

CHAPTER 3

Desegregating Dollars

"We feel a responsibility for others, but we do want to protect the kind of quality our people have come to expect."

—Betty Menke, president, Scarsdale Board of Education (1972)

In 1968, Derrick Bell was serving as the executive director of the Western Center on Law and Poverty in Los Angeles. Before moving out west, Bell had spent five years working on school desegregation cases as a lawyer with the NAACP Legal Defense Fund. He started his legal career as "a true believer in desegregation," but by 1968 he was beginning to have doubts. More and more, it seemed like money, not segregation, was the real issue. As he later wrote, while a law professor at New York University, "the root of the problem appeared to be the substantial disparities in the resources provided to black students relative to white students."¹

Bell decided that instead of pushing for more integration, "we should concentrate on desegregating the money." In 1968, he and a colleague helped recruit John Serrano as a plaintiff for a suit challenging California's unequal school finance system. The ensuing case, *Serrano v. Priest*, emerged as the first important victory for school finance plaintiffs, and it set off a slew of similar suits across the country.²

The embrace of school finance litigation by Bell and others was at once both ironic and understandable. It was ironic because desegregation began in part as a reaction to the continued failure of efforts to make separate schools equal. Simply suing for equal resources, when *Plessy's* rule of separate but equal was in force, did not work so well. Integrating schools came to be seen as a better strategy for equalizing resources. But now school funding suits were supposed to make up for the failures of desegregation. In some ways, it seemed like starting all over again.

The embrace of school finance litigation was nonetheless understandable given the disappointing results of school desegregation. By the mid-1960s, integration had lost some of its luster, even to its earlier supporters like Bell. Many

despaired over the slow pace and uneven results of court-ordered desegregation. Others came to question the underlying premise of integration: that it was the best means to equalize educational opportunities. Why couldn't black students learn just as much in all-black classrooms?

Under these circumstances, it was only natural that some advocates would switch their focus to school funding, which was grossly unequal in most states. Some school districts spent two to ten times more per pupil than others in the same state. Many of those initially attracted to integration saw it as an indirect way to gain access to more resources for minority students. Given that this strategy did not seem to be working, why not try (again) to go after the resources directly?

In turning away from racial integration and toward school funding, those who embraced school finance reform were essentially embracing the compromise Nixon would propose in his 1972 antibusing speech: let suburban and urban students remain where they are but provide more resources to urban schools. Like Nixon, those who advocated for school funding reform sought to move beyond racial separation as the key issue in the fight for educational equity. Indeed, in some ways they sought to move beyond race itself as the issue, given that school finance reform promised to benefit not just minority students, but all students who attended underfunded schools.

The promise of school finance litigation, however, remains unfulfilled. The litigation has only partially succeeded in court, and even successful lawsuits have not had a major impact on the ground. Litigation based on the federal Constitution was quickly halted by the Supreme Court's 1973 decision in *San Antonio v. Rodriguez*, which upheld Texas's unequal funding system. Richmond native Lewis Powell authored the opinion, which bears the marks of his experiences as a school board member and as a Virginian who lived through court-ordered school desegregation.³

Advocates then turned to state constitutions and state courts, filing funding suits in almost every state in the country. Plaintiffs have won only about half of these. Even when plaintiffs succeed on the merits in court, remedies are not always forthcoming. Courts are generally reluctant to order specific remedies, at least at first, and most legislatures are not exactly wild about coming up with their own fixes to a problem they denied existed. This dynamic triggers a tug-of-war between the plaintiffs and the legislature, which in turn typically necessitates several trips back to court. This is especially true in the few cases where urban districts have succeeded in court, which have been unusually long-running and acrimonious.⁴

When legislatures finally respond, they usually provide a bit more state funding to poor school districts while leaving the wealthier districts alone. The

latter are usually permitted to devote as much locally raised revenue on their own schools as they would like. They are hardly ever required to share that local revenue with neighboring districts. In this sense, relatively affluent suburban districts have been shielded from the reach of school finance litigation, just as they were spared the burden of school desegregation. This has enabled these schools to remain not only physically separate from urban schools, but financially separate as well.

Despite the hope of advocates, school finance reform has not been an effective substitute for desegregation. The failure to integrate urban schools has left many of them isolated by poverty, and the problems of high-poverty urban schools do not seem solvable by money alone. Indeed, even high-spending urban schools lag behind lower-spending suburban and rural ones. Tee-Jay spends about \$4,000 more *per pupil* than Freeman, for example, yet one would be hard pressed to say that Tee-Jay is a better school.⁵

Moreover, even if we were confident that more money could solve the problem, it seems unlikely to materialize. State legislatures are not especially keen to devote additional resources to city schools. This reluctance, it bears noting, seems due at least in part to the continued racial and class segregation between urban and suburban districts. Poor minority students and their families are not especially powerful politically, and representatives of urban areas rarely hold the balance of power in state legislatures. Suburban—and rural—legislators, in turn, have no direct interest in the health of urban schools, and it would not be shocking if at least some were prejudiced against urban schools because of stereotypical assumptions about urban minorities. Most courts, meanwhile, have proven reluctant to do more than tinker at the margins of spending; they have left the political dynamics of funding largely unchanged.⁶

Although school finance litigation has generally not achieved the goals advocates have set for it, it has had one lasting, unintentional impact. In shifting away from race and toward resources, the focus on funding reform has helped narrow the conversation about what to expect from schools. From the outset of the common school movement in the mid-nineteenth century, schools were seen as both academic and socializing institutions, where students would learn not only how to read and write but also how to become good citizens. Integration was consistent with this tradition insofar as it held out the hope that white and black students would learn from one another. When Justice Marshall lamented in his dissenting opinion in *Milliken* that “unless our children begin to learn together, there is little hope that our people will ever learn to live together,” he captured the belief that integration could help prepare students to live in a diverse, pluralistic society.⁷

Whether by necessity or design, this socializing aspect of education has been put to one side in the quest for more money. Increasing funding does not and cannot buy integration or racial tolerance; if anything, school finance reform unintentionally entrenches segregation by defining the problem as one of resources rather than racial separation. What money *can* buy, at least in theory, is a better academic education. Not surprisingly, therefore, the ultimate goal of school finance litigation has been to improve academic achievement. And improving academic achievement, usually as measured by scores on standardized tests, has remained the exclusive goal of major education reforms ever since, as we will see in subsequent chapters.

The last two chapters started with Virginia and Richmond and expanded outward to consider national trends. This chapter and the next begin at the national level and work backward to Virginia and Richmond. This chapter covers the early period of school finance litigation, ending with the Supreme Court's decision in *San Antonio v. Rodriguez*. The following chapter describes school finance litigation in state courts and assesses the consequences of that litigation.

There has never been a successful finance suit in Virginia, despite two different attempts—three if one counts the unsuccessful attempt by Richmond, discussed in chapter 2, to secure *Milliken II* funds. Virginia and Richmond nonetheless serve as useful examples of the larger trends in school finance reform. Supporters and opponents of school finance litigation, for different reasons, tend to exaggerate its success in court, but the experience in Virginia brings home the point that a significant number of school finance suits have been rejected. Even without a court victory, however, Richmond schools still spend a good deal more per pupil than those in Henrico County. Richmond schools are thus in roughly the same position as those that have *succeeded* in school finance litigation, which in turn offers the opportunity to study the impact of increased spending on urban education. As this chapter will show, despite greater funding levels, Richmond schools like Tee-Jay still perform worse than their Henrico counterparts like Freeman. The experience in metropolitan Richmond thus provides a sobering example of the limits of school finance reform, at least as currently pursued.⁸

FUNDING BASICS AND THE BASIC PROBLEM

Schools receive funding from states, localities, and the federal government. In the earliest days of "public" education, schools were funded through a mixture

of private and local revenues. Over the course of the twentieth century, private funding decreased dramatically, though private contributions still play a marginal role in funding some schools. State contributions, by contrast, increased steadily as states took on more responsibility for education and made greater efforts to equalize the resources available for public schools.⁹

Local, State, and Federal Funding

Today, local and state governments generally contribute about the same amount of funding for education, with localities picking up about 44 percent of the tab and states contributing 47 percent. That said, there are variations both among and within states. Hawaii, for example, has just one district, so the state pays the lion's share of the costs. On the other end of the spectrum, localities provide the bulk of school funding in some states. Within most states, moreover, poorer districts usually contribute a smaller portion of funding than do wealthier districts, which in turn means that the state's share of funding varies as well.¹⁰

The federal government's financial contribution to public education is small by comparison. This news often comes as a surprise given the increasingly important and intrusive role of the federal government in public education, illustrated most dramatically by the No Child Left Behind Act. The federal government contributes, on average, only about 9 percent of the total costs of public education in each state, though again there are variations. Much of this money is directed toward categorical programs that ostensibly target needy populations, such as poor students, who are funded through Title I, and students with special needs, who are funded through the Individuals with Disabilities in Education Act. Spending on education constitutes only about 2 percent of the federal government's overall budget, while it consumes over 40 percent of all expenditures by localities and over 20 percent of each state's expenditures.¹¹

Overall spending on education has increased dramatically over the last half-century. Total expenditures per student have more than quintupled, even after adjusting for inflation. Thus, in today's dollars, average spending per pupil was \$1,600 in 1949–50; in 2005, per pupil spending reached \$9,400. In total, nearly \$500 billion was spent on public education in 2005. The increases in spending are due to a number of factors, including large increases in teachers' salaries, which in turn reflect the fact that women have more employment opportunities today than they did in 1950. (Indeed, an irony of federal antidiscrimination laws, especially Title VII, which prohibits employment discrimination on the basis of gender, is that they made it much harder to find good teachers for low

pay.) Increased spending on compensatory programs also accounts for some of the rise, and here special education is by far the most significant and costliest addition. Prior to 1950, indeed prior to 1970, many states simply did not educate students with serious physical or mental disabilities.¹²

Funding increases have not been matched by similarly dramatic advances in student achievement. Commentators disagree over the health of public education and the significance of various indicators such as test scores, graduation rates, and college attendance. Some argue that the entire system is mediocre and lags behind education systems in other countries. Others counter that claims of crisis in public education are overblown and that public schools are fairly strong, at least for some children. No one, however, would claim that there has been anything close to a fivefold increase in quality to match the fivefold increase in expenditures. And no one would claim, as will be discussed in more detail later, that increased expenditures have made urban schools as successful as suburban ones.

Three Kinds of Disparities

Funding disparities come in three varieties—interstate, intradistrict, and interdistrict. Only the last of these three has been the subject of sustained political and legal attention, which is not to say that the others deserve to be neglected. Interstate disparities can be quite severe. In 2005, New York spent, on average, a little more than \$14,000 per pupil, while Utah spent only about \$5,200 per pupil. Disparities like these, while significant in themselves, mask even greater disparities that exist between low-spending districts in states like Utah and high-spending districts in states like New York. Despite their obvious importance, interstate disparities have generally been ignored in the legal and policy world. Only the federal government could equalize spending among the states. The federal Constitution, however, does not require such equalization, and Congress has never shown much interest in addressing the problem.¹³

At the other end of the spectrum, intradistrict disparities, while usually not as dramatic, certainly exist: some schools in some districts spend more per pupil than others. Before *Brown*, such disparities were rampant and followed racial lines, with all-black schools often funded at much lower levels than all-white schools. Intradistrict disparities are no longer as prevalent, but they continue. Although some researchers have begun to focus attention on these disparities, they remain on the fringes of reform efforts. This inattention is partially due to a lack of solid data about individual school spending. But there is also general acceptance that some students—such as those with disabilities and

those living in poverty—need and deserve more resources. The real question, which has only begun to be investigated, is whether intradistrict disparities are due primarily to extra spending on students in need. Early answers suggest perhaps not, but this research has yet to play much of a role in legislative debates or in litigation.¹⁴

Nearly all of the attention in the area of school finance reform has focused on interdistrict disparities. Outside of Hawaii and the District of Columbia, which do not really count because each has only a single school district, no state has equalized spending among its school districts. The disparities in spending, moreover, have traditionally been severe, with some districts spending two, three, or even ten times more per pupil than others. The prevalence and size of these disparities have diminished in the last thirty years, in part because of school finance litigation, but they continue to exist.¹⁵

Why Some Districts Spend More Than Others

Interdistrict disparities result from the interplay of three different factors: local property wealth, property tax rates, and state aid. Local funding for schools is typically raised through property taxes. The actual amount raised on the local level is a product of the amount of property wealth in a district and the tax rate. Some districts have more property wealth than others, which enables them to raise more money per pupil at any given tax rate. Indeed, if the differences in property wealth are great enough, property-rich districts can tax themselves at a lower rate and still raise more money than property-poor districts. State aid can be used to eliminate or reduce local funding disparities, leave them untouched, or exacerbate them.¹⁶

Consider a simple example, limited at first to local funding. Imagine that District A has \$100,000 of property wealth per pupil, which means that the total assessed value of property within the district divided by the total number of students in the district results in \$100,000 of property value for each student. Imagine that District B has only \$50,000 of property wealth per pupil. If both districts tax property at 5 percent, District A will raise \$5,000 per pupil, whereas District B will raise only \$2,500 per pupil. Now imagine that District A lowers its tax rate to 3 percent while District B retains its 5 percent rate. District A will still raise more money—\$3,000 per pupil—than District B, despite taxing itself at a lower rate.

The last example captures the reality in the majority of states, where lower-spending districts generally tax themselves at higher rates than higher-spending districts. Thus, in most states, different levels of property wealth, rather than

different tax rates, are the primary cause of local funding disparities. Even where tax rates drive differences in funding, it is important to recognize that the ability of local districts to tax themselves for school funding depends on competing demands for public spending. Not all districts have the same level of competition for public dollars. Cities, for example, typically have greater demands for public services, such as fire and police protection, housing, health care, and welfare, than do middle-class suburbs.¹⁷

State Aid: The Key Variable

State aid could totally eliminate the effect of local variations in property wealth, but no state has gone that far. There are countless ways that states could structure funding to school districts, and state aid formulas have changed over time. In the past, most states simply provided a flat grant to school districts based on the number of students in the district. Each student received an equal amount of funding, which obviously did nothing to offset the inequalities in local funding.

Today, the most common method of distributing state funding is through what is typically called a foundation program. The details of these programs are varied and can be remarkably complicated, but the basic idea is straightforward. States determine the overall amount of funding per pupil thought necessary to pay for a decent education. This is usually called the foundation amount. The state then determines how much each district should have to pay toward the foundation amount. The state might simply set a uniform minimum property tax rate, or it might use various formulas that are in theory designed to assess each district's ability to raise revenue. Property wealth is a key component in all formulas, but states also consider income levels and other indices of ability to pay. The state then makes up the difference, if any, between the local share and the foundation amount.¹⁸

To continue with the earlier hypothetical, imagine that the state determines that the foundation amount is \$6,000 per pupil. To simplify the example, imagine further that the state requires all districts to tax local property at a minimum of 4 percent. The state will then fund the difference between the amount raised by that tax rate in each locality and the foundation amount. Districts with lower property values will raise less money and therefore will receive more assistance from the state. Going back to District A, which has \$100,000 of property wealth per pupil, a 4 percent tax rate will produce \$4,000 per pupil, which means that the state would provide \$2,000 per pupil to district A. District B, which only has \$50,000 per pupil, would receive \$4,000 from the state, because it would only be able to raise \$2,000 on its own at a 4 percent tax rate.

In theory, this approach could equalize funding, but everything depends on the foundation amount. If the foundation amount were higher than any district would raise on its own, funding across districts would be equal. In reality, however, states tend to set the foundation amount at fairly low levels. This in turn means that most districts will want to spend *more* than the foundation amount. In order to do so, they have to tax themselves at higher rates than the state mandates, which means that local property values and local tax rates still matter a great deal.¹⁹

The Virginia Formula

Virginia provides a good illustration of the basic point and highlights the complexity of determining local contributions. The state sets a foundation amount, which is the amount of funding per pupil that it believes is necessary to provide an adequate education. It then determines local contributions through something called the Composite Index (CI). The CI represents the percentage of the foundation amount that the locality must provide, or, in other words, the local share. (The local share is a floor, not a ceiling; localities can and do contribute more.) The higher the CI, the less money the district receives from the state.²⁰

The CI is a function of ten variables, which include local property values, local adjusted gross income, local taxable sales, state taxable sales, and state adjusted gross income. The CI is supposed to reflect the district's ability to raise revenue, but it is an imperfect measure at best. The formula does not take into account competing demands for local money, nor does it consider differences in costs among districts, due either to wage and price variations or variations among student populations. Those who serve higher percentages of poor students do not, for example, have a lower CI as a result. Richmond and Henrico County have nearly identical CIs—Richmond's is .42 and Henrico's is .46—despite the different student populations they serve, cost differentials in the districts, and different levels of demand for public services.²¹

The fundamental flaw in Virginia's system, however, is the foundation amount. By all accounts, it is unrealistically low. Indeed, all but one district in the entire state—135 out of 136—contribute more than is required by the CI. Many districts spend much more than is required, including Richmond, which contributes 170 percent more than state law mandates. Interestingly, Henrico contributes less per pupil than Richmond, which in turn means that the state funds a slightly larger portion of Henrico's budget than Richmond's. Whether Richmond needs to contribute as much as it does or needs to spend even more is an issue that will be addressed later. For now, however, this brief overview

should be sufficient to understand the genesis of school finance litigation, which was designed to eliminate the inequalities that have plagued school funding systems for decades.²²

IN SEARCH OF A THEORY: EARLY SCHOOL FINANCE LITIGATION

Advocates for school desegregation had a fairly straightforward conception of equal educational opportunity, which was essentially negative: educational opportunity should not be determined on the basis of race, such that African-American students were systematically disadvantaged. The central goal was to break the link between race and educational opportunity. School finance reform advocates, by contrast, have had a much more difficult time articulating their own vision of equal educational opportunity and, in particular, what equal educational opportunity requires with regard to funding. As a result, they have had a harder time figuring out what to ask for, and courts have had an equally difficult time figuring out the proper remedies in school finance cases.

The problems and possibilities were present from the start. Various theories, each of which might become a blueprint for legislative reform and litigation, competed with one another in the late 1960s. Three theories proved most important and enduring: (1) equal funding, (2) needs-based funding, and (3) fiscal neutrality.

Equal Funding

In 1968, Arthur Wise, a graduate student at the University of Chicago, proposed the simple idea of equal funding. He called his the "one-dollar, one-scholar theory," picking up on the 1964 apportionment decision in *Reynolds v. Sims*, in which the U.S. Supreme Court adopted the principle of one person, one vote. Wise thought each school in the state should receive the same amount of funding per pupil, period.²³

Wise's approach was attractive in its simplicity, but it had theoretical and practical problems. Given the differing needs of students, it was not clear why equal educational opportunity should require precisely equal funding. It seemed to violate basic ideas about equality to ignore rather than accommodate relevant differences in need. As a practical matter, moreover, equal funding might hurt urban districts that spent more money but educated a

disproportionate share of poor students. In addition, requiring exactly equal spending would either require a dramatic leveling up, which might prove too expensive for most states, or a leveling down, which might prove either politically impossible or self-defeating.²⁴

Wise was not an attorney representing clients. He was a graduate student writing his dissertation, so his ideas did not surface in litigation right away. In fact, complete equalization of funding has never been fully embraced. The one-dollar, one-scholar approach has nonetheless remained something of an implicit benchmark against which school funding schemes are measured, and reducing disparities among school districts has remained important in every school funding suit, whether as the chief aim or a subsidiary goal.

Needs-based Funding

Legal aid lawyers came up with their own theory, and theirs was the first actually presented in litigation. These attorneys represented poor students. Not surprisingly, they found Wise's theory unappealing because it offered no way to argue that poor students should receive more funding than middle-income students. Indeed, it prohibited such funding differences. Legal aid lawyers thus favored an alternative approach, which became known as the needs-based theory of equal educational opportunity.²⁵

They argued that poor and affluent students should have their education needs met equally, which in turn meant—among other things—that poor students should receive more resources because they had greater needs. Although not styled as such, this theory was really the precursor of the adequacy movement, which is discussed in detail in the next chapter. Meeting the different needs of students is hard to accomplish without reference to some objective outcome goal, unless the aim is the unrealistic one of providing enough resources for each student to maximize his or her individual potential. An obvious goal, as advocates later realized, is an adequate education—that is, students should receive the level of resources they need to obtain an adequate education, which might mean that some students receive more than others if necessary to achieve an adequate outcome.

When first presenting the needs-based theory to courts, however, litigants simply alleged that funding should track the differing needs of the students. As might be expected, courts did not know where to begin. In the two earliest cases, federal courts in Illinois and Virginia rejected the challenges for similar reasons: the plaintiffs offered no manageable standard by which to assess and measure educational need. The court in Virginia, for example, expressed

sympathy for the plaintiffs' position, recognizing that the deficiencies in property-poor districts "are not and cannot be gainsaid" and acknowledging the plaintiffs' "beseeming, earnest, and justified appeal for help." The court also acknowledged that the attempt to provide students "the same educational opportunities... is certainly a worthy aim, commendable beyond measure." But the court ultimately concluded that "courts have neither the knowledge, nor the means, nor the power to tailor the public moneys to fit the varying needs of these students throughout the State."²⁶

Fiscal Neutrality

At about the same time these decisions were handed down, Professor John Coons at Northwestern University Law School began to frame another theory. He received help from two students, William Clune and Stephen Sugarman, who would themselves go on to become law professors. Their basic idea, which they dramatically styled as "Proposition I," was that school funding in any district should not be a function of local property wealth. Equal educational opportunity, they argued, required the state to ensure equal access to school funding at the same tax rate. Hence the idea of fiscal neutrality: the funding system would neutralize the influence of local property wealth by enabling all districts to raise the same amount of funding at any given tax rate.²⁷

The principle of fiscal neutrality could be satisfied if the state guaranteed exactly equal funding for all districts, as that would sever the link between local wealth and school spending. But fiscal neutrality could also be satisfied by ensuring equal *access* to resources and allowing localities in effect to decide for themselves how much to spend. The mechanics of the latter approach resembled the more traditional foundation programs, with one key difference: Instead of establishing a fixed foundation amount, thought sufficient to fund a decent education, states would instead establish a guaranteed tax base (GTB). States would then fund the difference between the amount a locality could raise by applying its tax rate to its tax base, and the amount it could raise if it applied that same tax rate to the GTB.²⁸

For example, imagine that a state establishes a GTB of \$100,000 per pupil, meaning that all districts can assume they have that much property wealth. Now imagine that District B has a real tax base of \$50,000 per pupil. Under a fiscal neutrality program, District B could tax itself at whatever rate it liked, and the state would make up the difference between that tax rate as applied to \$50,000 and the same tax rate as applied to \$100,000. A 1 percent tax rate would mean that the state would supply the locality with \$500 per pupil, because that

is the difference between 1 percent of \$100,000 (\$1,000) and 1 percent of \$50,000 (\$500). If District B decided to tax itself at 5 percent, state funding would rise to \$2,500, as that is the difference between 5 percent of \$100,000 (\$5,000) and 5 percent of \$50,000 (\$2,500). In both examples, District B could behave as if it had \$100,000 per pupil in property wealth.

In offering their fiscal neutrality theory, Coons, Clune, and Sugarman hoped to solve at least three problems. First, they hoped to change the politics of school funding, which typically pitted poor districts against rich ones. Coons in particular hoped that high-spending districts would become the driving force to ensure that all districts had ample resources. He believed that high-spending districts would have an interest in having the guaranteed tax base set at a high level to avoid having to redistribute locally raised revenues, which might occur if property rich districts had a higher tax base than the GTB. In Coon's view, poor and rich districts would thus work in concert to ensure a high GTB, and in this sense their fates would be tied together.²⁹

Second, this theory offered a manageable standard to courts, as compared to the needs-based approach already rejected in two cases. Courts would simply have to ensure that for any given tax rate, all districts in the state could raise the same funding. Courts would not have to determine student need, nor would they have to insist on equal funding for all districts.

Third, fiscal neutrality would respect local control over funding. Coons and his colleagues recognized that local control remained a strong tradition and feared that courts would be reluctant to jettison it. Fiscal neutrality would not require courts to override local control because it would leave to states the decision about how to break the link between local property wealth and school spending. States might mandate equal spending, which would destroy local control. But they could instead, consistent with fiscal neutrality, mandate equal access to funding at any given tax rate. The latter approach would leave to localities control over tax rates and spending.³⁰

The idea of fiscal neutrality was also consistent, at least in theory, with providing some districts more funding to compensate for higher costs, due either to location or the demographics of the student population. The bedrock principle of fiscal neutrality was simply that school funding should not be a product of local property wealth, which would not preclude the state from giving more aid to districts that faced higher costs. This aspect of fiscal neutrality theory, however, was often ignored by critics of this approach, and indeed by the courts that favored it.³¹

Fiscal neutrality was not without flaws or critics. To begin, it seemed to replace one arbitrary factor with another, at least from a student's perspective. Instead of local property wealth, local preferences for education spending

would determine the amount spent in local schools. Fiscal neutrality would thus respect the wishes of local taxpayers, but it would not necessarily meet the needs of local students. Indeed, fiscal neutrality really promised equity for taxpayers, who could be assured that the same tax rates would result in the same amount of funding for schools. It did not guarantee equity for students.³²

There were practical and political obstacles as well. If fiscal neutrality were to achieve perfect equality, the GTB would have to be set at the same tax base as the wealthiest school district. This would be financially impossible in most states, as almost every state has some districts that have extraordinarily high property values per pupil. Even if fiscal neutrality programs only sought substantial equality, the GTB would have to be set at the eightieth or ninetieth percentile of local property wealth, which still might be financially unrealistic for many states.

The alternative to setting the GTB at a high level is to use a form of recapture, which is not practically difficult but is politically controversial. The idea is simple enough. The districts with property wealth above the GTB would have to return a portion of funds raised at any given tax rate to reflect the difference between their actual tax base and the guaranteed tax base. It involves the same math, just in reverse. If the GTB were \$100,000 per pupil, for example, and a district had \$200,000 per pupil in property wealth, if it taxed itself at 1 percent it would have to return \$1,000 to the state for redistribution elsewhere. Recapture would effectively equalize spending among districts, but it is not especially popular politically, as we shall see.

Another practical objection came from urban school leaders, who worried that fiscal neutrality might result in less money for city schools, especially if it required wealthier districts to share local funds with poorer districts. The tax base in a number of cities was (and remains) higher than that in some suburbs and in many rural areas; a fiscal neutrality scheme might require cities—already strapped for cash because of high demands for other social services—to tax themselves at higher rates with no increase in money for education. Again, the general idea of fiscal neutrality did not preclude states from offering more assistance to urban districts because of greater needs, but this feature of fiscal neutrality was usually ignored.³³

While some thought fiscal neutrality might not do enough, especially for poor students, others thought it might prove too much. The main concern was what Coons colorfully described as the “equal sewer” problem. If access to education funding had to be equalized, many wondered, what about other services, such as fire and police protection, welfare, or even health care? Did courts really have the capacity and the authority to restructure the tax and spending schemes of states and localities? Added to this concern about a slippery slope was the

underlying uncertainty about the relationship between money and educational opportunity. Was it really the case, some wondered, that more money meant more learning?³⁴

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Serrano v. Priest (1971)

Despite these shortcomings, fiscal neutrality received a much better reception from courts than did the needs-based theory. The first big victory came in California in *Serrano v. Priest*. The lead plaintiff, John Serrano, Jr., was the father of two boys who had recently moved out of a Mexican-American neighborhood in East Los Angeles. The move was actually prompted by the principal at his sons' elementary school, who called Serrano into his office and told him: "You've got a couple of very bright kids—get them out of East L.A. schools if you want to give them a chance." Serrano took the advice and moved his family to the middle-class suburb of Whittier, California.³⁵

Serrano remained troubled by the principal's blunt advice, however, and the broader question of why some schools seemed better equipped than others. When Derrick Bell approached him at a dinner party, Serrano agreed to join a case challenging the unequal funding system in California. At the time, Serrano thought the case was hopeless.³⁶

It was not. In August 1971, the California Supreme Court upheld the Serrano complaint. It agreed with the plaintiffs that California's system of school funding, which relied largely on local property tax revenues, violated the equal protection provisions of both the federal and state constitutions. California's funding scheme unlawfully discriminated, the court reasoned, because it made the quality of a child's education dependent on the wealth of the district in which the child lived. In other words, the court agreed with the basic principle of fiscal neutrality. The court also denounced unequal funding as inconsistent with the basic tradition of public education. "By our decision today," the court proclaimed, "we further the cherished idea of American education that in a democratic society free public schools shall make available to all children equally the abundant gifts of learning. This was the credo of Horace Mann, which has been the heritage and the inspiration of this country."³⁷

The *Serrano* case helped spark a series of school finance challenges in other states. In a little less than two years following *Serrano*, fifty-two lawsuits had been filed in roughly thirty different states—twenty-seven in federal courts and twenty-five in state courts. Plaintiffs won cases in lower courts in Arizona, New Jersey, Minnesota, Texas, and Kansas. In each of the cases, courts struck down the school funding system without specifying a remedy.³⁸

The Lawyer's Committee for Civil Rights Under Law, a public interest organization in Washington, D.C., tried to coordinate plaintiffs' efforts. Armed with a grant from the Ford Foundation, the Lawyer's Committee acted as a clearinghouse and strategy center for lawyers across the country involved in school finance litigation. The Lawyer's Committee, however, could not exercise the same control over school finance litigation that the NAACP Legal Defense Fund (LDF) had exercised over desegregation. The LDF, at least in the early years, was the only game in town. Desegregation cases simply were not brought without their help, which made it easier for the LDF to direct these cases strategically—deciding which ones to bring and when, and which ones to appeal and when.³⁹

Not so with regard to school finance cases, which were brought by disparate lawyers who did not have ties to a single organization. Working for legal aid groups, public interest law firms, or simply on their own, not all of these lawyers were willing to take direction from the Lawyer's Committee. As a result, school finance cases were brought in more places over a shorter period of time than desegregation cases had been, and the U.S. Supreme Court confronted a school finance case shortly after litigation efforts began. Indeed, less than two years passed between the California Supreme Court's decision in *Serrano* in 1971 and the U.S. Supreme Court's decision in *San Antonio v. Rodriguez*, a case from Texas. This was not enough time, those involved with the Lawyer's Committee believed, for the Court and the country to get used to the idea of equalizing school resources.⁴⁰

It was a fair point, and it was probably right. Then again, it is not clear, on the basis of thirty subsequent years of school finance litigation in state courts, that any amount of time would have made either the Court or the country comfortable with the idea of equalizing school funding.

THE SUPREME COURT WEIGHS IN: *SAN ANTONIO V. RODRIGUEZ*

Arthur Gochman of San Antonio was the lawyer for Demetrio Rodriguez and other parents whose children attended school in the Edgewood school district in Texas. He did not work with the Lawyer's Committee and refused to take their direction. As he told the *Washington Post*: "I filed this suit long before I ever heard of any of these committees and foundations."⁴¹

Gochman filed his case on July 30, 1968, three years before the *Serrano* decision put school finance litigation on the map. He took the case after friends sought his help for the downtrodden Edgewood school district. Edgewood was

a Mexican-American community and one of the poorest in the city of San Antonio. Gochman discovered that the school district was poorly funded despite taxing itself at a high rate.⁴²

Things looked even worse when Edgewood was compared to nearby Alamo Heights, a relatively affluent and overwhelmingly white district in the same area. Edgewood had a higher property tax rate than Alamo Heights, but this was not enough to eclipse the vast differences in property wealth between the two districts. Alamo Heights had \$45,000 of property value per student, while Edgewood had about one-ninth as much—\$5,429. State aid, moreover, did not help matters. The state actually provided Alamo Heights with more money than it did Edgewood, because that aid was tied in part to teacher experience and Alamo Heights had more experienced teachers. The end result was that Alamo Heights spent more than twice as much per pupil than Edgewood. This was a significant disparity, obviously, but it was not the worst in the state. During the same time period, the wealthiest district in the state spent \$5,334 per pupil—more than *twenty times* the amount spent by the poorest district: \$264.⁴³

Gochman brought his case before a special panel of three federal judges, whose ruling could be directly appealed to the U.S. Supreme Court. Two trial court judges and an appeals court judge sat on the panel. They released their decision on Christmas Eve, 1971, just a few months after *Serrano*. These judges, like the California court in *Serrano*, believed it was unconstitutional to allow school funding to be a function of local property wealth. They thus endorsed the same notion of fiscal neutrality that ruled the day in California. But they explicitly refused to prescribe a particular remedy. Instead, they agreed with the plaintiffs' proposal that the legislature could adopt whatever "financial scheme [it] desired so long as the variations in wealth among governmentally chosen districts do not affect spending for the education of any child." The court also gave the legislature two years to come up with a remedy.⁴⁴

The legislature would not need the time. As many predicted, the U.S. Supreme Court decided to hear the case. This did not please the Lawyer's Committee. The Committee believed that prospects for success were low. The Court had recently become more conservative with the addition of four Nixon appointees, and as mentioned, the issue of equalizing school funding was still fairly novel. The Court would not have the benefit of seeing how funding reform worked in several states before deciding whether to mandate equalization across the country.⁴⁵

While the case was pending before the Supreme Court, suburban legislators and citizens began to think harder about what the case might mean for them. School finance reform was initially popular in suburban districts because it

seemed to promise some relief from high property taxes. But when suburbanites considered the alternatives, they began to have second thoughts. In a *New York Times* article entitled "Property Tax Reform Enthusiasm Lags," for example, reporter Linda Greenhouse explained how initial enthusiasm for property tax relief in New York's suburbs had turned to fear that the cure would be worse than the disease. Frederick Shore, who was superintendent of a school district in Long Island, captured the mood of many: "First you say, 'Hooray, finally everyone agrees that the property tax is ridiculous and we're going to get some relief.' Then you start to think 'All right, but what do I have to lose in order to get that relief....I don't want to be hurting myself in order to help my neighbor.'" ⁴⁶

Suburban residents expressed particular alarm over the prospect of equalizing funding by capping local spending. In New York, the state board of education proposed just such a plan without waiting for a court order. It did not play well in the suburbs. If residents of a local district wanted to spend their own tax money for special programs, many suburbanites believed, they ought to be able to do so. Local leaders recognized the conflict between their own interests and the goal of equalization, and some were apologetic in stating their reservations. But their reservations were nonetheless as clear as they were firm. The president of the Scarsdale Board of Education, Betty Menke, acknowledged the "fundamental conflict between what's good for everyone and the natural desire of individuals to do the best they can for their own children." She made it plain, however, how she and her constituents would resolve the conflict. "We feel a responsibility for others, but we do want to protect the kind of quality our people have come to expect." Equalization was a nice idea, in other words, but it would be a serious problem if it required too much sacrifice from property-rich districts. ⁴⁷

The Opinion

The Supreme Court spared districts like Scarsdale from having to make that sacrifice. In a five-to-four opinion issued in March 1973, the Court rejected the challenge to Texas's unequal school funding scheme. Justice Powell wrote the opinion. He was joined by the same four justices who would make up the majority in the Court's decision in *Milliken v. Bradley* the following year. As in *Milliken*, the Court in *Rodriguez* sought to protect local control. In *Milliken*, preserving local control effectively insulated the suburbs from having to participate in school desegregation and thus protected the physical independence of suburban districts. Preserving local control in the school finance context

protected the financial independence of property-rich suburban districts, which would not be required—at least not by the federal Constitution—to share locally raised revenues. The financial tie that might have bound urban and suburban districts, just like the physical tie of desegregation, was thus cut by the Court in *Rodriguez*.⁴⁸

To reach this result, the Court had to reject the notion that education was a fundamental right. Under existing doctrine, any inequalities with regard to fundamental rights were considered suspect and subjected to intense scrutiny, requiring the government to provide a compelling justification for the inequity. More often than not, attempts at justification failed to satisfy the Court, which meant that the outcome of the case hinged largely on how the Court defined the status of education.

Justice Powell, writing for the Court, acknowledged that education played a vital role in American life. But he did not believe that courts should be involved in the administration of education, and he worried about the implications of recognizing education as a fundamental right. He and his colleagues consequently dismissed the notion that education should be recognized as a fundamental right because of its importance. Instead, the Court reasoned, fundamental rights needed to be tied to the text and history of the Constitution, and education could not be linked in this way. What the Court never explained was the language in *Brown*, in which the Court had stated simply that education, where the state makes it available, “is a right which must be made available to all on equal terms.” It is not impossible to reconcile the reasoning in *Rodriguez* with the language in *Brown*, which might be confined to race cases; but rather than attempt to do so, the Court ignored the apparent contradiction.⁴⁹

In declining to recognize education as a fundamental right, the Court expressed concern about what Coons had called the equal sewers problem: if education were considered fundamental because important, what about other important social services like health care, welfare, and housing? What really seemed to trouble the Court, though this is not obvious from the face of the opinion, was the unusual nature of a right to education. The right to education is a positive right: it requires the government to provide something to citizens. The Constitution, however, has traditionally been thought a charter of negative rights—that is, rights that protect *against* governmental interference. The fear among some, and the corresponding hope among others, was that a number of welfare rights might be read into the Constitution if education were given protected status.

The Court’s hesitancy to recognize positive rights helps explain, and is highlighted by, an otherwise baffling anomaly. In the very same term that the Court decided *Rodriguez*, it also decided *Roe v. Wade*. In *Roe*, the Court concluded that

women have a fundamental right to obtain an abortion, based on a general right to privacy. Whatever else might be said of the right to an abortion or the more general right to privacy, they are surely no easier to link to the text or history of the Constitution than a right to education, a point forcefully made by Justice Marshall in his dissent in *Rodriguez*. But a right to abortion, as opposed to a right to education, is a classic negative right, which basically prevents the government from *interfering* with a decision to obtain an abortion. The government is not obliged to provide abortions, nor, as later cases made clear, is the government obliged to provide financial assistance to women too poor to afford abortions.⁵⁰

Concern about creating welfare rights through constitutional interpretation also influenced the Court's second conclusion in *Rodriguez*: that this case did not involve unconstitutional wealth discrimination. In a series of cases decided in the late 1950s and the 1960s, the Court struck down court fees and poll taxes on the ground that they prevented the poor from exercising important rights like appealing criminal convictions and voting. Many saw the Court inching toward the proposition that discrimination against the poor might be treated similarly to discrimination against racial minorities. Racial discrimination, like discrimination with regard to fundamental rights, also triggered strict scrutiny from the Court, and the Court almost without exception refused to countenance discrimination on the basis of race. When the Court decided *Rodriguez*, some lower courts had already expressed their belief that "it is clear beyond question that discrimination based on poverty is no more permissible than racial discrimination." In truth, the question remained open, and many anticipated that *Rodriguez* would finally settle the matter.⁵¹

It did and it did not. Although *Rodriguez* came to stand for the proposition that wealth discrimination is not suspect and therefore does not trigger strict scrutiny, in reality the Court did not so much address the question as deflect it. The Court focused, among other things, on the fact that in its earlier decisions, the laws at issue discriminated against a class of *people* clearly defined by their poverty. School funding systems, by contrast, discriminated against property-poor *districts*. To be sure, it was often the case that poor people lived in poor districts, but the correlation was not perfect, and this mismatch prevented the facile conclusion that discriminating against poor school districts necessarily meant discriminating against poor people. Regardless of whether poor *people* might deserve special judicial protection, the Court in *Rodriguez* made clear that poor *school districts* did not.⁵²

Having rejected the idea that education was a fundamental right and the notion that unequal funding impermissibly discriminated against the poor, the Court refused to subject Texas's funding scheme to strict scrutiny. Instead, it

applied the extremely deferential rational basis test, asking only if the funding scheme was rationally related to a legitimate state interest. The Court identified local control as the relevant state interest. Allowing unequal funding, the Court reasoned, protected local control in two ways: it allowed districts to determine how much to spend on their schools, and it guarded against increased state regulation that might accompany increased state funding.⁵³

The Court fleshed out its reasoning by pointing to the numerous practical difficulties that courts would have to confront if the plaintiffs' legal claims were sustained. These concerns reflected Justice Powell's intimate knowledge of administering public education and his experiences on both the Richmond and state boards of education. Two in particular drew sustained attention from the Court, and these same concerns continue to surface in state school finance litigation.

First, the Court confessed great reluctance to interfere with legislative decisions about raising and spending revenues. No system of taxation is perfect, the Court reasoned, and the questions raised by how much to tax and which services to provide are remarkably complex and intertwined. "In such a complex arena in which no perfect alternatives exist," Justice Powell wrote for the Court, it is best "not to impose too rigorous a standard of scrutiny lest all local fiscal schemes become subjects of criticism under the Equal Protection Clause."⁵⁴

Second, the Court discussed the uncertain connection between funding and achievement. Scholars and experts disagreed over "the extent to which there is a demonstrable correlation between educational expenditures and the quality of education." Equally unsettled was the related question regarding the very purpose of public education. The Court was unsure if these questions would ever be settled, but it was sure that it had neither the expertise nor wisdom to settle them. "In such circumstances," the Court concluded, "the judiciary is well advised to refrain from interposing on the States inflexible constitutional restraints that could circumscribe or handicap the continued research and experimentation so vital to finding even partial solutions to educational problems."⁵⁵

Justices White and Marshall dissented. Justice White, whose dissenting opinion was joined by Justices Douglas and Brennan, argued that local control was a fiction in the case of property-poor districts, because state law restricted them from taxing themselves over a certain amount. Local control, in operation, thus did not allow districts to decide for themselves how much to spend on education.⁵⁶

Justice Marshall's dissent, joined only by Justice Douglas, was more sweeping in its rejection of the majority opinion. Marshall believed that education ought to be deemed a fundamental right because of the close nexus between education and the ability to exercise other constitutional rights, such as the

right of free speech and the right to participate in the political process. Marshall recognized that his nexus theory might prove too much, but he argued that education was more closely associated with established constitutional rights and therefore could be distinguished from claimed rights to food and shelter. Marshall also took on the majority's skepticism about the connection between funding and educational quality, asking why wealthy districts were so intent on keeping their money if it did not affect educational quality. He also thought the entire issue was somewhat irrelevant: courts should ensure equality of opportunity by equalizing funding; they could not and need not guarantee equal outcomes.⁵⁷

There is some evidence that the Lawyer's Committee was right to worry that the case for school finance reform had been prematurely presented to the Supreme Court. Justice Powell expressed reluctance in the opinion about mandating new funding schemes that "are only recently conceived and nowhere yet tested." (He was blunter in private, writing in a memorandum that the district court was wrong to adopt the "activist scholarship theory of Professors Coon and Sugarman" and expressing great skepticism about "facile new theories" of funding.) Justice Blackmun also commented at the justices' conference, when they met to decide the case, that he wished that lower courts had had more time to wrestle with the issue.⁵⁸

On the other hand, one could argue that the case came too late rather than too early. If the case had been heard a few years earlier, the Court would likely have been more receptive, given that none of the four conservative Nixon appointees would have been on the bench. More broadly, the increasingly controversial and somewhat disappointing experience with school desegregation must have weighed on the justices as they considered the *Rodriguez* case. The bitter public reaction to busing, mandated by *Swann* in 1971, could not have escaped their notice, and it may have made some of them even more reluctant to take on reforming the funding systems in all fifty states. There is no doubt, for instance, that Justice Powell, a southerner intimately involved with school desegregation, feared increased federal control of education. He worried privately that school finance reform would ultimately lead to "national control of education," which he adamantly opposed.⁵⁹

Reaction

Justice Blackmun feared that the decision in *Rodriguez* would be unpopular, but public reaction was fairly muted. Partisans were upset, of course. The National Education Association, for example, charged that the Court had

rejected “the idea of equal educational opportunity,” and plaintiff Demetrio Rodriguez expressed “deep and bitter resentment” of the justices and those who nominated and confirmed them. But the major newspapers either supported or at least accepted the decision. The *New York Times*, for example, “sympathize[d] with the Court’s school ruling” and urged a political fix for school funding systems it called chaotic and unjust. The *Washington Post* supported the outcome, arguing that requiring equal funding might have hurt city schools that needed more money per pupil in order to educate their large portion of poor students. The *Chicago Tribune* blasted the conditions in poor schools but nonetheless supported the decision because it forestalled creating a “uniform mold in the name of guaranteeing equality.” In Richmond, the *Times-Dispatch*, true to form, applauded the decision as “pure gold,” suggested that money does not really matter, and expressed some hope that this meant the Court would block the consolidation of the Richmond, Henrico, and Chesterfield school districts.⁶⁰

As these editorials indicate, school finance reform directed by the U.S. Supreme Court was not an issue that garnered uniform support, even among liberal-leaning newspapers. In addition to fears about national control of education and the Court’s capacity to fix funding, there was uncertainty and disagreement—just as there had been at the very early stages of school finance reform—over what that fix should be. Strictly equal funding? Fiscal neutrality? Needs-based funding? The need to correct the chaos and injustice of funding systems was obvious, but exactly how to do that was unclear. The same is true today.

It is possible that the reaction to *Rodriguez* might have heated up over time, but news of the case was quickly eclipsed by another school finance decision, this one from the New Jersey Supreme Court. Less than two weeks after *Rodriguez* was decided, the New Jersey court struck down its state funding system, relying exclusively on the New Jersey constitution. *Rodriguez*, it appeared, would not be the last word on school finance reform. Instead of ending courts’ involvement with the issue, it channeled litigants into state courts, where they have been fighting ever since.⁶¹