-wealth principle would have no direct control over this impact, but should take notice of the likely outcome of the force set in motion.

It is no secret that some of the applause for the *Serrano* decision was based on the expected demise of the property tax. The conventional wisdom is that the property tax is regressive,¹⁰⁸ and politicians of all views have expressed their opposition.¹⁰⁹ But the property tax may not be all that bad. Its most regressive features can be remedied, as a report by a California Senate

105. See Moynihan, *Equalizing Education: In Whose Benefit?*, THE PUBLIC INTEREST 69, 74 (no. 29, 1972).

106. See PRESENT DISPARITIES, *supra* note 16, at 98 *et seq.*

107. See UNITED STATES OFFICE OF EDUCATION, DO TEACHERS MAKE A DIFFERENCE? (1970).

108. See, e.g., J. JENSEN, PROPERTY TAXATION IN THE UNITED STATES (1931).

109. President Nixon has called the property tax "one of the most oppressive and discriminatory of all taxes," while Senator George McGovern has identified himself with what he calls a property tax revolt. Quoted by G. Peterson & A. Solomon, *Property Taxes and Populist Reform*, THE PUBLIC INTEREST 60 (No. 30, 1973).

Committee has demonstrated.¹¹⁰ There is, moreover, some reason to believe that the burden is borne largely by industrial and commercial land users and by landlords.¹¹¹ If the tax is localized, it may be difficult to pass the high tax on to tenants and consumers because the entrepreneur must compete with others less burdened by it; thus, as capital is attracted to the tax haven, values in the high tax area diminish, and the tenants follow the capital, thus lowering rents.¹¹²

Moreover, those who object to the property tax have not manifested any eagerness to pay other, more progressive, taxes. The voters of several states have emphatically rejected such tax reform.¹¹³ The California report was unable to recommend other sources of revenue to replace it, thereby maintaining a primary dependence on a statewide property tax.¹¹⁴ The New York Fleischmann Commission could not unite behind any recommendation of new forms of taxation.¹¹⁵ It is, therefore, very likely that judicial imposition of the no-wealth principle, necessitating greater statewide tax revenues, would lead

110. Thus, its most regressive feature is that it is deductible against taxable federal income; the Internal Revenue Code can and should be amended to correct this subsidy to suburbanization. The other regressive feature is that the burden falls on some citizens, particularly senior citizens, who have little or no income. This is also a correctable situation. See CALIFORNIA SENATE COMMITTEE ON GOVERNMENT RELATIONS, A STAFF REPORT ON THE PROPERTY TAX (1972).

111. R. NETZER, *supra* note 69, at 32-40. See G. Peterson & A. Solomon, *supra* note 109, at 73.

112. For a contrary analysis of the transferability of the marginal tax in a high tax area, see G. Peterson & A. Solomon, *supra* note 109, at 73.

113. The elections of November, 1972 produced the following results:

California: A package of proposals for top-to-bottom changes in the state's tax structure was voted down nearly 2 to 1. The state constitution would have been amended to clamp tight ceilings on property taxes and severely limit creation of bonded debt by governmental bodies.

The amendment called for big changes in the way public schools are financed. And it would have raised the corporate income tax to 11% from 7.6%, the combined state-local sales and use tax to 7% from 5% (it is 5½% in San Francisco), the cigaret tax to a minimum of 20 cents a pack from 10 cents and the liquor tax by 25%. The amendment also would have required that increases in the personal income tax be approved by two-thirds of the legislature.

Michigan: Residents defeated 58% to 42% a proposal to eliminate the local property tax as the main means of financing basic school programs and to transfer most responsibility for school money to the state. They also voted 69% to 31% against authorizing the legislature to replace the present flat-rate income tax with a graduated one. Rejection of the property-tax measure, plus a 3 to 2 defeat of a property-tax increase in the Detroit school district, means that the district faces a severe financial squeeze unless the legislature votes special money to help out.

Supporters of the first proposal felt that the Detroit district would have benefited if the state had been given the school-financing responsibility. They said per-pupil funds would then probably be more evenly distributed among the state's districts. Detroit generally is not able to spend as much per pupil as wealthier districts can.

Colorado: Two attempts to limit property taxes to 1½% of actual value were opposed by more than 70% of the voters. One of the proposals specifically would have barred the use of property taxes for schools. Its supporters favored replacing the property tax with higher income and sales taxes. Coloradans also voted to bar the spending of state or Denver City funds on the 1976 Winter Olympics.

Oregon: Proposed withdrawal of property-tax support of public schools was defeated by nearly a 2 to 1 vote, and was not approved in a single county. Wall Street Journal, Nov. 9, 1972, at 1, col. 1.

114. CALIFORNIA SENATE COMMITTEE REPORT, *supra* note 49, at 13-28.

115. See note 50 *supra*.

to an increase in the property tax levels in rich districts and, relative to that increase, a decrease in the burdens borne by some poor district taxpayers.

The consequences of such progressive adjustments are not necessarily as equitable as might be supposed. Economists report that tax levels are substantially capitalized in the value of land.¹¹⁶ As relative tax levels rise or fall, relative land values change. Hence, a relative decrease in the tax rate of poor districts will tend to enrich large landowners there, while a corresponding relative increase in the rates of rich districts will result in a loss of capital to owners there.¹¹⁷ This phenomenon gives substance to the adage that an old tax is a fair tax. Thus, even if we would not consider the property tax desirable as a new tax, it does not follow that it can be abandoned, or even significantly shifted, fairly. Alternatively, if we were to shift to a different form of taxation, some luckless taxpayers, in some place or class, would provide the funds which would otherwise have been paid by property owners who bought their land with the expectation of having to provide them.¹¹⁸

Furthermore, if we assume that adjustments are to be made in tax levels in rich districts, conceivably the secondary disadvantage will fall on the poor urban children who are among the supposed beneficiaries of the no-wealth principle. This can be seen in the recommendations of the California Senate Committee.¹¹⁹ Both of the Committee's plans contemplated that current school spending levels could be maintained by local taxes. The plans would require an increase of about 50% to 70% in local school taxes imposed on San Francisco property to maintain current levels.¹²⁰ The area is "rich" because of the industry located therein. While it is doubtful that the voters of San Francisco would, in fact, opt for increases of such magnitude, some increases might be expected. These would create a risk of losing marginal industry in the city. It is at least possible, and perhaps probable, that the existence of the industrial jobs in the city is more important to the educational growth of poor children than any possible equalization of school spending. Lost jobs mean broken families, decreased family pride, increased dependence on welfare,¹²¹ and possibly an irreversible educational disadvantage.

116. Oates, *The Effect of Property Taxes and Local Public Spending on Property Values: An Empirical Study of Tax Capitalization and the Tiebout Hypothesis*, 77 J. POL. ECON. 957 (1969).

117. "Any reduction in tax votes would confer windfalls . . ." Harriss, 155 THE BANKERS MAGAZINE No. 2 (1972).

118. And see Cordtz, *A Word for the Property Tax*, 85 FORTUNE 105 (May 1972).

119. For further analysis, see B. LEVIN, M. COHEN, T. MULLER, & W. SCANLON, ISSUES OF SCHOOL FINANCE IN CALIFORNIA 32-34 (1972). Cf. PRESENT DISPARITIES, *supra* note 16, at 124-36.

120. CALIFORNIA SENATE COMMITTEE REPORT, *supra* note 49, at 78-79.

121. On the tenacious educational consequences of family circumstance, see C. JENCKS ET AL., INEQUALITY: A REASSESSMENT OF THE EFFECT OF FAMILY AND SCHOOLING IN AMERICA (1972).

E. Diversion of Revenue From Other Services

Neither the California nor the New York reports contemplate the equalization of school spending by levelling. It seems to be generally agreed that new money will have to be supplied to raise the level of spending in poor districts. No mere tinkering with the property tax will supply enough. The California Senate Committee thought that it had developed a workable scheme which could be implemented for a little less than a billion dollars.¹²² The New York report is less specific in calculating its costs, but it is clear that substantial new funds would be needed. It has been estimated that equalization could be achieved in all states for about an additional nine billion dollars.¹²³

A judgment about the practical wisdom of the no-wealth principle cannot be made without knowing who is to pay this price. If the cost is to be borne by taxpayers who are less able to bear it than those who will benefit, the implementation will be counter-productive. Even if the source of the new money is a very progressive tax it may be questioned whether the improvement of school spending equity is the best use of available funds.¹²⁴ Experienced budget makers know that public budgets are not infinitely elastic, but rather that there are always worthy competing uses of limited funds to be considered.

Thus, a difficult choice must be made as to what programs most need funds. For instance, if California has a billion dollars to spend, or all the states have nine billion dollars to spend, for the purpose of promoting greater social equality and better opportunity, is school spending equity the best use of the money? Housing and transportation needs, for example, ought to be compared with the needs for higher teachers' salaries and smaller class sizes in poor districts.¹²⁵ The aims and values of the fourteenth amendment may be better served by spending nine billion dollars on compensatory programs which are aimed directly at the needs of the disadvantaged.¹²⁶ While it is not clear that such spending is effective,¹²⁷ at least such efforts have direct effects on those sought to be benefited. Such judgments are not simple, but must be confronted. The no-wealth principle would seriously impede the making of such choices. Moreover as we shall see, the no-wealth principle substantially

122. CALIFORNIA SENATE COMMITTEE REPORT, *supra* note 49, at 83.

123. COMMISSION ON SCHOOL FINANCE, PUBLIC SCHOOL FINANCE 15 (1972). This is a modest estimate. If the maximum level of spending in Texas is to be made the norm, the state would need to double its present education budget with an increase of \$2.4 billion on top of present spending. TEXAS RESEARCH LEAGUE, PUBLIC SCHOOL FINANCE PROBLEMS IN TEXAS 16-18 (Interim Report, 1972). On the difficulties of locating such substantial additional funds, *see* M. COHEN, B. LEVIN, & R. BEAVER, THE POLITICAL LIMITS OF SCHOOL FINANCE REFORM (1973).

124. *See* text at notes 83-95 *supra*.

125. *See* Schoettle, *supra* note 51, at 1388-93.

126. *Cf.* Elementary and Secondary Education Act Title I, 20 U.S.C. § 241c (1970).

127. *See* notes 89 and 90 *supra*.

magnifies the difficulty of choice by drying up a source of revenue not otherwise available, which is derived from the localized nature of school taxation.

F. *The Incompatibility of Statewide Financing and Local Control*

Although "virtually conceding" that its school finance system could not withstand the test of "strict scrutiny,"¹²⁸ Texas contended that its system does meet the traditional equal protection test of rationality because it is reasonably related to a legitimate state policy of preserving local control of schools.¹²⁹ In rejecting this contention Justices Marshall and Douglas, who have embraced the no-wealth principle, were joined in dissent by Justices White and Brennan.¹³⁰ Justice White's opinion, joined by Justice Brennan, found that the Texas system of local financing was not a reasonable means of pursuing the goal of local control.¹³¹

There is some tangible evidence to support the position of Justice White that local finance and local control bear no necessary relation. A study by the Urban Institute found no correlation between the measure of local autonomy and the proportion of school money provided by the states.¹³² Experience in Scandinavia confirms that local control can be exercised over funds provided by the control government,¹³³ if central officials are self-disciplined.

Nevertheless, it would seem that a reasonable legislator might believe that there is some relationship between local financing and local control.¹³⁴ Even if state officials can control the urge to spend the funds they raise, they have an incentive, and arguably a duty not to do so. The capacity to take responsibility for the mistaken judgments of others is not a universal trait of politicians. Therefore it is likely that future state legislators will not turn a deaf ear to constituents who complain that tax monies collected by their order are being misspent. State control will follow.

Moreover, as Professor Simon has noted,¹³⁵ full state financing of schools sets in motion a powerful force for statewide collective bargaining. If the state is the source of funds, the only way for teachers' unions to get more is to apply pressure at the state level. It would be difficult to limit the range of issues that statewide bargaining would concern. The likely result is that statewide contracts will resolve a variety of issues, such as class size, level of auxiliary services, leave practices, and discipline, which are now subject to some control by local boards.

128. 411 U.S. at 16.

129. *Id.* at 49-53.

130. *Id.* at 62-70.

131. In so holding, Justice White seemed to apply a new test, less rigorous than strict scrutiny, but more demanding than the traditional rationality standard.

132. PRESENT DISPARITIES, *supra* note 16, at 245-70.

133. R. NETZER, *supra* note 69, at 171.

134. Cf. J. CONANT, *THE CHILD, THE PARENT, AND THE STATE* 26 (1959).

135. *The School Finance Decisions: Collective Bargaining and Future Finance Systems*, 82 YALE L.J. 409 (1973).

The advocates of the no-wealth principle have been concerned with the problem of retaining local autonomy. A major effort was invested to develop a scheme for local control of spending levels consistent with the no-wealth principle.¹³⁶ Through this scheme, known as district power equalizing, a school district would receive a specified revenue by choosing a particular property tax rate. The rate may generate a greater or lesser amount than the chosen revenue. Subsidies would be provided to poorer districts by taking from wealthier districts funds yielded by the local tax which exceed the standardized yield guaranteed by the state for that particular tax rate. In this way, each district would receive an equivalent revenue for an equivalent tax rate. It is not clear that such a plan would be politically saleable in many states¹³⁷ or administratively viable given the variations in local tax assessment practices.¹³⁸ Nor is it even clear that it would be constitutional if the premises of the no-wealth principle were accepted.¹³⁹ Spending discrepancies between districts would remain, and might be more closely linked to family incomes than now, since richer districts would probably be more willing to accept the higher rates. For these reasons, some of those who have been most concerned about financial equity have rejected district power equalizing.¹⁴⁰ And the Supreme Court of California, despite an explicit invitation to do so, declined to endorse it.¹⁴¹

Given the natural inclinations of state officials, the likely effects of state-wide collective bargaining and the extensive efforts of the no-wealth principles to retain a measure of local financing, there are thus serious grounds for doubting Justice White's appraisal that there is no reasonable relation between local financing and local control.

A different challenge to the justifying policy of local control was mounted by Justice Marshall. He contended that so little local control is exercised in Texas that the argument in its favor is a sham.¹⁴² But while Justice Marshall could point to many strictures imposed by legislation on the power of local boards,¹⁴³ local districts nonetheless do appear to exercise vital powers concerning eminent domain, choosing school sites, hiring and firing teachers,

136. For full exposition, see *PRIVATE WEALTH*, *supra* note 14, at 200-83. The source of the district power equalization is traced to the percentage equalizing concept developed in C. BENSON, *THE ECONOMICS OF PUBLIC EDUCATION* 242-46 (1961); C. BENSON, *THE CHEERFUL PROSPECT: A STATEMENT ON THE FUTURE OF PUBLIC EDUCATION* 90-94 (1965).

137. For an acknowledgment of the political difficulties, see Statement of J. Coons, *Hearings by the Select Committee on Equal Educational Opportunity*, U.S. Senate, 92d Cong., 1st Sess. 6882 (1971). Cf. Berke & Callahan, *supra* note 51, at 62.

138. See text accompanying notes 69-70 *supra*.

139. Wise, *School Finance Equalization Lawsuits: A Model Legislative Response*, 2 *YALE REV. OF LAW & SOCIAL ACTION* 123, 124, 125 (1971); Silard & White, *Intrastate Inequalities in Public Education: the Case for Judicial Relief under the Equal Protection Clause*, 1970 *WIS. L. REV.* 7, 34; Michelman, *supra* note 34, at 50-67.

140. *E.g.*, Wise, note 139 *supra*. See Wise, *The California Doctrine*, *SATURDAY REVIEW*, Nov. 20, 1971, 78, at 82. Cf. FLEISCHMANN REPORT, *supra* note 50, at 88-90.

141. See Karst, *supra* note 26, at 740 n.87 (1972).

142. 411 U.S. at 126-30.

143. *E.g.*, certain courses are required, textbooks must be submitted for approval, and teachers must be certified. *Id.* at 127.

maintaining discipline, and raising and spending money.¹⁴⁴ It is probably true in Texas, as elsewhere, that some of these powers are more apparent than real. Most decisions of educational policy are effectively made by administrative staff, in accordance with standards which are widely shared in the profession.¹⁴⁵ In this sense, it is probably true that democratic localism in education lost its vitality in Texas, as elsewhere,¹⁴⁶ long ago. But it is not so moribund that Justice Marshall can properly proclaim it a sham.

There are, indeed, two politically significant features of localism, as practiced in the public schools, which were not discussed by the Court. One important consequence of local control in Texas is that it is a source of public funds which are not otherwise available to the state.¹⁴⁷ The most common and important function of local boards is to persuade fellow citizens to forego liquor or cosmetics in favor of spending on children.

Because only a local board is in a position to exploit the somewhat selfish instinct of parents,¹⁴⁸ much of the money so raised is not otherwise available for public use.¹⁴⁹ If the state is to forego parental protectiveness as a source of revenue, it will have to substitute another source. Whatever the choice, there will be some adverse consequences to be borne, or other public services to be denied.

A second feature of traditional local control which might deserve mention in the present context is that it tends to operate with anti-minority political effects,¹⁵⁰ and thus to disserve the egalitarian goals of the *Rodriguez* plaintiffs. It seems to be a fact that minority interests are more heavily weighed in deci-

144. *Id.* at 51-52, n.108.

145. J. KOERNER, *WHO CONTROLS AMERICAN EDUCATION?* (1968). *See generally* R. DAHL, *WHO GOVERNS?* (1961); S. BAILEY, *SCHOOLMEN AND POLITICS* (1962).

146. The story is well told in M. KATZ, *CLASS, BUREAUCRACY AND SCHOOLS* 56-104 (1971). *See also* PERKINSON, *supra* note 1, at 103-59 and J. SPRING, *EDUCATION AND THE RISE OF THE CORPORATE STATE* (1972).

147. Although it is almost never openly acknowledged, this is the function that local school boards best serve. *But cf.* Harriss, note 117 *supra*.

148. Perhaps the "selfish instinct" should be viewed as benign. In modifying its full-state funding system, the Hawaii legislature praised local spending as the best feature of democratic government. *See* Session Laws of Hawaii, Act 38 (1968). *Cf.* P. Malmberg, Remarks, Advisory Commission on Intergovernmental Relations, *Who Should Pay for Public Schools?* 12 (1971).

149. If the state exploits the parental protective instinct less because of a desire for local control, the private sector will surely exploit it more. Thus, parents who wish to give their children something extra, and who have heretofore satisfied this urge by buying homes in high spending school districts, would turn to private programs to satisfy the parental instinct. Economic class lines would be drawn even more sharply in the private sector than they are in the most elite suburban schools. This suggests that poor children in the wealthier districts rather than the elite are the primary beneficiaries of the existing financial system. Whatever the merits of eliminating Beverly Hills and Great Neck as sanctuaries for the rich, equal school financing will not accomplish that result. What has occurred as a result of school spending, even in places like Beverly Hills and Great Neck, is that consumption of such services as golf and music have been socialized in a limited way. The elimination of these islands of shared elitism in the schools of elite communities does not seem to advance the aims of the fourteenth amendment.

150. *Cf.* THE FEDERALIST X at 60-61 (Modern Library ed.); T. Sandalow, *The Limits of Municipal Power Under Home Rule: A Role for the Courts*, 48 MINN. L. REV. 643, 710-13 (1964).

sions made in larger units of government. There are at least two apparent causes for this phenomenon. First, smaller groups tend to produce relatively stable political organizations that are not dependent on minority cooperation.¹⁵¹ Second, local politics tend to be low-visibility, low-participation politics.¹⁵² Accordingly, local government tends to be controlled by the most attentive voters, who generally are members of dominant groups.¹⁵³ It is difficult enough to get poor and minority voters to turn out in substantial numbers for a Presidential election; it is almost impossible to get them out for a local schools election.¹⁵⁴

For these reasons, local school boards tend to be relatively less sensitive to the special needs of minority children.¹⁵⁵ It is not an accident that money for compensatory education has, with few exceptions, been available only at the federal level.¹⁵⁶ And, in general such allocations of resources have better political prospects at the state than the local level. For this reason, among others, it has been a mistaken notion to advocate community control as a means to equal educational opportunity.¹⁵⁷ And, although it is the consequence

151. Cf. E. BANFIELD & J. WILSON, *CITY POLITICS* 53-56 (1963); Note, *City Government in the State Courts*, 78 HARV. L. REV. 1596 (1965). According to the note, the problem of stability is serious only in small cities, defined as those under 100,000 in population. *Id.* at 1596 n.2.

152. In recent, widely-publicized elections to decentralized local boards in New York City, the turnout was 10%; 13.9% voted in 1970. N.Y. Times, May 13, 1973, § 4, at 9, col. 2.

153. Thus, candidates backed by the teachers' union won 93 of 171 seats in the New York City election, a result that surprised no experienced observers. Cf. H. SUMMERFIELD, *THE NEIGHBORHOOD-BASED POLITICS OF EDUCATION* (1971). With regard to the New York City decentralization elections, union leader Albert Shanker has questioned whether the process is democratic:

The keystone of representative democracy is that voters know enough to hold their public official accountable. But the 288 candidates who won community school board seats—not to speak of the 700 who try—are almost completely unknown to their constituents. One reason is that there are simply too many of them. Another is that the news media are not community-based, but are citywide and even regional. Indeed, virtually the only community figures who are well known by the electorate are those who achieve notoriety from confrontation politics, racist and other controversial behavior, or the improper use of public monies.

N.Y. Times, May 6, 1972, § 4, at 11, col. 8.

154. Cf. Schoettle, *supra* note 51, at 1389-90; Vieira, *supra* note 51, at 622-23.

155. The point has been somewhat overstated by Albert Shanker: "Decentralization is like a Banana Republic revolution. The pictures of the leaders change, but life on the plantation is the same." Quoted in LA NOVE AND SMITH, *THE POLITICS OF SCHOOL DECENTRALIZATION* 212 (1973).

156. The history of Title I of the Elementary and Secondary Education Act, 20 U.S.C. § 241a tends strongly to confirm the anti-egalitarian consequences of local control. It has been a difficult struggle for the federal Office of Education to induce local school districts to spend federal money to give real benefits to the educationally disadvantaged for whom the money was intended. See Murphy, *Title I of ESEA*, 41 HARV. ED. REV. 35 (1971); Sky, *Concentration Under Title I of the Elementary and Secondary Education Act*, 1 J. LAW & EDUC. 171, 177-178 (1972); WASHINGTON RESEARCH PROJECT OF SOUTHERN CENTER FOR STUDIES IN PUBLIC POLICY AND NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, *TITLE I OF ESEA: IS IT HELPING POOR CHILDREN?* (R. Martin & P. McClure, eds., 1969); *Hearings, Select Committee on Equal Educational Opportunity*, U.S. Senate, 92nd Cong., Part 17—Delivery Systems for Federal Aid to Disadvantaged Children (1971); U.S. DEPARTMENT OF HEALTH, EDUCATION & WELFARE, *MISUSE OF COMPENSATORY EDUCATION FUNDS* (1972).

157. Among the advocates of community control for this reason are: MAYOR'S AD-

which community control advocates are at most pains to prevent, state control may be the feature of the no-wealth principle which would most effectively promote social equality. This might occur because spending power would tend to move away from local districts, where it is more often controlled by special and professional interests, to the state level, where egalitarian politics can operate with greater force.

Thus, it is painful to read a suggestion advanced in both the Fleischmann Commission Report¹⁵⁸ and in the California Senate Committee Report,¹⁶⁰ that state financing will liberate local boards from the burdens of fund raising so that they can devote more time to policy making. This is wisdom reversed. The education profession and its establishment do need help in policy making. Few would deny that educators tend to be too cautious, or alternatively, too prone to fads that neither improve nor change, and too authoritarian in personal relationships.¹⁶⁰ But there is little to suggest that school board politicians can provide the needed stimulation.¹⁶¹ Given the limitations inherent in low-visibility, part-time politics, it would seem to be the egalitarian course to abolish local school boards if they are not performing their important function of raising public revenue.

G. *The Problem of Effective Judicial Enforcement*

Although the opinion made no reference to it, the Court probably was also moved to reject the no-wealth principle by the grave difficulty of enforcing such a decision. It is generally sound judicial practice to refuse to enter decrees that can be enforced only with excessive cost or risk of crisis.¹⁶² Enforcement of the no-wealth principle would involve such a risk.

The nature of the difficulty is revealed in the decree that was entered by the trial court in *Rodriguez*.¹⁶³ The decree was primarily declaratory; the

VISORY PANEL ON DECENTRALIZATION OF THE NEW YORK CITY SCHOOLS, RECONNECTION FOR LEARNING: A COMMUNITY SCHOOL SYSTEM FOR NEW YORK CITY (1967); M. FANTINI & G. WEINSTEIN, MAKING URBAN SCHOOLS WORK (1968); M. GITTELL, PARTICIPANTS AND PARTICIPATION (1967). An authoritative history of the movement is LANOVE & SMITH, *supra* note 155.

A brief balanced presentation of the question is L. FEIN, THE ECOLOGY OF THE PUBLIC SCHOOLS (1971). See generally SYMPOSIUM, COMMUNITY CONTROL OF SCHOOLS (H. Levin, ed., 1970). Cf. F. WIRT & M. KIRST, THE POLITICAL WEB OF AMERICAN SCHOOLS 67-77 (1972). A leading exponent of decentralization in New York City, Kenneth Clark, has changed his mind for this reason. See N.Y. Times, Nov. 30, 1972, at 1, col. 1.

158. *Supra* note 50, at 24.

159. *Supra* note 49, at 68.

160. See generally C. SILBERMAN, CRISIS IN THE CLASSROOM (1st ed. 1970).

161. See KOERNER, *supra* note 145, at 118-54; K. GOLDHAMMER, THE SCHOOL BOARD (1964).

162. See, e.g., *Boomer v. The Atlantic Cement Co.*, 26 N.Y.2d 309, 309 N.Y.S.2d 312, 251 N.E.2d 870 (1970).

163. 337 F. Supp. 280, 285-86 (W.D. Tex. 1971). See generally P. Kurland, *Equal Educational Opportunity: The Limit of Constitutional Jurisprudence Undefined*, 35 U. CHI. L. REV. 583 (1968); D. Kirp. & M. Yudof, *Serrano in the Political Arena*, 2 YALE REV. OF LAW & SOCIAL ACTION 142 (1971).

court clearly expected the Texas legislature to respond to the advice that its school finance scheme was unconstitutional. The decree contemplated no enforcement for an extended period while the legislature might deliberate. Consequently, there is a risk that the period would end without the kind of response which the court expected. The legislature need not be contumacious. The problem derives from the nature of its process; it is quite possible that no legislative consensus would form around any one of the many possible responses and that no adequate response could be produced. Indeed, the existing system is the result of much labored compromise by many Texas legislators, past and present, who manifested varying degrees of sensitivity to the ideal of equal educational opportunity and the competing values of parsimony and local control.¹⁶⁴ It is by no means certain that a simple declaration by the court would generate sufficient harmony to produce a result that meets the no-wealth test, however it might be interpreted and applied.

What then? The trial court somewhat glibly decreed that if the legislature did not comply with its strictures, then the state school officials should reallocate funds in a manner to conform with the Constitution. But the ability of state officials to do this is severely limited. A substantial portion of the revenues is collected from local levies that have been authorized for local communities by local voters with the understanding that the money was to be spent locally. If the state takes dollars out of rich districts to spend in poor ones, the rich districts would in all likelihood repeal their excess levies. The resulting loss of revenue could be massive. How could these funds be recouped? No American court has ever directed an official to collect a tax which had no legislative authorization.¹⁶⁵ The *Rodriguez* trial court did not presume to do so, and such a holding would have been of questionable validity. There are many kinds of powers about which state and federal constitutions are vague or flexible, but the power to tax is not among them. The extent of the power to tax is carefully circumscribed.¹⁶⁶ It is not an oversight that "[a] court does not have a Ways and Means Committee."¹⁶⁷ If the Boston Tea Party and Shay's Rebellion are not recent events, they are not forgotten. Yet, if such revenue loss occurred, the adverse effect in decreased educational opportunities might be immense. The court-ordered plan to equalize schooling for all might through honest legislative failure to agree and defensive municipal repeal of taxes, result in a lessening rather than a

164. See R. STILL, *supra* note 13.

165. But compare *Griffin v. County School Board of Prince Edward County*, 377 U.S. 218 (1964). In that case, the legislature had authorized a levy which the local government unlawfully refused to collect; it was required to do so.

166. The power to tax is the first identified as legislative by Section 8 of Article I of the federal Constitution.

167. Hazard, *Law Reforming in the Anti-Poverty Effort*, 37 U. CHI. L. REV. 242, 249 (1970).

broadening of state-financed education. The court's efforts to assure its plan would be inadequate—it could not assess and collect taxes.

Some advocates of the no-wealth principle view this prospect with moderate equanimity.¹⁶⁸ If children are harmed, so much the worse for the obstinate legislators! The people will throw them out and elect others to enact a constitutional scheme. But surely the court would bear some of the responsibility for such a situation. In order to save the schools, it would destroy them. In order to provide for equal educational opportunity, the court would have denied it. Such arrogance is more than unseemly. For a branch of the government to hold the children as hostages in order to force another to accept its opinion of rectitude would be a step well-calculated to harm the public confidence in all the institutions involved.

The advocates of the no-wealth principle cite the legislative reapportionment cases¹⁶⁹ as an example of comparable exercises of remedial power by the courts. These cases do exemplify novel applications of the judicial power. Nevertheless, a failure of the legislature to respond to decrees requiring reapportionment leads to a far more certain judicial response than would be required by a failure to comply with a no-wealth decree. Elections can be held at large,¹⁷⁰ or districts can be re-drawn to comply with the judicial mandate,¹⁷¹ with no coercion other than that applied to local election officials.¹⁷² The no-wealth principle poses a problem of ultimate remediation of a far greater order because nothing short of the court's assumption of the taxing power would assure compliance.

IV. THE PRESENT STATE OF THE NO-WEALTH PRINCIPLE AND SCHOOL FINANCE EQUITY

For the reasons stated, and perhaps others, the no-wealth principle is unlikely to be established as a principle of constitutional law. Some who were at first attracted to the lofty ethics of the idea have concluded that it is quixotic. It mounts a myopic attack on a serviceable mill, the local property tax.¹⁷³ The attack may prove more harmful than helpful to the ultimate values

168. *E.g.*, Coons, Clune, and Sugarman, *A First Appraisal of Serrano*, 2 YALE REV. OF LAW & SOCIAL ACTION 118 (1971).

169. PRIVATE WEALTH, *supra* note 14, at 452-55.

170. *See generally* Comment, *Reapportionment and the Problem of Remedy*, 13 U.C.L.A. L. REV. 1345 (1966).

171. *E.g.*, *Holt v. Buckley*, 397 U.S. 359 (1970); *Williams v. Moss*, 378 U.S. 558 (1964).

172. The localization of the remedy is important not only in reapportionment and the school closing case, but also in the emerging equal services cases. *E.g.*, *Hawkins v. Town of Shaw, Mississippi*, 437 F. 2d 1286 (5th Cir. 1971). *Cf.* *Hornby & Holmes, Equalization of Resources Within School Districts*, 58 VA. L. REV. 1119 (1972).

173. Carrington, *On Egalitarian Overseas: A Polemic Against the Local School Property Tax Cases*, 1972 U. ILL. L.F. 232, 258.

which it purports to advance. Examination of the multiple consequences of its application reveals that the cost is too high if all we accomplish is a gesture toward equality.

For the time being, the problem of equity in school finance will remain a legislative and political problem in most states. Legislatures are unquestionably the best places in which to confront problems as complex and polycentric as school finance. Courts are designed to act on principle. Principles are most likely to produce good, practical solutions to problems if the problems involve no more than one matched set of competing values which can be balanced on either side of a scale, and then explained as ordered reasons. When a problem is too complex for such analysis, a principled solution is likely to be impossible. Legislatures are far better suited to such tasks because they can compromise, and because legislators need not agree on the reasons which move them to act. For this reason, it was awry for the advocates of the no-wealth principle to develop such an intricate scheme as district power equalizing in order to present it first to a court, which was then asked to encourage or require the legislature to adopt it. To be sure, few legislatures will adopt the scheme without multiple changes resulting from a series of compromises, if, indeed, it is ever adopted. The untidy result in the legislature will not satisfy those who bring a purely intellectual appreciation to the question of equity in school finance. But such untidiness is as likely to reflect our best understanding of such a complex problem as any simple formula that might be prescribed by any court.

On the other hand, it should not be assumed that school finance will remain a problem for legislatures only. The plaintiffs in *Rodriguez* lost by only a single vote. All that the majority of the Court has demonstrated is that it will not challenge forty-nine state legislatures to a political variation of the game of chicken, for the purpose of conferring an uncertain benefit on children who have demonstrated no special need, at the expense of unidentified taxpayers and consumers of other public services. Less demanding plaintiffs may well get a more favorable response.

V. THE FUTURE OF SCHOOL FINANCE LITIGATION: WINNING FOR RODRIGUEZ

With the benefit of hindsight, it is possible to say that *Rodriguez* could have been won for the children of Edgewood. It seems likely that an additional vote might have been obtained by means of a different presentation.

First, the plaintiffs might have emphasized that they are, at least in large number, members of a disadvantaged group of the kind that the fourteenth amendment was designed to protect. There was, indeed, some evidence in

the record to support a finding that Edgewood is a district serving a population that is mostly poor and mostly Mexican-American.¹⁷⁴ If this were clearly established, the plaintiffs would be entitled to some special constitutional consideration, if not an application of the strict scrutiny test.¹⁷⁵

Second, the plaintiffs might have emphasized the particular respects in which they are educationally disadvantaged by the Texas school finance scheme. The record was apparently less clear than it might have been that Edgewood was taxing its revenue sources to their practical limits. It was established that the Edgewood rate was the highest in the metropolitan area,¹⁷⁶ but it was not shown to have reached or approached any political or economic limits. If Edgewood were taxing its taxpayers to these limits, such a showing would add credence to the plaintiffs' contention that the local choice consideration—the claim that each district has the choice of providing the kind of education it desired—was inoperative as applied to Edgewood.¹⁷⁷ It would also lend significance to the evidence of the shortcomings of Edgewood schools. The record did show that Edgewood teachers were inexperienced,¹⁷⁸ and that their pay was lower,¹⁷⁹ and their class size higher¹⁸⁰ than Alamo Heights teachers. The comparison would have been more compelling if this data contrasted unfavorably with reasonable minima, such as those suggested by accreditation agencies. It would have been still more effective if it could have been shown that Edgewood could not supply transportation for distant children, food for hungry ones, or books and supplies for poor ones. But there was no showing that Edgewood children lacked any such essentials.

If the plaintiffs could have established a disadvantaged identity for Edgewood children and a real and significant deprivation of the essentials of school quality, they might then have sought a remedy designed to correct their particular needs. There is, in fact, a remedy—the fiscal federation of the rich and poor districts within the San Antonio metropolitan area¹⁸¹—which would ease the financial straits of the Edgewood schools without undue hazard to others. Specifically, Edgewood children might seek to share the taxable resources of Alamo Heights, and those other districts whose inclusion might be justified. Such a remedy would not alter the political control of the dis-

174. For an examination of the evidence in the record, see Brief of NAACP Legal Defense and Educational Fund, Inc. as amicus curiae, 5-17.

175. *Cisneros v. Corpus Christi Independent School District*, 467 F.2d 142 (5th Cir. 1972); cf. *Hernandez v. Texas*, 347 U.S. 475, 477-78 (1954).

176. 411 U.S. at 12.

177. In fact, the Court expressly reserved consideration of this issue. 411 U.S. at 50-51, n.107.

178. Appendix 117.

179. Appendix 118.

180. *Id.*

181. For economic analysis of this idea, see Stiles, *Local Tax Structure and Metropolitan Area Land Use*, 22 URBAN LAND, January 1963 at 1; S. SACKS & W. HELLMUTH, *FINANCING GOVERNMENT IN A METROPOLITAN AREA* 209-10 (1961).

tricts affected, but would require a pooling of resources in a common endeavor to raise local revenue; for purposes of taxation and state aid, they would be treated as a single district. Such a remedy would, to be sure, have some adverse consequences. It would raise land values in Edgewood and lower them in Alamo Heights. The chief direct beneficiaries would be Edgewood teachers. But these costs would apparently be outweighed by the inequity to be corrected, if the plaintiffs made the kind of showing described.¹⁸²

A remedy of fiscal federation can be fashioned from existing administrative powers over the organization of local school districts. For example, the New York Commissioner of Education has substantial authority to reorganize and consolidate local school districts.^{182a} Usually, legislation provides that such power must be exercised subject to popular referendum.

The financial condition of the various districts is a proper basis for the exercise of this kind of administrative power.¹⁸³ In at least one instance, the New York Commissioner has prevented the creation of a suburban high school district on the ground that the suburban parents were needed to provide financial and political support for inner city schools.¹⁸⁴ And a South Dakota court has held that it is an abuse of discretion for the administrative agency to so reorganize the districts that some children are left with inadequate financial resources.¹⁸⁵

It is also established that legislative requirements for popular referenda cannot obstruct the enforcement of the right to equal protection.¹⁸⁶ It would require no extension of the existing law and practice to disregard the popular referendum provisions for the purpose of enforcing constitutional rights of a disadvantaged group whose rights may be otherwise denied by majority vote, especially, it would seem, if the majority is of an electorate to which the disadvantaged have no access.

It should be emphasized that the suggested remedy of federation would

182. The remedy proposed is less traumatic than full consolidation. Consolidation has been imposed judicially in school desegregation cases. See Comment, *Judicial Consolidation of Public School Districts to Achieve Racial Balance*, 25 VAND. L. REV. 893 (1972); Comment, *Comprehensive Metropolitan Planning: A Reinterpretation of Equal Educational Opportunity*, 67 NW. U. L. REV. 388 (1972). On the other hand, it should not be minimized that substantial administrative difficulties will be encountered. For an extended treatment of the complexities of consolidation, see F. MICHELMAN & T. SANDALOW, MATERIALS ON GOVERNMENT IN URBAN AREAS 491-701 (1970).

182a. N.Y. EDUC. LAW §§ 314, 1526 (McKinney 1969).

183. See generally L. Peterson, R. Rossmiller, & M. Volz, THE LAW AND PUBLIC SCHOOL OPERATION 41-81. The financial significance of school district boundaries has taken on a different constitutional significance with respect to the rights of holders of outstanding bonds to be secure from an impairment of the contractual obligation. For an extreme case, see *Canal National Bank v. School Administrative District No. 3*, 160 Me. 309, 203 A. 2d 734 (1964).

184. *In re Spackinckill High School*, 9 N.Y. Ed. Rep. 213 (1959).

185. *Glenham Independent School Dist. v. Walworth County Bd. of Educ.*, 78 S.D. 63, 98 N.W. 2d 348 (1959). But cf. *Elk Point Independent School Dist. No. 3 v. State Comm'n on Elementary & Secondary Educ.*, 85 S.D. 600, 187 N.W. 2d 666 (1971).

186. E.g., *Hunter v. Erickson*, 393 U.S. 385 (1969); *Contrast James v. Valtierra*, 402 U.S. 137 (1971).

be much less traumatic than the more obvious remedy of consolidation. Political institutions and relationships would be undisturbed. And it would be a relatively simple matter to phase the remedy in such a way as to avoid financial shock to the richer district.¹⁸⁷ The chief obstacle to the implementation of the federation remedy is our tendency to be infatuated by political boundaries, to regard them as having a supernatural permanence derived from their indelibility in the expectations of citizens. With respect to local school district boundaries, at least, it is certain that they were drawn with little thought, not so very long ago, and usually without involvement of the legislature, much less the constitution. They are not sacred. We have become accustomed to subjecting them to constitutional scrutiny in school desegregation cases.¹⁸⁸ It appears that the recent action of the Supreme Court in the *Richmond Schools Case*¹⁸⁹ manifests an unwillingness of some justices to approve, or at least require, the disregard of district boundaries, at least for the limited purpose of attaining racial balance. But it is very unlikely that the Court will attribute to imaginary district lines such a mystic vitality or longevity that they override claims of constitutional right which might be enforced but for such lines. State courts have long proclaimed that citizens have no vested rights in the continued existence of their school districts.¹⁹⁰ Surely neither they nor their bondholding creditors have interests affected by fiscal federation which are of sufficient substance to prevent the enforcement of the equal protection clause if that provision is theoretically applicable.

If fiscal federation thus seems to be an appropriate remedy, it would appear to be most feasible in the setting of a litigation which brings the regular administrative authority into play. This would indicate that the next efforts of the Edgewood children should begin with an administrative proceeding in which Bexar County school district boundaries might be properly called into question.

But there remains the question of whether a defensible theoretical basis

187. This might be constitutionally obligatory. See note 184 *supra*. For an extended treatment of the administrative difficulties inhering in consolidation, see F. MICHELMAN & T. SANDALOW, MATERIALS ON GOVERNMENT IN URBAN AREAS 491-701.

188. E.g., *Haney v. County Bd. of Educ.*, 410 F.2d 920 (8th Cir. 1969); cf., *United States v. Scotland Neck Bd. of Educ.*, 407 U.S. 484 (1972); see generally, Comment, *Judicial Consolidation of Public School Districts to Achieve Racial Balance*, 25 VAND. L. REV. 893 (1972); Comment, *Comprehensive Metropolitan Planning: A Reinterpretation of Equal Educational Opportunity*, 67 NW.U.L.REV. 388 (1972).

189. *School Bd. v. State Bd. of Educ.*, 93 S.Ct. 1952 (1973), affirming by necessity, *Bradley v. School Bd.*, 462 F.2d 1058 (4th Cir. 1972).

190. E.g., *Alanreed Independent School Dist. v. McLean Independent School Dist.*, 354 S.W. 2d 232 (Tex. App. 1962); *Halstead v. Rozmiarek*, 167 Nebr. 652, 94 N.W. 2d 37 (1959); *Bd. of Educ. v. Wilson*, 303 N.Y. 107, 100 N.E. 2d 159 (1951); *State ex rel. Miller v. Common School Dist. No. 87*, 163 Kan. 650, 185 P. 2d 677 (1947); *Wheeler v. School Dist. No. 152 v. Hawley*, 18 Wash. 2d 37, 137 P. 2d 1010 (1943); *School District No. 3 v. Callahan*, 237 Wis. 560, 297 N.W. 407 (1941); *Fisher v. Fay*, 288 Ill. 11, 122 N.E. 811 (1919). But cf. *Brandon Valley Independent School Dist. No. 150 v. Minnehaha County Bd. of Educ.*, 181 N.W. 2d 96, 855 D. 255 (1970).

can be provided for linking such a remedy to the equal protection clause. The key can perhaps be found in the *Rodriguez* case.

The opinion of Justice White sets forth a doctrinal basis for such a remedy.¹⁹¹ The opinion shows a readiness to give "moderate scrutiny" to assure that the Texas school finance system was, in fact, reasonably related to its ostensible goal of local control.¹⁹² In challenging the whole idea of local finance as a means of assuring local control, Justice White ventured a conclusion of arguable persuasiveness.¹⁹³ But if the plaintiffs had particularized the issue, by seeking a narrower remedy and by invoking the special circumstances of Edgewood, Justice White's analysis would have been much stronger. Whatever may be the general national relationship between local finance and local control, it cannot be a reasonable means of establishing local control that the state of Texas maintains particular districts desperately poor in resources to serve largely disadvantaged children. A general policy of local control affords no real justification for maintaining a school finance ghetto. Inasmuch as the Court has applied the kind of standard invoked by Justice White in a variety of other situations within the last two years,¹⁹⁴ it is not at all unlikely that he would have been able to secure several more votes for his opinion if the facts in the record had supported such a specific analysis and remedy.

It is, to be sure, not certain that the Edgewood plaintiffs could make the kind of showing required to identify their case as having such a clear relation to the aims and values of the fourteenth amendment. But some groups of plaintiffs could make such a showing. When such a group appears, they will probably prevail and thus be assured of at least "minimum protection" against the most adverse consequences of traditional school finance. When this occurs, the Burger Court will have its opportunity to give expression to the lofty ideal of equal educational opportunity which we have come to expect the Court to support. Such an incremental approach will not satisfy those who are restless to transform the educational universe. But it is an approach that is more congenial to the judicial process, and better calculated to give help where it is needed.

Meanwhile, we should give those restless champions of the no-wealth principle their due. What could be more becoming to Justice Marshall than to invoke, on behalf of children who are neither black nor poor, the very right which he won so hard as the advocate of the black children that he represented in the *Brown* case twenty years ago? His action and his words re-

191. 411 U.S. at 62-70.

192. See note 131 *supra*.

193. See text accompanying notes 132-141 *supra*.

194. Gunther, note 102 *supra*.

assuringly bespeak a commitment to principled decision-making. And of the advocates of the no-wealth principle, Professors Coons, Clune, and Sugarman, it must be said that the defeat of their case was chiefly the result of an excessive commitment to an ethical ideal. But it is just such ethical idealism which redeems American law from being a harsh oppressor of the powerless. Over the longer arc of time, the future is with them.