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## FOREWORD

The way in which we finance public elementary and secondary schools causes substantial inequalities in the raising of educational revenues and in the distribution of educational resources in nearly every state in the nation—Hawaii being the only possible exception.<sup>1</sup> While there has been pressure for reform since the beginning of this century,<sup>2</sup> efforts to bring about reform through litigation did not get under way until the late 1960's.<sup>3</sup> And it was not until late 1971, with *Serrano v. Priest*, that the reformers achieved their first real victory.<sup>4</sup>

The California Supreme Court put forward a negative constitutional principle: the quality of public education may not be "a function of the wealth of... [a pupil's] parents and neighbors."<sup>5</sup> This so-called principle of "fiscal neutrality" was first articulated by Professors Coons, Clune, and Sugarman<sup>6</sup> in order to avoid the barriers raised by the *McInnis* case.<sup>7</sup> The plaintiffs in that case had contended that "only a financing system which apportions public funds according to the educational needs of the student satisfies the 14th Amendment,"<sup>8</sup> but the court found that this was not a judicially manageable standard. By contrast, the fiscal neu-

<sup>1</sup> R. REISCHAUER & R. HARTMAN, *REFORMING SCHOOL FINANCE* 66 (1973).

<sup>2</sup> See J. COONS, W. CLUNE & S. SUGARMAN, *PRIVATE WEALTH AND PUBLIC EDUCATION* 49-61 (1970).

<sup>3</sup> See, e.g., *Rodriguez v. San Antonio Independent School Dist.*, 337 F. Supp. 280 (W.D. Tex. 1971) (litigation commenced 1968, Civil No. 68-175-SA); *McInnis v. Shapiro*, 293 F. Supp. 327 (N.D. Ill. 1968) (litigation commenced 1968, Civil No. 68-C-673); *Hobson v. Hansen*, 269 F. Supp. 401 (D.D.C. 1967) (litigation commenced 1966, Civil No. 82-66); *Serrano v. Priest*, 5 Cal. 3d 584, 487 P.2d 1241, 96 Cal. Rptr. 601 (1971) (litigation commenced 1968, Civil No. 35017, Los Angeles County Super Ct.); *Board of Educ. of the School Dist. of the City of Detroit v. Michigan* (litigation commenced 1968, Civil No. 103342, Wayne County Cir. Ct., dismissed for lack of prosecution).

<sup>4</sup> *Serrano v. Priest*, 5 Cal. 3d 584, 487 P.2d 1241, 96 Cal. Rptr. 601 (1971). In *McInnis v. Shapiro*, 293 F. Supp. 327 (N.D. Ill. 1968), the plaintiff asked that public school expenditures be allocated according to student needs. The court ruled that no discoverable and manageable standards existed by which it could determine whether or not the Constitution was violated. The United States Supreme Court affirmed, per curiam, *McInnis v. Ogilvie*, 394 U.S. 322 (1969). In *Burrus v. Wilkerson*, 310 F. Supp. 572 (W.D. Va. 1969), a three-judge district court recognized the existing inequalities but indicated that it lacked the power, knowledge, and means to effect a remedy and that the solution was more properly a legislative matter. As it had in *McInnis*, the U.S. Supreme Court affirmed *Burrus*, per curiam, 397 U.S. 44 (1970).

<sup>5</sup> *Serrano v. Priest*, 5 Cal. 3d at 589, 487 P.2d at 1244, 96 Cal. Rptr. at 604.

<sup>6</sup> J. COONS, W. CLUNE & S. SUGARMAN, *supra* note 2, at 2.

<sup>7</sup> *McInnis v. Shapiro*, 293 F. Supp. at 327.

<sup>8</sup> *Id.* at 331.

trality standard "does not involve the Court in the intricacies of affirmatively requiring that expenditures be made in a certain manner or amount."<sup>9</sup>

The fiscal neutrality principle was strongly criticized, in part because alternative methods of financing education would seem to require the elimination of the local property tax as a revenue source for education, with diversion of revenues from noneducational services and the elimination of local autonomy.<sup>10</sup> The standard was also criticized because its principal proponents also advocated district power/equalizing (equal dollars for equal tax *effort* regardless of property wealth—which *does* permit local choice) as the preferred method of financing schools. Some courts appeared to equate a "fiscally neutral" system with district power equalizing (DPE).<sup>11</sup>

The fiscal neutrality principle and DPE have also been attacked for failing to recognize the problems of the central cities. The litigation had focused on the correlation between high property values and high per pupil expenditure levels. Affluent school districts could spend more per pupil than districts of lower property wealth, frequently with lower tax rates. The fiscal neutrality principle was devised in response to these conditions. While application of this principle would help low property wealth districts, it would not necessarily benefit central city districts, which have comparatively high property values and often higher than average per pupil expenditure levels.<sup>12</sup> The fiscal difficulties of central city schools are attributable not to low property values but to higher costs for both educational and noneducational public services. Thus minimal compliance with a wealth-free standard could result in central cities losing education funds while having to pay still higher taxes.<sup>13</sup>

Another objection to DPE, as indicated by one of the contributors to this symposium, is that it makes a child's constitutional right to an education subject to the whim of the electorate in his district.<sup>14</sup> Since the level of local spending would vary according to the wishes of local district voters, the level of expenditure for a child's education would still depend on his residence. This seems inconsistent with the rationale upon which the fiscal neutrality principle is premised—that education is a fundamental right.<sup>15</sup>

<sup>9</sup> *Rodriguez v. San Antonio Independent School Dist.*, 337 F. Supp. at 284.

<sup>10</sup> The arguments against the fiscal neutrality or the wealth-free principle are thoroughly reviewed in Carrington, *Financing the American Dream: Equality and School Taxes*, 73 COLUM. L. REV. 1227 (1973).

<sup>11</sup> In *Van Dusartz v. Hatfield*, 334 F. Supp. 870, 876-77 (D. Minn. 1971), the court suggested that "the fiscal neutrality principle not only removes discrimination by wealth but also allows free play to local effort and choice."

<sup>12</sup> See B. LEVIN, T. MULLER, W. SCANLON, & M. COHEN, *PUBLIC SCHOOL FINANCE: PRESENT DISPARITIES AND FISCAL ALTERNATIVES* (1972).

<sup>13</sup> See, e.g., B. LEVIN, T. MULLER & C. SANDOVAL, *THE HIGH COST OF EDUCATION IN CITIES* 70-71 (1973); Berke & Callahan, *Serrano v. Priest: Milestone or Millstone for School Finance*, 21 J. PUB. L. 23, 57-64 (1972). See also J. CALLAHAN, W. WILKEN & M. SILLERMAN, *URBAN SCHOOLS AND SCHOOL FINANCE REFORM: PROMISE AND REALITY* (1973).

<sup>14</sup> A community with a high proportion of nonpublic school enrollment or with a majority of retired residents may vote a low tax rate, and hence a low expenditure level, penalizing the minority of child-bearing families who may desire a higher level of expenditure.

<sup>15</sup> Levin, *Alternatives to the Present System of School Finance: Their Problems and Prospects*, 61 GEO. L.J. 879, 920-21 (1973).

Despite these criticisms, the fiscal neutrality principle and the legal arguments developed by Professor Coons and his colleagues were eagerly seized upon by lawyers throughout the country who were seeking to overturn their states' systems of school finance. Between August 30, 1971, when the California Supreme Court handed down its decision in *Serrano v. Priest*, and March 21, 1973, when the U.S. Supreme Court handed down its decision in *San Antonio Independent School District v. Rodriguez*,<sup>16</sup> a tidal wave of school finance litigation engulfed the country. By early 1973, courts in Minnesota, Texas, New Jersey, Arizona, Wyoming, Kansas and Michigan reached essentially the same holding as the California Supreme Court. All together, some fifty-two actions were filed in thirty-one states.<sup>17</sup>

The *Serrano* decision and its progeny held that the school finance system violated the equal protection clause of the fourteenth amendment of the Federal Constitution.<sup>18</sup> The California court found that the system's reliance on the local property tax as a source of education revenues, due to variations among districts in taxable property, resulted in substantial disparities in per pupil revenues. Since state subventions failed to offset these disparities, the state's school financing system discriminated on the basis of district property wealth, which the court held to be a "suspect classification" for purposes of the equal protection clause. The *Serrano* court then concluded that education was a "fundamental right," and that this fundamental right could not be conditioned on wealth. The court thus invoked the strict scrutiny—rather than the rational basis—test, meaning that the state bears the burden of showing a compelling state interest in the particular school finance system utilized. Since the state was unable to show that the discrimination was necessary to promote a compelling state interest, the system was unconstitutional.<sup>19</sup>

A three-judge federal district court in Texas, in a decision that paralleled *Serrano*, held that state's system of financing education unconstitutional,<sup>20</sup> and it was this case which ultimately was to be decided by the U.S. Supreme Court. It was argued in October of 1972, and the following March, a five-to-four decision was handed down reversing the district court. The Supreme Court found that the system of school finance did not discriminate against any class of persons considered "suspect," since the case did not present a definable class of poor persons (as opposed to poor districts).<sup>21</sup> Furthermore, education was not a fundamental right since it was neither explicitly nor implicitly guaranteed by the Constitution.<sup>22</sup> With neither a suspect classification nor a fundamental right involved, there

<sup>16</sup> 411 U.S. 1 (1973).

<sup>17</sup> Lawyers' Committee for Civil Rights Under Law, *Intrastate School Finance Court Cases*, Aug. 1972.

<sup>18</sup> While the complaint in *Serrano* was also based on the state "equal protection" clause, the court primarily relied on the Federal Constitution. 5 Cal. 3d at 596, 487 P.2d at 1249, 96 Cal. Rptr. at 609.

<sup>19</sup> *Id.* at 584, 487 P.2d at 1241, 96 Cal. Rptr. at 601.

<sup>20</sup> *Rodriguez v. San Antonio Independent School Dist.*, 337 F. Supp. at 280.

<sup>21</sup> *San Antonio Independent School Dist. v. Rodriguez*, 411 U.S. at 28.

<sup>22</sup> *Id.* at 35.

was no basis on which to invoke the strict scrutiny test.<sup>23</sup> The Court therefore turned to the rational basis test and found that the Texas system of school financing rationally furthered a legitimate state purpose: to encourage "a large measure of participation in the control of each district's schools at the local level."<sup>24</sup>

With this decision, the fiscal neutrality principle articulated by Coons, Clune, and Sugarman—which in the less than three years since its birth had received considerably more attention and notoriety than doctrines of much older vintage—appeared to have been given its funeral.<sup>25</sup> The question now is what happens to school finance reform in the next decade. While the *Rodriguez* opinion does not totally rule out the possibility of invalidating a state's school financing system on the basis of the federal equal protection clause,<sup>26</sup> most school finance reform advocates are turning away from the federal courts as a forum for change. This symposium explores alternative routes that may be open to reformers.

It should be noted that while five members of the *Rodriguez* Court found that the way in which education dollars are now distributed is "rational," and therefore not unconstitutional, the Court did not find the existing system of financing schools to be equitable or just.<sup>27</sup> Thus the decision may act as a goad to state legislatures to reform their school finance statutes without the necessity of court action. This symposium explores several alternative ways of financing education, including one which focuses on the family or the child as the basic decision-making unit rather than the local school district, and analyzes some of the legislative reforms which have already been enacted under the stimulus of the initial *Serrano* wave of litigation. While the reforms lessen reliance on the local property tax through substantial increases in the state share and narrow the range of variations in expenditures and tax rates, save-harmless clauses and other similar provisions suggest that political compromise remains essential to success, and that reform may be incremental rather than overnight. Moreover, the reforms may be unstable, depending upon the political forces in sway at any one time. For example, as this issue went to press, the Florida legislature repealed its newly enacted DPE provision and restored the non-equalized millage.<sup>28</sup> Some additional problems not dealt with in this symposium,

<sup>23</sup> *Id.* at 40.

<sup>24</sup> *Id.* at 49.

<sup>25</sup> One commentator has said that "[t]he real trouble with *Rodriguez* may be that it came 10 years before its time (or, given the venturesomeness of the Warren court, five years after its time)." Kirp, *San Antonio Independent School District v. Rodriguez: Chaotic, Unjust—and Constitutional*, 2 J. LAW & EDUC. 461, 462 (1973).

<sup>26</sup> See Tractenberg, *Reforming School Finance Through State Constitutions: Robinson v. Cahill Points the Way*, 27 RUTGERS L. REV. 365, 373-84 (1974).

<sup>27</sup> For example, Justice Powell—who wrote the majority opinion in *Rodriguez*—noted that "[t]he need is apparent for reform in tax systems which may well have relied too long and too heavily on the local property tax." 411 U.S. at 58. Justice Stewart, concurring, added: "The method of financing public schools in Texas, as in almost every other State, has resulted in a system of public education that can fairly be described as chaotic and unjust." *Id.* at 59.

<sup>28</sup> The Florida legislation, as modified in the most recent legislative session, is still quite reformist in nature. One of the reasons for repeal of the DPE provision was the fact that it

which may act as constraints on reform unless resolved, are the fear of loss of local control—a particular concern of suburban districts,<sup>29</sup> the concern that additional revenues will be absorbed by increases in teachers' salaries and fringe benefits rather than be used for improving educational programs,<sup>30</sup> and the related concern that the rapidly increasing costs of education are not associated with improvement in the quality of education.

This last concern is one of the most persistent questions raised in discussions of school finance reform: whether revising a school finance system so that more funds are available to poor school districts will make a difference in the education of the children in those districts. Recent research has cast doubt upon the cost-quality relationship in education.<sup>31</sup> The assumption that money can make a difference, thus militating toward the elimination of wealth-based disparities in per pupil expenditures to meet the national goal of equal educational opportunity, has been severely shaken. The efforts of courts to resolve the cost-quality issue is discussed in this symposium and various standards for defining equal educational opportunity are analyzed.

For more recalcitrant state legislatures, the pressure of a court decision may still be an essential prerequisite to reform. Less than a month after the Supreme Court's *Rodriguez* decision, the New Jersey Supreme Court, in *Robinson v. Cahill*,<sup>32</sup> struck down that state's school finance statutes as violative of a state constitutional provision guaranteeing a "thorough and efficient" school system. The rationale put forward by the court suggests alternative litigation strategies which reformers might pursue. The approach taken by the *Robinson v. Cahill* court and those taken in several other states are also described in this symposium.

At the height of the litigation efforts, many school finance reform advocates called for a substantial increase in the federal role in the financing of elementary and secondary education—from its present seven per cent<sup>33</sup> of the total education dollar to as much as thirty-five per cent.<sup>34</sup> However, as the euphoria resulting from the legal victories has subsided, a more carefully considered analysis indicates that a substantial increase in the federal contribution to education is unlikely in the next decade. This reinforces the view, expressed in this symposium and elsewhere, that reform will have to come from within the states.

The conclusion one can draw from the articles in this symposium is that while *Rodriguez* may have temporarily slowed the reform movement,

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acted as an incentive to increase millage rates, with many districts raising expenditures by 25 to 30 per cent over the previous year. Telephone interview with Dr. Marshall A. Harris, Special Assistant on Education, Office of the Governor of Florida, July 8, 1974. The legislature apparently felt that spending priorities were being distorted by the availability of equalized dollars.

<sup>29</sup> See M. COHEN, B. LEVIN & R. BEAVER, *THE POLITICAL LIMITS TO SCHOOL FINANCE REFORM* 121-23 (1973).

<sup>30</sup> See Moynihan, *Equalizing Education—In Whose Benefit?*, *PUBLIC INTEREST*, Fall 1972, at 69, 74-75.

<sup>31</sup> J. COLEMAN, *EQUALITY OF EDUCATIONAL OPPORTUNITY* (1966); C. JENCKS, *INEQUALITY* (1972).

<sup>32</sup> 62 N.J. 473, 303 A.2d 273 (1973).

<sup>33</sup> R. REISCHAUER & R. HARTMAN, *supra* note 1, at 5, 9.

<sup>34</sup> *Id.* at 165.

the principal effect of the decision was merely to change its direction. The efforts that went into the litigation of school finance reform on federal equal protection grounds in the period between the first *Serrano* decision and the Supreme Court's decision in *Rodriguez* were not in vain. Perhaps the most important contribution of that litigation was to make citizens and legislators more aware of the deficiencies and irrationalities of the current system for financing schools. An understanding of the system and the resulting inequalities in the raising and distributing of educational funds is no longer limited to a few school finance "experts."

No introduction to the issues of school finance reform would be complete without an acknowledgement of the work of the Lawyers' Committee for Civil Rights Under Law, which, since the first school finance lawsuit, has coordinated and assisted school finance reform legal efforts across the country. With the setback delivered by *Rodriguez*, the Lawyers' Committee has begun to explore the education and equal protection provisions of the fifty state constitutions and has continued to disseminate information to attorneys with pending school finance suits. While his name does not appear on any of the articles in this symposium, R. Stephen Browning, Director of the Lawyers' Committee's School Finance Project, has provided many helpful suggestions toward its development and it is with gratitude that I acknowledge his assistance.

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