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An Attack on the Texas School Financing System: Rodriguez v. San Antonio Independent School District

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An Attack on the Texas School Financing System: *Rodriguez v. San Antonio Independent School District*

A suit challenging the constitutionality of the Texas school financing system was filed originally in 1968 by a group of Mexican-American public school children and their taxpaying parents in the Edgewood Independent School District in San Antonio, Texas.[1] The plaintiffs alleged that the Texas Constitution requires the state to support a free public school system[2] and that the financing system established by the state denied them equal educational opportunity.[3] On October 15, 1969, the three-judge federal court overruled the defendant's motion to dismiss but delayed action on the case because revisions to the state's system for financing schools were under consideration by the Texas Legislature.[4] When the legislature failed to act, the action was resumed. *Held, injunction granted and order stayed*: The Texas public school financing system, which relies heavily on local property taxes and promotes substantial disparities among school districts in the amount of revenue available per pupil, invidiously discriminates against the poor and violates the equal protection clause of the fourteenth amendment. *Rodriguez v. San Antonio Independent School District*, 337 F. Supp. 280 (W.D. Tex. 1972), *prob. juris. noted*, 40 U.S.L.W. 3576 (U.S. June 6, 1972) (No. 1332).

I. The Texas Public School Financing System

Over ninety percent of the funds for the support of Texas public schools comes from local property taxes and aid from the state.[5] State aid consists of funds from the Available School Fund and the Minimum Foundation Program. The Available School Fund is allocated as a flat grant for each pupil in daily attendance regardless of the district's income from other sources.[6] The sources of revenue for the Available School Fund are state-wide taxes and income from the permanent school fund.

[1] The suit was filed as a class action pursuant to Fed. R. Civ. P. 23. The plaintiffs also represented all other children in Texas who live in school districts with low property valuations.

[2] Tex. Const. art. VII, § 1. Although the Texas Constitution seems to create a right to public education, the plaintiffs challenged the existing financing system under the federal equal protection clause. 28 U.S.C. §§ 1331, 1343 (1970).

[3] The plaintiffs alleged that the Texas school financing system denied them equal educational opportunity in that (1) it made the quality of education a function of the wealth of the local school district; (2) it provided students, living in school districts other than Edgewood, with material advantages for education; (3) it provided educational resources which were substantially inferior to those received by children of similar age, aptitude, motivation, and ability in other school districts; (4) it perpetuated marked differences in the quality of educational services; (5) it discriminated against Mexican-American school children.

[4] Tex. Educ. Code Ann. § 16.711 (Supp. 1971) established the Governor's Committee on Public School Education to study the "apparent inequities in the allocation of funds to be provided by local school districts" and to provide a solution to be implemented in the 1970-1971 school year.

[5] Local property taxes produced approximately one-half of the state-local expenditure for public schools. The federal government contributes the remaining 10% of the overall public school expenditures. 1968-1969 Texas Education Agency, Public School Directory vol. 2, at 58-59.

[6] Tex. Educ. Code Ann. §§ 15.01(b), (c) (Supp. 1971).

The Minimum Foundation Program is designed to guarantee a minimum expenditure per pupil throughout the state. The minimum foundation amount for each district is calculated on the basis of professional salaries, operating expenses, and transportation costs.[7] Eighty percent of this program is financed by the state and the remaining twenty percent is allocated to the local districts through the Local Fund Assignment.[8] Each district's share of the Local Fund Assignment is calculated from an economic index which is designed to measure the taxpaying ability of the district.[9] If the sum of a district's share of the Local Fund Assignment and per capita grant from the Available School Fund is less than the amount necessary to support a Minimum Foundation Program in the district, the state provides the additional funds necessary to reach the foundation minimum.[10]

The local districts levy and collect property taxes on the property within each district to provide the funds for the Local Fund Assignment, capital expenditures, and any expenditures beyond the state's minimum.[11] Therefore, the amount of revenue available from local sources depends on the property value per pupil within a district and the district's tax effort measured by the tax rate. In the seven San Antonio school districts the market value of property varied from a low of $5,960 per student in Edgewood to a high of $49,478 per student in Alamo Heights.[12] Although taxes as a percentage of the property's market value were the highest in Edgewood and the lowest in Alamo Heights, Edgewood produced only $21 per student from local ad valorem taxes while the lower rate in Alamo Heights provided $307 per pupil.[13] State financial assistance did not equalize these disparities in educational expenditures. In the 1967-1968 school year the combined local-state expenditure in Edgewood was $231 per student, while in Alamo Heights it was $543 per pupil.[14] Since the stated purpose of the foundation program was merely to guarantee a minimum expenditure,[15] it did not even attempt to equalize educational expenditures from district to district.

II. CHALLENGES TO STATE SCHOOL FINANCING SYSTEMS

The disparities in educational expenditures within the State of Texas are not unique. Every school financing system in the United States except Hawaii[16]

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[7] *Id.* § 16.71.

[8] *Id.* § 16.72.

[9] *Id.* §§ 16.74-.76. The economic index has been criticized. *See* GOVERNOR'S COMM. ON PUBLIC SCHOOL EDUC., THE CHALLENGE AND THE CHANCE 58-68 (1968).

[10] TEX. EDUC. CODE ANN. § 16.79 (Supp. 1971).

[11] TEX. CONST. art. VII, § 3; TEX. EDUC. CODE ANN. §§ 20.01-.08 (Supp. 1971).

[12] Plaintiff's Exhibit VIII, at 25, Rodriguez v. San Antonio Ind. School Dist., 337 F. Supp. 280, 282 n.3 (W.D. Tex. 1972), *prob. juris. noted*, 40 U.S.L.W. 3576 (U.S. June 6, 1972) (No. 1332).

[13] Rodriguez v. San Antonio Ind. School Dist., 337 F. Supp. 280, 282 (W.D. Tex. 1972), *prob. juris. noted*, 40 U.S.L.W. 3576 (U.S. June 6, 1971) (No. 1332).

[14] *Id.* With federal funds added to state-local funds the expenditure per pupil was $356 in Edgewood and $594 in Alamo Heights. 1967-1968 TEXAS EDUCATIONAL AGENCY, PUBLIC SCHOOL DIRECTORY vol. 2, at 2, 4.

[15] TEX. EDUC. CODE ANN. § 16.01 (Supp. 1971).

[16] Hawaii has a centralized system of school financing and administration which relies primarily on statewide income, property, and excise taxes. *See* HAWAII REV. STAT. §§ 296-1 to -48 (1968).

relies to some extent on local property tax revenues. In *McInnis v. Shapiro*[17] a group of Chicago students challenged the Illinois school financing system, but the court dismissed the complaint, and the United States Supreme Court summarily affirmed without oral argument.[18] The court in *McInnis* stated that "[u]nequal educational expenditures per student, based upon the variable property values and tax rates of local school districts, do not amount to an invidious discrimination."[19] The court also emphasized that the concept of spending according to educational needs did not provide judicially manageable standards.[20]

The fate of the Illinois suit did not deter other challenges to state school financing. In *Burrus v. Wilkerson*[21] a three-judge federal court, relying on *McInnis*, dismissed a challenge to the Virginia school financing system for lack of judicially manageable standards.[22] In *Hargrave v. Kirk*[23] the court held that the Florida millage rollback statute[24] violated the equal protection clause by preventing poorer counties from providing as good an education for their children as richer counties.[25] But the *Hargrave* court distinguished the holding in *McInnis* on two grounds: (1) the plaintiffs in *Hargrave* did not challenge the variations in per-pupil expenditures caused by differences in tax effort and property values and (2) the remedy required only an injunction to prevent state officials from withholding state funds from counties exceeding the ten mill limit.[26] Therefore, *Hargrave* was considered an attack on only one segment of Florida's school financing system.

In *Serrano v. Priest*[27] the California Supreme Court held that a complaint

[17] 293 F. Supp. 327 (N.D. Ill. 1968), *aff'd mem. sub nom.* McInnis v. Ogilvie, 394 U.S. 322 (1969). According to the court in *McInnis*, the plaintiffs contended that "*only* a financing system which apportions public funds according to the educational needs of the student satisfies the Fourteenth Amendment." *Id.* at 331. The court stated that the two primary reasons for dismissing the complaint were: "(1) the Fourteenth Amendment does not require that public school expenditures be made only on the basis of pupils' educational needs, and (2) the lack of judicially manageable standards makes this controversy nonjusticiable." *Id.* at 329.

[18] A summary affirmance on an appeal from a decision of a three-judge federal court is a decision on the merits entitled to precedential weight. *See* Barton v. Sentner, 353 U.S. 963 (1957); R. STERN & E. GRESSMAN, SUPREME COURT PRACTICE 197-99 (4th ed. 1969).

[19] McInnis v. Shapiro, 293 F. Supp. 327, 336 (N.D. Ill. 1968).

[20] The court called educational needs a "nebulous concept" which rendered the issue nonjusticiable. *Id.* at 329 n.4.

[21] 310 F. Supp. 572 (W.D. Va. 1969), *aff'd*, 397 U.S. 44 (1970).

[22] The plaintiffs in *Burris* relied on the educational needs standard that had been rejected in *McInnis*. The court stated that "the courts have neither the knowledge, nor the means, nor the power to tailor the public monies to fit the varying needs of . . . students throughout the state." *Id.* at 574.

[23] 313 F. Supp. 944 (M.D. Fla. 1970), *vacated and remanded sub nom.* Askew v. Hargrave, 401 U.S. 476 (1971). The Supreme Court vacated and remanded for two reasons: (1) the district court should have abstained because of an intervening proceeding attacking the law in the state court, and (2) the equal protection claim should have been decided only after full hearing rather than as a summary judgment.

[24] FLA. STAT. ANN. § 236.251 (Supp. 1971) provided that any county imposing on itself more than ten mills ad valorem tax for educational purposes would not be eligible to receive state funds for support of its public schools.

[25] The court applied the traditional equal protection test and held that the millage rollback statute was not rationally related to any permissible state purpose. Hargrave v. Kirk, 313 F. Supp. 944, 948 (M.D. Fla. 1970); *see* McGowan v. Maryland, 366 U.S. 420 (1961).

[26] Hargrave v. Kirk, 313 F. Supp. 944, 949 (M.D. Fla. 1970).

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

challenging the California school financing system stated a cause of action.[28] The court found that the level of educational expenditures within California school districts depended primarily upon the wealth of each district. Therefore, there were wide disparities in expenditures per pupil from district to district within the state.[29] The court rejected the state's contention that the equal protection clause does not require territorial uniformity,[30] and stated that "where fundamental rights or suspect classifications are at stake, a state's general freedom to discriminate on a geographical basis will be significantly curtailed by the equal protection clause."[31] The court concluded that no compelling state interest[32] justified a classification based on wealth[33] affecting the fundamental interest in education.[34]

Serrano was the first case to state expressly that education is a fundamental interest for purposes of the "new" equal protection test.[35] The court based its decision on the importance of education to society and the individual. The court also relied on the uniqueness of education in distinguishing it from other governmental services[36] and compared education to the "fundamental interests" in voting[37] and fair criminal procedure.[38]

The California Supreme Court refused to be bound by the decision in *McInnis*. The court acknowledged that a summary affirmance was technically an adjudication on the merits but suggested that in practice it was often equivalent

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[28] The court upheld the complaint against a demurrer and returned the case to the trial court for further proceedings.

[29] *See* Serrano v. Priest, 5 Cal. 3d 584, 592-95, 487 P.2d 1241, 1246-48, 96 Cal. Rptr. 601, 606-08 (1971).

[30] This contention was based on a quotation from Salsburg v. Maryland, 346 U.S. 545, 551 (1954): "The Equal Protection Clause relates to equality between persons as such rather than between areas."

[31] Serrano v. Priest, 5 Cal. 3d 584, 612, 487 P.2d 1241, 1261, 96 Cal. Rptr. 601, 621 (1971). *See* Horowitz & Nietring, *Equal Protection Aspects of Inequalities in Public Education and Public Assistance Programs From Place to Place Within a State*, 15 U.C.L.A.L. REV. 787 (1968).

[32] The court held that the state's interest in retaining local decision-making power and local fiscal control was not sufficient to justify the present system. According to the court, local decision-making power could remain under any new system. Furthermore, the present system actually deprived the poor districts of local fiscal control because they were unable to raise the necessary revenues even at high tax rates.

[33] The court held: (1) that a wealth classification does not have to be the product of purposeful discrimination to be invalid; (2) that a wealth classification based on district wealth is as unconstitutional as individual wealth classifications; and (3) that a de facto wealth classification cannot be justified by analogy to de facto racial segregation.

[34] When a classification is based on suspect criteria or affects a "fundamental interest," the equal protection clause requires a "compelling state interest" to justify the classification. Under the "new" equal protection test the courts generally find that no compelling state interest exists or that less onerous alternatives are available. *See* Shapiro v. Thompson, 394 U.S. 618 (1969). *But see* Korematsu v. United States, 323 U.S. 214 (1944).

[35] The court acknowledged that no direct authority supported the contention that education is a fundamental interest which may not be conditioned upon wealth. Serrano v. Priest, 5 Cal. 3d 584, 604, 487 P.2d 1241, 1255, 96 Cal. Rptr. 601, 615 (1971).

[36] Factors distinguishing education from other public services are: (1) the role of education in maintaining free enterprise democracy; (2) the universal relevance of education; (3) the sustained, intensive contact between the state and the student; (4) the extent to which education molds the personality of youth; and (5) the compulsory nature of education. *See* J. COONS, W. CLUNE & S. SUGARMAN, PRIVATE WEALTH AND PUBLIC EDUCATION 414-19 (1970).

[37] Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966).

[38] Griffin v. Illinois, 351 U.S. 12 (1956).

to a denial of certiorari.[39] Furthermore, the court considered the plaintiff's contentions significantly different from those in *McInnis* because the proposition that education cannot be a function of wealth provided the judicially manageable standard that was lacking in the concept of spending according to educational needs.[40]

A federal district court in *Van Dusartz v. Hatfield*[41] relied on *Serrano* to uphold a challenge to the Minnesota school financing system. The opinion in *Van Dusartz* closely parallels *Serrano*, but the court expressly adopted the concept of "fiscal neutrality" as a constitutional standard for school financing systems.[42] The court stated the proposition that the quality of public education "may not be a function of wealth other than the wealth of the state as a whole."[43] The decisions in *Serrano* and *Van Dusartz* opened the door to a flood of suits challenging state school financing systems.[44]

III. RODRIGUEZ V. SAN ANTONIO INDEPENDENT SCHOOL DISTRICT

Rodriguez v. San Antonio Independent School District[45] was the first case to declare unequivocally a state school financing system unconstitutional because of the disparities in expenditures per pupil within the state. The opinion in *Rodriguez* basically followed the reasoning employed in *Serrano* and *Van Dusartz*.[46] The court first analyzed the present Texas school financing system and found that it promoted wide disparities in expenditures per pupil throughout the state. The court then held that use of the local school district as the financing unit for public education constituted a wealth classification affecting the fundamental interest in education. No compelling state interest was found to justify such a wealth classification; therefore, the court adopted the proposition that the quality of public education may not be a function of wealth other than the wealth of the state as a whole.

The court found that the disparities in educational expenditures existing throughout Texas were the result of the differences in local district property values.[47] State aid did not equalize expenditures within the state, and the court pointed out that state funds actually subsidized the rich districts rather than aiding the poor ones.[48] The court cited two reasons for rejecting the contention

[39] Serrano v. Priest, 5 Cal. 3d 584, 604, 487 P.2d 1241, 1264, 96 Cal. Rptr. 601, 624 (1971). *See* note 18 *supra*.

[40] *See* notes 17-20 *supra*, and accompanying text.

[41] 334 F. Supp. 870 (D. Minn. 1971). The district court denied the state's motion to dismiss but the plaintiffs later dismissed their suit without prejudice because the Minnesota Legislature revised the school aid formula.

[42] J. COONS, W. CLUNE & S. SUGARMAN, *supra* note 36, at 9, originated the concept of fiscal neutrality as a constitutional standard for state school financing systems.

[43] Van Dusartz v. Hatfield, 334 F. Supp. 870, 872 (D. Minn. 1971).

[44] For a listing of suits see LAWYER'S COMM. FOR CIVIL RIGHTS UNDER LAW, LAW SUITS CHALLENGING STATE SCHOOL FINANCING SYSTEMS (Jan. 1971).

[45] 337 F. Supp. 280 (W.D. Tex. 1972), *prob. juris. noted*, 40 U.S.L.W. 3576 (U.S. June 6, 1972) (No. 1332).

[46] The theory upon which these three suits were primarily based first appeared in Coons, Clune & Sugarman, *Educational Opportunity: A Workable Constitutional Test for State Financial Structures*, 57 CALIF. L. REV. 305 (1969).

[47] *See* notes 5-15 *supra*, and accompanying text.

[48] State funds subsidize rich school districts in at least two ways: (1) The grants for professional personnel are contingent on the actual employment of qualified personnel and payment of a minimum salary. *See* TEX. EDUC. CODE ANN. §§ 16.11(b), (c) (Supp.

that the state may distribute state funds as it desires as long as federal financing equalizes the differences. First, federal funds did not in fact compensate for the differences caused by the state school financing system.[49] Secondly, the state's performance of its constitutional obligations must be judged by its own behavior rather than by the actions of the federal government.[50]

The court held that the disparities in educational expenditures caused by differences in local district property values constituted a classification based on wealth. Although the court found a correlation between poor school districts and low income families,[51] the decision relied on the relative wealth of the district itself. The poverty of individuals within these poor districts only heightened the discrimination that the court found in the system. The court emphasized that the local school districts were created by the state and that the manner of financing education was dictated by the state. Therefore, the poverty of a governmental unit, rather than individual poverty, promoted this wealth classification.

In *Rodriguez* the plaintiffs further alleged that the Texas school financing system promoted a racial classification. Although the court recognized that poor school districts contained a disproportionate number of minority students,[52] the court did not emphasize this correlation or rely on it to support the decision. Apparently the court recognized that minorities are affected by the disparities in educational expenditures because of their poverty rather than any racial discrimination inherent in the financing system.

The *Rodriguez* court indicated that strict scrutiny of the Texas school financing system could be based solely on the existence of a wealth classification. In *McDonald v. Board of Elections*[53] the Supreme Court stated that lines "drawn on the basis of wealth . . . would independently render a classification highly suspect and thereby demand a more exacting judicial scrutiny." The phrase "classification on the basis of wealth" is misleading because it conceivably includes the denial of any goods or services because of the inability to pay. Although an express wealth classification would probably be held unconstitutional,[54] a de facto wealth classification has been held unconstitutional

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1971). Therefore, districts with the financial ability to employ their entire allotment of personnel are subsidized; (2) The flat per capita grant from the Available School Fund provides a bonus for rich districts which would not otherwise qualify for state aid under the minimum foundation program.

[49] *See* note 14 *supra.*

[50] The court relied on cases holding that the federal aid is intended as special assistance and to permit a reduction in state aid would violate congressional intent. *See, e.g.*, Triplett v. Tiemann, 302 F. Supp. 1244 (D. Neb. 1969). However, these decisions relied on the supremacy clause rather than on equal protection. *See* Carlsbad Union School Dist. v. Rafferty, 300 F. Supp. 434 (S.D. Cal. 1969), *aff'd*, 429 F.2d 337 (9th Cir. 1970), in which the court rejected an equal protection challenge to the reduction of state aid.

[51] The court noted that in 1960, the median family income in districts with high property values per pupil was $5,900, while in the districts with low per-pupil values there was a $3,325 median family income. 337 F. Supp. at 282 n.3. *Serrano* and *Van Dusartz* did not rely on such a correlation.

[52] Plaintiff's Exhibit VIII, at 6, 337 F. Supp. at 282 n.3, showed that 10 districts with market value of taxable property per pupil above $100,000 had 8% minority pupils, while the 4 districts with market value of taxable property per pupil below $10,000 had 79% minority pupils.

[53] 394 U.S. 802, 807 (1969).

[54] Michelman, *The Supreme Court, 1968 Term, Foreword: On Protecting the Poor Through the Fourteenth Amendment*, 83 HARV. L. REV. 7, 20-27 (1967). An express

only when it adversely affected a fundamental interest.[55]

The Texas school financing system does not expressly classify on the basis of wealth. The differences in property values among the school districts created a de facto wealth classification based on the ability of each district to pay for education. Such de facto wealth classification will continue as long as income or property value differences exist. Thus far the courts have not attempted to correct the results of wealth disparities unless other factors required strict scrutiny.[56]

However, the court held that education is a fundamental interest which cannot be conditioned upon wealth. The court relied on *Brown v. Board of Education*[57] to establish education as a fundamental interest. But the decision in *Brown* and others in the field of school desegregation have been thought to be controlled by the racial discrimination involved, rather than the fundamental nature of education.[58] By establishing education as a fundamental interest under equal protection, the court extended the inner circle of protected interests.

The court in *Rodriguez* stated that the importance of education both to the individual and to society established education as a fundamental interest. The extensive impact of education on the political, social, and economic life of an individual and the society in which he lives is evident, but the importance of an interest is not necessarily sufficient to require strict scrutiny.[59] Admitting

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wealth classification would exist if the state prohibited all children from low income families from attending Alamo Heights' schools. But an express geographical classification does exist in the form of local school districts. This geographical classification in reality creates a wealth classification similar to de facto racial segregation.

[55] *See* Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966); Douglas v. California, 372 U.S. 353 (1963); Griffin v. Illinois, 351 U.S. 12 (1956). A de facto wealth classification exists whenever goods and services are provided according to an individual's ability to pay.

[56] Factors requiring strict scrutiny of a wealth classification affecting education include the importance of education, the extent that the government has created district wealth differences through zoning and drawing district boundaries, and the role of the state as the seller of public education.

[57] 347 U.S. 483 (1954). The statement in *Brown* which the court relied on was:

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

Id. at 493.

[58] In subsequent per curiam decisions citing *Brown*, the Supreme Court ruled racial segregation invalid in golf courses, bathhouses, and motor buses without attempting to evaluate the interest involved. *See, e.g.*, Muir v. Louisville Park Theatrical Ass'n, 347 U.S. 971 (1954). *See Developments in the Law—Equal Protection*, 82 HARV. L. REV. 1065, 1089 (1969).

[59] Dandridge v. Williams, 397 U.S. 471 (1970). The Court upheld a state statute fixing a maximum on Aid to Families With Dependent Children (AFDC payments). The plaintiffs contended that the statute discriminated against large families in the provision of basic subsistence. The court acknowledged that "the administration of public welfare . . . involves the most basic economic needs of impoverished human beings" but applied the traditional test under equal protection. *Id.* at 485. However, the decision in *Dandridge* could be based

education to the inner circle of protected interests represents a significant extension of the definition of a fundamental interest. Proponents of the "new" equal protection test reject any "*a priori* definition of a 'right' fundamental or otherwise," and support a weighing of competing interests under equal protection.[60] The interest in education would probably satisfy such a weighing test even though distinguishable from other interests held to be fundamental under the standard of equal protection.[61] If education qualifies as a fundamental interest which cannot be conditioned upon payment, the term could conceivably be expanded to encompass all public services which are presently provided through local financing.[62]

Accepting education as a fundamental interest, the court demanded that the state demonstrate a compelling interest to justify a wealth classification affecting education. The court rejected the state's interest in local decision-making and fiscal control on the same basis as in *Serrano*,[63] and held that the state's interest can be achieved through alternatives that do not involve a classification based on wealth.

The court ordered the abolition of the existing Texas school financing system but stayed the order for two years to allow the legislature to formulate a new school financing system. The court emphasized that the primary job of formulating a new program rests with the legislature rather than with the courts. The only requirement is that the program adopted does not make the quality of public education a function of wealth other than the wealth of the state as a whole. The court seemed to consider the latitude of this proposition as a virtue which would allow the legislature flexibility in formulating a new school financing system. According to the court, this proposition also provides a judicially manageable standard against which any new program of school financing can be measured.[64]

IV. CONCLUSION

No one could deny that disparities in educational expenditures exist within the state of Texas and that the primary cause of these differences is the variation in property values among the districts. However, if no public schools existed, the financing unit for education would be the family, and the expenditure on

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on the absence of any suspect classification rather than the absence of a fundamental interest. *See* Graham v. Richardson, 403 U.S. 365, 376 (1971).

[60] Dandridge v. Williams, 397 U.S. 471, 520 (1970) (Marshall, J., dissenting). "[C]oncentration must be placed upon the character of the classification in question, the relative importance to the individuals in the class discriminated against of the governmental benefits they do not receive, and the asserted state interest in support of the classification." *Id.* at 520-21.

[61] One basic characteristic separates education from those interests which have been held to be fundamental under equal protection: Public education, unlike voting, fair criminal procedure, and interstate mobility, is not essential to the functioning of the federal system or a "penumbra" of other constitutional rights. *See* Brest, *Interdistrict Disparities in Education Resources*, 23 STAN. L. REV. 591, 614 (1971).

[62] *But see* note 36 *supra*.

[63] *See* note 32 *supra*.

[64] The court distinguished *McInnis* on the basis of the different judicial standards available. *See* notes 17-20 *supra*, and accompanying text. The court maintained that the judiciary can always determine that an act of the legislature violates the Constitution and that, therefore, it was not acting as a "super legislature."

education would depend on the ability of the family to pay. The existing school financing system shifts the financing burden to the local school district and guarantees a minimum educational expenditure to each pupil. Therefore, the issue in *Rodriguez* is whether the Constitution requires the state to go further and correct the disparities which result from reliance on the local school district as the financing unit for public education.

The court convincingly brings the existing school financing system within the prohibition of the equal protection clause by applying strict scrutiny to a suspect classification affecting a fundamental interest. However, the uncertainty of the terms "suspect classification" and "fundamental interest" supports the charge that the new equal protection test merely represents a return to a natural law Constitution.[65] The conclusion that education is a fundamental interest under equal protection is the cornerstone of the decision in *Rodriguez*, but this conclusion seems to rest on the sensibilities of the court rather than on the dictates of the Constitution. Therefore, criticism of the decision is basically a criticism of the "new" equal protection.

In declaring the existing school financing system unconstitutional, the court adopted the concept of fiscal neutrality as a constitutional standard for the legislature to follow in formulating a new school financing program. According to the originators of fiscal neutrality, the property tax could still be utilized as a tool of public school financing,[66] but since the court did not set rigid guidelines for interpreting the proposition that public education cannot be a function of wealth other than the wealth of the state as a whole, several different financing plans could possibly qualify.[67]

The most obvious legislative response to the decision in *Rodriguez* would be to require equal expenditures per pupil throughout the state. Although such a program would not violate the basic concept of fiscal neutrality, it is not necessarily required by the decision. Furthermore, equal expenditures would actually promote inequality in educational opportunity because the cost of providing equivalent schooling varies among schools and school districts. A variant of the equal expenditure proposal would merely raise the minimum to a higher level and continue to allow local districts to supplement the statewide minimum. But such a system would violate the strict concept of fiscal neutrality even though it reduced the magnitude of disparities in educational expenditures.[68] Another apparent solution would be to redraw local school district

[65] *See* Shapiro v. Thompson, 394 U.S. 618, 655 (1969) (Harlan, J., dissenting).

[66] J. COONS, W. CLUNE & S. SUGARMAN, *supra* note 36, at 163-65.

[67] Interpreted literally, the concept of fiscal neutrality condemns only wealth-related disparities in educational expenditures. In formulating a new financing system, the legislature must only avoid disparities caused by the differences in wealth. Therefore, the decision does not guarantee "equal learning opportunity" throughout the state. *See* Silard & White, *Intrastate Inequalities in Public Education: The Case for Judicial Relief Under the Equal Protection Clause*, 1970 WIS. L. REV. 7.

[68] The existing school financing system was held unconstitutional because it allowed the wealthy to transfer the advantages of wealth to their children through higher quality public schools. The wealthy can continue to provide better educations for their children through private schools, but *Rodriguez* negates the private school attitude toward public education. Therefore, if the courts strictly adhere to the concept of fiscal neutrality, any system that allows local districts of varying wealth to supplement the state minimum would be held unconstitutional. It is highly unlikely that the state minimum could be set so high that the richer districts would not want to supplement state funds.

boundary lines to achieve equal property values per pupil throughout the state. The school districts would thus retain local decision-making power and fiscal control but the difficulties of valuation and continual adjustment would be overwhelming.

The concept of "power equalizing" would retain local decision-making and fiscal control and also satisfy the requirements of fiscal neutrality. District power equalizing would allow differing levels of educational expenditure depending on the district's interest in education rather than wealth.[69] However, such a system would not guarantee equal educational opportunity and could actually cause a reduction in statewide support for public education.[70] Furthermore, the practical implementation of power equalizing in school financing has not been tested.

Another system that would achieve fiscal neutrality would require statewide centralization of public school financing.[71] Despite the fact that centralization conflicts with the tradition of local control over public schools, this could be remedied by allowing local control over the actual use of the funds. However, the local school districts would not be allowed to determine the level of educational expenditures. The decision in *Rodriguez* did not declare local control over the level of educational expenditures unconstitutional unless it caused wealth-related disparities. Therefore, differences in educational expenditures caused by factors other than wealth would not violate the concept of fiscal neutrality.[72] Notwithstanding this legal subtlety, centralization probably represents the most pragmatic method to achieve fiscal neutrality and preserve the public school system.

The decision in *Rodriguez* thrusts the courts into an area traditionally reserved to legislative action. The willingness of the courts to supervise extensive reforms in the school desegregation and reapportionment areas indicates that the courts will rarely abstain from an issue because of the difficulty of enforcement. Nevertheless, the proposition that the quality of public education cannot be a function of wealth other than the wealth of the state as a whole provides a simplistic answer to a complex problem. Although the constitutional challenge

[69] Under a system of district power equalizing, the local school districts would retain control over the amount of funds to be spent for education, but the level of expenditures would be a function of the tax effort alone. For example, the legislature could develop a table specifying the per-pupil expenditure permitted at differing levels of tax effort. If two districts were taxed at the same rate, they would be permitted to spend the same amount per pupil regardless of the wealth of the districts. This plan would probably require the redistribution of excess local collections from rich districts and the subsidy of poor districts, but the districts could retain local decision-making power and fiscal control. *See* J. COONS, W. CLUNE & S. SUGARMAN, *supra* note 36, at 201-42.

[70] If the wealthy are not permitted to provide higher quality educations for their children in the public schools at low tax rates, they will likely flee to private schools. Taxpayers without children and those with children in private schools would not want to vote for higher tax rates, especially where much of the revenue will be spent outside of the local school district. Even the poor districts might not vote for the higher tax rates necessary to obtain higher expenditures because of ignorance or low valuation of education.

[71] Centralized financing would satisfy fiscal neutrality only if it were a bona fide effort to provide substantially equivalent educational opportunity for all school children. The state could allocate funds according to the educational needs of each school based on factors similar to those employed by the existing minimum foundation program. *See* note 7 *supra*, and accompanying text. Such a system would require substantial administrative discretion at the state level to provide flexibility.

[72] *See* note 69 *supra*, and acompanying text.