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Commentary*

SAN ANTONIO INDEPENDENT SCHOOL DISTRICT V. RODRIGUEZ

Chaotic, Unjust—and Constitutional†

DAVID L. KIRP‡

Prevailing school finance schemes, which rely heavily on locally raised money, work real hardships on those who live in property-poor school districts. Even though taxpayers in those districts impose exorbitant tax rates on themselves, their children have less spent on their education than do the scions of the rich.

Everyone on the Supreme Court recognizes the problem. Justice Stewart described present arrangements as “chaotic and unjust.” Yet five members of the court (including Justice Stewart) declared, in *San Antonio Independent School District v. Rodriguez*,¹ that these unfairnesses are not unconstitutional. They urged the reform-minded to confront their legislatures, while concluding that the way in which education dollars are now distributed is “rational,” and therefore consistent with the Equal Protection Clause.

The Court’s opinion is strangely mechanical. It struggles to determine just who is hurt by the *status quo*, blinking at the obvious consequences for children unlucky enough to live in poor areas. It attempts to distinguish “fundamental” interests—those which merit more exacting judicial scrutiny—from all others, ignoring the inextricable links between education and such constitutionally secured rights as voting and free speech.

The constitutional analysis is particularly startling in light of the court’s bold forays in the abortion, contraception, and death penalty cases. It is also, as

* This will be a periodic feature of the *Journal* whenever decisions or legislation of major significance are forthcoming.

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¹ 93 S. Ct. 1278 (1973).

Justice Marshall's dissent forcefully notes, inconsistent with a host of less-publicized decisions which eschew formalism for a reasoned weighing of state interest and personal injury.

The Justices were clearly worried about the unhappy consequences that they imagined would follow from upsetting school finance laws: increased state education costs; the substitution of universal mediocrity for sporadic excellence; the demise of local control; demands that all locally funded services (police, fire, sewage, and the like) be equalized. In short, the *Rodriguez* case nipped in the bud what it may well have perceived as an emerging egalitarian revolution.

These fears were, however, misplaced. The remedy proposed in *Rodriguez* would in fact, as Justices White and Marshall point out, have made real local control possible for all districts, not just the rich. Equalization of spending was not sought—indeed, many of the alternative schemes proposed would have preserved inequities which flowed from true local choice differential attention to varied student needs. And education seems sufficiently different, in constitutional terms, from other public services to permit the court to adhere to that distinction.

The real trouble with *Rodriguez* may be that it came 10 years before its time (or, given the venturesomeness of the Warren court, five years *after* its time). What happens to school finance reform in the next decade? Prospects are, at best, mixed. In many states, nothing is likely to happen: The rich districts will successfully resist change, just as they have for over a century.

Yet elsewhere, the future may be more encouraging. Scattered state courts may follow the example set by Michigan and Wyoming, and conclude that current school financing schemes violate state constitutional guarantees of "free and efficient" or "thorough and uniform" schooling. And in a few states, enough legislators may have gotten excited about the issue to junk the old system, and substitute one that is more equitable and rational. In Texas, for example, the day after *Rodriguez* was decided leading politicians vowed to rewrite that state's school finance statute. If that doesn't happen, Demetrio Rodriguez, the poor Texan whose case was dismissed by the Supreme Court, will have to accept the fact that, through no fault of his own, his children will continue to get a second-rate education.

Local Discretion and Common Sense Affirmed

GEORGE W. LIEBMANN*

The decision in the *Rodriguez*¹ case should surprise no one familiar with the constitutional traditions of this country. Efforts to have the courts induce higher levels of appropriation or taxation either by direct coercion or by creation of a series of Hobson's choices for legislatures will continue to be destined to failure.²

The States and nation have been spared an inducement toward between five and ten billion dollars in essentially wasteful spending. The lion's share of the benefits of a *Rodriguez* rule would have flowed to rural districts without especially pressing needs, and to the extent that cities would have benefited the benefits would have taken the form of larger general purpose funds, used for increased salaries for teachers presently serving or educationally insignificant marginal reductions in class size. The only persons with reason to mourn the result are those who would organize statewide teachers' unions.³ It is no accident that the nation's first statewide teachers' strike commenced only a few days after the *Rodriguez* decision in the only state—Hawaii—which possesses a regime approaching full state funding. There is no reason to believe that public willingness to support public education would be enhanced by repetition of this on a national scale. The experience of Hawaii⁴ and New Brunswick⁵ further speaks against the view that full state funding would, in the long run, result in more generous total public support of public education. We can be thankful that this country will be spared the creation of institutions which would aggravate political and social divisions and endanger the stability of its political processes in the manner dramatized by the French experience in 1968.⁶ The projection of such controversies over an ever wider geographical

* *Amicus curiae* in *Rodriguez*. Counsel for Montgomery Co., Md., in *Parker v. Mandel*, 344 F. Supp. 1068 (D. Md. 1972) and for the State of Maryland in *Dandridge v. Williams*, 397 U.S. 471 (1970).

¹ *San Antonio Independent School District v. Rodriguez*, 93 S.Ct. 1278 (1973).

² See generally, Hazard, *Social Justice Through Civil Justice*, 36 U. CHI. L. REV. 699 (1969).

³ Simon, *The School Finance Decisions: Collective Bargaining and Future Finance Systems*, 82 YALE L. J. 409 (1973).

⁴ See *Spears v. Honda*, 51 Haw. 1, 449 P.2d 130 (1968); FUCHS, *HAWAII PONO: A SOCIAL HISTORY*, 271-72, 297, 434-35 (1960).

⁵ ADVISORY COMMISSION ON INTERGOVERNMENTAL RELATIONS, *WHO SHOULD PAY FOR PUBLIC SCHOOLS*, ch. 1 (1971).

⁶ De GAULLE, *MEMOIRS OF HOPE: RENEWAL AND ENDEAVOR* (1971):

Other(s) . . . advocated the so-called 'presidential system' on the American pattern. . . . Executive and legislative would thus go through the whole duration of their respective mandates

scope and their concentration upon ever fewer pressure points would scarcely have been in the interest of orderly democratic government in a nation of continental expanse.

Clearly, the decision sounds the death knell of "fiscal neutrality" suits in federal court. It involved the state with the grossest intra-state disparities, virtually the only state in which state aid did not have a significant equalizing effect, and one of the few states in which the system arguably disadvantaged minority groups. There was a color of racial or ethnic distinction in the drawing of district lines within a single city, the state's position was barely presented, and the position of plaintiffs was highly sympathetic and thoroughly presented. Reversal was outright without remand. Moreover, most state courts proclaim that state equal protection clauses will be construed *in pari materia* with the federal clause. The Supreme Court's demonstration of the defects of the "fiscal neutrality" principle will have an influence upon those few state courts that might otherwise have been induced to reject the Supreme Court decision in *Rodriguez*. For the "fiscal neutrality" principle had no virtues of its own and its appeal even to its proponents was only as a means of distinguishing the *McInnis*⁷ decision.

The impact of the holding that education is not a "fundamental interest" will be substantial. The fee cases are of minimal importance and may be arguably distinguishable from *Rodriguez* on the basis that the claims of at least some plaintiffs involve total rather than relative indigency.⁸ The sweep of *Rodriguez*, however, is such as to prejudice even these claims⁹ and the Supreme Court in the *Johnson* case displayed no enthusiasm for involving itself.¹⁰ As for the suits involving handicapped children and the bi-lingual cases, it must be remembered that the initial decision validating such claims arose not in a litigated case but by a consent judgment.¹¹ Ultimately, leaving aside cases involving complete denial of any state contribution to education, any claim for special subventions would seem doomed to failure.¹² Eventually, the courts will

without either of them ever being able to coerce the other... [The United States] is a federation of states each of which, with its governor, its representatives, its judges, and its officials—all elected—takes upon itself responsibility for a large part of the immediate business of politics, administration, justice, public order, economy, health, education, etc. while the central government and Congress normally confine themselves to larger matters: foreign policy, civic rights and duties, defense, currency, overall taxes and tariffs. For these reasons the system has succeeded in functioning up to now in the north of the New World. But where would it lead France... a country the demands of whose unity coupled with the perpetual threats from outside have induced to centralize its administration to the utmost, thus making it *ipso facto* the target of every grievance?... The inevitable result would be either the submission of the President to the demands of the deputies or else a pronunciamiento. *Id* at 323-24.

⁷ *McInnis v. Shapiro*, 293 F. Supp. 327 (D. Ill.) *aff'd* 394 U.S. 322 (1969).

⁸ *San Antonio Independent School District v. Rodriguez*, 93 S.Ct. at 1292 n.60. *Id* at 1311 n.6 (Stewart, J. concurring).

⁹ *Id* at 1299.

¹⁰ *Johnson v. New York State Educ. Dep't.*, 409 U.S. 75, 93 S.Ct. 259 (1972).

¹¹ See Friendly, *The "Law of the Circuit" and All That*, 46 ST. JOHN'S L. REV. 406, 410 (1972).

¹² *McMillan v. Board of Educ.*, 430 F.2d 1145 (2nd Cir. 1970) (Friendly, J.).

collide with the fiscal dimensions of the claims being asserted, which are almost as large as those of the claims asserted in *Rodriguez*.

The intra-district suits deserve to have a bright future where anything in the nature of purposeful racial discrimination can be demonstrated.¹³ Neither *Dandridge*¹⁴ nor *Rodriguez* legitimizes discrimination on racial grounds. The obstacle to these cases is found in *Jefferson v. Hackney*¹⁵ which requires more than *de facto* differential impact and in the fact that the disadvantage claimed is frequently assumed by plaintiffs but not provable or proven. One important issue will be whether Title I funds may be considered in determining whether the state has fulfilled its constitutional obligation.

The fate of the metropolitan desegregation suits will soon be decided. *Rodriguez*, and particularly its 110th footnote,¹⁶ can scarcely have brought joy to the proponents of these cases, for it rejects the logic satirized by Professor Kurland:

Equality demands uniformity of rules. Uniformity cannot exist if there are multiple rulemakers. Therefore, the objective of equality can be achieved only by the elimination of authorities not subordinate to the central power.¹⁷

The courts have declined to reallocate financial resources across jurisdictional lines, and there is limited reason to believe that they will take what Professor Coleman has recognized as the greater step of reallocating "human resources."¹⁸ To regard people as inputs to be reshuffled to produce a pre-ordained design in cases not involving equitable remedial powers against recent state-imposed school segregation is to reject government by consent and to take a giant step toward "the organic relation of the citizen to the state." As Justice Holmes informed us in his seminal dissent in *Lochner v. New York*,¹⁹ the constitution does not ordain this any more than it ordains a regime of pure *laissez faire*.

The results in cases under state constitutions will turn on the history of particular provisions and the degree of politicalization of the state courts. The recent New Jersey decision²⁰ arises under a provision identified in advance as being uniquely restrictive, and in perhaps the only state where the fiscal neu-

¹³ See Havighurst, et al., *A Profile of the Large-City High School*, National Association of Secondary School Principals, November 1970, quoted at MOSTELLER & MOYNIHAN, ON EQUALITY OF EDUCATIONAL OPPORTUNITY 11 (1972).

¹⁴ *Dandridge v. Williams*, 401 U.S. 471 (1970).

¹⁵ *Jefferson v. Hackney*, 406 U.S. 535 (1972).

¹⁶ "This court has never doubted the propriety of maintaining political subdivisions within the States and has never found in the Equal Protection Clause any *per se* rule of 'territorial uniformity.'" McGowan. . . See also Griffin. . . ; Salsburg. . . Cf. Board of Education of Muskogee v. Oklahoma, 409 F.2d 665, 668 (10th Cir. 1969). *San Antonio Indep. School Dist., v. Rodriguez*, 93 S.Ct. at 1307 n. 110.

¹⁷ Kurland, *Equal in Origin and Equal in Title to the Legislative and Executive Branches of the Government*, 78 HARV. L. REV. 143, 144 (1964).

¹⁸ Coleman, *Preface*, in COONS, CLUNE AND SUGARMAN, PRIVATE WEALTH AND PUBLIC EDUCATION XV-XVI (1969).

¹⁹ *Lochner v. New York*, 198 U.S. 45, 74 (1905) (Holmes, J. dissenting).

²⁰ *Robinson v. Cahill*, 62 N.J. 473, 303 A.2d 273 (1973).

trality principle would clearly benefit cities. Most state constitutions include recognitions of local taxing powers at variance with any such contention. In some states, such as Maryland, history clearly rejects any purpose to impose full or equal funding.²¹

As for the suits challenging property tax systems, the discussion in *Rodriguez* may dampen the enthusiasm of the lower courts. The property tax is a good local tax, a worse state tax, and would be an atrocious national tax and it is by no means undesirable that grievances concerning assessments be directed at local officials and not projected upon a statewide or national scale. Local assessment of the commercial property tax almost certainly benefits large cities.²²

Reduction of commercial property taxes would confer windfalls on speculators and on many industries. Even the residential property tax is not regressive in its impact,²³ particularly where circuit breaker provisions for the elderly are included in it, nor except in a very few cities is it unduly burdensome, given the fact that the United States, unlike many countries, does not treat the imputed rental value of owner-occupied property as income for income tax purposes.²⁴

Rodriguez is indeed cause for rejoicing. No longer can fashion do service for fact in efforts to secure change in school finance or in taxation. The decision may slow the pace of change, but it is also likely to increase the wisdom of such changes as are made. Legislative proposals will achieve and deserve success insofar as they focus less on the reallocation of general purpose funds and more upon special problems. Attention here may properly be given to devices used in some of the mass literacy programs of underdeveloped countries and the suggestions of the British Plowden Report, which have been almost totally ignored in this country.²⁵ There will undoubtedly also continue to be a movement toward circuit breaker laws and a gradual movement toward greater use of graduated state income taxes. These movements will be dependent upon their ability to appeal to enlightened self-interest and to what Justice Holmes referred to as the limitations upon self-interest imposed by sympathy. Such appeals are not foredoomed: if they were, there would be no present equalization programs and indeed no public schools. If the liberal-minded people who have sponsored these cases are to succeed in any of their objects they will have at last to become Fabians and not the would-be authoritarians that they have been thus far, and will have to accord greater respect to "perhaps the most fundamental individual liberty of our people—the right of each man to participate in the self-government of his society."²⁶

²¹ Proceedings of the Maryland Constitutional Convention of 1867, 200–202.

²² *San Antonio Independent School District v. Rodriguez*, 93 S.Ct. at 1291, citing Note, 81 YALE L. J. 1303 (1972).

²³ HARRIS, *Issues and Interpretations*, 155 *The Bankers' Magazine* No. 2 (1972).

²⁴ SIMONS, *PERSONAL INCOME TAXATION*, Ch. V (1938).

²⁵ CENTRAL ADVISORY COUNCIL FOR EDUCATION (ENGLAND), *CHILDREN AND THEIR PRIMARY SCHOOLS* pp. 40–49 (1967).

²⁶ *In re Winship*, 397 U.S. 358, 385 (Black, J. dissenting).

The Politics of Futility

MARK G. YUDOF*

Walter Lippmann was recently asked what he thought of President Nixon's performance in the White House. His reply was that Mr. Nixon had done "pretty well" with respect to the essential task of his administration, the liquidation of the romantic Jacobin ideal "that the environment can be made perfect by taxing the mass of people to spend money for improving it." In Lippmann's view, this undertaking was necessary, not because the ideal was unworthy, but "because it was all beyond our power and beyond the nature of things".¹ *San Antonio Independent School District v. Rodriguez*² is the most recent manifestation of Lippmann's philosophy of liquidation. It is a result, at least in part, of the notions that complex social problems are somehow beyond our grasp, that the verities of yesterday are the fictions of today, that the consensus as to values and purposes and the methods of their achievement has broken down.

Rodriguez contains a laundry list of legal obstacles which, the majority argued, the plaintiffs had not overcome. Education is not a constitutionally fundamental interest. The victims of the Texas school financing system were not poor enough, they did not live in homogeneous poor communities, they were not deprived of all educational opportunity, they had not demonstrated that some minimal quality of education had not been afforded them. Yet, the opinion, notwithstanding its eloquence, is markedly formalistic and unpersuasive when it reviews these legal and factual arguments. In my view, the decision rests on two distinct but closely related assumptions. First, courts should not interfere with a problem of such political magnitude; for school financing is distinctly a matter for elected legislatures and not for appointed judges.³ This is particularly true when an affirmative decision may be difficult to limit to education, leading to judicial intervention with respect to the whole array of municipal services. Second, there is no indication that the costs of judicial intervention in democratic terms would be offset by the likely gains. There is, the court argued, no reason to believe that a more equitable distribu-

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¹ Steel, *An Interview with Walter Lippmann*, THE NEW REPUBLIC 16 (April 14, 1973).

² 93 S.Ct. 1278 (1973). See generally Yudof, *Equal Educational Opportunity and the Courts*, 51 TEX. L. REV. 411 (1973). Hereinafter cited as Yudof.

³ *Id.* at 1309-1310.

tion of school dollars would improve the plight of low-income children⁴—even assuming that they are the primary victims of the state funding program.

The social science evidence supporting the court's second assumption is the often cited Coleman Report⁵ and the re-analyses of the Coleman data⁶ which concluded that increments in dollars available per pupil for education do not lead to improved academic performance or to additional years of schooling. However, the evidence of the futility of recent governmental programs aimed at social and economic inequality goes well beyond the financing of education. The more we come to know about social policy, the less efficacious our efforts appear and the more difficult it becomes to wade through the complexities to a decision.⁷ Researchers have found that there is little relationship between additional spending for medical care and the general health of a population.⁸ Public housing and job retraining programs have come under attack for their failure to achieve their avowed goals. There is considerable debate as to whether integration of the public schools improves the academic achievement of blacks.⁹ Perhaps focusing on the ultimate futility, Richard Herrnstein argues that "social mobility is blocked by innate human differences after the social and legal impediments are removed".¹⁰ In short, Herrnstein asserts, our efforts to create equality and mobility must result in a complete stratification of society in which interclass movement is virtually nonexistent.

What is at stake in all this and what is ultimately at the heart of *Rodriguez* is a threat to the traditional Western assumption that social problems may be ameliorated by the rational application of resources in accordance with a society's values and purposes. If my understanding of *Rodriguez* is correct, the Court is saying that resources for education need not be distributed rationally in accordance with child characteristics or program factors; for an irrational distribution according to race, personal wealth, or geographic location does no injury to those who receive less. The result, of course, is that the status quo is affirmed. Minimalization of institutional and social adjustments, where a substitute course has not shown itself to be more desirable, inevitably demands this.

If the *Rodriguez* concern for proof of injury were applied to the past decisions of the Supreme Court, few of them would stand. The criminal defendant would have to show that the provision of a transcript would result in his acquittal. Excluded voters would have to prove that their votes would change election results. A litigant seeking the reapportionment of a legislature would have to prove that more responsible legislation would result from a decree in his favor. In every case, the party bearing this burden of proof would fail.

⁴ *Id.* at 1301-1302.

⁵ COLEMAN ET AL, EQUALITY OF EDUCATIONAL OPPORTUNITY (1966) (The Coleman Report).

⁶ E.g., ON EQUALITY OF EDUCATIONAL OPPORTUNITY (Mosteller & Moynihan eds.) (1972); C. JENCKS ET AL, INEQUALITY (1972). But see J. GUTHRIE, G. KLEINDORFER, H. LEVIN, & R. STOUT, SCHOOLS AND INEQUALITY (1969).

⁷ Glazer, *The Limits of Social Policy*, COMMENTARY 51,54 (September, 1971).

⁸ Cassell, *Disease as a Way of Life*, COMMENTARY 80 (February, 1973).

⁹ See studies cited in notes 5 and 6, *supra*.

¹⁰ Herrnstein, *I.Q.*, THE ATLANTIC 43,63 (September, 1971).

The ultimate consequence of the philosophy of futility may be a new infusion of ethical principles in our constitutional decision-making¹¹ or a search for new values or new methods of controlling our environment. The immediate judicial response, however, is a decisional paralysis which conforms both to the new scientism and to the politics of judicial restraint.

¹¹ See Yudof, *supra* note 2.

School Finance Equalization: The Beat Goes On

JOHN SILARD*

Opponents of public school equalization won a split decision in *Rodriguez*,¹ but they did not deliver a knockout punch. As indicated by the New Jersey Supreme Court's recent *Robinson*² ruling, there are prospects in at least some of the states for winning judicial assistance in the equalization effort. Now equalization efforts will for a time move over to the state legislatures, the Congress, and the state courts. In time the issue will return to the United States Supreme Court, and a constitutional right of equal treatment in public education for children in every school district within the state will ultimately win the Court's approbation.

It is significant in that regard that the majority opinion in *Rodriguez* does not so much question the logic of the demand for equal treatment as it reflects doubts about its judicial definition and achievability. In particular, the majority opinion recognizes the lack of consensus among proponents of reform "as to what type of school financing should replace" our present system.³ Indeed, neither the California court in *Serrano*⁴ nor the three-judge District Court in *Rodriguez*⁵ consented to address that \$64 question; even if the Supreme Court had affirmed *Rodriguez* the remedial issue would have remained necessary for legislative and ultimately judicial resolution.

Perhaps it was too optimistic to believe that the Supreme Court would invalidate the present funding system before some consensus had been achieved on a constitutionally adequate and educationally workable substitute. In any event, at this juncture the issue must be directly addressed, and particularly if state legislative efforts are to be pursued. That issue presents four basic options:

First, there is *Serrano* or "fiscal neutrality," which guarantees only a kind of taxpayer equality among localities of the states in its promise of achieving school funds at comparable tax rates. It does not necessarily secure school equality at all in districts where taxpayers are disinclined to vote the necessary school taxes. For large urban districts where taxpayers are balking at any further increases this theory has always been unpromising and remains so.

A second possible remedial standard would provide the same dollar expenditure for each school child within the state. This is a kind of "rough justice" approach which no one would defend as perfect but is sometimes advocated on the ground that educational equality as such is unmeasurable so that equalizing

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¹ San Antonio Indep. School Dist. v. Rodriguez, 93 S.Ct. 1278 (1973).

² Robinson v. Cahill, 118 N. J. Super. 223, 287 A.2d 187 (1972), *aff'd*, 62 N.J. 473, 303 A.2d 273 (1973).

³ San Antonio Indep. School Dist. v. Rodriguez, 93 S.Ct. at 1301.

⁴ Serrano v. Priest, 5 Cal. 3d 584, 96 Cal. Rptr. 601, 487 P.2d 1241 (1971).

⁵ Rodriguez v. San Antonio Indep. School Dist., 337 F. Supp. 280 (W.D. Tex. 1971).

the dollar spent is the closest we can come to the desired goal. For a high-cost school system, dollar equalization is patently not equality.

The third possible standard would provide funds to every school district geared to achieving equal educational offering ("input equalization") in every district. Since it is education, not dollars, which is offered to the children in the schools, it is this standard which seems to have the simplest constitutional logic. A study recently published by Potomac Institute, of which I am a co-author, argues the validity of this standard and the achievability of objective measurement criteria making it capable of application.

The fourth potential standard would provide funding that would seek to equalize pupil achievement in each district and school throughout the state. This proposal, advanced by Guthrie and his associates, would provide substantial compensatory education for underprivileged school populations with learning disabilities.⁶ It is the principle on which Congress has provided substantial assistance under Title I, and state legislatures too may come to provide additional compensatory aid. But it is to be doubted whether as a matter of constitutional necessity courts can be induced to order a school funding system geared to pupil achievement equalization.

However the ultimate remedial issue is to be resolved, and research, statistical analysis, and constructive debate toward its resolution is now the first order of business. Progress in public education equalization requires achievement at least of a tentative consensus among proponents of reform on what constitutes a desirable, workable, and constitutionally adequate equal school funding principle. Ultimately the debate should be seen as a normative one, for what is essentially at stake is the question of what constitutes equality in public education.

Finally, it is my view that *Rodriguez* may in time prove less of a setback for school equalization than is now supposed. It has been only five short years since the equalization demand was first embodied in litigation. That four of nine Justices were ready so soon after its formulation to espouse a constitutional principle having profound ultimate implication for our society is a measure of the strength of that principle. In this century the spending activity of local, state, and federal agencies has become the most significant function of government. The school equalization cases are the first to assert the claim that the Constitution guarantees a measure of social justice and fair treatment in government spending programs. The Supreme Court in *Rodriguez* exhibited its reluctance to embark on a new dimension in judicial review, necessarily presenting complicated and pervasive legal issues in vast areas of government activity. Considering how new was the challenge before the Court, and how profound its ultimate implications, the narrow defeat in *Rodriguez* should not discourage continuing school equalization efforts in other forums. And if educational equalization is not soon achieved in those forums, it is a fair prediction that the Supreme Court will ultimately bring to bear federal constitutional guarantees to secure the integrity of our public education system.

⁶ *Equity for Cities in School Finance Reform*.

⁷ Levin, Guthrie, Kleindorfer, Stout, *Capital Embodiment: A New Approach to Paying for Schools*, in *NEW MODELS FOR AMERICAN EDUCATION* (Guthrie & Wynne ed. 1971).

Rebound: Issues for the Future

JOHN D. SUGARMAN*

Inter-district school finance disparities cases based upon the Fourteenth Amendment's Equal Protection Clause have been quashed, at least for the present, by *Rodriguez*.¹ The fate of other education cases which have been couched in "equal protection" terms is left ambiguous. This is because Mr. Justice Powell never stated a blanket rule that those denied education have not been denied fundamental constitutional rights. Rather, carefully deciding only the case before him, Powell concluded that, whatever harm suffered by the *Rodriguez* plaintiffs as a result of the Texas school finance system, they were not deprived of some "fundamental personal right or liberty."²

Suppose, however, that some children are excluded from school altogether on the ground, for example, that they are "stupid". Suppose further that it is asserted that these children benefit little, if at all, from the school's educational program and that in any event it is sensible public policy to devote the state's resources to those who show promise of learning the most.

Does *Rodriguez* close the constitutional door on these excluded "dummies"? If the equal protection "test" to be applied is the so-called "rational basis" test, at least in its conventional manner, then it would appear that the door is probably closed. That is, if the purpose of serving "local control" which the Court seized upon to justify the Texas school finance system in *Rodriguez* is sufficient to make that system "rational", then excluding the "stupid" for the reasons above proposed should also satisfy the test. It is likely that the Court will have difficulty with the imprecision with which the stupid are identified in view of how little troubled it was by the mismatch of the rhetoric and reality of local control contained in the Texas school finance system?³

There might be some hope for the "stupid" were the Court to choose not to treat the case under the "rational basis" test but use "tougher" standards as Professor Gunther suggests the Court did with a number of sensitive cases in the

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¹ 93 S.Ct. 1278 (1973).

² *Id.* at 1299.

³ Mr. Justice White's dissent is based upon the "rational basis" test and concludes that "local control" is not a sufficient explanation for the system because poor school districts have no effective local fiscal control. Had the Court been willing to endorse as "rational" Texas' real purpose which might be described as "allowing rich districts to spend more, more easily, if they want to", then perhaps one might have greater hope for the success of an "under and over inclusion" argument on behalf of the "dummy" exclusion plaintiffs in the hypothetical under discussion. *Id.* at 1312 (White J. dissenting).

1971-72 term.⁴ As a Yale law student has ably intimated, however, these cases seem more properly viewed as "strict scrutiny" cases dressed up in "rationality" garb.⁵ In view of this and the language of *Rodriguez* the most salient question would seem to be whether the excluded "dummies" win under the "fundamental interest" test and leave the phrasing to the Court.⁶

How, one must immediately ask, will the "dummies" surmount the hurdle set up by *Rodriguez* that the denial there of educational opportunities was not the denial of a "fundamental interest"? The answer seems to lie in two directions. First, the *Rodriguez* opinion itself seems deliberately to have left the door ajar when it says "Whatever merit appellees' argument might have if a State's financing system occasioned an absolute denial of educational opportunities to any of its children . . . [that is not the case with the Texas school finance system]." ⁷ Second, it is necessary to move away from focusing on "education" itself as the fundamental interest and to think in terms of the impact of education deprivations on other recognized fundamental personal rights and liberties. Plaintiffs in *Rodriguez* argued that the Texas school finance plan operated to infringe upon their First Amendment and voting rights. The Court concluded that it did not, or at least that it was not shown to have sufficiently infringed to be unconstitutional. Without debating that conclusion here, the important thing is that the Court did concede, at least for purposes of argument, that perhaps "some identifiable quantum of education is a constitutionally protected prerequisite to the meaningful exercise . . . [of free speech and voting rights]."⁸

If there is to be any viability to the notion that some minimum education is constitutionally required, how will that be decided? Will its success turn on social science proofs of the relationship of minimum education and various rights? This seems unlikely. Rather, it will largely be a matter of faith coupled

⁴ Gunther, Forward: *In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1 (1972).

⁵ Note, *Legislative Purpose, Rationality and Equal Protection*, 82 YALE L. J. 123 (1972). "Strict scrutiny" is used here as shorthand for both "fundamental interest" and "suspect classification" cases.

⁶ Many may object that this kind of inquiry is bound to be unfruitful because they see the "fundamental interest" test as inherently unprincipled; moreover, they would point to *Rodriguez* as illustrative of the intellectual foolishness of having a two level test for equal protection and would probably urge instead the more candid adoption of a "balancing" test which Mr. Justice Marshall seems to be advocating (indeed he does so in his *Rodriguez* dissent). (Of course, these critics will split on how heavy are the things placed on each side of the balance.) Yet, since Powell so explicitly endorsed the two level test approach in *Rodriguez* in the end it does seem more fruitful to deal with the issue in terms of the "fundamental interest" test. Further, this is how the lower courts are likely to deal with it and they will be getting the "dummy" cases first.

⁷ 93 S. Ct. at 1299.

⁸ *Id.* at 1298. Plaintiffs might also have urged upon the Court the importance of education in that personal development needed to exert and enjoy the benefits of privacy (particularly family privacy) with which the Court seems so concerned of late. See e.g. *Eisenstadt v. Baird*, 405 U.S. 438 (1972) (contraceptives) and *Roe v. Wade*, 93 S.Ct. 705 (1973) and *Doe v. Bolton*, 93 S.Ct. 739 (1973) (abortion). Perhaps some minimum education could be constitutionally required on that account as well.

with our existing national consensus about the importance of education (if not schooling) to these other personal rights and liberties. Notice that the practice of excluding the "stupid" is a reasonably accurate description of much of public *higher* education today. Moreover, most people probably believe that such a policy for higher education is proper. Yet, to imagine employing it in lower education seems shocking, and the reasons for this are more than historical practice. First, it is submitted that American society believes that quite different functions are performed by higher and lower education; the elementary-secondary school system serves to provide, or at least to offer, some "basics" or "essentials" to everyone.⁹ Second, protective attitudes toward children lead many to conclude that they are less responsible for themselves than are adults and should have some substantial period to demonstrate whether they are stupid and how well they can benefit from schooling.

Some will surely be concerned that without social science proof connecting education with other rights, the Court will fall into a morass of not knowing where to draw the line; that is, when has the necessary "identifiable quantum" been identified? The brief answer to this is twofold. First, the life of the Constitution and the common law has been drawing lines in a morass.¹⁰ Second, many of the cases will not be seen as directly asking the Court to define "minimum". For example, absolute denial (at least most of the way through lower education) will be easily understood as less than "minimum". Using this approach, the "stupid" can win.

Other issues crucial to explore in detail will obviously arise. A few will be touched upon here. In some cases the Court may find itself deciding whether the state has a "compelling interest" for what it does. For example, the state may well be seen to have a "compelling interest" in excluding children who are shown to be genuine threats to the physical safety of others. Assume that the school has not excluded "dummies" but rather physically handicapped, educationally mentally retarded, or profoundly mentally retarded children or other classes of children who are usually described as "exceptional" or "special education" children. In fact, this happens, and there are many suits now challenging such practices.¹¹ At some point the state may be able to show that for some children one cannot look to schooling to provide the minimum personal development needed for them to enjoy the fundamental personal rights and liberties the *Rodriguez* Court talks about. Until then, these children have very strong

⁹ Whether this ends with the eighth grade or the twelfth grade or some other grade is not something that the Court is going to be able to decide very easily. Depending upon the issues involved it might find itself drawing lines at different places. One can perhaps detect a sigh of relief in Chief Justice Burger's *Yoder* opinion that the Amish objected on religious grounds only to high school. In fact, he makes something of the general belief of the more universal importance of the earlier grades. *Wisconsin v. Yoder*, 406 U.S. 205 (1972).

¹⁰ The court has survived drawing lines in the criminal appeals area requiring the state to provide a transcript to indigents, *Griffin v. Illinois*, 351 U.S. 12 (1956), because of the Court's strong belief of its importance, but not requiring, say, that investigators be made available at state expense.

¹¹ See e.g. *P.A.R.C. v. Pennsylvania*, 334 F. Supp. 1257 (E.D. Pa. 1971) and 343 F. Supp. 279 (E.D. Pa. 1972) and *Mills v. District of Columbia Bd. of Educ.*, 348 F. Supp. 866 (D.D.C. 1972).

claims. On the other hand there are bound to be some troublesome "cost-benefit" issues. Suppose the child has been admitted to school, but because of some characteristic of his or hers (a handicap?) he or she does not profit from the offering provided. An example might be putting a blind child in a regular reading class rather than giving him or her braille books or other forms of instruction. Perhaps such placements can be condemned as "irrational"; maybe this requires a showing by the plaintiff that he or she will clearly benefit more from a different type of offering. Perhaps the test will develop that the school will be required to provide "some substantial benefit" if it may do so without substantial harm to other children through reallocation of resources. Maybe the school will have to provide "some benefit" regardless of cost effectiveness concerns. These thorny matters the Court is continually confronted with when, for example, it requires certain things to be provided to indigents.¹²

Hence, perhaps the 2000 Chinese children in San Francisco who do not speak English but are put in regular elementary school classes taught in English will win the right to some training in English, while the brother and sister who move to San Francisco from Yugoslavia and speak only Serbo-Croatian will not.¹³ The result may turn partly on numbers and partly on our notions of race and national origin. Maybe both groups will win or lose. In any event, to dismiss these cases with a shrug and a reference to *Rodriguez* as standing for the proposition that "education" is not a "fundamental interest" is surely a mistake. Mr. Justice Powell should be taken at his word when he said "Nothing this Court holds today in any way detracts from our historic dedication to public education."¹⁴

¹² It might be that those complaining about exclusion from or "no benefit" in school may have to prove their financial inability to obtain their education elsewhere. If so, this group would, in any event, not be limited to "indigents".

¹³ The Chinese example is a real case. *Lau v. Nichols*, 472 F.2d 909 (9th Cir. 1973). *Cert. granted*, 41 U.S.L.W. 3644 (June 12, 1973).

¹⁴ 93 S. Ct. at 1295.

Rodriguez and Retarded Children

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In assessing the impact of *Rodriguez*¹ on future constitutional adjudication involving public education, it is tempting to freight the decision heavily with a single underlying political message: a "conservative" Court has said, in effect, no more judicial intervention into public schooling. Such a judgment, however, is premature and does an injustice to the sensibilities and judicial integrity of the Supreme Court Justices and to the diversity of school issues which are now ripe, or may hereafter ripen, for judicial determination. Moreover, such a sweeping reading of the implication of *Rodriguez* for other school litigation can only be premised upon an uninformed view of the constitutional difficulties inherent in the principles of "fiscal neutrality" pressed by plaintiffs in *Rodriguez*.² School finance litigation and *Rodriguez* were not the beginning and are not the end of public school constitutional adjudication.³

To understand how *Rodriguez* does not foreshadow the closing of the judicial portals to the redress of all grievances concerning schools, consider just one line of recent cases: across the country in a variety of administrative and judicial actions, retarded children claim that they are entitled (1) to a publicly supported educational opportunity, regardless of the extent of their handicap, where the state regularly makes the opportunity of education available to other children, and (2) to a fundamentally fair procedure—including prior notice and hearing and periodic review—in school decisions which label them as retarded, place them in special classes or institutions, or exclude them from

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¹ *San Antonio Independent School District v. Rodriguez*, 93 S.Ct. 1278 (1973).

² Several judicial pundits, not known for judicial "conservatism", pointed out the shortcomings of the principle and correctly predicted its rejection by the Supreme Court. *E.g.*, Dimond, *Serrano: A Victory of Sorts for Ethics, Not Necessarily for Education*, 2 *YALE REVIEW OF LAW AND SOCIAL ACTION* 132 (1971); Goldstein, *Interdistrict Inequalities in School Financing*, 120 *U. PA. L. REV.* 504 (1972).

³ *E.g.*, *Gong Lum v. Rice*, 275 U.S. 78 (1927); *Missouri ex rel. Gaines v. Canada*, 305 U.S. 337 (1938); *Pierce v. Society of Sisters*, 368 U.S. 510 (1925); *Barnette v. West Va. Bd. of Ed.*, 319 U.S. 624 (1943); *Brown v. Board of Ed.*, 347 U.S. 483 (1954); *Tinker v. Des Moines Ind. Sch. Dist.*, 393 U.S. 503 (1969); *Swann v. Charlotte-Mecklenberg Bd. of Ed.*, 402 U.S. 1 (1971).

public education altogether.⁴ The basis for the substantive claim to education is usually state law right as well as the Equal Protection Clause; the basis for the procedural claim is the Due Process Clause. At a minimum, therefore, it should be clear that *Rodriguez*, based on equal protection analysis, does not affect adjudication of the substantive state law claims and due process issues. Moreover, for the several reasons discussed hereafter, *Rodriguez* does not foreclose the equal protection claim of the retarded to a publicly supported educational opportunity.

Unlike Rodriguez, the Exclusion of the Retarded From All Educational Opportunity Involves a Total Deprivation.

At issue in *Rodriguez* was the validity, under the Equal Protection Clause only, of a state school financing system that assured every child an adequate education but which resulted in unequal per-pupil expenditures by school districts. The ultimate holding in *Rodriguez* was merely that, when all children are accorded a basic education, differences in the amount of money spent on each child, which are based on existing state school finance schemes' reliance on the local property tax, must be tested under the equal protection standard of whether such financial systems are rationally related to a legitimate state interest. When thus tested on the facts of that case, the Court held that the challenged school finance system did not constitute a denial of equal protection but was defensible and justifiable as rationally related to the state's interest in local control and involvement in public education.

The most significant and glaring distinction between the case of exclusion of the retarded from all educational opportunity and *Rodriguez* is that the former concerns a discrimination that results in the *total* denial of all education to a class of persons. In *Rodriguez*, on the other hand, the issue was merely the varying worths of the educations given to all children where all those educations were conceded to be fundamentally adequate. The significance of this distinction runs throughout the *Rodriguez* opinion.

Unlike Rodriguez, the Exclusion of the Retarded From All Educational Opportunity Involves a Suspect Classification.

In *Rodriguez*, the first branch of plaintiff's argument attacked the school financing system as discriminating on the basis of wealth and thus creating a suspect classification. The Court rejected this analysis for two reasons both of which are instructive. First, the Court found that it was not at all clear that a definable wealth classification or any other suspect classification existed, and second, even assuming the existence of such a classification, it lacked constitutional significance because the affected class was not totally excluded from, or totally denied access to, the benefit in question but was merely treated with less than exact equality.

⁴ *E.g.*, *P.A.R.C. v. Pennsylvania*, 343 F. Supp. 279 (E.D. Pa. 1972); *Lebanks v. Spears*, Civil No. 71-2897 (E.D. La., filed ___, 1973). *Cf.* *Mills v. D.C. Bd. of Ed.*, 348 F. Supp. 866 (D.D.C. 1972). See, generally, Dimond, *The Constitutional Right to Education*, forthcoming in the *HASTINGS LAW JOURNAL*.

In *Rodriguez*, the class could be defined either as the functionally indigent, as persons relatively poorer than others, or as persons, whether rich or poor, who resided in poor school districts.⁵ The Court discussed each possible definition and found none satisfactory to define a distinguishable class of persons entitled to the special protection warranted by a suspect classification analysis. The Court summarized the situation in the following words:

However described, it is clear that appellees' suit asks this Court to extend its most exacting scrutiny to review a system that allegedly discriminates against a large, diverse, and amorphous class, unified only by the common factor of residence in districts that happen to have less taxable wealth than other districts. The system of alleged discrimination and the class it defines have none of the traditional indicia of suspectness. The class is not saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process.⁶

The Court did not reject the plaintiffs' analysis on this ground alone, however, for it found further that, at least as to suspect wealth classifications, there is generally no equal protection violation unless the affected class is totally denied access to an important benefit. The Court summarized the wealth classification cases and noted that, in each, the affected class did not merely get a benefit of lower quality than other persons but was effectively and completely excluded from that benefit. In *Griffin v. Illinois*⁷ and *Douglas v. California*⁸ the poor were totally denied an appeal because unable to afford a transcript or a lawyer; in *Bullock v. Carter*⁹ the poor were totally denied the opportunity to run for office because unable to pay a filing fee. The Court remarked that it had never concerned itself with the relative quality of appointed versus retained counsel and that it had always required that the poor be given only the minimal benefit necessary, but not necessarily a precisely equal benefit. Thus, for example the Court has held that the full stenographic transcript usually obtained for an appeal need not be given to an indigent, an adequate substitute for a transcript being all that is constitutionally required.¹⁰ The Court, accordingly, rejected the argument of the plaintiffs in *Rodriguez* in the following words:

... Neither appellees nor the District Court addressed the fact that unlike each of the foregoing cases, lack of personal resources has not occasioned an absolute deprivation of the desired benefit. The argument here is not that children in districts having relatively low assessable values are receiving no public education; rather, it is that they are receiving a poorer quality education than that available to children in districts having more assessable wealth. . . . A sufficient answer to appellees' argument is that, at least where wealth is involved the Equal Protection Clause does not require absolute equality or precisely equal advantages. . . . Texas

⁵ *San Antonio Independent School District v. Rodriguez*, 93 S.Ct. 1278, 1289 (1973).

⁶ *Id.* at 1294.

⁷ 351 U.S. 12 (1956).

⁸ 372 U.S. 353 (1963).

⁹ 405 U.S. 134 (1972).

¹⁰ *E.g. Butt v. North Carolina*, 404 U.S. 226 (1971).

asserts that the Minimum Foundation Program provides an 'adequate' education for all children in the State. . . . The State repeatedly asserted in its briefs that . . . it now assured 'every child in every school district an adequate education.' No proof was offered at trial persuasively discrediting or refuting the State's assertion.¹¹

It is clear that the first part of the *Rodriguez* opinion turned on the absence of a definable class of persons whose different treatment by the state could be called inherently suspect and on the fact that no total denial of education was involved, but merely an asserted and vaguely defined and inexact inequality in the quality of education. In the case of the retarded excluded from all schooling, we are concerned with a definable class, those children who either are retarded or are suspected of being retarded. The evidence is clear that this is a class which, in the words of Mr. Justice Powell, has historically been 'saddled with such disabilities, subjected to such a history of purposeful unequal treatment, and relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process,' a class defined by a criterion which like race, national origin, alienage, indigency and illegitimacy is 'inherently suspect.'¹² Further, the claim is not that the education provided to retarded children is not as good as that given normal children, but rather that many retarded children have been *totally* denied and excluded from education. The claim is one of total discrimination; it is that states which effectively exclude retarded children from public schooling, unlike the State of Texas, are distinctly not providing 'every child . . . with an adequate education.'¹³ They completely fail to provide *any* education to many retarded children. Thus the retarded children excluded from education represent a definable suspect classification subjected to a total, not a relative, denial of educational benefits.

Unlike Rodriguez, the Exclusion of the Retarded From All Education May Involve a Fundamental Interest.

The second branch of plaintiffs' argument in *Rodriguez* was that education was a fundamental right and thus any discrimination affecting the delivery of educational services must be justified as necessary in the promotion of a compelling state interest. The Court held that the quantum of education with which *Rodriguez* was concerned—any varying and unequal amount of education over and above a minimally adequate level of education provided to all children—was not a fundamental right protected by the Constitution.¹⁴ Once again, however, it is clear that the result may be different when the issue is the

¹¹ *San Antonio School District v. Rodriguez*, 93 S.Ct. 1278, 1291 (1973).

¹² By definition, mentally retarded children are saddled with real disabilities. Historically, they also have been subject to invidious discrimination, stigmatization, and deprivation unrelated to their actual handicap. And, not only have the retarded long been effectively denied the franchise, it is only in very recent years that seminal political action on their behalf has been conceived and begun.

¹³ *San Antonio School District v. Rodriguez*, 93 S.Ct. 1278 (1973).

¹⁴ *Cf. Dimond, supra* note 2, at 141 n.48.

total denial to retarded persons of all educational opportunity. *Rodriguez* simply did not involve that issue and the Court so indicated:

Even if it were conceded that some identifiable quantum of education is a constitutionally protected prerequisite to the meaningful exercise of either right [the right to vote and to receive First Amendment freedoms], we have no indication that the present levels of educational expenditure in Texas provide an education that falls short. Whatever merit appellees' argument might have if a State financing system occasioned an absolute denial of educational opportunities to any of its children, that argument provides no basis for finding an interference with fundamental rights where only relative differences in spending levels are involved and where—as is true in the present case—no charge fairly could be made that the system fails to provide each child with an opportunity to acquire the basic minimal skills necessary for the enjoyment of the rights of speech and of full participation in the political process.²⁵

It is precisely the issues *not raised* in *Rodriguez* that are here involved. At trial, retarded children excluded from public schooling should be able to prove that the educational system does occasion an absolute denial of educational opportunities to them and that they are thereby denied the opportunity to acquire the basic minimal skills necessary to citizenship and even to be free from later institutionalization and total dependency.

Unlike Rodriguez, the Exclusion of the Retarded From All Education Does Not Involve Complex Fiscal and Educational Policy Issues.

In *Rodriguez*, the Court was faced with 'nothing less than a direct attack on the way in which Texas has chosen to raise and disburse state and local tax revenues.'²⁶ The Court was loath "to direct the states either to alter drastically the present system or to throw out the property tax altogether in favor of some other form of taxation." No such challenge is involved in redressing the claim of the retarded to educational opportunity. They merely ask the states to do that which they have in effect always promised to do, accord each child the opportunity of an education. Financial issues are involved only to the extent necessary to afford education for all retarded children as well as normal children.

Rodriguez also involved difficult questions of educational policy. Said the Court:

On even the most basic questions in this area, the scholars and educational experts are divided. Indeed, one of the hottest sources of controversy concerns the extent to which there is a demonstrable correlation between educational expenditures and the quality of education. . . .²⁷

No such contested educational issues are involved in the exclusion of the retarded for there is no controversy about the deprivation to retarded children of all educational opportunity. All educational experts agree that it is a terrible

²⁵ *San Antonio School District v. Rodriguez*, 93 S.Ct. 1278, 1298 (1973).

²⁶ *Id.* at 1299.

²⁷ *Id.* at 1302.

tragedy to deny to retarded children all educational opportunity. Indeed, the State's only legitimate interest in a classification of some children as educable and others as ineducable is the education of children. As retarded children share in common with others the attribute of potential for development with schooling,¹⁸ the denial of all education to retarded children may *not* even be rationally related to the State's legitimate purpose.

Conclusion

Rodriguez has rejected the hope—or ended the fear—that “fiscal neutrality” in financing public education would be mandated by the judiciary under the Equal Protection Clause. *Rodriguez*, however, simply does not address many other constitutional claims and fact situations involving public schooling. Lower courts, commentators and school policy-makers and -shakers would be wise not to read into the Court's opinion a judicial bill of *laissez faire* for school policies, practices and authorities. Judicial scrutiny will still be given—whether under the commands of state law, the First and Fourteenth Amendments, the Due Process Clause, or strict scrutiny or a search for a rational relationship to a legitimate purpose under the Equal Protection Clause—to school practices where they affect the important interests of school children or import more heavily against the interests of an identifiable minority group. Where, for example, the retarded child is excluded from all educational opportunity, I believe judicial scrutiny will be sufficiently exacting to require judicial intervention to redress fully the grievance.

¹⁸ *E.g. P.A.R.C. v. Pennsylvania*, 343 F. Supp. 279, 295–7 (E.D. Pa. 1972) and authorities there cited.

Avoiding the "Thicket"

WILLIAM L. TAYLOR*

The 5-4 decision in the *Rodriguez*¹ school finance case provides fresh evidence that the Supreme Court of the 1970s' perceives a new kind of "political thicket"—one which a majority of Justices will enter only for the most persuasive reasons. The dimensions of the thicket as seen by the Justices are far from clear, but it appears that whenever the Court is being asked to require a redistribution of the fiscal resources of a state, to dictate a reshaping of social welfare programs, to give content to rights or interests not easily defined (such as the need for decent shelter) the going for plaintiffs will usually be rough.

"Excessive entanglement" in demands for social reform, where state legislatures and Congress have proved unresponsive or even unfair, may well be the Court's basic concern. Some evidence of this may be found in contrasting the results in cases like *Rodriguez*, *Dandridge v. Williams*,² and *Jefferson v. Hackney*³ with those in the capital punishment⁴ and abortion⁵ cases. In the latter cases, the Court did not shrink from effecting changes that were controversial and had large public impact and, in the abortion case in particular, the decision involved the promulgation of detailed judicial standards which, to a critic, might appear suspiciously legislative in nature. The important difference may be that neither case involved a court determination of how fiscal resources should be allocated and neither promised a welter of follow-up litigation requiring the making of subtle and difficult legal distinctions.

If the undefined limits of efforts to use litigation as a vehicle for social reform are what troubles the Court, it is not difficult to understand the emphasis in *Rodriguez* on the lack of a clearly delineated class or the relative rather than absolute nature of the deprivation. Nor is it particularly surprising that after embracing in the 1960s the conceptual framework of "fundamental interests" that require "strict scrutiny" of state enactments, the justices in *Rodriguez* and elsewhere have begun to develop reservations. In the context of fiscal equality, it was hard for the Court to see why education services, important as

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¹ *San Antonio Indep. School Dist. v. Rodriguez*, 93 S.Ct. 1278 (1973).

² 397 U.S. 471 (1970).

³ 406 U.S. 535 (1972).

⁴ *Furman v. Georgia*, 92 S.Ct. 2726 (1972).

⁵ *Roe v. Wade*, 93 S.Ct. 705 (1973); *Doe v. Bolton*, 93 S.Ct. 739 (1973).

they are, should be treated differently from police services which after all involve the protection of life and limb, or from health and nutrition services which may be as "fundamental" to education as education is to informed participation in society. So, while the Court's rule for assessing whether an interest is fundamental (is it "explicitly or implicitly guaranteed by the Constitution"?) seems hardly more serviceable or less arbitrary than tests it rejected, its virtue for the majority was that it avoided a further plunge into the thicket.

What is harder to understand is how the Court could have found that the Texas educational finance scheme met even a "rational basis" test. The majority accepted uncritically the rubric of "local control," ignoring the fact that a system in which for some citizens even high taxes produced low educational expenditures could hardly be justified as offering scope for local choice and "participation in the decision-making process." To buttress its reasoning, the Court made numerous references to social science findings that expenditure differences have little or no relation to differences in educational results.⁶ The relevance of these findings was never explained and, in any case, the amorphous and shifting state of social science knowledge hardly seems a solid basis for decision. But if one is concerned about being drawn into quicksand, even the slimmest reed may prove serviceable.

If this sketchy analysis is correct, the Court's treatment of justifications such as "local control" may vary significantly with the nature of the case. In the "splinter district" cases, *Emporia*⁷ and *Scotland Neck*,⁸ last year the Court rejected the contention that "local control" was an appropriate excuse for district lines which produced racially segregated schools. (The minority in *Emporia* disagreed only on the proposition that the result was segregatory.) Thus, the uncritical acceptance of "local control" in *Rodriguez* does not necessarily govern *Bradley v. Richmond*,⁹ or other cases in which it is claimed that even long established district lines are unbreachable barriers to public school integration.

Indeed, I think that in a variety of situations (e.g. restrictive land use controls on the location of low cost housing) a key to avoiding the pitfalls of *Rodriguez* is the demonstration of a racial wrong. If the racial impact of state enactments can be clearly shown, the Court may vindicate the rights claimed even if the relief requires social and economic reform as well. The task will not always be the easy one, for the Court has already indicated in *Jefferson v. Hackney*¹⁰ that it will not accept uncritically the contention that a social inequity must be struck down just because it places a burden on racial minorities. But it is not necessary to prove that the enactment was racially motivated or that the classification was explicitly racial. If the Court can be convinced that the government action challenged placed special burdens on minorities or was predominantly racial in its impact, its concerns about being caught in the

⁶ 93 S.Ct. at 1292, 1293.

⁷ *Wright v. Council of Emporia*, 92 S.Ct. 2214 (1972).

⁸ *Cotton v. Scotland Neck Bd. of Educ.*, 92 S.Ct. 2214 (1972).

⁹ 93 S.Ct. 936 (1973).

¹⁰ 406 U.S. 535 (1972).

thicket of social reform may be dissipated. In short, I believe that racial injustice continues to be both the greatest stain on our legal system and the greatest engine for reforms that benefit all citizens.

In developing proof of racial impact as well as in other areas, the challenge facing advocates of reform is to help the Court grapple with its concerns about intruding into territory that it views as more appropriate to legislative and political bodies. Experience demonstrates that this is better done by meticulous development of the facts and carefully limited legal theories than by advocacy of sweeping doctrines.

Certainly, the *Rodriguez* case was a set back to advocates of educational reform. Yet, despite missteps and false starts, court challenges to fiscal inequity have produced a modicum of progress in state courts and legislatures have spurred efforts to build public support for change. And, over the long run, there ought not to be undue pessimism about the prospects for court required reform in education and other fields. The reapportionment cases remind us that, with hard work, yesterday's political thickets sometimes become tomorrow's frontiers for equal justice.