Table of Contents

Table of Citations

Cases

Constitutional Provisions, Statutes, and Rules

Miscellaneous

IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 71-1332

SAN ANTONIO INDEPENDENT SCHOOL DISTRICT, ET AL.,

Appellants,

v.

DEMETRIO P. RODRIGUEZ, ET AL.,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS

BRIEF OF AMICI CURIAE IN SUPPORT OF APPELLANTS

INTERESTS OF AMICI CURIAE

Amici Curiae are representatives of state governments or political subdivisions in 30 states. Each such subdivision, like all American subdivisions, possesses systems of school financing inconsistent with the *Serrano-Rodriguez* doctrine. Each such subdivision, like all American subdivisions, has traditionally confided responsibility for the raising and allocation of public funds to its elected legislature. In consequence of the magnitude of the sums necessary to alter the system of school financing of each state and sub-

division to conform to the *Rodriguez* doctrine, each of the undersigned states and subdivisions would suffer severe financial stringency and interference with its ordinary budget making process and the democratic allocation of public resources within its borders.

The undersigned subdivisions have a common interest in resisting the imposition upon their fiscal choices in regard to taxing, spending, or the relation between them of the doctrine of judicial "strict scrutiny" which would be imposed upon educational and other spending decisions by plaintiffs and by the Court below. Each and all of the undersigned subdivisions rather favors the application to state taxing and spending decisions of those canons of restraint which have traditionally immunized such determinations, state and federal, from intensive judicial review. They believe required application of the standards which have traditionally governed judicial review of taxing and spending programs:

First, that "there need be no relation between the class of taxpayers and the purpose of the appropriation" (*New York Rapid Transit Company v. New York*, 303 U.S. 573 (1938)); "if the tax, qua tax, be good * * * and the purpose specified be one which would sustain a subsequent and separate appropriation made out of the general funds of the treasurer, neither is made invalid by being bound to the other in the same act of legislation." *Cincinnati Soap Company v. U.S.*, 301 U.S. 308 (1937), see *Carmichael v. Southern Coal Company*, 301 U.S. 495 (1937);

Second, that the appropriate standard by which state tax legislation is to be judged is the standard of *Madden v. Kentucky,* 309 U.S. 83 (1940): "In taxation, even more than in other fields, legislatures possess the greatest freedom in classification. Since the members of a legislature neces-

sarily enjoy a familiarity with local conditions which this court cannot have, the presumption of constitutionality can be overcome only by the most explicit demonstration that a classification is a hostile and oppressive discrimination against particular persons and classes. The burden is on the one attacking the legislative arrangement to negative every conceivable basis which might support it." 309 U.S. at 88 (1940);

Third, that the appropriate standard for assessing state expenditure programs not involving racial distinctions peculiarly reached by the Fourteenth Amendment is that of *Dandridge v. Williams,* 397 U.S. 471, 487 (1970) with its stress on the proposition that "the Constitution does not empower this court to second-guess state officials charged with the difficult responsibility of allocating limited public welfare funds among the myriad of potential recipients", see *Steward Machine Company v. Davis,* 301 U.S. 548, 584-85 (1939); *Helvering v. Davis,* 301 U.S. 619, 644 (1939);

Fourth, that in a federal nation with strong traditions of local government whose constitution recognizes rights in property, the existence of differences in the average wealth of political subdivisions does not constitute in itself State action activating any standard of constitutional review: "the use of taxes in the county where the tax property is located does not, of itself constitute an invidious discrimination or unreasonable classification" (*Board of Education of Independent School District of Muskogee v. Oklahoma,* 409 F.2d 665 (10th Cir. 1969)). Since states "have the attributes of sovereign powers in devising their fiscal systems to ensure revenue and foster their local interests" (*Allied Stores of Ohio, Inc. v. Bowers,* 358 U.S. 522, 526 (1959)), constitutional guarantees reach only action by the state and not "the inaction implicit in the failure to en-

act corrective legislation". *Adickes v. Kress and Company*, 398 U.S. 144, 167, note 39 (1970).

The present case, more than any other case before the Court in the last decade, constitutes a threat to the autonomy and independent existence of state and local governments and indeed to the power of the purse of legislatures that is the enduring and perhaps the most important legacy of seven centuries of Anglo-American constitutional history.

Since the brief of Texas treats fully the questions surrounding the applicable standard of review, the present memorandum will summarize the impact of the issues at stake in the present litigation upon the educational, social, revenue and expenditure policies of the signatory governments.

DANGERS OF A 'FUNDAMENTAL INTEREST' HOLDING

If this court accepts plaintiffs' invitation to pronounce educational finance a "fundamental interest" activating a strict standard of review, a wide range of other governmental programs, each of which can be plausibly represented as involving fundamental interests, will be open to attack. The emotional arguments surrounding the distribution of medical care, for example, are at least as compelling as those surrounding education.* Principles invoked with respect to elementary and secondary education can readily be extended to higher education in a society in which it is regarded as ever more essential.** The application of the

* An organization known as the Medical Committee for Human Rights is presently orchestrating a barrage of lawsuits in this field. It no doubt will take a great interest in *Serrano*.

** Indeed, it is difficult to think of a more regressive area of public spending than higher education in which nearly all the benefits go to persons with the economic wherewithal to avoid joining the labor

principles contended for here to sewerage and public health funds, police funds, funds for transportation, and library funds can be readily envisaged.

Judicial intervention in this sphere will almost certainly be productive of the "generation of litigation" phenomenon similar to that following the *Brown* desegregation decision, but without a foreseeable end. Thus former Commissioner Howe has noted:

> "There would be a long period of adjustment and difficulty. Seventeen years have passed since the Supreme Court handed down the *Brown* decision, and the schools are still in the process of desegregation." (Howe, op. cit. page 38, *infra.*)

The backbiting that has already taken place among the proponents of judicial intervention is sufficient to indicate the Pandora's box that will be opened if the courts are permitted to venture into this sphere.

Thus, the work by Coons, Clune and Sugarman,* the most important influence on the California decision, is filled with scornful references to the complaint in *McInnis v. Shapiro* with its demand for compensatory relief and is also filled with scornful references to the earlier work by Wise, *Rich Schools, Poor Schools,* with its explicit demand for something closely approaching total state assumption of costs or equality in actual expenditure among districts. The Messrs. Coons, Clune and Sugarman profess to prefer a system under which the state would act to provide each district with equal taxing resources but in which the level of educational spending within each district would in part

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force before graduation from high school. Professor Coons has already suggested extension of the *Rodriguez* principle to publicly-supported junior colleges, 2 Yale Review of Law and Social Action at 120 note 32 (1971), describing them as an "inviting target".

* *Private Wealth and Public Education* (1969).

be a function of the willingness of district voters to tax themselves. Under this regime the education received by each child would, it is said, continue to be a function of the political sentiments of his neighbors, though not necessarily of his own sentiments or those of his parents. It is easy to envisage the welter of law suits which will ensue if this Coons thesis is accepted — suits, for example, by Protestant school children aggrieved at the low level of public school taxation in predominately Catholic cities, etc. The long term viability of the limitations proposed by Coons, Clune and Sugarman upon a doctrine of absolute equality would indeed be in doubt. Indeed, Mr. Wise, repaying the 'compliments' directed at him by Coons, Clune and Sugarman, has pointed out that the California decision does not clearly adopt the Coons-Clune-Sugarman rule. Wise, *The California Doctrine,* Saturday Review, November 20, 1971, pg. 78.

The Messrs. Coons, Clune and Sugarman would leave some nominal scope for local autonomy by merely equalizing district taxing resources. Mr. Wise would equalize both taxing resources and taxing rates. He would not go so far, however, as to prohibit the use of distinctions based on child characteristics in the allocation of educational funds. Professor Michelman of Harvard likewise is an enemy of the Coons approach, see Michelman, *On Protecting the Poor Through the Fourteenth Amendment,* 83 Harv. Law Rev., 7 at 54-59 (1970). Alleging that the Coons approach could result in inequities while an approach requiring equal expenditures for a foundation program with some local variations upward presents problems of justiciability, he, as noted, goes on to favor "insistence on channelling all the state's educational expenditures into the common pool." (83 Harvard Law Review at 58). Yet another legal commentator, Professor Kirp, not to be outdone, proclaims:

> "Stressing the effectiveness of equal educational opportunity does however suggest that the school is obliged to exert its energies in overcoming initial differences that stem from variations in background, in home life (or lack of home life) and community * * * Focusing on effective equalization — an equal chance for equal achievement — stresses the obligation of the state to make a greater financial effort in those school districts whose needs are greater because their school children are less well prepared for school. The state has a constitutional obligation to develop schools which will compensate as fully as possible for inequalities of prior training and background. The cost of such an effort, seriously undertaken, will be immense; the result well worth the cost." (Kirp, *The Poor, The Schools and Equal Protection,* in Harvard Educational Review, *Equal Educational Opportunity* (1969) at 156, 169.)

Lest there be any doubt as to what this involves, Professor Kirp helpfully notes (Footnote 122 of his article):

> "The Passow Report estimated the cost of compensatory education at 'three or four times the cost of meeting the educational needs of the child whose home environment has already done a good portion of the job even before the child enters school' (Passow, *Washington D. C. Public Schools,* page 259)".

Professor Kirp does however provide one helpful suggestion. He notes:

> "The magnitude of the necessary effort may seem to some to represent an overreliance on schooling as a tool for social amelioration. While a court will not be able to choose among alternative social policies, (better schools or better housing or more jobs, etc.) it may, by denying plaintiff's claim, passively express its reluctance to order a major readjustment of fiscal and social priorities." (at 169 n. 122).

Lest it be thought that Professor Kirp's position is an extreme one, it should be noted that he too is outdone by Professor Samuel Bowles of Harvard. Professor Bowles set forth the ideal of "equality of education opportunity in terms of the economic results of education". Bowles, *Towards Equality of Educational Opportunity* in Harvard Review, *Equal Educational Opportunity* (1969) at 124. Professor Bowles goes on to urge:

> "The allocation of unequal amounts of resources for educating Negro as compared to White children and poor as compared to rich children." (at 115).

It is clear that there are as many versions of what the Constitution requires as there are professors of law and education, and that the courts, if they admit a significant judicial role in this sphere, will be subjecting themselves to a barrage of conflicting law suits by exponents of conflicting theories.*

Counsel coordinating the *Serrano* litigation has made clear that the decisions are deemed of value not for the actual results obtained, which may indeed be counterproductive in terms of the needs of urban districts ("Unless we are careful, we can be locked into a formula we don't like for over a decade" Myers, *Second Thoughts on the Serrano Case,* City Magazine, Vol. 5, No. 6 pg. 41 (Winter 1971) quoting Mrs. Sarah Carey, Assistant Director of the Lawyers' Committee), but rather for their holdings that education is a fundamental interest. Mrs. Carey has noted:

> "And then finally — and this is an issue the press has ignored totally — *if education is a fundamental inter-*

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* See Berke and Callahan, *Serrano v. Priest, Milestone or Millstone,* 21 J. PUBLIC LAW 23, at 69 (1972) ("the courts will once again be called upon to sit in judgment on school resource allocations in a second or third round of post-*Serrano* litigation * * *.")

est, as the Serrano court declared it to be, what flows from that?

In the criminal area, where the right to an adequate defense, has been declared a fundamental right, the Supreme Court has held that the State has to put the defendant in a position where he can actually fully exercise that right. This has been translated to mean if he is poor he must be furnished defense counsel; his trial transcript must be paid for; and he must be given other support to put him in an equal position with more well-to-do citizens.

(Senator Mondale) As I understand Dr. Coons' interpretation of the Serrano case, the court specifically was not asked to deal with the question of what he calls 'fiscal equity.' So in no way does that deal with the need question. But there have been two cases, in Virginia and Illinois which sought to deal with the fair ness principle, the need principle and both were lost.

(Mrs. Carey) I am getting at it from a different way. The Serrano decision did declare education to be a fundamental interest, and it said, as a result of that, we have to do certain things with the way we spend money for education, but *there are a whole lot of things in different directions that flow from the finding of fundamental interest.*

In other lawsuits which raise the point directly — which this case didn't — *it may well be that you will find fundamental interest interpreted as requiring whatever kinds of support a student needs to exercise that interest,* the same way a criminal defendant may need counsel. The student may need transportation, he may need lunches, or special instructional aids.

(Senator Mondale) I understood Dr. Coons to say he hopes no one will bring a lawsuit of that kind now.

Did I understand you correctly?

(Dr. Coons) Yes, sir.

(Mrs. Carey) Dr. Coons does not want to have Serrano fouled up on its way to the Supreme Court.

(Senator Mondale) That is going to be quite a conference in October.

> (Mrs. Carey) *Ultimately, 5 or 10 years down the road, there will be cases that flow from the fundamental interest interpretation just as there have been in the voting rights and criminal defense areas."*
>
> (Senate Select Committee on Equal Educational Opportunity, 90th Congress, 2nd Session. *Hearings* at pg. 6868 (hereinafter cited as Mondale Committee Hearings) (emphasis added).

It is evident that admitting a judicial role in this sphere will result in the crippling of essential governmental programs by a welter of conflicting legal commands. The existing system of multilevel grants in aid in many of its aspects makes effective budgeting difficult. When these difficulties are compounded by a number of conflicting decrees by state and federal courts, hasty and emotional legislative responses, and all the other predictable consequences of the course being urged upon the court, it is by no means clear that the intended beneficiaries of the new rules will in fact benefit from them, or will benefit from them more rapidly than they would benefit from a process of public persuasion directed at the legislature. The recent experience in connection with welfare litigation in California, with its barrage of conflicting federal and state injunctions, special sessions of the legislature, fund shortages and executive cutbacks may supply a vivid illustration of what is in store for our educational system under the regime urged upon the Court here. The consequences for school bond issues are also notorious. As noted by the court in *Spano v. Board of Education,* 328 N.Y.S.2d 229 (Sup. Ct., Westchester County, January 17, 1972):

> "Many contemplated school construction projects it was urged are in jeopardy as a result of the refusal of municipal bonding attorneys to render the necessary certification as to no pending litigation which would impair the validity of the bond issue . . . Unless and

> until the United States Supreme Court reverses or modifies McInnis and Burruss, I see no legal virtue championed or laudable judicial purpose served by placing the sword of Damocles over school bond financing in this state for the next several years."

Furthermore, there is no stopping place in plaintiffs' egalitarian logic which will be consistent with the survival of the right to private education. Indeed, as even commentators sympathetic to their cause have indicated, there is little stopping place in the logic as distinct from Plaintiffs' intentions short of compulsory state operated boarding schools. See Kirp, *The Poor, The Schools and Equal Protection*, in Harvard Educational Review, *Equal Educational Opportunity* (1969), at 155-56. The principle that education should not be a function of parental wealth, articulated by the *Rodriguez* decision and in the very title of the Coons, Clune and Sugarman book, is a politically debatable one on numerous grounds. It appears flatly inconsistent with the thrust of *Pierce v. Society of Sisters.* It would constitute constitutional compulsion of an "organic relationship of the citizen to the state" within the meaning of Justice Holmes' dissenting opinion in *Lochner v. New York.* But the maxim that "the child is not the creature of the state" evokes little sympathy from plaintiffs and their allies, some of whom have already declared their purpose to utilize the *Serrano* principle as a springboard further to constrict private schools and the right to private education: Thus Dr. Coons:

> "(Senator Mondale) In the absence of some kind of adjustment in the rich district, would you not actually be encouraging private schools for the rich? Would they not say, 'Well, we are in this trap where we can raise a lot of money to be sent elsewhere or we can put downward pressure on revenue for our local schools and simply spread all of our money on private schools

for our children.' Since all the capital costs of constructing private schools is deductible from the taxes anyway, it is sort of publicly supported . . .

(Dr. Coons) May I answer that other question which you had about the rich district and its disincentives? It is an important question. * * *

I think the amount that would already be taken out in personal income and other statewide taxes for the general support of education would be enough so that most people would not be able to afford both the support of public education and private education. At least there would not be a sufficient number of such people that there would be any but a fringe of districts in which the demography would be such that there would be so many very rich people that they would opt out of public education altogether. *And, of course, it is up to the State as to whether they can do that.* The State, after all, would set some kind of adequate minimum which every child should have available in public education. A district could simply drop out, as it were; it would have to stay in the system. Being in and paying for that system, people are going to use it — they are going to have to carry the burden of that local system, and so, there is a powerful incentive to stay in it and make it all work as a public system.

Was I responsive?

(Senator Mondale) Yes."

(Mondale Committee Hearings, pp. 6883-84) (emphasis added).

Mrs. Carey, the Assistant Director of the Lawyers' Committee sponsoring this litigation, went even further in outlining the possible attack on private schools:

"(Mrs. Carey) On the private school issue, that is one that everyone kicks around. As a factual matter, I am not sure there's any difference right now between the Scarsdale school system and Scarsdale with a private school system. It is just the admission practices that are slightly different. At present, it is a

question of buying a house rather than getting into a school. So, I am not sure that will change things from the way they are at present.

Another thing to consider is whether, if private schools are actually set up as nonprofit corporations and so on, whether there would not be grounds for attacking them. There is a case, a Lawyers' Committee case in Mississippi, *Green v. Kennedy,* where white parents tried to set up a school, a private school, for the purpose of avoiding integration, and the court knocked down their tax exemption on the ground that it was a deliberate evasion of the constitutional mandate.

Now, if the Constitution declares education to be a fundamental interest, it might be that you could attack private schools on that ground.

(Senator Mondale) The key to the *Green* case was deliberate segregation, white flight, designed to escape the court order.

(Mrs. Carey) That is right.

(Senator Mondale) *You might say there is a similar constitutional principle, and that no one can escape the public schools. Maybe that will be the law.*

Go ahead.

(Mrs. Carey) *That is roughly what I wanted to say."*

(Mondale Committee Hearings, pg. 6884) (emphasis added).

What plaintiffs seek to have the judiciary set aside is the operation in the sphere of education of the system of allocation of resources that in greater measure or less determines the distribution of every other commodity — this in a nation whose constitution, including the Fourteenth Amendment to it, expressly recognizes and protects private property: "Absent constitutional mandate, the assurance of adequate housing and the definition of landlord-tenant relationships is a legislative not a judicial function. Nor should we forget that the Constitution ex-

pressly protects against confiscation of private property or the income therefrom." *Lindsey v. Normet,* 405 U.S. 56, 74 (Feb. 22, 1972). The plaintiffs totally fail to respond to the problem created for them by the continuing survival of the "state action" doctrine, see *Evans v. Abney,* 396 U.S. 435 (1970); *Adickes v. Kress and Company,* 398 U.S. 144, 167 note 39 (1970). The state is not constitutionally obligated to eliminate the effects of differences in private means of individuals, let alone differences in average private means of the subdivisions in which individuals reside. These propositions would seem self-evident, but they are not in the constitutional wonderland inhabited by plaintiffs. As Dr. Harley Lutz, Professor of Public Finance at Princeton, has recently written:

> "It comes as quite a shock to be told that the property tax, workhorse of the tax system, is unconstitutional after so many years of reliable service. One can't help being suspicious of the circumstances — all the court decisions, in several states, have involved only school financing. The 'rich' and 'poor' municipal units must levy different rates of property tax for the support of all other local functions, but apparently the disparities of tax rates for these purposes are still constitutional; moreover, every state provides more or less state aid to local schools. Without consideration of this fact, complaint about differences in property values and tax burdens is overdone. * * * Mother Nature is primarily responsible for the differences in real property values, and the contrivances of men have been aimed at manipulating municipal boundaries for maximum advantages. Topography, location and other natural features result in value differences that cannot be eliminated. A given millage levy will obviously produce more revenue for a governmental unit that contains high value property than it will for a unit that contains low value property. It would be as reasonable to hold that the Rocky Mountains are unconstitutional because they are not flat

> enough to plow as is to indict the property tax because a given rate of tax will not produce the same revenue in every district. * * * We may not have to wait long before some court will decide that a low income family is denied equal protection of the law because it can buy less than another family with more income. Inequality of personal income would then be unconstitutional." Lutz, *Can the Property Tax be Replaced?*, Wall Street Journal, February 9, 1972, page 14.

There is no reason to believe that the *Rodriguez* principle can be readily confined to educational expenditures or readily enforced. Already defendants have been informed that one "wealthy"* school district in a university community in a mid-western state where a *Rodriguez* suit has been filed has commenced guarding itself against an unfavorable decision by transferring various physical education, shop, and audiovisual activities from the school board to the park board and library board. Of course, following transfer, they may not be within the scope of the compulsory education laws and hence arguably not within the scope of *Rodriguez*, notwithstanding that their noncompulsory character may mean that they will be availed of by fewer students from poorer homes. It is more probable, however, that if *Rodriguez* is accepted, the courts will feel bound, as they properly have in the school segregation cases, to pursue methods of evasion and to proliferate the *Rodriguez* principle to the point at which a corps of suitors** (or marshals) will relentlessly

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* Plaintiffs' definition of "wealth" in relation to education means the possession by a taxpayer of an annual sum equal to approximately one-sixth the cost of a late model car, the use of which upon one's childrens' education is an offense which must relentlessly be pursued and prevented by the federal equity power.

** There will be more cases like *Jelliffe v. Berdon* (U.S. D.C. Conn. Civil No. 14,821) where a federal district court on May 15, 1972 denied a preliminary injunction to prevent the Town of Darien from

root out from local property-tax-supported budgets all activities which raise the danger that someone might be educated by them. Do the federal courts really wish this role? Do they regard it as consistent with the maintenance of local or private initiative in a free country?

There is no reason to think that the judiciary, and particularly the lower federal and state judiciary, will possess any significant competence in this sphere. Typically and regrettably, constitutional cases raising important public issues are briefed on close schedules by lawyers heretofore possessing limited familiarity with the subject matter. This is not self-evidently the best means of making available to a deciding tribunal pertinent information. Rather it is a method of making public policy that places a premium on sloganeering — sloganeering of the sort that captivated the California and Texas Courts. In the end, it will set in motion forces that will lead to an increasing politicalization of the judiciary. Attention may properly be given to Justice Schaefer's recent warning:

> "It is true, I think that the style of legal argument and perhaps even the technique of legal research have shifted in recent years. This impression cannot be documented, but it seems to me that much more than in the past the lawyer's quest has become a search for quotable words which, regardless of their initial context, can be read in the abstract to bear upon the situation at hand. The pressure is thus toward a jurisprudence of words or phrases divorced from facts and capable of generating new words and phrases with independent lives." Schaefer, Book Review, 84 Harv. L. Rev. 1558, at 1559 (1971).

The present case constitutes a repudiation of methods of persuasion in favor of recourse to authoritarian decrees

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erecting a public school in asserted violation of the *Serrano* principle. Cf. also *Ansell v. Howard County Council,* 264 Md. 629 (March 6, 1972).

whose sanction must rest if disputed, entirely on force. No processes of consent gave rise to the Texas decision. The judgment of no legislative body or constitutional convention supports its result. If the decrees of courts rendering such judgments are disputed, the courts will stand effectively alone. Indeed, the present case is brought against a background of years of almost complete public and political inactivity by the proponents of greater educational equalization. The columns of the largest newspapers of most states will be searched in vain for any significant effort during the last several sessions of their legislatures by the proponents of the present lawsuits to enlist public support of greater equalization. Although it may be true that the narrow felt interests of taxpayers in the wealthier subdivisions is not aided by equalization, almost all social progress is the product of enlightened self-interest or what Justice Holmes described as the limitations upon self-interest imposed by sympathy. Were this not the case, there would be no equalization programs at all, and, indeed, no public schools at all. But the designers of plaintiffs' theory elect to abjure public persuasion. Rather here the tyranny of the syllogism is resorted to in order to carry the day on the belief that it is easier to persuade one man, or five, than to persuade thousands.*

DESTRUCTION OF THE FISCAL POWERS OF AMERICAN LEGISLATURES

The proposition tendered by plaintiffs is of course totally at variance with numerous prior cases including those cited in the *McInnis* opinion as well as those cited in *Board of Education of Independent School District of Muskogee v. Oklahoma,* 409 F.2d 665 (10th Cir. 1969). The *Muskogee*

* Indeed the Coons, Clune and Sugarman book, is not dedicated, in the manner of most polemical treatises, to a hopefully enlightened public but rather "To Nine Old Friends of the Children."

case makes clear that "the use of taxes in the county where the tax property is located does not, of itself, constitute an invidious discrimination or unreasonable classification." The *Muskogee* case refers to the leading Supreme Court cases relating to constitutional limits on state taxation. In *Allied Stores of Ohio, Inc. v. Bowers,* 358 U.S. 522, 526 (1959), the Supreme Court, rejecting equal protection challenges to state taxing systems, observed that states "have the attributes of sovereign powers in devising their fiscal systems to insure revenue and foster their local interests." The cases are legion which reject any suggestion that there is a constitutional requirement of correlation between taxes and benefits, a constitutional prohibition against regressive taxation (such as the property tax, the sales tax, the value-added tax, or the total impact of state and local taxation generally), or a constitutional prohibition against regressive benefit programs. (Public colleges, national parks, mortgage interest tax deductions, etc); yet an opposite postulate as to all three of these issues is at the root of Plaintiffs' complaint here.

The decided cases clearly indicate that there are virtually no constitutional limits on the distribution of state benefits by legislation. In *American Commuters Association v. Levitt,* 279 F. Supp. 40, 47 (S.D. N.Y. 1967), the court observed:

> "With respect to the challenged statutes conferring benefits, plaintiffs claim these statutes are unconstitutional because there is no equivalence between the taxes plaintiffs pay and the benefits they receive. This claim does not present a substantial constitutional question warranting consideration by a three judge court. * * * The controlling question as stated by the Supreme Court with respect to the constitutionality of a tax is whether the taxing authority has given anything for which it can ask a return. *State of Wisconsin*

> *v. J. C. Penney Company,* 311 U.S. 435 (1940). * * * Given the power to tax, the challenged statutes conferring benefits are not unconstitutional even if, as plaintiffs allege, the benefits they receive are not equivalent to the taxes they pay. Cf. *Carmichael v. Southern Coal & Coke Company,* 301 U.S. 495, 521-25 (1937). As the court stated in *Morton Salt Co. v. City of South Hutchinson,* 177 F.2d 889, 892 (10th Cir. 1949):
>
> > 'When * * * (a) tax is levied upon all the property for public use, such as schools, the support of the poor, for police and fire protection, for health and sanitation, for water works and the like, the tax need not, and in fact seldom does, bear a just relationship to the benefits received. Thus, the property of a corporation may be taxed for the support of public schools, asylums, hospitals, and innumerable public purposes, although it is impossible for it to derive any benefits other than privileges which come from living in an organized community.' "

The principles invoked by the district court were emphatically affirmed by the Court of Appeals in *American Commuters Association v. Levitt,* 405 F.2d 1148 (2d Cir. 1969). In that case the Second Circuit made mention of the "special attention courts have always shown to tax matters even when constitutional rights are involved, *e.g., Nelson v. City of New York,* 352 U.S. 103 (1956)."

If plaintiffs attain their apparent desire, a fully-state-funded system, the lot of the state administrators will not be a happy one. For the sponsors of the plaintiffs' suit have already made it clear that they consider that its principles extend beyond barring "discriminations" on the basis of district wealth and operate to bar discriminations in educational spending programs on any arbitrary basis, that is to say, any pattern of expenditure not resulting in per pupil equality. Thus Professor Coons has observed:

> "(Senator Mondale) So that if a school district found gold in the downtown area that permitted it to generate an additional $500 in the same tax effort for their school children, that would come within the *Serrano* decision; but, if they had an influential Congressman that distributed the gold out of the Federal Treasury, does it apply?
>
> (Dr. Coons) I am not sure. It seems to me that the 'due process' clause of the Fifth Amendment might require a level of rationality in Federal spending which would make such a policy questionable. It would be a very interesting constitutional problem."* (Mondale Committee Hearings, pg. 6848).

What became of most federal public works programs on this theory, so inconsistent with our history and with generally understood limitations on the judicial function, is not explained by plaintiffs. For them, it is not sufficient that, as here, an elected representative legislature has apportioned burdens and expenditures; the courts are to be invited to second-guess budgetary determinations and to invalidate "regressive" taxes and expenditures and "unfair" relationships of tax and expenditure as they did in *Rodriguez*.

The thesis of *Rodriguez* is that some unconstitutional unfairness inheres in the fact that the residents of "rich" districts are taxed less heavily, for more educational benefits, than the residents of "poor" districts. But the case law is emphatic that the constitution imposes no requirement of a relationship between tax burdens and benefits. As

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* Indeed, plaintiffs are driven inexorably to this conclusion. The specious nature of the distinction which they would draw between *Serrano* and *McInnis* may be appreciated by considering their probable attitude toward a statute providing for full state funding and going on to recite that the educational needs of the state required appropriating to the separate subdivisions in the precise unequal amounts spent under the total present system.

stated by Mr. Justice Cardozo for the Supreme Court in *Carmichael v. Southern Coal Co.*, 301 U.S. 495:

> "We have recently stated the applicable doctrine. 'But if the tax, qua tax, be good, as we hold it is, and the purpose specified be one which would sustain a subsequent and separate appropriation made out of the general funds of the Treasurer, neither is made invalid by being bound to the other in the same act of legislation.' *Cincinnati Soap Co. v. United States,* 301 U.S. 308, ante, 112, 57 S. Ct. 764, *supra.* Nothing is more familiar in taxation than the imposition of a tax upon a class or upon individuals who enjoy no direct benefit from its expenditure, and who are not responsible for the condition to be remedied.
>
> A tax is not an assessment of benefits. It is, as we have said, a means of distributing the burden of the cost of government. The only benefit to which the taxpayer is constitutionally entitled is that derived from his enjoyment of the privileges of living in an organized society, established and safeguarded by the devotion of taxes to public purposes. See *Cincinnati Soap Co. v. United States,* 301 U.S. 308, ante, 112, 57 S. Ct. 764, *supra.* Any other view would preclude the levying of taxes except as they are used to compensate for the burden on those who pay them, and would involve the abandonment of the most fundamental principle of government — that it exists primarily to provide for the common good. A corporation cannot object to the use of the taxes which it pays for the maintenance of schools because it has no children. *Thomas v. Gay,* 169 U.S. 264, 290, 42 L. ed. 740, 746, 18 S. Ct. 340. This Court has repudiated the suggestion, whenever made, that the Constitution requires the benefits derived from the expenditure of public moneys to be apportioned to the burdens of the taxpayer, or that he can resist the payment of the tax because it is not expended for purposes which are peculiarly beneficial to him. *Cincinnati Soap Co. v. United States, supra; Carley & Hamilton v. Snook, supra* (281 U.S. 72, 74

> L. ed. 708, 50 S. Ct. 294, 68 A.L.R. 194); *Nashville, C. & St. L.R. Co. v. Wallace,* 288 U.S. 249, 268, 77 L. ed. 730, 738, 53 S. Ct. 345, 87 A.L.R. 1191. See *Union Refrigerator Transit Co. v. Kentucky,* 199 U.S. 194, 203, 50 L. ed. 150, 153, 26 S. Ct. 36, 4 Ann. Cas. 493 (301 U.S. at 522, 523)."

Justice Cardozo further pointed out, citing numerous illustrations:

> "Cigarette and tobacco taxes are earmarked, in some states, for school funds and education purposes * * * Chain store taxes are sometimes earmarked for school funds * * * license and pari-mutuel taxes in states authorizing horse racing are directed to fairs and agricultural purposes, to highway funds, and to an old age pension fund in Washington * * * Unemployment relief, though financed in most states by special bond issues, has in some instances been financed by gasoline taxes * * * Similarly, special taxing districts for the maintenance of roads or public improvements within the district have been sustained, without proof of the nature or amount of special benefits (citing cases) 301 U.S. at 522-23 nn. 14, 15."

The havoc that will be wrought by the acceptance of the principles espoused by plaintiffs and the *Serrano* court is quite clear. The effect of acceptance of their claim would be to project the judiciary into a "second guessing" of government fiscal determinations unparalleled in our history. Virtually all existing spending programs, for education and otherwise, will be opened to attack.

Thus, the Federal Impacted Aid Program will be open to constitutional attack by the principle announced by plaintiffs, who reject the rational basis test presently used to sustain the program. See *Okaloosa Co. School Board v. Richardson,* (N.D. Fla., Oct. 12, 1971).* Indeed, the

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* 40 L.W. 2238 (N.D. Fla., Oct. 12, 1971).

program is a major cause of the "inequalities" between school districts in many states. Dr. Coons himself has discussed the possibility of such an attack. "It seems to me that the due process clause of the Fifth Amendment might require a level of rationality in Federal spending which would make such a policy questionable. I would be delighted to be involved in that law suit." (Mondale Committee Hearings pg. 6848). Even the Federal Title I Program, which uses negative wealth measures, may not be immune. See Coons, Clune and Sugarman, *A First Appraisal of Serrano*, 2 Yale Review of Law and Social Action 111, at 121 note 56 (1972).

UNDESIRABLE EFFECTS ON THE TAX SYSTEM

One consequence of the *Rodriguez* rule may be to promote a shift away from property taxation toward other forms of taxation whether of a regressive or progressive character. The property tax is an unfashionable tax, but the reasons for its unpopularity are not necessarily to its discredit. "The property tax's high visibility is sometimes cited as if it were an objectionable feature. But this is a curious argument. Taxes ought to be visible, not concealed * * * what's more, although some homeowners seem not to connect clearly the property taxes they pay with the services those taxes finance, there is a much closer linkage between costs and benefits than at the state or federal level." Cordtz, *A Word for the Property Tax,* Fortune, May 1972 pp. 105-06.

A shift away from the property tax would have other consequences. One of them would be to confer a windfall upon industries effectively exempt for one reason or another from corporate income taxation:

> "One aspect of the local property tax, which is sometimes overlooked, is that it can, in effect, close up the loopholes in the federal income tax laws. Con-

> sider coal. Coal royalties are accorded both capital gains treatment and depletion allowances. As a result of those two loopholes they are taxed on the federal level at a very very minimal level. Thus, the local property taxes is really the only tax in existence now which at least has the potential for getting at the fantastic 'mineral wealth." (Mondale Committee Hearings pg. 6775) (Testimony of Ralph Nader).

In addition, most economists are agreed that the imputed annual value of owner occupied land is at least conceptually income though not taxed as such under federal and state income tax laws nor otherwise reached except by property taxation. See Marsh, *The Taxation of Imputed Income*. 58 Pol. Sci. Q. 514 (1943); Vickery, *Agenda for Progressive Taxation*, 18-26, 44-49 (1947); Simons, *Personal Income Taxation* Ch. V (1938). "The British income tax and those of some other countries, include the rental value of owner-occupied homes in taxable income." Surrey and Warren, *Federal Income Taxation* 129 (1960 edition).

Still other economists point out virtues of the property tax in promoting transferability of land:

> "Not only are the property tax's purported flaws exaggerated, but its virtues are too often slighted. Properly applied, it can help a free real estate market function in a way that maximizes the benefits to society. Economists generally agree that low property taxes encourage speculators to hold land off the market for appreciation, since the cost of holding the land is insignificant compared with the potential gains. There is evidence that this has already happened in the U.S. on an important scale. Between 1956 and 1966 according to studies made by Alan D. Manvel for the National Commission on Urban Problems, land prices almost doubled — rising from 270 billion to 520 billion. The rate of increase was almost 7 times that of the wholesale commodity price index. Yet the rise in the value

> of land was caused almost entirely by the growth in the economy (which increased the demand for an inelastic supply) and by society's investment in infrastructure and services. Realistic property taxation would compel the owners of undeveloped and underdeveloped property to pay a fair share of the costs of services from which their lands derived additional value. Large scale reductions in property taxes on the other hand would merely strengthen the forces that already tend to inflate land prices. The fantastic price of land in many European countries, where property taxation is minimal, shows the potential danger." Cordtz, *supra* at 106.

These virtues of the property tax are not to be lightly despised. Certainly the decisions as to the value and fairness or lack of it of the property tax are decisions properly committed to state and local legislatures. Yet the present litigation constitutes a massive assault upon the property tax as it presently exists in the United States. The practical effect of adoption of the *Rodriguez* rule may be to require the states either to abandon the property tax for education or to provide for its state collection and assessment, an administrative task of gigantic proportions and one scarcely practicable in the near future in the many states which do not have state assessment agencies or state property taxes. The proponents of these suits do not deny these consequences, they acknowledge and seek to foster them:

> "The decision does not invalidate the property tax, but it requires that if that tax is to be retained, the distribution of the income generated by it must be reformed. This probably cannot be done unless the manner in which the tax is collected is also reformed." (Mondale Committee Hearings at 6867) (Testimony of Sarah Carey).

There is no reason why the property tax should be required to be a state tax or why the taxing authority should

be required in the absence of a state property tax to coordinate assessments by thousands rather than merely dozens of assessors. It is not surprising that the reaction of academic students of public finance to the recent court cases has been something less than enthusiastic.

Moreover, in many states, shifts in the pattern of taxation away from property taxes will operate to the detriment of poorer families. Particularly is this so in those states which already have adopted high income taxes, such as Maryland, Wisconsin and New York, to give three examples. By reason of the competition for industry these states are effectively precluded from significantly further increasing their income taxes in the absence of corresponding increases by neighboring states. They will be driven either to resort to state property taxes or to resort to state sales taxes which most economists agree are more regressive than the property tax. Some indication of the choices which various states are likely to make if presented with the need for raising a large quantity of additional revenues for state funding of education may be gleaned from examination of the tables at pages 307-08 and 317-18 in Johns (editor), *Economic Factors Affecting the Financing of Education,* National Educational Finance Project Volume II. These tables reveal that as of their dates, Wisconsin, by adopting the normal 5% sales tax rate and including consumer services at that rate, might derive an additional $88 million in sales tax revenues whereas that state could gain nothing from adoption of the high Oregon income tax rates since it already has a high income tax. The State of New York would have gained $1,150,000,000 from the 5% sales tax including consumer services, while it would have gained only $98 million from raising its income tax to the Oregon rates. The State of Maryland would have gained $165 million from raising its sales tax

rates to 5% and including consumer services, it would have gained only $54 million from raising its income tax to the Oregon levels. Given the practical exhaustion of these states' income tax bases it is not difficult to discern the direction in which they will turn if required to raise vast additional state sums for purpose of compliance with a *Serrano-Rodriguez* rule.

This potential regressive effect, of course, is not confined to the state level, as critics of proposals for value added taxes remind us. See Moynihan "Can Courts and Money Do It?" New York Times, January 10, 1972, page 24 E "Who will provide this money is not clear: it could come from heavier taxes on the poor and the working class."; Kraft, "U.S. Is Taxing Itself Too Little and Wrongly" Baltimore Sun, January 24, 1972, page 11 A ("In the name of a handful of persons badly hurt by property taxes — particularly older people who could easily be helped in some other way — [the President] holds out for next year the promise of substituting for state property tax a general sales tax.")

It is clear from the authorities discussed that there is no assurance that either on the tax side or the benefit side a shift to a formula complying with *Rodriguez* will be of benefit to poor taxpayers or their children. In many jurisdictions, and perhaps in the nation as a whole, the result may be a shift to more regressive sales taxes in the place of the present reliance upon property taxation. Similarly, distribution of school expenditures on a basis which gives property-rich areas less money may in many states operate to the detriment of persons of low income who reside in disproportionate measure in just such built-up property-rich areas. The assumption that shifts away from the property tax or shifts in expenditures away from property rich areas will have progressive effects has been

vigorously disputed and the writers on public finance have been quick to point out that:

> "Any reduction in [property] tax rates would confer windfalls according to ownership — and property ownership is more concentrated than that of income. Who actually bears the burden of property taxation? Neither the theoretical analysis nor the empirical evidence is as clear as we should like. A part of the tax on commercial, utility, industrial and housing structures can be assumed to fall on consumers more or less in proportion to spending. This part then has some of the regressive element which is often cited in condemning the tax. But despite frequent implied assertions to the contrary, a part probably remains on suppliers of capital; this will be more progressive than proportional (and not regressive). The considerable portion which falls on land, much of which was capitalized in the past, is hard to place in a meaningful sense — except to say that past and present land owners are generally 'not poor'. The distribution of this burden will be decidedly more progressive than regressive. In short, although families with 'low' incomes or consumption do bear property tax, persons who own, directly and indirectly, 'large' amounts of property must carry burdens which are 'heavy'. G. Lowell Harriss [Professor of Economics at Columbia University]. *Issues and Interpretations*, 155 The Bankers Magazine No. 2 (1972).

EFFECTIVE COMPULSION OF FULL STATE FUNDING

The *Rodriguez* decision at bottom is an effort to constitutionally impose a regime of full state funding of education upon the 49 American states that have historically rejected such a system and upon the state of Hawaii in which increasing dissatisfaction with its results has been manifested in recent years. It is true that for the moment proponents of the *Rodriguez* rule have urged that there are other methods of educational finance than full state

funding, such as voucher systems and the Coons proposal of "power equalizing", which are consistent with the *Rodriguez* rule. See, *e.g.*, Lawyers' Committee for Civil Rights, *Valid Systems under Serrano v. Priest, Compact*, vol. 6, no. 2 (April 1972) at 38. That these alleged alternatives to full state funding are "good for this day and train only" emerges quite clearly however from the writings of proponents of the new "movement". Thus, in describing the possible use of voucher plans, even the Lawyers' Committee suggests that "the system * * * be limited to an experiment in two or three urban areas" or be likewise limited to "after school educational experiences — *e.g.*, music or art lessons." *Id.* at 41. It requires only a slight familiarity with the general view of state education authorities with respect to voucher plans to realize that they are scarcely a likely result of court imposed adoption of a *Rodriguez* rule. Thus, for example, the National Educational Finance Project in its extended volume on "Alternative Programs for Financing Education" (National Education Financing Project No. 5) dismisses the possible use of voucher plans in one footnote:

> "This so-called 'voucher plan' was not considered because its constitutionality is in doubt at this writing. Furthermore, if the law prohibited the redeeming of the vouchers by parochial schools and also by private schools which enrolled a lower percent of blacks than the percent of blacks enrolled in public schools of the district in which the private school was located, there would probably be few advocates of the voucher plan." *Id.* at 350 note 3.

The so-called power-equalizing option pursuant to which districts would be permitted to supplement the uniform state allocation by levying additional local taxes provided that the wealthier districts levying such taxes turned over a large portion of the proceeds for statewide use similarly

is not regarded as a viable alternative to full state funding by anyone. Even its chief and only sponsor, Professor Coons, has indicated that it is designed for consumption only by judges and not by educators or legislators:

> "Of course, there are certain problems inherent in that [power equalizing proposal], not the least of them the political problem of recapture from the local district. I am informed by people who know these things that it is politically difficult to establish a system in which, if Beverly Hills is to spend $1,000 it may raise $1,500. It is cosmetically bad politically." (*Mondale Committee Hearings,* page 6882.)

In the event that any state should be so foolhardy and intrepid after adoption of the *Rodriguez* rule as to adopt a power-equalizing rule as distinct from full state funding, the proponents of judicial intervention in these matters have already made clear what is in store for it. Thus, Professor Wise, the founder of the new cult, reads the California decision as prohibiting not merely existing systems of school finance but the Coons power-equalizing proposal also:

> "This analysis is consistent with the more equalitarian proposition that the quality of a child's education may not be a function of local wealth or how highly its neighbors value education. In other words, it would prohibit variations in the number of dollars spent on any child by virtue of his place of residence. * * * One point that remains unclear in the opinion is whether the equal protection clause applies to children or to school districts. If it is children who are entitled to equal protection, then the quality of a child's education could not be subject to a vote of his neighbors * * *." Wise, *The California Doctrine,* Saturday Review, November 20, 1971, 78 at 82.

Professor Karst has analyzed the California decision as in effect rejecting the power equalizing option, pointing

out that Professor Coons had unsuccessfully sought a modification of the decision to expressly allow it. Karst, *Serrano v. Priest*, 60 CALIF. L. REV. 720, at 740, note 87 (1972).

Professor Michelman likewise has assisted in sharpening the blades of the knives which will fall upon any state utilizing this supposed option, urging that the Coons approach involves unacceptable variations between children and districts and that any other approach allowing limited local variations presents problems of justiciability. Michelman, *On Protecting the Poor Through the Fourteenth Amendment*, 83 Harvard Law Review 7 at 54-59. He is candid in favoring "insistence on channelling all the state's educational expenditures into the common pool." *Id.* at 58.

The President's Commission on School Finance has contributed its denunciation of power equalizing on the grounds that "it would be extremely difficult to establish an upper limit on district tax rates that would enable the state to plan its educational fund requirements. While the power equalizing would eliminate disparities based on wealth, it would nevertheless continue vast differences in funding among school districts and therefore among children in the state." President's Commission on School Finance, *Schools, People and Money* (1972) at 33.* The authors of the report of the Fleischmann Commission in New York State likewise rejected power equalizing.

> "We prefer full state funding to district power equalizing for several reasons. First, assume that wealthy districts are inhabited by wealthy residents and poor districts are populated by the poor. All district power equalizing does then is to assure equity in

* See also Berke and Callahan, *Serrano v. Priest, Milestone or Millstone*, 21 J. PUBLIC LAW 23, at 62 (1972), criticizing power equalizing as unfair to urban areas.

tax rates vis-à-vis school expenditures. Poor people would have difficulty in meeting the competition of rich people in rich districts, once the latter saw how the finance plan was shaping up and raised their school tax rates to preserve their favored position.

Second, assume (as we do) that there is no absolute standard of education which can be described as 'adequate' — that all educational disparities are relative. Then, if one is going to embark on a major revision of educational finance arrangements, why should one not remove 'place' inequalities as well as wealth inequalities? The quality of a child's education should, in our view, be no more a function of how highly his neighbors value education than how wealthy they are.

Moreover, we believe that the equal protection clause of the 14th Amendment applies to individual children rather than school districts. If this is so, then the quality of a child's education cannot depend any more on the vote of his neighbors within the confines of a local school district than it can on their aggregate relative wealth vis-à-vis other school districts within the state. The California Supreme Court in *Serrano v. Priest* was not explicit on this point, but it did take some pains to argue that territorial uniformity in school finance is constitutionally required. 'Where fundamental rights or suspect classifications are at stake,' the Court said, 'a state's general freedom to discriminate on a geographical basis will be significantly curtailed by the equal protection clause.'

To make the point clear, consider two districts, A and B, and let them be of equal wealth. Suppose the residents of district A choose a school program half as costly as the residents of district B. Is it good policy for the state to require the children of A to suffer the lifetime handicap of inferior education, which is to say, should the state exclude these children from the benefits of district B education on the basis of a district boundary line that is itself a historical accident? As we understand the ideals of a democracy, public

> institutions — and especially the schools — should see to it that personal attributes such as aptitude, talent, and energy, play a progressively larger role in an individual's success and development, while parental wealth, on the one hand, and apathy on the other, play a progressively smaller role. We see no way for this ideal to be achieved in the absence of direct state intervention in the allocation of educational resources.
>
> One of the functions of an educational system is to act as a sorting device. Classification of people on grounds of ability and aptitude occurs all the time, and schools often act as a major transmitter of the process. But if primary schooling of some children is of vastly greater quality than that of other children, the sorting process is ineffective and dangerous. Local tastes for basic educational services should not distort the function of the sorting mechanism and possibly undermine students' potential and achievements." (*Report of the New York State Commission on Quality, Costs, and Financing of Elementary and Secondary Education* at 2.45 and 2.46.

Lest the critics of power equalizing have overlooked some of the considerations which would be urged against it in future litigation, Professor Coons himself has supplied some further suggestions:

> "The first group notes that tax-sensitive voters may tend to cluster (*e.g.*, older persons with fixed incomes and no children). These critics would prefer the security of a state mandated uniformity of spending which, as they view it, would be more education-oriented and less arbitrary. * * * The second group of critics raises a more technical objection to local choice. They doubt whether it is possible to establish fiscal neutrality or know when it exists. Realistically there are many subtle forms of 'wealth' difference in addition to differences in the value of taxable property per pupil; to equalize assessed valuation per pupil does not necessarily equalize fiscal capacity. If in a decen-

> tralized ('power equalized') district system differences in spending exist, and if, for example, spending is higher in districts with higher personal incomes, how would an objective observer determine whether taste, wealth, or some other factor is responsible?" Coons, Clune and Sugarman, *A First Appraisal of Serrano*, 2 Yale Review of Law and Social Action, 111 at 117 (1971).

These quotations should be sufficient to make clear that what is at issue in this case is whether this court is going to impose upon the states full state funding as a matter of constitutional compulsion. Notwithstanding the protestations about the alleged availability of voucher systems and power equalizing, a decision by this court affirming *Rodriguez* will clearly have the practical effect of imposing full state funding upon every American state. The alleged options remaining open to the states are not viable and are not intended to be so.

Against this background the appropriate disposition of this case is apparent in light of what all nine members of this court have recently stated in respect to the importance of local control of school systems:

> "A more weighty consideration put forth by Emporia is its lack of formal control over the school system under the terms of its contract with the county. * * * Direct control over decisions vitally affecting the education of one child is a need that is strongly felt in our society. * * *" *Wright v. Council of City of Emporia*, 40 L.W. 4807, 4812 (Opinion of Stewart, Douglas, Brennan, White and Marshall, J.J.).
>
> "Local control is not only vital to continued public support of the schools, but it is of overriding importance from an educational standpoint as well." *Wright v. Council of City of Emporia*, 40 L.W. at 4815 (Opinion of Burger, Blackmun, Powell and Rehnquist, J.J.).

Indeed, it is clear that the major objective of many of the proponents of the present litigation is the obliteration of local control. See, *e.g.*, Zukotsky, *Taxes and Schools,* The New Republic, June 17, 1972, pp. 20, 21, where it is observed:

> "One cannot reform school financing in ways that meet the tests courts have adopted without striking directly at the problem the integration cases approach obliquely; the power of local school boards to make decisions that influence what takes place in classroom and school. The power of local boards to determine what children go to which school, what teachers are hired, where they teach and how much they are paid, where schools are built and buses run are facets of district power; so is the power of boards to tax, incur debt, make budgets for distributing local and state revenues, contract for personnel and services. Integrationists are attacking the district from the front as a fortress of power and privilege, and fiscal reformers from the rear, but both are headed for the same strong room."

IMPAIRMENT OF LOCAL CONTROL

There are profound implications for the control of the public schools in the results sought. The need to secure citizens' support for local schools in order to secure support for local property tax increases will be eliminated. The need for involvement of school superintendents in the politics of the community and the desires of its citizens will be in large measure eliminated. The power of the purse of the local legislative body will be eliminated.* The implications for control of the school system and of the curriculum are recognized by virtually all the commentators on this subject. The most obvious and immedi-

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* This is graphically illustrated by the supremacy given determinations by the Maryland State Board of Public Works in the recent legislation providing for full but not pre-emptive state assumption of school construction costs in that state. Md. Code, Art. 77, § 130 A (g).

ate shift is a shift in the responsibility for labor negotiations with teachers' unions, which will naturally be directed at the level of government which provides the revenue — the state government under the mode of educational finance favored by plaintiffs. There are longer term shifts also. Acceptance of the principle contended for presages a shift in control from the district and county to the state and perhaps ultimately to the nation. The extent to which such a shift is desirable and the degree to which it is desirable raise questions of the highest political moment, which under a democratic system of government cannot be placed beyond legislative and popular control. The implications have been spelled out by Professor James Coleman:

> "There are two very different conceptions of the relation of schools to the social order. One conception is that of schools as agents for the transmission of knowledge, culture and social norms of and thus as agents for the maintenance of the social order. The other conception is that of schools as crucial institutions of social change. Schools have performed both of these functions in the past and will continue to do so in the future. But the relative emphasis of the two functions has been different at different times and places and what is of interest to us here is different for local authorities and national organizations including national governments. As the discussion of differential opportunity indicated, local authorities ordinarily have more interest in stability and use of the school as a means of maintaining a social order than do national governments.
>
> Thus, again on the issue of social change, national governments are more often on one side, the side of change, and local authorities are more often on the other, the side of stability. The basic interests involved have been discussed in earlier sections; but the content of these issues of change vs. stability goes beyond the questions discussed earlier. Examples will

indicate how this is so. In Hitler's Germany, in Stalin's Russia, in Mao's China and in Castro's Cuba the schools have been used extensively by national governments as instruments of change. Modern totalitarian regimes following a coup or revolution move quickly to take control of the schools, in order to indoctrinate the new generation with the ideology of the regime. This is an important device enabling such regimes to consolidate their power and break the influence of the preceding generation upon the younger one. The use of boarding schools, the development of nationalistic youth groups in the schools, the introduction of nationalistic propaganda into the curriculum, the indoctrination of teachers and the purging of teachers are methods that these regimes have used to achieve, in a single generation, radical social change. Such attempts at change meet with increasing resistance at lower levels of social organization, all the way down to the family. What is true in totalitarian regimes is true, to a lesser degree, in democratic ones: The national government is more likely to see the schools as instruments of social change than is the local government. The local-national conflicts concerning school integration in the United States illustrate this well, because the national government, pressed by organizations at the national level, attempts to use the schools to create racial integration which is absent in other aspects of life and thus to bring about a major transformation of the social structure. What is evident in this type of conflict is, in a sense, the self-preservation interests of two social units, the nation and the community." Coleman, The Struggle for Control of Education, in Bowers (Editor), *Education and Social Policy: Local Control of Education,* 64, at 77-78 (1970).

In addition to these broader consequences which may flow from increased centralization of control, there are more immediate reasons for questioning centralization. Thus, the former Commissioner of Education, Harold

Howe, though sympathetic to the California decision, in commenting upon it has written:

> "Teachers' organizations have opposed decentralization of city schools because of the potential loss in leverage in dealing with multiple education authorities over a variety of issues, and they may welcome centralization of fiscal authority at the state level for corresponding reasons . . . Finally, the California decision raises questions of diversity and control. It is an axiom of American politics that control and power follow money. As schools finance is monopolized by the state, what would states be likely to do that they are not doing now in controlling the education options of school boards? They might move to complete standardization of education, decreeing what is to be studied, for how long, and in what manner, thereby adding to the already extensive requirements for teacher certification and similar matters. While there are abuses in any system, I believe strongly that we need less, rather than more, participation by the state in the day to day affairs of the schools."

Howe, *Anatomy of a Revolution,* Saturday Review, Nov. 20, 1971, 84, 88. Thus, too, Professor James Coleman, perhaps the leading authority on these matters, is led by concern for diversity and local control to advocacy of a voucher system with public control limited to control over ethnic and social class composition of student bodies. See Coleman, Preface to Coons, et al., *supra;* Coleman, *The Struggle for Control of the Schools*, in Bowers (ed.) *Education and Social Policy: Local Control of Education* (1970); and the essay by Coleman in Harvard Education Review, *Equal Educational Opportunity* (1969).

Dr. James Conant, though a recent convert to the desirability of full state funding, pertinently observed some years ago:

> "Four generalizations are possible about the financing of our public schools. First, in every state the

> funds for the support of the local system come in part from local real estate and in part from taxes levied by the state itself. Second, in no state is the amount of money now available adequate in every community of the state. Third, to find a satisfactory formula according to which state funds may flow to school districts on an equitable basis to supplement the local financial provisions has taxed the skill and ingenuity of lawyers, legislators, and economists to the very limit. Fourth, the need for a formula comes from the fact that the real estate base for local taxes has, by in large, proved totally inadequate. There probably is no one completely satisfactory scheme. For the state to take over entirely the financing of each school district would be, of course, to move far in the direction of a system of state schools. *Unless a local community, through its school board, has some control over the purse, there can be little real feeling in the community that schools are in fact local schools. I have heard the opinion expressed by those who have devoted much study to the matter that something like 50% of the current expenditures should be raised through local taxes if local control is to predominate*". (Emphasis added).
>
> Conant, *The Child, The Parent, and The State* (1959) at 26.

In discussing Federal equalization aid, Conant recognized that any large scale program of equalization assistance would result in a large and increasing measure of Federal control, an insight which applies equally at the state level. Conant observed:

> "To imagine that recurring appropriations of this magnitude can be made without careful budgeting on the part of the Administration seems to me to be the equivalent of imagining completely irresponsible government. Careful budgeting will mean, in turn, a strong Executive Agency which must have access to a mass of factual information about the educational situation in every state. The agency responsible for submitting the annual estimate to the Bureau of the

> Budget and then supporting the proposals before Congress will have no easy task. Proponents of a flat grant and various equalization formulas will have to argue their cases from time to time, if not each year. The Education Committees of the House and Senate will have every reason to examine into details of curricula and school organization, much as Committees of the State legislatures now do from time to time. Certainly a new chapter in American public education will have opened. It would not be accurate to describe the resulting situation as Federal control of our public schools, but we should certainly have a powerful Federal influence added to the present influence of the central authority in each state." (Conant, *supra*, at 55-56).

The fact that increased state financing inevitably means increased state control has long been recognized by students of state-local tax structures. As early as 1931 it was noted in Hutchinson, *State-Administered Locally-Shared Taxes* (1931) that:

> "This study of state-administered locally-shared taxes indicates, however, that state administration of taxation is the first step towards state control of the functions supported by these taxes. The state is increasing its control of local functions by minimum requirements. In the case of roads it may require that the road be built to satisfy the State Highway Commission. Minimum educational standards in the way of teachers per student and the length of the school year are often prescribed. As the amount of revenue return grows larger the restrictions placed on the localities increase in number and rigor." (at page 21).

The Hutchinson study recognizes the extent to which state control usually follows state subventions. Hutchinson quotes Sidney Webb's history of grants in aid in England, Webb, *Grants in Aid: A Criticism and a Proposal* (1920) (at p. 6) (Hutchinson at 122):

> "The [British] National Government in the course of the three-quarters of a century from 1832, successively 'bought' the rights of inspection, audit, supervision, initiative, criticism, and control, in respect of one local service after another and of one kind of local governing body after another, by the grant of annual subventions from the National Exchequer in aid of the local finances, and therefore, in relief of the local rate payer".

In summarizing the history of locally shared taxes Hutchinson observes:

> "Usually, however, the state administered taxes replace some source of taxation taken from the locality. Further, the method lends itself to more and more state supervision, through re-apportionment of the revenue according to the state's idea of need and through the establishment of minimum standards for the function of which the money is given. It is a movement to be watched, and studied, for the number of taxes so administered and returned is increasing. The state sees the local need and is giving its assistance, but with this assistance goes interference. This particular type of state interference will be questioned by believers in home rule, for it usually involves rigid legislative interference rather than flexible administrative control." (at 131-32).

Further, because of variations in local needs, courts will not be able, absent detailed meddling in the day to day operations of school systems, to be able to enforce any rule of equality, even the simplest. Thus, former Commissioner of Education Howe has pointed out:

> "Educational costs vary considerably within a state. The cost of living in upstate New York is about 10% less than in New York City, so that teachers' salaries, a major component in any system's expenses, must be higher in the city in order to be fair. Janitorial services, repair services, construction, and the like vary

> from place to place. Vocational education, because of the high cost of equipment, and the teaching of handicapped children are exceptionally expensive. Spending exactly the same amount on each child in a state, therefore, does not provide equality of services."

Howe, *supra* at 86. Any rule of equality, whether relating to per pupil expenditures, school facilities, or allocation of taxing resources, would force state school systems into a Procrustean bed.

It is, of course, not self-evident that in an age of increasingly complex problems complete educational leveling is either desirable or possible. Indeed Professor Coleman in his preface to the work by Coons has noted that the American system of local financing in education is in effect a substitute for the English and European systems:

> "The educational systems of Europe have traditionally exhibited these dual forces through dual public school systems: academically oriented set of secondary schools for an elite and a set of schools terminating early for the masses. Another outcome of these forces has been the educational system of England: The state supported schools were added in 1870 to a system of 'voluntary' or privately supported schools. Thus the family with some financial means could satisfy both its aims by supporting the state system through taxes, providing one level of education, and sending its own children to private schools, providing a higher level for them. In the United States, a dual system never developed within public education, nor has the use of private schools been widespread . . . It would appear, then, that the second of these forces, the desire of families to provide for their own children the best education they can afford, has been wholly submerged by the goal of educational opportunity for all children, or at least it has been implemented wholly through actions which achieve this latter goal. This appearance, however, is quite misleading. In the United States, another means has arisen whereby persons with finan-

cial resources can employ them to their own children's benefit without having them spread thin over everyone else's children as well. This means is place of residence together with local financing in education." Coleman, Preface to Coons, at VII-VIII.

Professor Wise and Professor Coleman recognize the profound political implications of the claim for greater constitutionally compelled equality in school financing. In writing of the Coons thesis, Professor Coleman has observed:

> "Obviously, the application of this principle to all areas of consumption would do away in effect with income differences, destroying the whole system of incentives on which every society is founded. Coleman, Preface to Coons at XIV.*

Professor Coleman goes on to note that inputs of financial resources are only one of several components of the educational experience in a school, and that a more significant component of that experience is the class background of the other students:

> "There is, of course, a broader sense of the terms 'equality of educational opportunity' which should be kept in mind; equality of all the effective resource inputs into education, not merely the financial ones. This equality can only be measured by equal effects for children of equal ability; but it clearly consists of a variety of input resources, not merely financial ones.

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* That this has wide implications is evident. Compare the viewpoint of Simons, *Economic Policy for a Free Society* (1948) at 28-29.

> "A society based on free responsible individuals or families must involve extensive rights of property. The economic responsibilities of families are an essential part of their freedom, like the inseparable moral responsibilities, are necessary to moral development. Family property in the occidental sense of the primary family, moreover, is largely the basis of preventive checks on population and of the effort to increase personal capacity from generation to generation, that is, to raise a few children hopefully and well or to sacrifice numbers to quality in family reproduction."

> The question about the state's provision of equal education opportunity becomes a difficult one: over which of these resources does the state have control, or should the state have control? Which of the resources can the state, through legal means, demand be redistributed equally? Certainly not the attentive help which some parents give their children in learning to read, nor the discipline some parents exert in enforcing the homework assignments of the school, nor the reinforcements by parents of the performance rewards given by the school. . . . In this second area of resources (the state) has been even more ineffective than in its attempt to redistribute financial resources. This second kind of educational resource, in the form of other children in a school, Coons and his colleagues do not discuss. Yet the attempt of the state to effect a redistribution focuses on the attention of the fact that financial resources are not the only ones. More fundamentally, it raises the question of just how far the state can go, and how far it should go, in redistributing educational resources to provide equal protection to the young in the form of equal educational opportunity." Coleman, Preface to Coons at XV-XVI.

In light of this, it should be entirely clear that this case at bottom involves questions not merely of educational finance but of political theory: of whether the state is to be viewed as an organic unity, and its citizens merely as components of an organic whole, a view common to most totalitarian systems and one consistent with the thesis that the state is fully responsible for all differences among its citizens, or whether rather the authority of the state is to be viewed as resting upon some form of social contract and is hence limited in its operation upon individual differences to those powers conferred and stemming from actions taken by elected constitutional conventions and legislatures.

It need scarcely be labored that the removal of fiscal controls to the state level has consequences for the survival

of local government. It has not hitherto, in this country, been thought unconstitutional for taxes raised by a given government to be spent without reduction by the sort of excise tax on educational expenditures which plaintiffs would have this court impose on "wealthy" districts. Nor, under modern concepts of government, is it unconstitutional for one level of government to delegate powers to another, even though the result of a delegation would be to produce distinctions between the actions taken by delegates which the delegating government itself would be powerless to adopt.* The whole purpose of delegation of power is to allow the delegates to do what the delegating power could not do. It does not follow from the fact that the state has arguably created its municipal corporations,** that absent racial gerrymandering of other racial discrimination it is chargeable with the consequences of their differing actions, as the plaintiffs would have it.

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* The examples are legion. The delegations to states undertaken by Congress in enacting the McCarran-Ferguson Act, the Miller-Tydings Act, the Webb-Kenyon Act, and the federal estate tax credit for state death taxes are of unassailable constitutionality, notwithstanding that Congress would almost certainly be barred by the apportionment clause from directly imposing the federal estate tax at different rates in different states or (perhaps) from specifying in a state that "fair trade" agreements were legal in Kansas and illegal in Missouri. Similarly, the conferral of home rule powers on local subdivisions has not been thought unconstitutional because the local Council of one subdivision enacted a regulatory ordinance which the local Council of an indistinguishable subdivision declined to enact, nor has it been thought that the resulting "discrimination" presents a problem of equal protection of the laws.

** In Maryland and in most Southern states where county districts are commonplace, nearly all the counties pre-existed the state, and the same is true of towns in New England. See *Liggett Co. v. Lee,* 288 U.S. 517, 581 (1933) (Cardozo, J. dissenting) and authorities there cited. The special school and taxing districts characteristic of the midwestern states were likewise only in form of state origin and in their inception bore many of the characteristics of voluntary associations. Cf. Cooley, *Constitutional Limitations* 123 (2d ed. 1871); and see *Forsyth v. Hammond,* 166 U.S. 506, 518 (1897).

It has been pointedly observed that:

"One purpose for which many Americans will make sacrifices, for which they will subject themselves to heavy taxes, is to pay for schools for their children. Will voters do as much to finance more education if there is less of a tie to their own children? Some may, some may not.

As voters are pressed for tax dollars now, some may be reluctant to shoulder heavier burdens to pay state or national taxes for schools elsewhere. Over the years, I suspect, a significant local identification (1) of prospective benefits (2) with payment obligations, can have positive results as regards taxes designed to finance better quality.

What value system leads people to sacrifice for the welfare of children? As long as scarcity bears upon Americans as it must, even those with the best of good intentions are compelled to curb the desire to be generous.

A 'foundation' level of school spending guaranteed by state finances will elicit strong support. But it will not do as much as some people wish and are able to pay for. If free to do so, some communities will exceed the general average. The country will benefit from this local freedom. The results of better schooling do extend beyond the area that pays the excess. People move. Positive 'spillovers' are no less real than the negative ones which are cited convincingly as a reason for taxing over a wide area to pay for a (rising) level of schooling for all.

Many an American in the upper middle income group is troubled by present taxes. He or she can pay still more. In many cases, more or less willingly, Americans will reduce personal consumption and saving to pay more to government. They are more likely to do so, I suggest, the more they expect their children to benefit.

Some groups supporting the court cases argue that if people in community A want to pay, say, $2 more for the education of their own children they will also

> have to pay $2 more for children in other parts of the state. Does this seem fair? How would it affect incentives? Is one too unrealistic and old-fashioned to believe that effort and thrift make a difference and are not unaffected by the prospects of rewards? What would be unfortunate is a condition in which the people who can pay for better education, who must be willing to support heavier taxes, will oppose because too much of additional amounts seem likely to go to 'others'.
>
> For the best results in financing education, a local element may need to be larger than seems consistent with the new court decisions." Harriss, *supra.*

Finally, it is important to note that the proponents of the *Rodriguez* rule do not expect it to secure the assent or even acquiescence of the public on its merits. They recognize that, given a free choice, the overwhelming majority of districts clustering near the median in wealth are likely to prefer local fiscal control to full state funding. The acquiescence of these districts and their residents in plaintiffs' designs for full state funding is sought to be secured by a process of blackmail:

> "*A primary factor will be the self-interest of the bulk of school districts that cluster near the median in wealth.* They can expect benefits from successful reform; what they can expect from unsuccessful reform is trouble. This makes them the staunch ally of the court. *What such districts do not want is a prolonged period of turmoil and doubt in which aid formulas, validity of tax impositions, validity of bonds, and retroactivity remain locked in a political struggle. The self-interest of these near-median-wealth districts lies in certainty, and they will be prepared to accept any reasonable legislative package that produces it.*" Coons, et al., 2 Yale Review of Law and Social Action at 118.

All of this is sought to be imposed in the face of the acknowledgment, by the architects of plaintiffs' theory, that:

> "Of all public functions, education in its goals and methods is least understood and most in need of local variety, experimentation, and independence." Coons, et al., 2 Yale Review of Law and Social Action at 119.

ENFORCED MEDIOCRITY AND REDUCTION OF PUBLIC SPENDING ON EDUCATION

Virtually all commentators on these problems agree that one effect of the *Rodriguez* rule would be to limit educational expenditures in the wealthier districts and to limit society's total investment in education, its reliance upon the public schools, and political support for increased educational appropriations at the state level. The nub of the matter is found in the observation of Professor Coleman (Preface to Coons, Clune and Sugarman, *Private Wealth and Public Education):*

> "The history of education since the industrial revolution shows a continual struggle between two forces: the desire by members of society to have educational opportunity for all children and the desire of each family to provide the best education it can afford for its own children. Neither of these desires is to be despised; they both lead to investment by the older generation in the younger."

The experience of the two leading jurisdictions which have adopted a system of full state funding is not such as to encourage a belief that statewide uniformity and maximization of total educational effort are consistent. In May of 1971, the Advisory Commission on Inter-Governmental Relations conducted a conference on state financing of public schools. At that conference, it was addressed by Professor P. J. H. Malmberg of the University of New Brunswick who served as director of curriculum and research in the provincial Department of Education from 1962 to 1969, during the period of the implementa-

tion of provincial assumption of all school costs. Portions of his remarks have been summarized as follows:

> "School districts which acted as innovators in curriculum prior to 1967 now are not able to do so. These districts usually spent a greater per-pupil amount on instructional development than other districts. Instructional funds are now distributed by the province on the same per-pupil basis to all school districts and they, plus economies, are minimal. The result is that in the 'lighthouse' districts there has been curriculum stagnation. The effects of Equal Opportunity on curriculum have been more a 'levelling down' than a 'evening up'.
>
> Later, in answer to a question, Mr. Malmberg said that he felt there had been some 'leveling up' — better teachers, buildings and programs — in the rural and poorer urban districts during the first two or three years of Equal Opportunity. Now, I think we are beginning to lose the dynamic and there is going to be a 'leveling down', he added. * * *
>
> * * * 'It is no secret', he said, 'that when school boards lost their fiscal independence in 1967 they felt that they had lost their manhood, for this independence to most school boards represented local control of education. The most significant decision making function that they lost is control of raising money and determining how to spend it in education. It is my impression that it has been more difficult to get good people to serve on school boards since the advent of Equal Opportunity and that school boards have not taken their duties as seriously as they did previously. To retain local interest in schools, it is essential to have a large measure of local control. This is a challenge New Brunswick now faces.' " Advisory Commission on Inter-Governmental Relations, *Who Should Pay for Public Schools* (1971) at 12-13.

A similar lack of enchantment with full state funding appears to have set in in Hawaii. There full state funding was an inheritance from territorial government. After

experience under this program, the Hawaiian Legislature by Act 38 of the Regular Session of 1968 (now codified as Hawaii Revised Statutes Section 27.1) adopted an act restoring to the counties the power to supplement state funds for school construction and transportation. The act in question was "declared to be an urgency measure deemed necessary in the public interest" by its preamble. The preamble went on to recite:

> "Under existing law, counties are precluded from doing anything in this area, even to spend their own funds if they so desire. This corrective legislation is urgently needed in order to allow counties to go above and beyond the state's standards and provide educational facilities as good as the people of the counties want and are willing to pay for. Allowing local communities to go above and beyond established minimums to provide for their people encourages the best features of democratic government."

Dissatisfaction with the consequences of full state funding in Hawaii has not been confined to its legislature.* The Supreme Court of Hawaii in its opinion in *Spears v. Honda,* 51 Hawaii 1, 7 (1968), a case invalidating a program providing bus transportation for private and parochial school students, alluded to the uniquely significant position of private schools in Hawaii which had survived throughout the present century and went on to refer to the "stinginess" of the Hawaiian Legislature with respect to appropriations for public schools and to the universal mediocrity of Hawaiian public schools under the full state funding system:

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* Full state funding in Hawaii has limited local initiative. Contrary to plaintiffs' postulate, it has not eliminated inequalities but merely rendered them less visible. Salaries per pupil in 1970-71 varied from $407 in the Nimitz School to $1181 in the Hookena School, against a state average of $597. Hawaii Public Education Department, District Summary of School Expenditures, 1970-71.

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

One consequence of the imposition of ceilings upon expenditures in the "wealthier" districts would be a tendency of residents of these districts to resort in greater measure to private schools. This phenomenon has been noted in the aftermath of the abolition of the District of Columbia Track System in *Hobson v. Hansen*, and was pointed to as a probable consequence of the relief sought by the court in *McInnis v. Shapiro*, 293 F. Supp. 327 (N.D. Ill. 1968) at notes 37-38. See also Kurland, *Equal Educational Opportunity: The Limits of Constitutional Jurisprudence Undefined*, 35 U. Chi. L. Rev. 583, 595 (1968). In response to this very real possibility Professor Coons and his colleagues have tendered two answers. Their first suggestion is that exercise of the right to private education should be further burdened; in Dr. Coons' words "of course, it is up to the state as to whether they can do that." (Mondale Committee Hearings pages 6883-84). See also Coons, Clune and Sugarman, Private Wealth and Public Education at 277-78; Mondale Committee Hearings at page 6884 (testimony of Mrs. Sarah Carey). It is in addition suggested by Professor Coons and his colleagues that "further, it seems appropriate for the court to view the class 'children' as simply a subgroup of the class 'poor'. Realistically, all children are poor * * * such separation of the interests of child and parent could be enormously significant in future encounters among pupils parents and the state on issues ranging

from compulsory education to school finance." Coons, Clune, and Sugarman, *A First Appraisal of Serrano*, 2 Yale Review of Law and Social Action 111, 115 (1972). It may be that this Court's recent opinion in the *Yoder* case has somewhat dampened the enthusiasm for this line of argument. The second answer of Professor Coons and his colleagues with respect to the possibility of flight to private schools, is the perhaps somewhat cavalier observation "if these families desert public education it is hard to see that much is lost." *Id.* at 118. The difficulty with this attitude is that much of the present political support for state as well as local education programs emanates from the "wealthy" suburban constituencies in which the flight to private education may well take place.

Imposing a rule requiring full state funding would be to decree that no new educational program could be embarked upon until it attained majority support in the state as a whole. It is part of the genius of our federal system that no such stultifying barrier to progress or greater expenditure is imposed upon the lower levels of government. The existence of national programs commanding majority support in the nation is not held to preclude the existence of state programs commanding statewide majorities but unacceptable to a national majority. Similarly, the existence of statewide programs commanding statewide majorities is not viewed as inconsistent with the survival of local programs commanding majorities in particular localities but not in the state as a whole and, indeed, the lack of majority support at any level of government for a public program does not under our system preclude individual private expenditures for social desiderata not publicly recognized. Surely this feature of our system of government has been conducive to progress. Many educational innovations now accepted by state majorities including special education for handicapped pupils,

kindergarten programs, school breakfast programs and the like were pioneered in "wealthy" local school districts. While plaintiffs profess to seek a decree which would allow local districts to raise added funds by taxing themselves more heavily and turning over a large portion of the added proceeds to other districts, the authors of their scheme recognize that in practice full state funding or fully state controlled funding will be the result of the relief sought. The obliteration of the local level of discretion is effectively demanded by plaintiffs' complaint; its sponsors have made plain that campaigns against private and state discretion will shortly follow. Wholly apart from the inconsistency of this design with a constitution which breathes from every pore of its language hostility toward an overly strong national government, can it be supposed that this program is the way to maximize public expenditures on education?

As the somewhat incredulous court in *McInnis v. Shapiro*, 239 F. Supp. 327, 331 n. 11 (N.D. Ill. 1968) observed when first confronted with claims similar to those urged by plaintiffs here:

> "Surely, quality education for all is more desirable than uniform, mediocre instruction. Certainly, parents who cherish education are constitutionally allowed to spend more money on their children's schools, be it private instruction or higher tax rates, than those who do not value education so highly."

That the end result of a Rodriguez rule, and the regime of full state funding enforced by it will be a reduction in total educational spending is apparent:

> "[A]t least some of the support for statewide financing in California is coming from people who see it as a way to hold down school costs. Taxpayers who have fought school tax increases and been outvoted in their local districts are now pressing to move the decision

> up to the state level. The lobbies for school improvements tend always to be strongest at the local level. That, in fact, is one reason for the local disparities. Districts with equal wealth choose to tax themselves at different levels. Whatever benefits statewide financing might bring to California's schools, the character of state politics under Governor Reagan suggest that it will not necessarily increase the money spent on them."

Anderson, *Study in California: Financing Schools: Search for Reform.* Washington Post, May 31, 1972.

LACK OF RELATIONSHIP BETWEEN EDUCATIONAL SPENDING AND EDUCATIONAL ACHIEVEMENT

The opinion of the *Rodriguez* court is unclear as to whether the gravamen of the constitutional violation found by it consists of the denial of education of equal quality to children in disfavored districts or rather consists of imposition by the state of an unfair relationship between taxes and benefits. As previously noted, if the constitutional violation is founded upon the second theory, the court's position is entirely untenable in light of the rule of *Carmichael v. Southern Coal Company*, 301 U.S. 495, which makes clear that there is no constitutional requirement of a relationship between taxes and benefits. Thus it would seem that the *Rodriguez* plaintiffs found their claim on the proposition that the state is providing their children with education of inferior quality. Certainly they do not urge that matters of taxing and spending generally are to be subject to a strict scrutiny test. Indeed, it is clear that even the rational basis test does not apply to such purely fiscal determinations as to which the powers of legislatures, state and federal, have traditionally been held to be almost plenary. Since the decision rests upon the premise — rejected by Judge Harvey in his eloquent opinion in *Parker*

v. Mandel — that there is something peculiarly significant about the detriment resulting to Plaintiffs from the system of educational finance, it was incumbent upon the plaintiffs to show a significant relationship between educational spending and educational achievement. This burden they did not and cannot sustain.

Even cursory review of the evidence in the record reveals that the disparities in spending between varying school districts are largely, if not entirely, explained by two factors: (1) variations in teachers' salaries, largely reflecting similar variations in wage levels and prices in varying portions of the state; and (2) variations in class size. The available studies on the relationship of educational spending to educational achievement speak with almost one voice on the insignificance of such differences. As is well known, the most extensive study of these relationships is that contained in the so-called Coleman Report, U.S. Office of Education, *Equality of Educational Opportunity* (1966). That report concluded:

> "It is known that socio-economic factors [of the students] bear a strong relation to academic achievement. When these factors are statistically controlled, however, it appears that differences between schools account for only a small fraction of differences in pupil achievement."

The Coleman Report found that the teacher pupil ratio "showed a consistent lack of relationship to achievement among all groups under all conditions" (p. 312). In addition the Coleman Report observed: "Differences in school facilities and curriculum, which are the major variables by which attempts are made to improve schools, are so little related to differences in achievement levels of students, that, with few exceptions, their effects fail to appear even in a survey of this magnitude."

The Coleman Report was no ordinary research study. It has been described as follows:

> "The study, *Equality of Educational Opportunity*, was hardly an everyday affair. Commissioned under the Civil Rights Act of 1964, one of the great bills of the Twentieth Century, sponsored by the United States Office of Education in a period of its most vigorous leadership, and conducted by leading social scientists at just the moment when incomparably powerful methods of analysis had been developed, the study was perhaps the second largest in the history of social science. Its findings were, if anything, even more extraordinary than its genesis. Stollesky and Lesser summarize these findings with admirable detachment: 'Coleman failed to find what he expected to find, direct evidence of large inequalities in educational facilities in schools attended by children from different majority or minority groups. The study set out to document the facts that for children of minority groups school facilities are sharply unequal and that this inequality is related to student achievement. Data did not support either conclusion. What small differences in school facilities did exist had little or no discernible relationship to the level of school achievement. In effect, the Coleman study was intended to prove beyond further question two central theses of the reform establishment: first that school facilities available to minorities were shockingly unequal; and second that this accounted for unequal outcomes. This, of course, was not found. Coleman's findings thus pose two equally difficult choices for the reform establishment. The first would be to conclude that the achievement of equality of educational opportunity — increasingly defined in terms of comparable educational achievement on the part of minority and majority groups — will require vastly greater expenditures of money and social effort than even they had envisaged. The second would be to conclude that improvement of schools as such should be downgraded in favor of a vast national

> effort to liquidate the lower class, in Walter B. Miller's phrase, and thereby remove the apparently insurmountable — or at least not likely to be surmounted — restraint on educational achievement among lower class youth, especially in urban ghetto areas. Understandably, the reform establishment chose first of all to concentrate on Coleman's findings, rather than on their implications. . . . A major element in the responses of the reform establishment has been the manifest fact that, heretofore, the public generally has been more willing to consider changes in educational instiitions than economic and social institutions. Coleman must be taken to suggest that reform will be considerably more difficult to achieve than has been expected. This is rarely welcome news, and has accordingly been resisted'." Moynihan, "Sources of Resistance to the Coleman Report", in Harvard Educational Review, *Equal Educational Opportunity* at 25, 26, 28-29, 30 (1969).

The Report's conclusions have gained much professional respect. See, *e.g.*, the article by former Dean of Harvard Graduate School of Education, Sizer, *Low-Income Families and The Schools for Their Children,* 30 Pub. Admin. Rev. 340 (1970); and Cohen, *Policy for the Public Schools: Compensation and Integration,* 38 Harv. Educ. Rev. 114 (1968). Re-analyzing the Coleman data, a later study arrived at the same conclusion. 1 U.S. Commission on Civil Rights, Racial Isolation in the Public Schools 86 (1967).

The Coleman Report was a disinterested study. There is no reason to believe that the conclusions reached in it were in any way palatable to Professor Coleman or its other authors, rather the contrary. See Schoettle, *Equal Protection Clause and Public Education,* 72 Columbia Law Review at 1378-1388 (1972). Subsequent to publication of the Coleman Report:

> "A recently published re-examination of the Coleman data by a score of eminent social scientists in a faculty seminar at Harvard University has confirmed the findings of the original report, while avoiding some of the original report's methodological problems. Indeed, this re-examination indicates that the influence of school expenditures on student achievement is even weaker than was indicated by the original Coleman Report. See Mosteller and Moynihan, *A Pathbreaking Report* in *On Equality of Educational Opportunity* 36-45 (1972); Jencks, *The Coleman Report and The Conventional Wisdom* in *Id.* 69-115; Smith, *Equality of Educational Opportunity: The Basic Findings Reconsidered* in *Id.* 230-42." (Goldstein, *Inter-District Inequalities in School Financing; A Critical Analysis of Serrano v. Priest and Its Progeny*, 120 University of Pennsylvania Law Review 504, 520, note 50 (1972).

This recent re-examination of the Coleman Report concluded that the best way to deal with the educational problems of poor children, whatever their race, was to improve the jobs and incomes of their families and also concluded that increased spending on schools had little effect on the educational performance of either lower class children or other children. The Jencks study concluded "the least promising approach to raising achievement is to raise expenditures since the data gives little evidence that any widely used school policy or resource has an appreciable effect on achievement scores."

The findings of the Coleman Report are supported by numerous prior studies. Among them is the leading British study of these matters, the so-called Plowden Report. Central Advisory Council on Education, *Children and Their Primary Schools* (2 Volumes, 1967). The findings of this report have been summarized by Professor Guthrie, Kleindorfer, Levin and Stout, as follows:

> "Except for the fact that the study limits itself to a concern for elementary school students, its findings and the controversy surrounding them are not very different from those produced by the Coleman Report in this nation." (Guthrie, et al., at page 74.)

The regression analysis undertaken as part of the national survey of primary education in England reached the conclusion that:

> "The specific contributions made by the variation in parental attitudes are greater than those made by the variation in home circumstances, while the latter in turn are greater than those made by the variations between schools and teachers that we have taken into account." (*Id.* Volume II at 188.)

The *Encyclopedia of Educational Research* (1950), observed in summarizing over 200 research studies on class size:

> "On the whole the statistical findings definitely favor large classes at every level of instruction, except kindergarten . . . The general trend of evidence places the burden of proof squarely upon the proponents of small classes."

The President's Commission on School Finance recently specially commissioned a survey of the available literature relating to the effects of additional school spending on educational performance. Its final report concluded:

> "The relationship between costs and quality in education is exceedingly complex and difficult to document. Despite years of research by educators and economists, reliable generalizations are few and scattered. * * * The conviction that class size has an important or even a measurable effect on educational quality cannot be presently supported by evidence. A review of a great body of research on the effects of class size (pupil-teacher ratios, to use a technical term) yields

no evidence that smaller classes, of themselves, produce more or better education in any accepted sense. Nor, conversely, has it been shown conclusively that larger classes, of themselves, provide less or poorer education to children — and they obviously cost less." President's Commission on School Finance, *Schools, People and Money, Final Report* (1972), at x-xi.

"In a study prepared for this Commission by a distinguished research organization, all available research projects were examined in an effort to determine the effect of class size on educational effectiveness. This study — which examined the body of research in this area — found no discernible difference in student achievement even though classes ranged from 18 to 1 up to 35 to 1 * * *. Despite diligent searches and widespread opinion to the contrary, the Commission finds no research evidence that demonstrates improved student achievement resulting from decreasing pupil-teacher ratios."* (*Id.* at 59.)

The implication of these studies for the relief sought by plaintiffs has been pointed out by many commentators. Thus, it has been rather succinctly observed that:

"Any reshuffling of dollars — if spent within the present range of variability on more highly paid teachers, reductions in class size, and buildings — is not likely to have much effect on the tested cognitive skills, or the credentials necessary for entrance into honors programs, jobs or college or on the values of the children. What the reshuffling of dollars will do is reshuffle teacher salaries in rough proportion. That such a result will not materially alter the outcome of schooling for the child should not be all that surprising. Teachers, like the rest of us, are not paid for how well they perform (even if we could define what performance means)." Dimond, *Serrano: A Victory of Sorts for Ethics, Not Necessarily for Education*, 2 Yale Review of Law and Social Action 133, 137 (1972).

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* See The Rand Corporation, *How Effective is Schooling* (1972).

Yet another report has recently reached similar conclusions. Center for Educational Policy Research, *Education and Inequality: A Preliminary Report* (1971) at 47-64. See also Wynne, *The Politics of Accountability: Public Information About Public Schools* (1972).

The observations of other commentators to similar effect are legion. Thus, Professor Moynihan has observed (*Can Courts and Money Do It?*, New York Times, January 10, 1972 page 1): "the only certain result that will come from this [the *Rodriguez* decision] is that a particular cadre of middle class persons in the possession of certain licenses — that is to say teachers — will receive more public money in the future than they do now."

Similarly, Professor Roger Freeman of Stanford has observed: (*Address to the Annual Meeting of the National School Boards Association*, April 14, 1972):

> "Added school spending provides sizable benefits to teachers and administrators in the form of more and better paid jobs, greater amenities, and reduced work loads. Its tangible advantage to children's education has yet to be demonstrated."

The findings of the Coleman Report have met with little significant dispute. The only substantial work purporting to dispute the Coleman findings is the study by Guthrie, Kleindorfer, Levin and Stout, *Schools and Inequality* (1972). That work is scarcely a disinterested work of scholarship. It was sponsored and paid for by the National Urban Coalition which, the authors tell us, "was specifically interested in supporting an objective study relevant to a Michigan court case of national significance for education * * * The Board of Education of the School District of the City of Detroit had filed a complaint alleging that Michigan's governmental arrangements for education, violated * * * the Equal Protection Clause.* Given

* The suit was later dismissed for want of prosecution.

this concurrence of interest, we accepted the National Urban Coalition offer of assistance." (*Schools and Inequality* at xvi). Only the fourth chapter of the resulting book is devoted to the relation of school services to student achievement. However, the study undertaken by these four writers, a fragmentary description of which appears at pages 84 through 90 of their book, was not a study of the relation of monetary inputs to educational performance. The extent of the study undertaken or correlations found by them has not been clearly disclosed and it appears that the more significant correlations found related to such matters as the relation between student achievement and such non-monetary variables as teacher morale, teacher verbal ability and the percentage of students transferring into the school — variables which bear no necessary relationship to school spending or at least no demonstrated relationship to school spending. Indeed, notwithstanding the fact that the Guthrie-Levin book is frequently cited as contradicting the Coleman study, when the matters studied in it were put to the test in litigation in Michigan none of its authors appeared as witnesses in the extended trial in the Michigan school finance case.* This is scarcely surprising, since Professor Guthrie had shortly before testified in a Michigan law suit involving metropolitan school desegregation problems, *Bradley v. Milliken,* U.S. Dist. Ct. E.D. Mich. No. 35257 that:

> "Q. Does your familiarity at the moment permit you to agree with me to the effect that the general, returning to the implications of Mr. Ritchie's question, the approach of additional dollars without more would seem on the basis of the [Moynihan and Mosteller] reanalysis [of the Coleman Report] as well as the other

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* *Milliken v. Green,* Mich. Cir. Ct. Ingham County, No. 13664-C (1972).

> data to which you referred, to be inadequate in terms of the problem? A. My response to Mr. Ritchie's question was not based very much on the Coleman Report, rather it was based on my work with Senator Mondale's Select Committee on Equal Educational Opportunity where I have come to see almost every effort we have made at putting additional dollars on the head of poor children has somehow never occurred because we have never gotten the additional dollars there. As Senator Mondale says 'Everytime we try to help poor children in this nation, someone robs the train on the way'. That seems to be what happens when you look at actual delivery of Title One dollars to poor children, it often doesn't get there and a volume which has been mentioned here, Schools and Inequality, for the State of Michigan, myself and colleagues found a negative relationship between the child's income and the amount of federal money being spent on him. Well, it wasn't a negative it was a positive relationship, poor children were not having money spent on them in Michigan the way it was alleged to be the case .
>
> Q. If the dollars got there, but nothing else was changed, including social SES composition and racial composition, would you be optimistic about the dollars spent? A. No, I would not be optimistic even if the dollars were changed by thousands." (Transcript of hearing, pages 523-524.)

Elsewhere at the same hearing Professor Guthrie referred to socio-economic status as "to date the best explainer of a child's school achievement that we have. It is a more powerful explainer than race, for example." (at 450).

Professor Guthrie's colloborator, Professor Levin, similarly appears to hold to the view that the limited additional increments of funds which "poor" districts would get from an application of the *Rodriguez* doctrine would

be of negligible educational value. Dr. Levin testified before the Senate Select Committee on Equal Educational Opportunity (Hearings, part 7 page 3516) as follows:

> "One of the problems is that additional dollars, as they move into the educational system, have never really been married up to education * * * They have not thought about why the particular techniques approaches, and resources that they have used have failed the same children in the past. They have not questioned whether just larger quantities of the same resources that have failed children in the past are going to succeed * * *".

After an extensive trial concerning these cost-quality issues, in a state unique for its possession of a statewide educational measurement program, the Circuit Court for Ingham County, Michigan made the following findings, among others:

> "1. A statewide comparison of State Equalized Valuation Per Pupil v. Composite Achievement reveals a low correlation between test scores of 4th and 7th grade composite achievement tests and SEV. (Ex. 127, 81, 82; Tr. 2716, 2778.)
>
> 2. A statewide comparison of Total Current Operating Expense Per Pupil v. Composite Achievement reveals a low correlation between test scores on 4th and 7th grade composite achievement tests and Total Current Operating Expense. (Ex. 127, 88, 89; Tr. 2224.)
>
> 3. A statewide comparison of Total Instructional Expense v. Composite Achievement reveals a low correlation between test scores on 4th and 7th grade composite achievement tests and total instructional expense. (Ex. 127, 90, 91; Tr. 2778.)
>
> 4. A statewide comparison of Student Evaluation of Socio-economic Status and State Equalized Valuation Per Pupil reveal a low relationship (Tr. 2716 and 2778.)
>
> 5. A statewide comparison of Student Evaluation of Socio-economic Status v. Composite Achievement

reveals a moderate correlation between test scores on 4th grade composite achievement test and a student evaluation of SES and a high correlation of test scores of 7th grade composite achievement and student evaluation of SES. Accordingly, statistical analysis of the relationship between student evaluation of SES and composite achievement scores reveals a high degree of relationship. (Ex. 127, 97, 98, Plaintiffs' Ex. 80; Tr. 2291, 2293.)

6. An analysis of the data compiled by the Michigan Department of Education contained in Exhibit 32, using the stepwise mutliple regression-technique indicates that there is a low statistical relationship between monetary inputs and achievement output (Tr. 2634). Thus, the low degree of relationship between financial inputs and achievement outputs found in the uni-variate statistical analysis (scattergrams and correlation coefficients) is confirmed in the multivariate context (stepwise multiple regression equation) (Tr. 2636). On the other hand, in both the univariate and the multi-variate context the relationship of SES to composite achievement is moderate at 4th grade and moderately high to high at 7th grade level (Tr. 2638).

7. A statewide analysis of the data contained in Exhibit 32 using the factor analysis technique of 7th grade data, reveals that SES and composite achievement are contained in the same family of variables (Ex. 122; Tr. 2672). Thus, SES appears to be related to the same factor that achievement is related to (Tr. 2672). However, all of the monetary resource variables (SEV, local revenue, and state aid) are found to belong to an entirely different factor (Tr. 2672-73). This indicates that student achievement and SES are operating independently of monetary resources."

Clearly, even a cursory examination of the pertinent educational literature reveals that there is no necessary cost-quality relationship or, at the least, that these issues are highly debatable. Under these circumstances it is

apparent that this case is about taxes and expenditures and not about education and that the state governments possess a rational basis for declining to appropriate the approximately ten billion dollars necessary to produce abstract monetary equality with its concomitant detriments to local fiscal control and to the future willingness of voters and legislators to avail themselves of, or appropriate funds for, public school systems. It is hardly appropriate for this court, or any court to try these disputed cost-quality issues; it is no more within the province of courts than it is within the province of legislators, in the face of the conflicting scientific evidence, to make of Professor Guthrie an American Lysenko. Cf. *Epperson v. Arkansas,* 393 U.S. 97 (1968).

LACK OF RELATIONSHIP BETWEEN PROPERTY AND INCOME

The essential thesis of the present wave of lawsuits is that there is a necessary connection between variations in the wealth of school districts and variations in the educational outcome of their individual students. But if there is one thing that the literature of this field makes entirely clear it is not merely that there is no connection between educational spending and educational achievement but also that there is no necessary connection between district wealth defined in terms of property and educational spending. The effort to translate the necessary consequence of the division of the nation into different organs of state and local governments into a deprivation of individual rights must hence fail.

It has been elaborately and repeatedly demonstrated that the property wealth standard utilized by the California and Texas Courts bears no necessary relationship to the individual wealth of residents of the affected school

districts and that in no sense is the alignment of school districts a discrimination against poor persons. Even Professor Coons and his colleagues have conceded:

> "The distinction between collective and individual wealth is worth considering. *Serrano* forbids discrimination in education upon either basis, but it is likely that the proof required at trial will be confined to the wealth of school districts. At present it is very difficult to specify the degree to which personal and school district wealth coincide. The economists seem confident that the relation is positive but the anomalies are frequent and sometimes embarrassing. Not only do poor people inhabit rich industrial enclaves with low populations, but they also are found in large numbers in certain large cities, a few of which for school purposes, are relatively well off (e.g. New York and San Francisco — a primary cause is significant private school enrollment). Equally troublesome, perhaps, the rich sometimes live in tax poor areas. *Serrano*, thus, is not a one edged blade for the war on poverty." 2 Yale Review of Law and Social Action at 114.

Professor Coons and his colleagues did not identify the economists who concluded that there is a positive relation between personal and school district wealth. But careful studies of the relationship of income to property wealth in two states, Kansas and California, have effectively exploded this notion. In Ridenour and Ridenour, *Serrano v. Priest: Wealth and Kansas School Finance,* 20 Kansas Law Review 213 (1972) the authors observed: "the application of a definition of wealth that relies only on assessed property valuation in Kansas would result in effective discrimination against taxpayers with little income". It further observed, citing a similar study in California (Davies, *The Challenge of Change in School Finance* in National Education Association, Tenth Annual Conference on School Finance 199 (1967)):

> "The practical result of the *Serrano* rationale in California and Kansas is to strike down de jure discrimination between pupils on the basis of assessed value per-pupil in favor of a scheme of de facto discrimination on the basis of income per-pupil" (at 224.)

It is even more dramatically observed:

> "It was pointed out in the previous section that a study in California found only random correlation between districts having high assessed value per-pupil and those having high income per-pupil. On the basis of the foregoing figures it can be argued that there exists in Kansas almost an inverse correlation: districts with highest income per-pupil have low assessed value per-pupil and districts with high assessed value per-pupil have low income per-pupil" (at 225.)

The study by Davies of California concluded:

> "California's present criterion of wealth imputes to the high wealth counties ability, that, on the basis of income, they do not possess. Ability to finance education may be exaggerated. These counties can raise equivalent sums of money only by apportioning a relatively greater share of income to taxes." Tenth Annual Conference on School Finance at 200.

These articles point out that in many states the net effect of a change from the present system of school finance to a system of school finance fully consistent with *Rodriguez* and *Serrano* may be to burden more heavily the low income taxpayers. In the authors' words, the *Serrano* court's "conclusion fails to recognize that there is no guaranteed relationship between ownership of property and a fixed yield from it" (at 224).

The detriment to minority group pupils as a class from the decision in *Serrano* has already been noted, 59% of such pupils living in districts with above average property valuations.

Nor is this all. The New Brunswick experience is illustrative of another possible consequence of the *Serrano-Rodriguez* rule. There, the introduction of full state funding was accompanied by a shift from the property tax to an even more regressive sales tax:

> "One of the elements that helped sell Equal Opportunity to the people was the fact that it represented 'a shift away from direct taxation as exemplified by property taxes . . . toward indirect taxation — the sales tax,' explained Mr. Arsenault [principal Secretary to the present Prime Minister]. 'Property taxes especially went down.'" Advisory Commission on Inter-governmental Relations, *Who Should Pay for Public Schools* at 10.

Thus, not only on the expenditure side but also on the tax side it is possible, indeed probable, that introduction of the *Rodriguez-Serrano* rule may be actually detrimental to spending on the education of children of low-income families.

It should further be noted that the lack of relationship between low district property values and low educational achievement is exacerbated by another factor: the extreme present reluctance of many low property value districts because of low educational costs in rural areas to make even an average tax effort for education. The importance of this effort factor was noted by the court in *McInnis v. Shapiro,* 203 F. Supp. at 333 (N.D. Ill. 1968). It is also dramatized by the study of a state commission in Maryland which revealed that a large part of the lower expenditures in many smaller rural counties was accounted for not by lower resources but by lower tax effort. See the table on "Effect of Differences in Effort" in [Maryland] *Commission to Study the State's Role in Financing Public Education, Background Information* (May 1970), pg. 68.

A REPRESENTATIVE STATE AID PROGRAM

It is the thesis of the framers of plaintiffs' theory that legislatures are incapable of independently re-examining state aid programs unless prodded to do so by courts, that state aid formulas constitute examples of "settled wrong", that existing state spending patterns and school district lines should be viewed for purposes of constitutional assessment as though each state had a single united state school system, that existing formulas are capricious, unjust, and irrational, and that the explosion of legislative creativity they profess to desire is dependent upon judicial invalidation of existing formulas. Examination of the history and rationale of state aid to education in a representative middle-sized state, Maryland, is sufficient to explode all these notions.

In Maryland, as in Virginia, North Carolina, and some Southern states, school district lines correspond exactly to the long established district lines of Maryland counties, just as in many New England, Midwestern, and Western states school district lines correspond exactly to town and township lines. The Maryland counties were established at early dates. Eleven of the 24 subdivisions were established within their present borders prior to 1695; all but six of them were established prior to the ratification of the Constitution of the United States; and all but one of them were established prior to ratification of the Fourteenth Amendment, the most recent erection of a Maryland county having taken place in 1872. The dates of origin of the Maryland counties are as follows: St. Mary's 1637, Kent 1642, Anne Arundel 1650, Calvert 1650, Charles 1658, Baltimore 1659, Talbot 1662, Somerset 1666, Dorchester 1668, Cecil 1679, Prince George's 1695, Queen Anne's 1706, Worcester 1742, Frederick 1748, Caroline 1773, Harford 1773,

Washington 1776, Montgomery 1776, Allegany 1789, Carroll 1836, Howard 1851, Wicomico 1867, Garrett 1872. See generally Maryland Geological Survey, *The Counties of Maryland, Their Origin, Boundaries and Election Districts* (1907), 426-572. Article 13, Section 1 of the Maryland Constitution of 1867, still in effect, effectively forbids the erection of new counties by providing that no new county shall contain less than 400 square miles or less than 10,000 inhabitants nor shall any existing county be reduced to less than the same amount in order to form a new county.

Maryland school boards possess no independent taxing authority. The taxes levied for schools are levied by the county governments and that of Baltimore City and included in county budgets. The counties are accorded by the state power to impose unlimited property taxes as well as limited local income taxes and various other taxes. No Maryland subdivision has exhausted its taxing authority apart from the property tax; each subdivision is empowered to levy taxes which it does not levy. The Maryland counties accord varied exemptions from their local property taxes (See *28th Biennial Report of the Maryland State Department of Assessments and Taxation* at 19-22.) Real property assessment is carried out and organized on a county basis under the supervision of a state agency. (Maryland Code, Art. 81, §§ 232 ff.). In no sense does Maryland have a unified school system.

Maryland once had a state school system, created by Article VIII of the Maryland Constitution of 1864, which provided for a state property tax to be distributed to the counties on a per pupil basis and for a powerful State Superintendent of Schools. The Convention adopting the present 1867 Constitution expressly repudiated this state system in favor of a system under local control. See the

Report of the [Maryland] School Law Revision Commission (1968), at 27, summarizing the history and see Perlman (ed.), *Proceedings of the Maryland Constitutional Convention of 1867*, at 200-202: "The economic expenses of the system, the mode of raising the money and the mode of expending it, and the power of the superintendent, are all reasons why this system should be dispensed with. * * * The whole system has radical, fundamental objections. It would be supposed that it would be right to commit the expenditure of those funds to those who contributed them, but these funds are placed beyond the control of every parent and guardian in the State; those who bear the burdens are denied all share in their direction." (Remarks of Delegate Kilbourn). "Concerning the [state] system, he would say that it required an infallible head and an inexhaustible treasury. [Laughter]" (Remarks of Delegate Farnandis).

The limited remaining powers accorded the State Superintendent of Schools under the legislation adopted under the 1867 Constitution are generally inapplicable to the Baltimore City system (see Md. Code, Art. 77, §§ 142-145), which is independent of most of these mild measures of state control. The existence of large county school districts has always limited disparities in school spending in Maryland, as has the fact that each county contains groups of widely varying income. Indeed, "the formation of single county wide school districts — as in Maryland and Nevada —is often advanced as a solution to resource disparities among school districts." Advisory Commission on Intergovernmental Relations, *State Aid to Local Government* (1969), at 49; *Mondale Committee Hearings*, at 8473. Nonetheless, Maryland has taken many measures to further equalize school spending. The initial such measure was taken by the adoption of a comprehensive school aid

formula by Chapter 383 of the Maryland Acts of 1922. That formula was not the creation of a rustic legislature. It was prepared under the sponsorship of the General Education Board of New York by Dr. Abraham Flexner of Johns Hopkins, best known for his work leading to the reform of medical education in the United States.* The formula adopted anticipated that summarized the next year in the pioneering work by Professors Strayer and Haig, *Financing of Education in the State of New York* (1923), of which Professor Coons and his colleagues have written:

> "The pioneer effort to translate the philosophy of equal education opportunity into a viable state finance program adjusting for district wealth variation was made by George E. Strayer and Robert M. Haig in 1923 and later refined and developed by Paul R. Mort." (*Private Wealth and Public Education* at 63.)

The 1922 act provided for a foundation program of education in each county based upon set-pupil-teacher ratios, a state minimum salary scale graduated to qualifications and experience of teachers and additional allotments founded on the theory that teachers' salaries should constitute not more than 76% of total current costs. The portions of this program which could not be financed by the counties from a uniform tax were paid for by the state equalization fund.

In the years following its enactment, the program was periodically reviewed and progressively amended. In 1927 a state retirement program for teachers was added; in 1929 a state program of education for the handicapped was added; in 1933 aid to transportation costs was added and in 1939 differentials between elementary and secondary school salary scales were eliminated. "This became known as the Maryland Single Salary Scale because Maryland was in the

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* See Flexner and Bachman, *Public Education in Maryland* (1921), at 8.

vanguard of this progressive advance." (*Report of the School Law Revision Commission* at 12.)

In 1941, the program again underwent extensive review by eminent authorities from outside of Maryland, the state engaging the services of Dr. Herbert Bruner of Teachers' College, Columbia University to direct a study for the Maryland School Survey Commission. The report concluded:

> "In the intervening twenty-five years [since the Flexner report] strong leadership in the state department combined with active and capable local initiative, has brought to fruition many of the recommendations which the General Education Board Survey Commission made." "The present system of state aid in Maryland is one of the most advanced in the county." (at 63).

In the same year, a court in Maryland (Chesnut, J.), approvingly quoted a bulletin of the United States Bureau of Education describing the program in glowing terms as "in a sound and relatively satisfactory way, equali[zing] school burdens, revenues, and educational opportunities." The opinion listed in detail "the outstanding features of the Maryland system of school support." *Mills v. Lowndes,* 26 F. Supp. at 797 n.3 (D. Md. 1939).

Following the war, the program underwent extended review by two distinguished state commissions, the Sherbow Commission (1948), and the Green Commission (Maryland Commission to Study Public Education and Finances) (1952). The latter of these Commissions, in summarizing the history of educational progress in Maryland, noted the pioneering role in introducing new programs played by bell-wether school districts. Neither of these Commissions recommended full state funding, both noting the detriment that would result from it to Baltimore City, then the richest subdivision in the state and the only subdivision not to

benefit from the equalization fund. See the *Report of the Maryland Commission to Study Public Education and Finances* (1952), especially at pg. 55.

Various liberalizing recommendations of these Commissions were enacted into law, these including a revision of salary scales in 1947, an increase from $200 to $400 in aid for handicapped children and the addition of the twelfth grade to the foundation program in 1949, further salary increases in 1953 and 1955, creation of an incentive fund for school children in 1956, and creation of a program of aid to preschool handicapped children in 1957.

In 1958, the Maryland program underwent an unusually comprehensive review. The state again went outside its borders to engage the most eminent student of school financing in the nation. Professor Paul Mort of Columbia. The resulting study occupies a summary volume and thirteen printed volumes, issued over a period of three years, as follows:

Staff Study 1 — Stapleton, *Educational Progress in Maryland Public Schools since 1916* (1959);

Staff Study 2 — Dorn, *What Money Does and What it Does Not Do* (1959);

Staff Study 3 — Sartorious, *The Fortunes of Equalization in Maryland Since 1920* (1959);

Staff Study 4 — Zimmerman & Walker, *The Tax Potential of Maryland, State and Local* (1959);

Staff Study 5 — Zimmerman, *Fiscal Adjustments Over a Century* (1959);

Staff Study 6 — Woollatt, *The Measurement of Cost in Maryland Public Schools* (1959);

Staff Study 7 — Woollatt & Zimmerman, *An Economic Index of the Maryland Taxpaying Ability of Maryland Public School Systems* (1960);

Staff Study 8 — Willis, *A Program of Financing School Construction Designed to Safeguard the Current Operating Program in Maryland* (1959);

Staff Study 9 — The Growing Edge Committee, *The Maryland Schools and Mid-Century Needs;*

Staff Study 10 — The Staff Characteristics Committee, *Maryland's Twenty-four Instructional Teams;*

Staff Study 11 — Dorn, *The Allocation of School Expenditures in Maryland Counties;*

Staff Study 12 — Hardesty, *The Relation of Expenditures in Higher Education to Expenditures for Elementary and Secondary Education;*

Staff Study 13 — Rhodes, *Lay Participation in School Budget Development in Maryland.*

In the Staff Study dealing most directly with equalization problems, Sartorious, *The Fortunes of Equalization in Maryland Since 1920 (Staff Study No. 3)*, it was observed:

> "It is well to bear in mind that the educational advantage of local participation in school support is that it frees the vigorous local units to forge ahead in meeting the problems education comes to face with in changing times. Such local units by their pioneering become leaders for the state" (page 9).

The Sartorious Study, by way of introduction, observed:

> "New legislation has merely incorporated into this (state-local) partnership certain features that were inaugurated in the local school systems. That is to say that, in the main, improvement in the school system has taken place on certain local levels and as the idea spread it became part of the total state program. This means further that the partnership in respect to support has always lagged on the part of the state, but,

> in fairness, it must be said that it has inevitably followed, and it is safe to conclude that it always will" (page 1).

From this summary characterization of the history of educational progress in Maryland the Sartorious Study concluded:

> "Equalization demands more than helping the poorer local units. It connotes equalization of an *adequate* program, but it certainly does not demand levelling down." (at page 11).

The Sartorious Study expressed concern that the equalization system then in operation in Maryland, while providing for a high degree of equalization in Maryland relative to other states, had not given rise to a high degree of local effort and that in consequence Maryland appeared to lack bellwether school districts in which new improvements might serve as an example for the entire state.

This concern was in accord with Professor Mort's concern for local tax leeway:

> "Paul Mort advanced a number of refinements in the Strayer-Harg plan with his associates and disciples at Columbia University. Among them were * * * 4) local tax leeway * * * The concept of local tax leeway provided for a downward adjustment of the rate of local contribution so that almost all districts would receive some state aid. Also the local district would have the discretionary power to tax itself beyond the local contribution rate in order to purchase its own unique program, presumably of a quality beyond the so-called state-mandated minimum." Garvue, *Modern Public School Finance,* (1969), 228-29.

Subsequent changes rapidly ensued. Increases in the salary component of the foundation program took place

in 1958, 1960, and 1961, increases in the basic aid component in 1960 and 1961, and an increase in the building incentive component in 1961.

The years following 1964 witnessed an explosion of creativity in educational finance in Maryland. Four major developments took place:

1. In the period 1964-1967, a distinguished state commission, the Maryland Commission on State and County Finance, recommended sweeping changes in the financing of education and other public services in Maryland, changes reflected in two major acts of the Maryland legislature, Chapter 17 of the Acts of 1964, and Chapter 142 of the Acts of 1967. By virtue of these changes, Maryland became the first state to consider income as well as property wealth in its state educational equalization formula, a change of particular benefit to Baltimore City. In addition, the state's first graduated income tax was enacted, supplanting a flat rate tax, and special subventions to the subdivisions for police services were provided for including a special lump sum appropriation to Baltimore City. This has been described as "a revolutionary change in support for Maryland schools. A unique feature is that per capita income is used as a factor in determination of the relative fiscal capacity of local school systems. * * * The elements making up the foundation program were raised to levels representing current average practice throughout the state * * *" A program of current expense incentive aid was created. "A notable improvement in this law was its establishment of a fixed percentage for the State's share in the foundation program." *Report of the School Law Revision Commission* (1968), at 29.

2. In 1968, another state commission, the School Law Revision Commission, after a study of equalization prob-

lems, refrained from endorsing full state funding or full equalization, recommending instead a focus upon the needs of urban districts.

> "The State should provide special, categorical financial aid for the education of children from an economically deprived environment. Such educational programs should be designed to compensate for the lack of prior appropriate learning experiences and to provide meaningful early childhood experiences before age six." (at 31).

The recommendations of this Commission were anticipated by the Legislature. By Chapter 142 of the Acts of 1967 the foundation aid program was extended to kindergarten children. By Chapter 754 of the Acts of 1969 and again by Chapter 4 of the Acts of 1970 a special program of "density aid" to Baltimore City created by the 1967 Act (see the similar suggestion by the Lawyers Committee for Civil Rights, Compact, April 1972, page 41) was enlarged and increased.

3. In 1970, another state commission, the Commission to Study the State's Role in Financing Public Education, recommended full state assumption of the costs of public school construction. The legislature, acting almost immediately, adopted this recommendation by Chapter 624 of the Acts of 1971, Maryland thus becoming the first state in the nation to fully assume school construction costs. In fiscal 1972, appropriations for this program approximated $150,000,000, raising the state's share of education spending from 31% to 39%. The budget estimate for this program for fiscal 1973 is approximately $300,000,000, all of it to be allocated by a state agency solely on the basis of educational need, which will further raise the state share of total school spending and will also operate to a considerable but as yet undetermined degree to elevate

the level of school spending in poorer counties to a figure closer to the state average. The Commission, though split on the issue, refrained from recommending full state funding of current expenses. Its recommendation that the state assume 55% of all existing current expenses in the several subdivisions, essentially a tax relief rather than equalizing measure, was not adopted, the legislature instead provided for distribution of an added fund of $22 million to subdivisions on a basis inverse to wealth by Chapter 4 of the Acts of 1970.

In 1971, another distinguished state commission, the Commission on the State Tax Structure under the chairmanship of Professor Edwin Mills of the Johns Hopkins Economics Department considered and rejected proposals for full state funding of education, recommending instead a program of general purpose grants akin to revenue-sharing to subdivisions with large numbers of persons below the poverty level. In rejecting full equalization of education, the Mills Commission observed:

> "Thus the relative burden of taxes in support of a particular program is very nearly the same in all jurisdiction [under equalization]. The problem with this approach is that each jurisdiction is forced to consume exactly the service level decreed by the State. Although it may be desirable to force or induce low income jurisdictions to consume a higher level of some services than they otherwise would, because of the State's interest in those services, it is not so clear that it would be desirable to force higher income jurisdictions to consume a lower level of services than they would prefer. If educational attainment is a desirable thing, the State surely doesn't want to be in the position of curtailing it in those jurisdictions that are likely to excel. State assumption of a local service is desirable only when a very large proportion of the benefits of a service are statewide and when most

> people desire similar levels of the services. This does not appear to be the case for education for example." (at 264).

It is thus clear that plaintiffs' proposals have not been neglected or ignored in Maryland, but rejected on their merits by disinterested public bodies.

One further instance of rejection deserves to be noted. In 1967, the abortive Maryland Constitutional Convention meeting in that year had before it a proposal to fasten on the state a rule substantially equivalent to that proposed by plaintiffs here. The proposal received extensive discussion. It was rejected on the floor of the convention after it was pointed out that such a provision "would discourage and frustrate local initiative", and effectively prevent or postpone new initiatives in education. Excerpts from the competing reports appear as an appendix to Kurland, *Equal Educational Opportunity,* in Daly (ed.). *The Quality of Inequality* (1968), at 67-72.

Professor Kurland accurately concludes:

> "The arguments addressed by the reports * * * are certainly relevant to the issue whether the Supreme Court should attempt to impose on all of the States what the delegates to the Maryland Constitutional Convention were unwilling to impose on their own state."

At present, state educational programs are continuing to undergo review in Maryland. The Governor's Education Counsel, a former superintendent of schools of one of the poorer counties, has opposed on principle full equalization or full state funding. Spigler, *Address to the Maryland Association of Counties,* January 20, 1972. The Governor, on June 8, 1972 appointed a new Task Force to consider reallocation of the presently available state funds in a fashion which "will avoid doing drastic damage to the

school system or taxpayers of any particular jurisdiction" and which "will require little, if any, increase in the very large sum of money ($343,425,540 in Fiscal Year 1971) that the State is already pumping into the local school system."*

Those advocating equalization at the Montgomery County level together with freezing of that county's expenditures have conceded that this *Rodriguez*-type approach would require additional revenues in Maryland of $200 million per year, equal to 3% on the present sales tax base. Wise, *School Finance Equalization Lawsuits: A Model Legislature Response*, 2 Yale Review of Law and Social Action at 130, precluding the state legislature for at least three years from "begin[ning] to set levels for education in competition with its assessment of needs for other public services." *Id.* at 130.

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* Existing disparities in Maryland are of a very modest order, and are largely attributable to the escalation of personal income in recent years in Montgomery County, the bell-wether subdivision — an escalation due in no small measure to the federal pay comparability program, and to the effects of the five-week Montgomery County teachers' strike in 1970. Cost per pupil for current expenses, including transportation in 1969-70 was $972.84 in Montgomery County. In the other 23 subdivisions in the state the range was strikingly narrow, from $597.92 in Somerset County on the eastern shore to $767.19 in Baltimore County. Selected Financial Data, Maryland Public Schools, 1969-70, Part I, Table II. These figures do not take into account the new state assumption of school construction which heavily benefits the rural counties since state funds are available on a need basis. There is no reason to believe that Montgomery County children are enjoying peculiar benefits. Recent comparative studies of educational achievement in the Montgomery County schools indicate that children in those schools perform slightly below the national average of children of comparable intelligence on nationwide tests. Washington Post, November 23, 1971 Pg. C-1. Indeed, by a number of measures, Montgomery County schools are worse off than Somerset County schools. 23.3% of Montgomery County teachers have less than 2 years' experience as against 14.7% in Somerset County, 63% of Montgomery County teachers have more than 5 years' experience as against 78.9% of those in Somerset County. Maryland State Department of Education, Experience of Teachers and Principals, September 1969, Table 1.

ADVERSE EFFECTS ON INTERESTS OF URBAN AREAS AND RACIAL MINORITIES

The relief granted by the *Rodriguez* and *Serrano* courts, far from being the advertised panacea to problems of minority and urban education is, as some of its original supporters have come to recognize, actually destructive of the interests of urban areas and the interests of minority children.

Nothing makes this clearer than consideration of the evidentiary material upon which the *Rodriguez* court purported to base its decision. The principal such piece of "evidence" was a lengthy narrative affidavit of Joel S. Berke of Syracuse University, filed at an extremely late stage of the litigation under circumstances which precluded the state from making effective reply. It has been observed of this affidavit that:

> "It is true that the three-judge federal district court which invalidated the Texas school financing system in Rodriguez found that 'those districts most rich in property also have the highest median family income and the lowest percentage of minority pupils, while the poor property districts are poor in income . . .' The basis for this finding was an affidavit submitted by plaintiffs and cited by the court. As a basis for the court's conclusion, this was a questionable source; a careful reading of the data contained in the affidavit creates grave doubt about the validity of its conclusions * * * The Rodriguez court cited the affidavit as showing a median family income of $5,900 in the ten districts with the highest tax base per-pupil and $3,325 in the four districts with the lowest tax base per-pupil [337 F. Supp.] at 282 n. 3. The following are the study's figures:

Market Value of Taxable Property Per Pupil	*Median Family Income From 1960*	*Per Cent Minority Pupils*	*State & Local Revenues Per Pupil*
Above $100,000 (10 Districts)	$5900	8%	$815
$100,000-$50,000 (26 Districts)	4425	32	544
$50,000-30,000 (30 Districts)	4900	23	483
$30,000-$10,000 (40 Districts)	5050	31	462
Below $10,000 (4 Districts)	3325	79	305

Affidavit of Joel S. Berke at 6 (footnotes omitted.)

"The five category breakdown of school districts seems to be arbitrary, and it is only this breakdown which appears to produce the correlation of poor school districts and poor people. Even on this breakdown, however, the correlation is doubtful. Note the very small number of districts in the top and bottom categories. Even more significant is the apparent inverse relationship between property value and median income in the three middle districts, where 96 of the 110 districts fall. While the family income differences among the three groups of districts are small, they may be even more significant if categories are weighted by the number of districts in each. At the very least, the study does not support the affirmative correlation of poor school districts and poor people stated by the court and the affiants; this is, however, the study the court relied upon, and it is apparently the only study which purports to show such correlation." Goldstein, *Inter-District Inequalities in School Financing: A Critical Analysis of Serrano v. Priest and*

Its Progeny, 120 University of Pennsylvania Law Review 504, 523 and note 67 (1972).

Professor Berke has since pursued his studies of the effects of the *Serrano-Rodriguez* rule and has reached conclusions dramatically at variance with those advanced in or at least suggested by his affidavit in *Rodriguez.*

Two monographs prepared by Professor Berke have since been published. Select Committee on Equal Educational Opportunity, United States Senate, *The Financial Aspects of Equality of Educational Opportunity* and *Inequities in School Finance* (January 1972). The second of these monographs considers the results which would obtain in the event that a state adopting the *Rodriguez* rule provided for full state assumption of the costs of education and equal per-pupil expenditures, the costs of this program being funded by a proportional income tax. The study notes that similar results would obtain if the state educational program where funded from another broad-based non-progressive tax such as a statewide sales or property tax. It need scarcely be labored that the line of least resistance for states confronted with a Rodriguez type decision will be movement to a statewide property tax. Professor Berke and his colleagues conclude in this study:

> "Despite the widespread enthusiasm that the California, Minnesota and Texas cases have raised throughout the nation, it is our belief that finance reform of the type just described will not result in removing the major inequities in American educational finance and *on the contrary may well exacerbate the problems of a substantial proportion of urban schools.* The results are rather sobering for those concerned about the urban financial crises. *In three-fourths of the cities in these large metropolitan areas, school taxes would rise and of the six exceptions to this tendency*

three are located in a single state, Ohio, and in a fourth the tax rates would remain virtually the same. The expenditure implications, however, are even more jarring. For this aspect of the analysis we have assumed that the local share of revenues assumed by the state would be re-distributed on an equal per-pupil basis throughout the state. * * * *Nearly twice as many central cities would receive lower expenditures from the states under equal statewide per-pupil distribution of funds than they presently receive under the existing revenue structure.* In a number of cases, for example, New York City, the proportion of income tax for educational purposes would rise from 2.5% to 3.1% yet the expenditures from local sources that were $694 in the 1970 school year would drop under an equal per-pupil statewide re-distribution of the state assumed local share to $636. In short, not only would New York be paying more, under equal per-pupil statewide re-distribution, it would be receiving less. * * * Under our revenue-expenditure model, educational resources are being re-distributed from large cities to other parts of the state. The reason for this phenomenon lies in the analysis already discussed * * * which showed that city tax rates for education were lower than in the surrounding areas because city tax rates for all governmental functions combined were higher than in other parts of metropolitan areas. The explanation for the expenditure effect has also been shown: city educational costs are considerably higher than those in other parts of the state; and, while expenditures in cities are not as high as their added costs and greater educational need requires, they are higher than expenditures in rural areas and in some suburban areas. Certainly, *city school expenditures usually are above the statewide average of districts, and thus, cities lose or only break even in plans that have equal per-pupil expenditures throughout the state or which 'level-up' to the state average.* To show the impact of our tax-expenditure model on cities and their suburbs, we took a random

> selection of thirteen of the 37 largest metropolitan areas, and looked at a large central city and its county. * * * In six of the eight large cities in the Northeast and Midwest, suburban taxes would rise under state assumption, but the rise would be markedly less than in the cities in most cases. Both areas would be redistributing to non-metropolitan areas or to the least urbanized portions of metropolitan areas. In the South the tax impact of statewide assumption would permit the suburban counties in both metropolitan areas to reduce tax effort for education, while the cities would get either a lesser degree of tax relief or none at all. In the West, all three cities would have their tax effort increased, while that would be the case for only one suburban county. Table XVI shows the comparative central city-suburban expenditure results. * * * After equal per-pupil distribution of the state assumed local share, the third column shows the new statewide expenditure levels from what were formally local revenues. Only two of the eight Northeastern and Midwestern cities gain, while only one suburb does, and the rates by which the suburbs exceed the state average are substantially higher than in the cities." *Id.* at 66-69. (Emphasis added).

The Berke study contains (at 67) a detailed table which is instructive, and which is set out below.

TABLE XIV. — *Tax effort and expenditures implication under State assumption and equal per pupil distribution*

	Percent of income taxed for school purposes		Local expenditures per pupil		
	1970	Under State assumption	1970	Statewide equal expenditures	Local expenditures under statewide tax rate[1]
Northeast:					
Baltimore, Md.	3.4	3.7	$444	$538	$486
Boston, Mass.	2.5	3.6	522	632	741
Newark, N.J.	3.4	3.8	587	707	648
Paterson-Clifton-Passaic, N.J.	(2)	3.8	(2)	707	797
Buffalo, N.Y.	1.6	3.1	347	636	662
New York City, N.Y.	2.5	3.1	694	636	863
Rochester, N.Y.	3.0	3.1	697	636	727
Philadelphia, Pa.	2.0	2.7	444	446	593
Pittsburgh, Pa.	2.5	2.7	596	446	650
Providence, R.I.	2.9	2.8	701	477	678
Midwest:					
Chicago, Ill.	1.4	3.3	307	600	754
Indianapolis, Ind.	2.4	2.8	415	377	495
Detroit, Mich.	2.1	2.9	439	396	589
Minneapolis-St. Paul, Minn.	2.3	3.3	582	429	835
Kansas City, Mo.	(2)	3.0	(2)	408	428
St. Louis, Mo.	2.7	3.0	422	408	469
Cincinnati, Ohio	4.6	3.4	677	490	499
Cleveland, Ohio	4.8	3.4	749	490	530
Columbus, Ohio,	3.0	3.4	479	490	546
Dayton, Ohio	3.7	3.4	632	490	568
Milwaukee, Wis.	3.4	4.3	599	573	708
South:					
Miami, Fla. (Dade County)	1.6	1.8	287	383	324
Tampa-St. Petersburg, Fla.	1.3	1.8	222	383	315
Atlanta, Ga.	2.4	1.5	395	175	350
Louisville, Ky.	1.6	1.6	341	191	343
New Orleans, La.	1.5	1.9	261	212	325
Dallas, Tex.	—	2.2	(2)	275	409
Houston, Tex.	—	2.2	(2)	275	364
San Antonio, Tex.	—	2.2	(2)	275	259
West:					
Los Angeles-Long Beach, Calif.	—	2.9	(2)	433	531
San Bernardino, Riverside, Ontario, Calif.	—	2.9	(2)	433	403
San Diego, Calif.	—	2.9	(2)	433	423
San Francisco-Oakland, Calif.	2.5	2.9	709	435	817
Denver, Colo.	3.3	4.3	667	507	864
Portland, Oreg.	2.3	2.0	442	672	980
Seattle-Everett, Wash.	1.7	2.3	436	328	608

1 Local revenues that would be generated if the statewide rates were applied but the revenues raised by those rates were retained for local expenditure.
2 Not compiled.

The Berke table reveals that a shift from local to statewide property taxes coupled with distribution on an equal per-pupil basis, the probable political result of *Rodriguez*-type decisions, would be an almost unmitigated calamity for most large cities, including the cities of Boston, Buffalo, New York, Rochester, Philadelphia, Pittsburgh, Providence, Chicago, Indianapolis, Detroit, Minneapolis-St. Paul, Kansas City, St. Louis, Columbus, Milwaukee, Atlanta, Louisville, New Orleans, Los Angeles, San Francisco, Oakland, Denver, Portland, and Seattle. Virtually all these cities have poor and minority populations which greatly exceed the state average.

Professor Berke and his colleagues have summarized their findings as follows:

> "If * * * a statewide property tax is employed, and the rates are higher than the characteristically lower education tax rates of the central cities — total tax rates are higher in cities than in other regions of states because of the demand for general governmental services — *the results of Serrano type litigation would be higher taxation of urban areas for education than is currently the case.* If the alternative selected for the distribution of educational services is the equal expenditures approach rather than some measure of educational need, since large city educational expenditure levels tend to be higher than the average for the entire state — although they are generally lower than most of their suburbs — *the results of a school finance case could result in no additional urban expenditures and perhaps even a lowering of them to a rigidly enforced state norm.* In short, the result of one possible constitutional alternative — statewide assumption of educational costs through a state property tax and a distribution of educational services through an equal expenditures per child formula — could result in higher taxation of city residents for the benefit of education in suburban or rural areas." *Id.* at 33-34. (Emphasis added).

Professor Berke and his colleagues are not alone in these findings. The study conducted by the United States Office of Education, *Finances of Large City School Systems: A Comparative Analysis* (DHEW Publication No. OE72-29 1972) conducted an even more extensive survey of the effects on large cities. The study found that sixteen out of twenty-five representative large city school systems had above average assessed valuations, and that sixteen out of twenty-five also had average or below average tax rates for education.

That study also found that if all school systems in the respective states collected all presently collected local funds for education and re-distributed them on a equal funds per-pupil basis, only 29 of the 84 urban school systems studied would receive more funds. If the distribution were made not on a equal dollars per-pupil basis but on an equalization basis rewarding areas with low property values, the results for the large cities would have been even more disastrous.

Indeed, one cannot view without wonder the extent to which ideology has triumphed over good sense in the work of some of the defenders of the *Rodriguez* doctrine. An especially spectacular example of this tendency is found in the recommendations of the Report of the New York State Commission on the Quality Costs and Financing of Elementary and Secondary Education. That Commission recommended a shift from the present mode of financing to a regime in which state property taxes would supply all educational funds, the funds to be re-distributed on a per-pupil basis modified by factors designed to channel more funds to large cities. Under its recommendations

a uniform state property tax of $2.04 per hundred dollars would be imposed for educational purposes. The present tax rate in New York City for education is $1.89, in Buffalo $1.44, in Albany $1.77, in Syracuse $1.66, in Rochester $1.72 and in Yonkers $1.74. The "big six" cities in New York would be presented by this "reform" measure with massive increases in property taxes. By contrast, sweeping reductions would be mandated for those suburban areas now making high tax efforts on education. The tax effort for education in Scarsdale would drop from $2.58 to $2.04, in Hempstead from $2.61 to $2.04, in New Rochelle from $2.49 to $2.04 and so on. *Id.* at p. 2.33.*

Against this background it is scarcely a source of wonder that disenchantment with the *Serrano-Rodriguez* doctrine has set in. Thus, William L. Taylor, former staff director of the United States Civil Rights Commission and now director of the Center for National Policy Review, Catholic University Law School has testified:

> "In the first place, it is being discovered rather belatedly that in some areas there is no correlation between the property wealth of an area and the wealth of families who reside there. This means that in New York City which has a good tax base and many poor families, poor and minority children would be hurt — not helped — by an application of the *Serrano* principle re-distributing property wealth for school financing purposes. Second, the *Serrano* decision points not toward a system of financing based on educational need — which is what poor children really require — or even to equal expenditures, but simply to equalizing the property tax base. Third, even in the best

* See the critical lead editorial in the New York Times for January 29, 1972, and see Buder, *City Tax Rise Linked to Fleischmann Proposals* and Maeroff, *Suburban School Officials Fear Effect of a Freeze on Spending,* New York Times, February 2, 1972 at 47.

> of circumstances, there is no persuasive evidence that differences in expenditures — unless they are massive — produce significant differences in educational outcome. It is highly problematical that increases in expenditure alone will produce for poor children the higher quality teaching they so desperately need." (Mondale Committee Hearings page 10472).

The kindest thing that Mr. Taylor could think of to say about the *Rodriguez* doctrine was that "it will strip away one rationale that affluent suburban communities employ for refusing to provide shelter for poor and minority families from the central city," surely a minor and remote consequence.

Mr. Norman J. Chachkin of the NAACP Legal Defense and Educational Fund, a supporter of metropolitanization of school districts, has observed:

> "Some of the schemes proposed in the wake of the California decision could make the cure worse than the ailment. Many school districts — particularly urban districts — could get less money under a revised aid scheme than they get now. The failure of the *Serrano* litigants and court, in their haste to avoid the *McInnis* problem of defining educational need, to propose acceptable remedies puts the burden on state legislatures.
>
> I would not be surprised if many respond by abolishing the flat grant, minimum foundation and all categorical aid programs, equalizing effective assessment ratios, levying and collecting a uniform property tax on a statewide basis, and then distributing to the existing school district structures on a equal dollars per-pupil basis. Not only will this be extremely bad for the education of minority and disadvantaged children, but I wonder how such a restricted revenue base might affect a school district which had in the past negotiated contracts with an affiliate calling for higher than average teachers' salaries." (Mondale Committee Hearings, at 10905.)

To similar effect see Myers, *Second Thoughts on the Serrano Case*, City: The Magazine of the National Urban Coalition, Volume V, Number 6 (Winter 1971), at page 38; Bassett, *Leaders of Urban Schools Oppose Dollar-A-Scholar*, Baltimore News-American, March 16, 1972, page 1, column 4; Goldstein, *supra,* 120 University of Pennsylvania Law Review 504, 526 (1972).

Nor is the probable detriment to large cities resulting from the *Rodriguez* rule a function of the fact that the rule applies only to property tax bases:

> "An equalization principle that operated beyond the sphere of property tax base wealth could work against the cities in another area. Local non-property taxes, though limited in significance to a few states * * * may also disproportionately favor urban centers. In a study of Alabama, Kentucky, Louisiana, Maryland, New York, Pennsylvania and Tennessee for 1968-1969, school districts were classified into central city, suburban, independent city and rural districts. It was found that in five of the seven states * * * the rural districts received the least amount of revenue per-pupil from such local non-property taxes; in four of the seven states * * * the central city districts received the most revenue per-pupil. The average ranking for the seven states showed that the central city school districts on the average received the most revenue per-pupil from local non-property taxes, followed in order by suburban, independent city, and rural districts." *Alternative Programs for Financing Education* 186-187 (1971) (National Educational Finance Project, Volume V). Goldstein, *supra,* at 526 note 73.

Not only will large cities not benefit from *Rodriguez* but it has also been established that minority groups will not benefit from the *Rodriguez* rule. Though the United States Civil Rights Commission has claimed that some moderate benefit would accrue to Mexican-American children in

Texas, its studies of the school systems of California, Arizona, New Mexico and Colorado, conspicuously failed to find any detriment to Mexican-Americans from operation of the existing system of school finance. Similarly, Coons, Clune and Sugarman, *A First Appraisal of Serrano*, 2 Yale Review of Law and Social Action 108, 120 note 37, observe:

> "The racial district wealth pattern may be other than intuition might suggest. In California, over half the minority pupils reside in districts above the average in assessed valuation per pupil."

Professor Coons and his colleagues have noted:

> "If racial discrimination were measured by the percentage of all minority students who reside in districts below the statewide median average valuation per-pupil, California would manifest inverse discrimination. 59% (683,919) of minority students live in districts above the median average valuation per-pupil. The percentage is considerably higher for Negroes; Indians and those with Spanish surnames are nearly evenly divided above and below the median. The minority figures were taken from an unpublished survey for the State Department of Education by F. R. Gunsky, 'Racial and Ethnic Distribution of Public School Pupils, District Report, October 1968.' The average valuations per-pupil are from California Public Schools Selected Statistics, 1967-68 (Sacramento)." Coons, Clune and Sugarman, *Private Wealth and Public Education* at 356 note 47.

The disenchantment of large cities with the *Serrano* rule is dramatized by the case of San Francisco which initially filed an Amicus Curiae Brief in support of the plaintiffs in *Serrano,* see Myers, *supra.* More recently, we are told, "San Francisco has joined several of the small wealthy districts to organize a lobby ('Schools for Sound Finance') to fight any limits on local expenditures" in connection with the

legislative consideration of school finance revisions in California. Anderson, *Financing Schools: Search for Reform,* Washington Post, May 31, 1972.

The obvious detriment to large cities inherent in the *Rodriguez* rule has driven apologists for the formula to suggest ever more desperate rationalizations. Thus, it has been suggested that the detriment to large cities might be in part mitigated by adopting a rule requiring not equal dollar spending but equal facilities, thus partially taking account of higher city costs. But the almost total unjusticiability and unenforceability of such a rule, which invariably draws the court into comparison of apples and oranges should be apparent. Other commentators have suggested that the solution is to be found in some formula, legislatively rather than judicially adopted, taking account of the factor of municipal overburden. The difficulty with such a suggestion is that "the National Educational Finance Project reached a different conclusion after analysis of a sample of school districts from eight states: 'no persuasive evidence of the existence of municipal overburden was uncovered.' Johns, et al., *Alternative Programs of Financing Education* 98 (1971)." Dimond, *supra*, 2 Yale Review of Law and Social Action 140, note 38 (1971).

Finally, there have been suggestions that although an unmodified *Rodriguez* rule may be detrimental to cities, the effect of *Rodriguez* type decisions is to induce states to re-examine their systems of school finance; it is inferred that such a re-examination can only result in benefit to cities. However, the history of recent and frequent amendments to state school finance formulas makes clear they have undergone continuous re-examination. As recently pointed out "equal statewide financing will take more money out of the central cities than it will give to them. * * * Under

the Texas decision a state could theoretically choose to appropriate extra funds to deprived urban children. But it would be very difficult for the cities to get those appropriations through any legislature, as a matter of practical politics, in a period in which other wealthy districts were being held down." Editorial, The Washington Post, May 31, 1972.

Indeed, the most dramatic illustration of what the *Rodriguez* principle may mean in practice is supplied by the experience in New Jersey where, in pursuit of the will of the wisp of abstract numerical equalization in favor of small rural districts not really needing additional funds, a state court judge invalidated a new and progressive piece of reform legislation, the Bateman Act, which specifically addressed the problems of large cities by allocating available funds in heavy proportion to districts with large numbers of AFDC recipients.

There is no way a constitutional rule can readily take account of these problems. It has been demonstrated that the *Rodriguez* rule in general, would operate to the severe detriment of urban districts:

> "A decision by the United States Supreme Court attempting to differentiate among the states, would be entirely inappropriate. It would be most unwise to have basically similar state systems held invalid or valid depending on where the state's poor lived, or more accurately, depending on judges' views of the difficult statistical analysis demonstrating a correlation between poor people and poor school districts." Goldstein, *supra,* at 525.*

* Professor Goldstein also accurately observes: "Whatever correlation there is between the percentage of minority people and the tax base wealth of a school district in Texas may reflect the rural nature of Texas minority life or some other state peculiarity." *Id.* at 525 note 71.

Even if it is assumed that the changes adopted by state legislatures following invalidation of existing formulas gave some weight to problems of the cities, the net result would still be grave detriment to the long term interests of the deprived residents of cities. This is so because even the most sanguine exponents of the *Rodriguez* rule acknowledge that vast additional appropriations for education would be necessary to elevate districts to the level of the higher districts in each state and that the larger part of such appropriations would be channeled to districts without particularly pressing educational problems. Whatever marginal benefits might accrue to large cities from changes in educational spending patterns viewed alone would be more than offset by the waste of society's total resources and the detriment in the capacity of government to address other problems such as the urban unemployment which the Coleman Report and its defenders view as the gravest detriment to the educational and other interests of urban children. Thus, even one of the proponents of the *Rodriguez* principle, Professor Charles S. Benson has observed:

> "Assuming compliance with the dictum of *Serrano v. Priest* that wealth not influence quality of education within the states, one is led to the conclusion that state governments must allocate additional revenues to the public schools simply to establish such compliance. To remove the influence of wealth on education requires that expenditures in the large number of low wealth — low expenditure districts be brought up to acceptable standards. This can only be done by injecting money from a higher level of government into those districts. (No one can imagine that states could obtain compliance with *Serrano v. Priest* by forcing high wealth, high expenditure districts to reduce their expenditures sharply, one reason being that most of these expenditures are contractual in nature.) My concern

> is that state governments which are obliged to raise their education budget for this purpose of compliance will slight other social welfare activities, such as health, low cost housing, and the more developmental types of welfare accounts. There is strong reason to believe that performance of schools with respect to disadvantaged youth is itself extremely sensitive to these very kinds of expenditures that might suffer as states move toward compliance with Serrano. This would subvert whatever equalitarian purpose exists in *Serrano* * * *". (Mondale Committee Hearings at 7669).

Similar concerns underlie the conclusion of a recent careful study of the history of state educational finance formulas:

> "Improving the condition of large city school systems can best be attained by a pinpointed federal program that will deal with financing needs of the large cities and other areas containing the concentrations of poverty which are so costly to local governments, both in the educational and non-educational spheres. The financial requirements of suburban and rural school systems can be most adequately dealt with by the system of state and local finance which has been able to provide such large sums of money since the end of World War II. Large cities, on the other hand, present problems which are very different and probably can be dealt with only on a national scale with a national resource base." Sacks, *City Schools, Suburban Schools: A History of Fiscal Conflict* (1972) at 177.*

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* Indeed, the limited federal and state programs focused on deprived urban areas are said to have already placed city high schools with large numbers of low-income children on a much better than average material footing. See Havighurst, et al. *A Profile of the Large-City High School,* National Association of Secondary School Principals, November 1970, quoted at Mosteller and Moynihan, *On Equality of Educational Opportunity* (1972), pg. 11.

Plaintiffs, though claiming to represent all parents, children and taxpayers in their state, seek a rule profoundly destructive of their political rights. As to the rural districts in Texas and elsewhere in the country, local budgetary control over educational expenditures and a tradition of close accountability of school officials would be ended. As to urban areas, a process of political evolution which over the course of a century has given varying racial and ethnic groups, in Texas and in the large cities of the East and Midwest, a voice in fiscal control of their educational systems would be brought to an end and further shifts in influence over City educational policy precluded.

Finally, it has further been noted that "the variations in school expenditures per pupil, throughout the country, are mainly due to the differences in teachers' salary scales. The high salary scales are commonly protected by formal contracts between school boards and teachers' organizations. As a practical matter, in view of the political strength of the teachers' organizations, it is idle to suppose that salaries in the high-cost school systems can be cut or, following one proposal, can be frozen over a period of years while other systems gradually catch up. The alternative would be to equalize costs by increasing class sizes in high-budget areas. Here again the effects would be sharpest in the central cities, where the need for low pupil-teacher ratios is greatest." Editorial, The Washington Post, May 31, 1972.

COSTS OF THE RELIEF SOUGHT

The relief sought by Plaintiffs will result in staggering costs to already heavily burdened state governments. The President's Commission on School Finance estimated the cost of elevating all school districts to the level of the

ninetieth percentile in each state at 6.2 billion dollars and the cost of elevating all school districts to the ninety-fifth percentile in each state at 8.8 billion dollars. Since the larger part of school budgets consists of contractually obligated items such as teachers' salaries, bonds, contracts for pupil transportation and the like, it is unlikely that as a practical matter any state would find it possible to equalize at less than the ninety-fifth percentile. See the summary of the findings at Nation's Schools, May 1972, page 8 and see Staff Report, President's Commission on School Finance, *Review of Existing State School Finance Programs*. These additional outlays are, of course, in addition to the rapidly rising ordinary level of expenditures with which state governments must keep abreast. The rate of increase in educational expenditures in recent years has far outstripped the rate of inflation and the rate of growth of the revenue resources of state governments. Thus, on a national basis, taxation and appropriation for public school systems increased by 67.4% between 1957-58 and 1963-64, see Advisory Commission on Inter-Governmental Relations, *State Aid to Local Government* (1969) at 56 (Mondale Committee Hearings at 8480). Similarly, state and local revenue receipts from own sources for public schools as a percentage of state personal income increased from 3.1% in 1957-58 to 4.6% in 1967-68. *Id.* The increasing militancy of teachers' unions suggests that this burden upon state governments is likely, if anything, to accelerate in its dimensions in the next several years. The present suits would saddle the states with the responsibility not merely of keeping abreast of ordinary demands for ever-increasing revenues, but also of finding the vast additional sums mentioned. Just how a burden of 6.2 billion or 8.8 billion dollars per year upon the hard pressed state governments can be described as anything

other than overwhelming is difficult to discern, given the fact that the pending revenue-sharing bill over which there has been so much travail will give state and local governments together only 5 billion dollars per year or roughly 5/9ths of the added burden which plaintiffs here would thrust upon them in a period of rising public demand for other governmental functions.

Some inkling of the burden which would be imposed upon particular states may be gleaned by comparing the sums necessary to raise school expenditures in given states to the ninetieth percentile now prevailing in those states with the revenues which would be generated from a 1% percent increase in existing sales taxes. The comparison for the eighteen states which would be most heavily burdened in absolute terms by the *Rodriguez* rule is as follows:

	Revenues per 1% of Sales Tax Rate, Present Taxes, 1969 (National Educational Project, Vol. 2, pp. 307-08).	*Total Expenditures to Raise to 90th Percentile (President's Commission on School Finance)* Compact, *April 1972, pg. 25*	
California	$421,000,000	$731,200,000	
Connecticut	50,000,000	126,800,000	
Florida	143,000,000	117,200,000	
Georgia	103,000,000	162,600,000	
Illinois	234,000,000	401,600,000	
Indiana	100,000,000	112,900,000	
Maryland	66,000,000	175,200,000	
Massachusetts	53,000,000	236,000,000	
Michigan	199,000,000	326,600,000	
Minnesota	58,000,000	107,200,000	
Missouri	99,000,000	107,100,000	
New Jersey	88,000,000	285,600,000	
New York	350,000,000	537,700,000	
Ohio	155,000,000	471,800,000	
Pennsylvania	148,000,000	456,800,000	
Texas	179,000,000	263,400,000	
Virginia	70,000,000	130,800,000	
Washington	94,000,000	107,800,000	
U.S. as whole	$3,790,000,000	$6,200,000,000	(est.)

Similar comparisons with respect to income and property taxes may be made by recourse to the figures contained in the study of the National Educational Finance Project above cited. It is clear that the order of magnitude of the increases which will be required will be such as to totally preempt for a number of years one or more of the principal revenue sources in almost every state in the union and to render impractical tax increases or substantial budget increases for any other public purpose.

As elsewhere noted in this memorandum, no particularly useful public purpose would be served by this massive

effort. In Maryland, for example, less than ¼th of the total additional funds necessary would go to the City of Baltimore; the overwhelming proportion of it would be channelled to rural districts lacking pressing educational needs and the same is true elsewhere in the country. The chief, if not the only, beneficiaries of this massive disruption would be teachers' organizations which would swiftly organize on the state level to obtain the maximum portion of the newly appropriated revenues.

The interference with state and local budgeting which imposition of the *Rodriguez* rule would produce would be total. As Professor Coons and his colleagues have noted:

> "The adoption of a power equalized school district system would have analogous but more complex effects on other public services. * * * Power equalizing would alter the price of education for nearly all districts and the interdependencies of local services would assert themselves in contrasting ways. That is, this all would happen unless the state either mandated or assumed the cost of other services beside education. In fact, there are certain to be pressures toward such comprehensive fiscal neutrality. The *Serrano* idea will increase sensitivity to abuses in respect to other public services which have been long endured because of their apparent inevitablity; this dissatisfaction will be further stimulated by economists and politicians, some of whom will promote full state assumption of all services and others whom will argue for power equalizing these same functions." Coons, Clune and Sugarman, *A First Appraisal of Serrano*, 2 Yale Review of Law and Social Action 111 at 119 (1972).

Professor Dimond has similarly noted:

> "I have not the vaguest notion of what the effect of fiscal neutrality in school finance alone will be on other public taxing and spending and private consumption and saving. I only know that Coons, et al., bear a high

> burden of proof that it is possible to tinker with 'just' the public school finance scheme. I suspect that requiring reform of public school finance systems will have a considerable impact on the patterns of all other public and private systems of raising and spending money. Those disinclined by philosophy to judicial intervention will be immensely troubled by that specter, and especially by its unknown contours."

Professor Yudof and Kirp have likewise noted:

> "The *Serrano* decision does of course have an impact on the legislature's capacity to set fiscal policy. If the legislature is prodded by a *Serrano* like suit to increase state education appropriations (a likely response), then the state will be obliged either to increase state taxing, or to cut back some other state supported program. *Serrano,* to put the point differently, imposes constraints on the legislatures' ability to trade off expenditures on public goods." 2 Yale Journal of Law and Social Action at 147, note 4.

Nor is there any reason to believe that the principles of *Rodriguez* will be limited in their impact to state programs. Rather it is clear that every federal matching program will be potentially jeopardized by the decision, since almost by definition the ability of states to put up state funds to be matched is a function in some measure of their wealth.

It should be noted that this spelling out of the potential implications of *Rodriguez* is not a parade of horribles devised by counsel opposing application of that decision; it comes from the lips of the proponents of the doctrine themselves.

See also Schoettle, *The Equal Protection Clause in Public Education,* 71 Columbia Law Review 1355 (1971), noting the potential implications for the total budgeting process.

There is indeed no reason to believe that these opportunities will not be eagerly pursued once the door is open to lawsuits of this character attacking state and federal taxing and spending programs. We have been told:

> "*Serrano* 'opens a very large door' says John Silard, a Washington, D.C., attorney involved in school tax litigation. For the first time, he says, the courts are requiring 'equal protection' in public programs. They are holding states accountable for how and where they spend public money. In his view, this means 'a revolution in public services', the schools, he predicts, are merely 'the first bite at the big apple. Welfare obviously comes next, and I guess health too.' * * * Some lawyers predict that if education is accepted as a fundamental interest, other public services are bound to follow. But they don't like to say it out loud. 'They want this to stick', one attorney says. 'You stress that education isn't like garbage. We are playing a game here. You have to (in order) not to frighten the courts away from a proposition that's sound'." Andrews, *Tax 'Revolution'*, Wall Street Journal, March 13, 1972, pages 1, 12.

The effective inseparability and indistinguishability of education from other services was noted by Judge Harvey in his decision in *Parker v. Mandel,* which repeatedly refers to "health, education and welfare" in declining to apply the *Serrano-Rodriguez* doctrine.

It will be recalled that the California Supreme Court felt obligated to issue a supplemental opinion when it was discovered that its initial edict was having an adverse effect upon state property tax collections. With the doctrine that plaintiffs propose the legitimacy of virtually all state taxation will be cast in peril in the eyes of many members of the public and the eyes also of at least the more exuberant members of the lower federal judiciary. Professors Coons,

Clune and Sugarman have gleefully pointed to the factors which they hope will induce legislative acquiescence in their favored doctrine:

> "A prolonged period of turmoil and doubt in which aid formulas, validity of tax impositions, validity of bonds and retroactivity remain locked in a political struggle." 2 Yale Review of Law and Social Action at 118.

Surely, whatever their applicability in their original context, there is merit in this new context in the cautionary words of Judge Learned Hand on the duty of deference to the decisions of legislatures:

> "These men [Justices Holmes and Cardozo] believed that democracy was a political contrivance by which the group conflicts inevitable in all society should find a relatively harmless outlet in the give and take of legislative compromise after the contending groups had had a chance to measure their relative strength; and through which the bitterest animosities might at least be assuaged, even though the reconciliation did not ensue which sometimes follows upon an open fight. They had no illusion that the outcome would necessarily be the best attainable, certainly not that which they might themselves have personally chosen; but the political stability of such a system and the possible enlightenment which the battle itself might bring, were worth the price. * * * We face difficulties which are big with portent and uncertain of solution. Such solutions as will arrive, like all human solutions, will be likely to be inadequate and unfair placebos. But nevertheless they will be compromises, as government almost always must be in a free country; and if they are to be upset under cover of * * * majestic sententiousness, they are likely to become centers of frictions undreamed of by those who avail themselves of this facile opportunity to enforce their will." Learned

Hand, *Chief Justice Stone's Concept of the Judicial Function,* Dilliard (editor), *The Spirit of Liberty* at 204, 207.

CONCLUSION

The judgment should be reversed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, George W. Liebmann, one of the attorneys for Amici Curiae Montgomery County, Maryland, et al., and a member of the Bar of the Supreme Court of the United States, hereby certify that on July 21, 1972, I served copies of the foregoing Amici Curiae Brief on the Appellees and Appellants by depositing such copies in the United States Mail, postage prepaid, and addressed to the attorneys of record for Appellees and Appellants as follows: Arthur Gochman, Esquire, 313 Travis Park West, 711 Navarro, San Antonio, Texas 78224, Mario Obledo, Esquire, 145 9th Street, San Francisco, California 94103, Counsel for Appellees. Pat Bailey, Esquire, Assistant Attorney General, P.O. Box 12548, Capitol Station, Austin, Texas 78711, Charles Alan Wright, Esquire, 2500 Red River Street, Austin, Texas 78705, Counsel for Appellants.

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