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The School Finance Decisions: Collective Bargaining and Future Finance Systems

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The decision of the California Supreme Court in *Serrano v. Priest*¹ requires little introduction. Employing a legal theory first suggested by Professors Coons, Clune, and Sugarman in *Private Wealth and Public Education*,² the court declared unconstitutional the method by which public education is financed in California. Several courts have followed *Serrano*,³ and the decision of one, a three-judge federal court in Texas,⁴ is now before the Supreme Court in *San Antonio Independent School District v. Rodriguez*.⁵

The legal foundation of *Rodriguez* and *Serrano* is familiar if not entirely clear: Laws involving "suspect classifications" and touching "fundamental interests" must be justified by some "compelling" state interest.⁶ Both courts held that the traditional system of school finance,

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1. 5 Cal. 3d 584, 487 P.2d 1241, 96 Cal. Rptr. 601 (1971).

2. J. COONS, W. CLUNE & S. SUGARMAN, *PRIVATE WEALTH AND PUBLIC EDUCATION* (1970).

3. See *Van Dusartz v. Hatfield*, 334 F. Supp. 870 (D. Minn. 1971); *Hollins v. Shofstall*, No. C-253652 (Super. Ct. Ariz., Jan. 13, 1972); *Caldwell v. Kansas*, No. 50616 (District Ct. Kan., Aug. 30, 1972); *Robinson v. Cahill*, 118 N.J. Super. 223, 287 A.2d 187 (1972); cf. *Sweetwater County Planning Committee for the Organization of School Dist. v. Hinkle*, 491 P.2d 1234 (Wyo. 1971), *juris. relinquished*, 493 P.2d 1050 (Wyo. 1972). But see *Parker v. Mandel*, 344 F. Supp. 1068 (D. Md. 1972); *Spano v. Bd. of Educ. of Lakeland Cent. School Dist. #1*, 68 Misc. 2d 804, 328 N.Y.S.2d 229 (Sup. Ct. 1972).

At last report, suits were pending in 31 states. U.S. OFFICE OF EDUCATION TASK FORCE ON SCHOOL FINANCE, *ANALYSIS OF INTRASTATE SCHOOL FINANCE CASES* (1972).

4. 337 F. Supp. 280 (W.D. Tex. 1971), *prob. juris. noted*, 406 U.S. 966 (1972).

5. Oral argument was held on October 12, 1972. See 41 U.S.L.W. 71-1332 (October 17, 1972).

6. See generally *Developments in the Law—Equal Protection*, 82 HARV. L. REV. 1065 (1968); Karst, *Invidious Discrimination: Justice Douglas and the Return of the 'Natural-Law—Due Process Formula'*, 16 U.C.L.A.L. REV. 716 (1969); Sager, *Tight Little Islands: Exclusionary Zoning, Equal Protection, and the Indigent*, 21 STAN. L. REV. 767 (1969); Schoettle, *The Equal Protection Clause in Public Education*, 71 COLUM. L. REV. 1355 (1971). The state has been required to meet a higher burden of justification (sometimes called a compelling state interest) than that required by the traditional "rational relationship" test (an outgrowth of the "presumption of constitutionality") in cases where the classification was held suspect, e.g., *Korematsu v. U.S.*, 323 U.S. 214 (1944) (ancestry); *McLaughlin v. Florida*, 379 U.S. 184 (1964) (race); and *Graham v. Richardson*, 403 U.S. 365 (1971) (alienage), and where the court has apparently regarded the interest affected by

in its dependence on local property taxes, makes the "quality" of a child's education (a fundamental interest) dependent on the wealth of his school district (a suspect classification) and that the state interests of administrative and fiscal decentralization were attainable in other ways and hence not compelling justifications for the system.⁷ The *Rodriguez* court further found that per pupil expenditures measure educational quality, and consequently the decision prohibits school finance systems which make district expenditures dependent on district wealth.⁸

The decision thus speaks in the negative, specifying only which forms of school finance are impermissible. Much of the considerable doctrinal and empirical commentary on *Rodriguez* and *Serrano*⁹ has sought to describe generally the systems the decisions would approve. The conclusions usually have been that the states have great latitude in fashioning complying systems,¹⁰ and that many of these might be worse for the urban poor than the status quo.¹¹

the challenged legislation particularly important or fundamental, e.g., *Kramer v. Union Free School District*, 395 U.S. 621 (1969) (voting) and *Shapiro v. Thompson*, 394 U.S. 618, 630 (1968) (right to travel). Although the Court once suggested in dicta that wealth is a suspect classification, *McDonald v. Board of Election Commissioners*, 394 U.S. 802, 807 (1969), neither wealth nor ability to pay alone (i.e., without a fundamental interest) have been expressly so held, and *James v. Valtierra*, 402 U.S. 137 (1971), seems to stand for an unmistakable though implicit rejection of such a claim. *But see Note, The Equal Protection Clause and Exclusionary Zoning After Valtierra and Dandridge*, 81 YALE L.J. 61, 76 (1971). The Court has seemingly indicated, however, that when the interest affected is fundamental a wealth or ability to pay classification may become suspect. E.g., *Douglas v. California*, 372 U.S. 353 (1963) (right to appeal and wealth); *Harper v. Virginia Board of Elections*, 383 U.S. 663 (1966) (voting and wealth). It has been suggested that these cases reflect a "sliding scale" approach to Equal Protection that somehow combines the degree of "suspectness" and the fundamentality of the right to determine whether the threshold has been reached to invoke the stricter standard of review. *See Developments in the Law—Equal Protection, supra*, at 1130-32. *See also Michelman, On Protecting the Poor Through the Fourteenth Amendment*, 83 HARV. L. REV. 7, 36-37 (1969).

7. 337 F. Supp. 280, 282-84.

8. The *Rodriguez* court does not expressly consider the relationship between expenditures and educational quality. There is no mention in the opinion of any measure of educational quality except expenditures, however, and there is no possible referent in the opinion except per pupil expenditures for the court's ruling that the state cannot "make the quality of public education a function of wealth . . ." *Id.* at 285 (emphasis added). *See pp.* 441-46 for a more extended treatment of this question.

9. For a comprehensive list of the legal literature, see Note, *A Statistical Analysis of the School Finance Decisions: On Winning Battles and Losing Wars*, 81 YALE L.J. 1303 n.2 (1972).

10. E.g., Coons, Clune & Sugarman, *A First Appraisal of Serrano*, 2 YALE REV. L. & SOC. ACTION 111, 115 (1971); Goldstein, *Interdistrict Inequalities in School Financing: A Critical Analysis of Serrano v. Priest and Its Progeny*, 120 U. PA. L. REV. 504, 511-19 (1972); Ridenour and Ridenour, *Serrano v. Priest: Wealth and Kansas School Finance*, 20 KANS. L. REV. 213, 221-26 (1972); Wise, *School Finance Equalization Lawsuits: A Model Legislative Response*, 2 YALE REV. L. & SOC. ACTION 123 (1971); Comment, *The Aftermath of Serrano: The Strict Scrutiny Approach and the Viability of Property Tax Financing for Public Educational Systems*, 17 VILL. L. REV. 928, 951 (1972).

11. *See, e.g., Carrington, On Equalitarian Overzeal: A Polemic Against the Local School Property Tax Cases*, 1972 U. ILL. L. FORUM 232, 243-44; Goldstein, *Interdistrict*

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This article, by contrast, seeks to discern which of the *legally permissible* systems are *politically likely*. Should *Rodriguez* be affirmed—a result assumed here merely for expositional convenience—this article should have application in every state. If *Rodriguez* is reversed, there would remain many similar state constitutional claims and the possibility that the legislatures may on their own move to revise school finance.¹² If the Court reverses, this article should be read as a criticism, though a qualified one, of some of the kinds of thinking that will likely have led to the reversal—the fears of precipitating a constitutional crisis by foisting impossible tax increases on the public, of disadvantaging cities, or of embroiling the Court in a morass of nonjusticiable issues.

One might, of course, oppose affirmance in *Rodriguez* for still other reasons. Such opposition might be informed, for example, by a view of the “proper” role of the Court based on political theory, by a historical view of the purpose of the Fourteenth Amendment, or by a general concern for principled doctrinal development. These concerns are by and large outside the scope of this article. Our task here is to understand the revenue impact of an affirmance in *Rodriguez*, the likely resulting political pressures, and the institutional changes and legal issues that will consequently become crucial in a post-*Rodriguez* future. Given the ambiguity of *Rodriguez* and the complexity of educational politics, the impact of the decision cannot be deduced from its words as if these were tea leaves. Dire predictions, as in the Appellant’s brief

Inequalities in School Financing: A Critical Analysis of Serrano v. Priest and Its Progeny, 120 U. PA. L. REV. 504, 526 (1972); Kirp & Yudof, *Serrano in the Political Arena*, 2 YALE REV. L. & SOC. ACTION 143, 145-46 (1971); Note, *A Statistical Analysis of the School Finance Decisions: On Winning Battles and Losing Wars*, 81 YALE L.J. 1303 (1972); cf. Moynihan, *Solving the Equal Educational Opportunity Dilemma: Equal Dollars Is Not Equal Opportunity*, 1972 U. ILL. L. FORUM 259, 260-62.

12. Of the *Serrano-Rodriguez* type cases now pending, thirty-four are based on state as well as federal grounds, and twenty-nine of these on state equal protection clauses. U.S. OFFICE OF EDUCATION TASK FORCE ON SCHOOL FINANCE, ANALYSIS OF INTRASTATE SCHOOL FINANCE COURT CASES (1972). Several of the decisions to date either suggest or expressly hold that the school finance system is unconstitutional under state constitutional provisions as well as the Fourteenth Amendment. See, e.g., *Serrano v. Priest*, 5 Cal. 3d 584, 596n.11, 487 P.2d 1241, 1249 n.11, 96 Cal. Rptr. 601, 609n.11 (1971). For a discussion of the California Supreme Court’s probably intentional obfuscation of the state constitutional issue as “another step in a continuing *pas de deux* between the California and United States Supreme Court,” see Coons, Clune & Sugarman, *A First Appraisal of Serrano*, 2 YALE REV. L. & SOC. ACTION 111, 112 (1971) (footnote omitted). In the New Jersey case, the court held the system invalid under a state constitutional requirement of a “thorough” school system. *Robinson v. Cahill*, 118 N.J. Super. 223, 268-69, 287 A.2d 187, 211 (1972). Supplemental opinion at 119 N.J. Super. 40, 289 A.2d 569 (1972). The Wyoming case, though presenting a modified form of the issue, also turned in part on a finding of state unconstitutionality. *Sweetwater County Planning Comm. v. Hinkle*, 491 P.2d 1234, 1236-37 (Wyo. 1971), *juris. relinquished*, 493 P.2d 1030 (Wyo. 1972). See also *Van Dusartz v. Hatfield*, 334 F. Supp. 870, 874 (D. Minn. 1971); *Spano v. Bd. of Educ.*, 68 Misc. 2d 804, 328 N.Y.S.2d 229 (Sup. Ct. 1972).

in *Rodriguez*,¹³ of what "will" happen are not persuasive without an indication of political probabilities and careful attention to the doctrinal boundaries the decision creates for the political process.

It will be argued here that a strict rule of per pupil expenditure equality would be not only unfortunate for its social results but politically infeasible as well. Political forces will press for continued and substantial district expenditure disparities. Because the disparities demanded may well, like those today, correlate with district wealth, the problem arises of accommodating these political pressures within the ambiguous mandate of *Rodriguez*. Possible doctrinal accommodations, centering on the concept of district differences in the "cost of education," will therefore be discussed. It will be suggested that, though the issues will often be difficult, the task of reconciling *Rodriguez* with reality is not impossible, and more importantly, that the decision leaves the courts great discretion in this assignment. In this regard, one of our purposes is to suggest that the courts will not be obliged to carry the full burden of "enforcing" *Rodriguez*.

Needless to say, such political speculation is largely a series of informed guesses. This article attempts to focus the discussion by concentrating on the probable impact of *Rodriguez* on teachers and their organizations, and on the institution of collective bargaining between teachers and public bodies. Of course, "education" involves more than this, but the focus seems appropriate for several reasons. First, in addressing the distribution of funds for public education, and particularly the existing district disparities in expenditures per pupil,¹⁴ the

13. Appellants, after arguing the practical effects of *Rodriguez* are irrelevant, nonetheless proceed "in the interest of completeness" to note "some of the consequences that would follow from affirmance of the decision below." They argue that affirmance would require Texas to either raise \$2.4 billion to equalize all districts at the expenditure level of one near the top, or flatly equalize all districts at the current state average. They then suggest, relying chiefly upon the Urban Institute Study which provides one of the chief empirical bases for this article, that cities will be hurt by the decision. Brief for Appellants at 39-42, *San Antonio Independent School Dist. v. Rodriguez*, 406 U.S. 966 (1972).

14. Specifying, with any precision, the dimensions of intra-state per pupil expenditure disparities is impossible, since different studies and reports often show somewhat different figures. A recent study prepared for the President's Commission on School Finance shows that in roughly seventy-five percent of the states the ratio of the highest to lowest spending district is approximately three to one. A report for the Senate Select Committee on Equal Educational Opportunity has similar findings for fifty-six percent of the states. Both studies demonstrate inequalities far in excess of three to one in particular states. (In Texas, the locus of *Rodriguez*, the former study shows a high-low ratio of fifty-six to one and the latter of twenty to one.) High-low ratios naturally reflect aberrational districts, and the range of variation among more typical districts in most states is usually considerably less. Within the fifth to ninety-fifth percentiles in school district spending, according to the President's Commission study, the ratio of the maximum to minimum is approximately two to one or less in three quarters of the states. (Texas, though still higher than the average state, drops to a 2.8 to one ratio.) Within the tenth through ninetieth percentiles, the maximum to minimum ratio is roughly two to one or less in all but four of the states, and 1.5 or less to one

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decisions are to a large extent about teachers. Approximately fifty-five percent of current operating costs¹⁵ are for teacher salaries, that figure increasing to roughly sixty-five percent when fringe benefits are included.¹⁶ More importantly the disparities in expenditures appear to be largely explained by variations in teacher salaries.¹⁷ Second, teacher organizations are in many states (and particularly in the heavily urban ones) large and powerful lobbies which will undoubtedly influence

in approximately half. (Texas is 2.1 to one). STAFF REPORT, THE PRESIDENT'S COMMISSION ON SCHOOL FINANCE, 2 REVIEW OF EXISTING STATE SCHOOL FINANCE PROGRAMS, DOCUMENTATION OF DISPARITIES IN THE FINANCING OF PUBLIC ELEMENTARY AND SECONDARY SCHOOL SYSTEMS—BY STATE, 1971, at 13; U.S. SENATE SELECT COMMITTEE ON EQUAL EDUCATIONAL OPPORTUNITY, 92d Cong., 2d Sess., THE FINANCIAL ASPECTS OF EQUALITY OF EDUCATIONAL OPPORTUNITY AND INEQUITIES IN SCHOOL FINANCE (Comm. Print. 1972), 8-9.

15. It is not clear if *Serrano* and *Rodriguez* use only current operating expenditures as the measure of "per pupil expenditures." *Rodriguez* specifies that its holding "shall have prospective application only" and shall "in no way affect the validity, incontestability . . . of any presently outstanding bond," thus suggesting that prospectively the holding applies to capital costs as well. 337 F. Supp. at 286. See also I CAL. SENATE SELECT COMMITTEE ON SCHOOL DISTRICT FINANCE, FINAL REPORT (1972); J. COONS, W. CLUNE & S. SUGARMAN, PRIVATE WEALTH AND PUBLIC EDUCATION 151, 251-52 (1970).

This article does not consider, except where expressly noted, the capital cost implications of *Serrano* and *Rodriguez*. Its speculations and predictions are by and large based on current operating expenditure data, which are generally chosen as the most meaningful measure of comparability in school district spending. *But see* note 38 *infra*. The figure includes the following: salaries of principals, supervisors, and teachers; other instructional expenditures; expenses for administration, transportation, plant operation and maintenance; supplies, library, clerical staff, textbooks, health, food service, attendance services, and teacher benefits and social security. URBAN INSTITUTE, PUBLIC SCHOOL FINANCE: PRESENT DISPARITIES AND FISCAL ALTERNATIVES 108 (1972).

Data on capital costs are not readily available in a form that makes them useful for comparative analysis. See URBAN INSTITUTE, PUBLIC SCHOOL FINANCE: PRESENT DISPARITIES AND FISCAL ALTERNATIVES 38 n.9 (1972); I CAL. SENATE SELECT COMMITTEE ON SCHOOL DISTRICT FINANCE FINAL REPORT 70-71 (1972). One study, which finds that capital outlays in 1969-1970 amounted to approximately nineteen percent of the total school budget nationally, may give us a very rough notion of their order of magnitude. FINANCING PUBLIC ELEMENTARY AND SECONDARY SCHOOL FACILITIES IN THE UNITED STATES (National Educational Finance Project Special Study No. 7, June 1970). See also NATIONAL CENTER FOR EDUCATIONAL STATISTICS, DEPARTMENT OF HEALTH, EDUCATION AND WELFARE; FINANCES OF LARGE-CITY SCHOOL SYSTEMS A COMPARATIVE ANALYSIS 48-49 (1971).

16. The largest proportion of instructional expenditures by far is teacher salaries. URBAN INSTITUTE, PUBLIC SCHOOL FINANCE: PRESENT DISPARITIES AND FISCAL ALTERNATIVES 81 (1972). Of the states in this study, New Hampshire and New York differ by up to five percent from the overall estimate that fifty-five percent of current budget is for teacher salaries (sixty-five percent when benefits are included). Other states are much closer to the Urban Institute estimate. *Id.* at 82.

17. For a discussion of the dimensions of intra-state per pupil expenditure disparities see note 14 *supra*. The Urban Institute sample showed a relatively small amount of variation on non-instructional expenditures. Plant operation costs and (to a lesser extent) transportation costs are the most variable components of variation. Other budget elements (generally included in the instructional budget) vary considerably, but are a small part of total spending; examples are principal salaries, supplies, and textbooks. *Id.* at 81-84.

A pair-wise comparison of expenditure differentials between central city school districts and slow-growth suburbs, fast-growth suburbs, and rural districts showed that the largest source of variation in current expenditures, both absolutely (in dollars) and relatively (as a source of the difference between the district types) was teacher salaries. *Id.* at 86. In other words, teacher salaries largely explain interdistrict disparities, and districts' decisions about expenditures must largely reflect teacher salaries. See also NATIONAL CENTER FOR EDUCATIONAL STATISTICS, DEPARTMENT OF HEALTH, EDUCATION AND WELFARE, FINANCES OF LARGE-CITY SCHOOL SYSTEMS: A COMPARATIVE ANALYSIS 52-53 (1971).

the restructuring of educational finance under *Rodriguez*.¹⁸ Third, to assess whether *Serrano* or *Rodriguez* threaten local autonomy in educational policy, as opponents of the decisions allege, one must consider the effect of the decisions on the power and structure of teacher organizations and their collective bargaining, for these are already major factors in school governance and important constraints on the autonomy of local boards of education.¹⁹ Finally, teachers are the most important resource in the educational process²⁰ and are thus crucial to the ultimate goal of *Rodriguez*: equal "quality" education. A key question, therefore, is whether the decisions will enable "poor" districts to hire teachers of equal quality and quantity as "rich" districts.

I. The Fundamental Conflicts

Under *Rodriguez*, a system of school finance will pass muster only if district per pupil expenditures do not depend on district wealth. Two fundamental systems have been proposed to satisfy this requirement: *full state funding*, where the state levies all necessary taxes and disburses equal amounts per pupil to each district;²¹ and *power equalization*, where the state's disbursements depend on the tax rate, but not the tax base, of the recipient district, the state redistributing to "poor" districts the excess revenue generated from rich districts.²² It is, how-

18. See, e.g., NATIONAL EDUCATION ASSOCIATION, RESEARCH REPORT 1970-R10, HIGH SPOTS IN STATE SCHOOL LEGISLATION, JANUARY 1 - AUGUST 31, 1970 for a state by state description of the National Education Association's lobbying goals and achievements in state legislation from January 1 to August 31, 1970; R. BRAUN, TEACHERS AND POWER, THE STORY OF THE AMERICAN FEDERATION OF TEACHERS (1972) for an impassioned account of the growth of the American Federation of Teachers by one who views the power of teachers as a clear and present danger to education in this country. See also A. ROSENTHAL, PEDAGOGUES AND POWER: TEACHER GROUPS IN SCHOOL POLITICS (1969) for a more systematic study of the nature and impact of teachers' organizations in large cities.

19. See pp. 424-27, 437.

20. Common sense supports this. Social science, while indicating that all school resources have less influence on student performance than is commonly believed, still suggests that teachers are the most important resource. See notes 144 & 159 *infra*.

21. See, e.g., I CAL. SENATE SELECT COMMITTEE ON SCHOOL DISTRICT FINANCE 63 *et seq.* (1972); Coons, Clune and Sugarman, *A First Appraisal of Serrano*, 2 YALE REV. L. & SOC. ACTION 111 (1971); Wise *School Finance Equalization Lawsuits: A Model Legislative Response*, 2 YALE REV. L. & SOC. ACTION 123 (1971).

22. Under this system, the legislature would specify the per pupil expenditure to which every school district taxing at specified rates would be entitled. The rate-expenditure schedule might look as follows:

Tax Rate	Per Pupil Expenditure
1 percent	\$ 400
1½	600
2	800
2½	1000
3	1200

Each school district would choose its own rate, and every district taxing at the same rate would be guaranteed by the state the same (scheduled) expenditure. The system need not necessarily employ property taxation, although most discussions of power equaliza-

ever, important to understand that both systems go somewhat further than *Rodriguez* requires. Under that decision, disbursements may deviate from either strict per pupil equality (under full state funding) or strictly equal per pupil expenditures for equal tax rates (under power equalization), so long as the deviations do not make expenditures a "function" of the differential wealth of districts.²³ *Rodriguez* may therefore permit disparities reflecting a legislative preference for certain students or programs, or differences in the "cost" of education to different districts.

Thus, while mandating some reform of school finance, *Rodriguez* and *Serrano* leave the states a wide range of choice. However, three political factors considerably narrow the field. First, under the decisions, state legislatures, rather than local authorities, will largely determine the amount of tax revenue (aside from federal aid) available for public education. In predicting the nature of future school finance, we must therefore look to the legislatures and the political interests and attitudes which influence them. Second, few legislatures will move to enact either full state funding or power equalization in their pure forms, for both would work to the disadvantage of certain groups whose political influence and equitable claims are likely to be irresistible. Third, state legislatures will thus be under unremitting pressure to create or validate district expenditure disparities by allowing inter-district "cost" differentials or granting categorical or special program aid.

A. *An Increased Role for State Legislatures*

While all state governments now provide some aid to public education,²⁴ a majority of educational expenditures come from local prop-

tion assume a property tax. *But see* note 48 *infra*. For districts whose wealth base (total assessed value, if the property tax is used) is insufficient to generate the scheduled amount per pupil, the state would make up the difference. Districts whose wealth bases yield more than the scheduled amount would have to pay the difference to the state for redistribution to poorer districts. *See generally* J. COONS, W. CLUNE & S. SUGARMAN, *PRIVATE WEALTH AND PUBLIC EDUCATION* (1970).

23. The *Rodriguez* court noted that its holding, does not involve the Court in the intricacies of affirmatively requiring that expenditures be made in a certain manner or amount. On the contrary, the state may adopt the financial scheme desired so long as the variations in wealth among the governmentally chosen units do not affect spending for the education of any child. 337 F. Supp. at 284. *See also* Van Duzart v. Hatfield, 334 F. Supp. 870, 876-77 (D. Minn. 1971); J. COONS, W. CLUNE & S. SUGARMAN, *PRIVATE WEALTH AND PUBLIC EDUCATION*, 232-54, 309-11 (1970). Post-*Serrano* commentators have reached similar conclusions. *E.g.*, Karst, *Serrano v. Priest: A State Court's Responsibilities and Opportunities in the Development of Federal Constitutional Law*, 60 CAL. L. REV. 720, 752-56 (1972). We later argue that this problem is not so simple as many appear to think. *See* pp. 439-58 *infra*.

24. For a description of the history and operation of state educational aid, and a criticism of current systems, *see* J. COONS, W. CLUNE & S. SUGARMAN, *PRIVATE WEALTH AND PUBLIC EDUCATION* 38-197 (1970).

erty taxes. In 1971-72, fifty-one percent of the educational revenues raised in the nation were levied by local districts; forty-two percent came from state taxes; the remaining seven percent, from the federal government.²⁵ But these averages conceal great variations among states and districts: The state aid percentage of *non-federal* educational revenues ranged from ten percent in New Hampshire to ninety-seven percent in Hawaii; within the states, the state-local breakdowns vary significantly from district to district.²⁶

After equalization, the determination of total educational revenue will rest to a much greater extent with the state legislatures. Under full state funding, they will determine the expenditure level for public education and will set state tax rates accordingly. Under power equalization, local tax rate choice would affect expenditures, but the level for each permissible rate will again depend on the state legislature's selection of a rate-expenditure schedule. The legislature will determine the acceptable minimum and maximum expenditure and the appropriate expenditure increments for each local rate increase.²⁷ It will decide whether to finance the system by merely redistributing locally-raised revenues among districts or by adding to the "pot" through state taxation.²⁸ The greater the reliance on state taxation, the more the power-equalized system resembles full state funding.²⁹

B. *Political Pressure for Expenditure Disparities*

Assuming that non-federal revenue for public education does not increase significantly in response to *Serrano* and *Rodriguez*, implementation of either of the "basic" reform plans will penalize districts that currently spend more than the state per pupil average and those that must pay above-average salaries to attract teachers. Equalization of per pupil expenditures under full state funding would in the short run probably force a reduction in teacher salaries and/or the number of teachers employed in such districts. While in the long run, the "nor-

25. See, e.g., 49 NEA RESEARCH BULLETIN 53 (May 1971).

26. For inter-state comparisons, see NEA, RESEARCH REPORT 1971-R13, ESTIMATES OF SCHOOL STATISTICS, 1971-72, at 34-35. Intra-state percentages will obviously vary greatly depending upon the amount of expenditures raised by local taxation.

27. Obviously, the effect of any power-equalized system depends entirely on the legislative rate-expenditure schedule. For example, if the expenditure increment increases geometrically in relation to each rate increase, the system creates great incentive for high spending. See note 22 *supra*.

28. See note 22 *supra*.

29. Imagine, for example, that under the rate-expenditure schedule a one percent local property tax rate entitled the district to \$1000 in per pupil expenditures, whereas this tax rate yielded only \$800 in the richest and \$300 in the average district of the state. Under such a schedule, the lion's share of educational revenue must come from state taxation, as in no district will district-raised revenues cover expenditures.

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mal" growth of state tax revenues (as the economy grows) may make absolute cutbacks unnecessary,³⁰ growth will not eliminate the relative losses of high-wealth districts.³¹ Further, in both the short and long run, currently high-spending districts would suffer an erosion of their present power in competing for teachers in the statewide labor market. Finally, equalization of per pupil expenditures would aggravate the hiring problems of many districts which must now pay above-average salaries to attract teachers.

Enactment of pure power equalization would have similar effects. It is true that under such a system high-spending districts could maintain their expenditure levels by increasing their local tax rates. However, since it is unrealistic to assume that the demand for per pupil expenditures is completely inelastic in such districts,³² power equalization would create some downward pressure on teacher hiring and salaries. Similarly, pure power equalization would disadvantage districts facing high teacher "costs."

These predictions, closely associating fiscal and teacher effects, are justified by the available data. There are, today, very significant disparities in teacher salaries per pupil from district to district.³³ A recent Urban Institute study, prepared for the President's Commission on School Finance, found that, with the possible exception of aberrationally low- and high-spending districts,³⁴ "expenditures for teachers are the major cause for . . . intra-state expenditure differentials."³⁵ We

30. According to the NEA, school revenue receipts increased 166% from 1961-62 through 1971-72, or at an average annual rate of 10.3%, though the actual year-by-year increases were more sporadic (e.g., an increase of 17% in 1967-68, and only 7.4% in 1971-72). NEA, RESEARCH REPORT 1971-R13, ESTIMATES OF SCHOOL STATISTICS, 1971-72, at 17. During 1961-66, the market value of real property increased by only 4.6% annually, on the average. 2 U.S. BUREAU OF THE CENSUS, CENSUS OF GOVERNMENTS, 1967, TAXABLE PROPERTY VALUES 11 (1968).

31. Depending on the state taxes chosen to finance revised systems, many or most of the currently high spending-high property wealth districts would have a higher tax yield by increasing their own tax rates and keeping the revenue, rather than pooling tax resources with the state. See note 47 *infra*.

32. See notes 68 and 111 *infra*.

33. See note 17 *supra*, and notes 155-58 *infra*. For 1967-68 comparisons between state average and large-city teacher salary per pupil, see NATIONAL CENTER FOR EDUCATIONAL STATISTICS, DEPARTMENT OF HEALTH, EDUCATION AND WELFARE: FINANCES OF LARGE-CITY SCHOOL SYSTEMS: A COMPARATIVE ANALYSIS 52-53 (1971). Taking the eighty-five largest districts in California in 1970-71 as an example, the median district paid an average teacher salary of \$10,840. Two-thirds of the systems are within a \$1069 range around the median, and one-third are beyond that range (\$10,325 to \$11,394). The highest average teacher salary of the eighty-four systems was \$12,485, and the lowest was \$8,993. I NATIONAL EDUCATION ASSOCIATION, RESEARCH REPORT 1971-R5, 25TH BIENNIAL SALARY SURVEY OF PUBLIC-SCHOOL PROFESSIONAL PERSONNEL, at 48-50 (1971). See also I CAL. SENATE SELECT COMMITTEE ON SCHOOL DISTRICT FINANCE, FINAL REPORT 34 (1972).

34. URBAN INSTITUTE, PUBLIC SCHOOL FINANCE: PRESENT DISPARITIES AND FISCAL ALTERNATIVES 36 (1972).

35. URBAN INSTITUTE, PUBLIC SCHOOL FINANCE: PRESENT DISPARITIES AND FISCAL ALTERNATIVES 90, 91-101 (1972). See note 17 *supra*.

shall later consider the causes of these variations, but for now it is enough to note that teachers in presently high-spending districts will very likely bear the brunt of any required reduction in their district's expenditures. Of course a district could reduce expenditures to some extent without affecting teachers by cutting back on school maintenance, buying less equipment or fewer books, and so forth. But such operating expenditures are very difficult to manipulate and combined represent but a relatively small percentage of total educational costs.³⁶ Nor are such expenditures likely to be a matter of indifference to teachers and their organizations (not to mention school administrators and parents) since they affect teaching conditions. Thus, we can anticipate that teacher organizations in currently high-spending districts will oppose the implementation of either of the basic reform finance systems. In this position, they will be allied with the parents and politicians of those districts.

The strength of this coalition will naturally vary from state to state, but it seems clear that it will have considerable political muscle, since it will include wealthy suburban interests and often the large cities where teacher organizations are particularly powerful.³⁷ The Urban Institute, consistently with other studies, found that in 1969 the average "central city" revenue per pupil (excluding federal contributions) in the states analyzed (California, Colorado, Delaware, Michigan, New Hampshire, New York, North Carolina, and Washington) exceeded the state average by \$124 or approximately fifteen percent.³⁸

36. For the Urban Institute sample states, non-salary instructional expenditures (including clerical staff, supplies, textbooks, and library) varied very little from 3.5% to 9.0% of current operating expenditures, while total non-instructional costs ranged only from 17.1% to 22.6% of current operating expenditures. URBAN INSTITUTE, PUBLIC SCHOOL FINANCE: PRESENT DISPARITIES AND FISCAL ALTERNATIVES 108 (1972). For a practical corroboration of these statistical indications of non-manipulability, consider the statement of a New York school official, commenting upon a cut of sixty-five teachers. "We can cut supplies and equipment, but the only place to go for large sums of money is the teaching staff, where the average teacher has a salary and fringe benefits in the \$12,000-a-year range." N.Y. Times, May 11, 1972, at 1, col. 2. See also "Muddling Through in the Year of the Crunch," N.Y. Times, Jan. 10, 1972, at 3, col. 4 describing the plight of teachers in budget-reducing districts. Perhaps future capital outlays are more manipulable, since a district presumably has some flexibility in timing the building of a new school, although imprudent delays might send maintenance costs skyrocketing. Too little is known about the dimensions and details of capital costs to enable reasonable speculation. See note 15 *supra*.

37. While a judicial decision will undoubtedly alter the political environment, it seems naive to expect that the interests which have thus far blocked school finance reform will suddenly fade away. As Professors Kirp and Yudof have noted:

Those who have benefited from the existing system—wealthy suburbs, cities with high tax bases—have been able to fend off proposed reforms, however cogently urged. It is in their political interests to do so."

Kirp & Yudof, *Serrano in the Political Arena*, 2 YALE REV. OF LAW AND SOCIAL ACTION 143 (1971).

38. URBAN INSTITUTE, PUBLIC SCHOOL FINANCE: PRESENT DISPARITIES AND FISCAL ALTERNATIVES 43 (1972). Central cities are defined as those with a population of 250,000 or

Similarly, separating slow growing ("rich") from fast growing ("poor") suburbs indicates that the average per pupil revenue of the former is \$108 (thirteen percent) above the state average.³⁹

Moreover, at least some opponents of both "basic" reform finance systems will also be able to marshal persuasive equitable claims. The public school population in central cities is composed of a far higher percentage of students from minority⁴⁰ and "poverty" families⁴¹ where academic performance is typically poor.⁴² On the taxing side, any "reform" which would force such cities to subsidize education in other parts of the state⁴³ would appear highly inequitable.⁴⁴

It may be argued that we have overstated the opposition to "reform" by assuming *Serrano* and *Rodriguez* will not lead to dramatic

more. We exclude federal revenue as its flow is not affected by *Serrano* and *Rodriguez*. Including federal revenue, the central cities receive even more and the "rich" suburbs slightly less than indicated in the text as compared with the state average. Since "revenue" figures include some capital costs, they are not perfect for our purposes, see note 15 *supra*, but "expenditure" figures are not separated by government source, and in any event they show the same pattern of variation. *Id.* at 85-90. An HEW study based on 1967-68 figures shows that a majority of eighty-seven large cities have per pupil expenditures above the state average; roughly two-thirds of them have per pupil revenues (excluding federal contribution) above the state average. DEPARTMENT OF HEALTH, EDUCATION AND WELFARE: FINANCES OF LARGE-CITY SCHOOL SYSTEMS: A COMPARATIVE ANALYSIS 52-53 (1968). See also I NEW YORK STATE COMMISSION ON THE QUALITY, COST AND FINANCE OF ELEMENTARY AND SECONDARY EDUCATION REPORT 2.63 (1972); THE URBAN INSTITUTE, PAYING FOR PUBLIC SCHOOLS—ISSUES OF SCHOOL FINANCE IN CALIFORNIA 14-15 (1972).

39. URBAN INSTITUTE, PUBLIC SCHOOL FINANCE: PRESENT DISPARITIES AND FISCAL ALTERNATIVES 43 (1972).

40. A Census Bureau national survey found that for metropolitan areas of 250,000 or more in 1968, fifty-four percent of the students in designated poverty areas were black, compared to ten percent of the students in non-poverty areas. Similarly thirty-two percent of the public school enrollment in central cities was black, compared to six percent of the suburban enrollment and seven percent of the non-metropolitan enrollment. U.S. BUREAU OF THE CENSUS, CURRENT POPULATION REPORTS, Series P-20, No. 190, *School Enrollment: October 1968 and 1967*, at 18-22 (1969).

41. See note 171 *infra*. Compare ESEA per pupil grants to cities with state averages, for 1967-68. DEPARTMENT OF HEALTH, EDUCATION AND WELFARE, FINANCES OF LARGE-CITY SCHOOL SYSTEMS: A COMPARATIVE ANALYSIS 52-53 (1968).

42. See, e.g., I NEW YORK STATE COMMISSION ON THE QUALITY, COST AND FINANCING OF ELEMENTARY AND SECONDARY EDUCATION REPORT 1.23-1.58 (1972); Dyer, *Some Thoughts About Future Studies in ON EQUALITY OF EDUCATIONAL OPPORTUNITY* 399 (F. Mosteller & D. Moynihan eds. 1972); Tyler, *Investing in Better Schools*, in *AGENDA FOR THE NATION* 207 (Gordon ed. 1968).

43. Many finance systems could have this effect. See note 47 *infra*.

44. Apart from the obvious inequity of forcing cities, with concentrations of minority, poor, and low achieving students, to subsidize other areas, there is the inequity caused by the often-invoked, undoubtedly real, but little-understood phenomenon of "municipal overburden." In its most general usage, municipal overburden refers to the well-known fact that cities typically have considerably higher non-educational public expenditures than other types of school districts. More particularly, the claim is that cities, quite apart from any possible greater taste for public goods, have higher "public costs" chiefly because of their relative concentrations of needy citizens, the influx of non-tax-paying visitors from suburbs and state mandated services. Thus, it is often argued, cities have less effective capacity to finance education than other areas. As should be obvious, measuring "municipal overburden" is very difficult, and what should "count" as a higher cost for tax-policy purposes—like the comparable claim discussed at p. 422 that some areas have higher education costs—is a normative not scientific question. We shall not treat the municipal overburden problem in any depth. See note 151 *infra*.

increases in the tax revenue devoted to education.⁴⁵ To this argument, two answers seem appropriate. First, while increased revenue would permit higher teacher salaries in all districts and would therefore expand the supply of teachers, currently high-spending districts will nevertheless still lose their ability to outbid currently low-spending districts for the "best" teachers; the districts would resent this loss of competitive advantage and this displeasure would be multiplied to the extent they have to pay *higher* salaries than other districts for teachers of the same quality. Teacher organizations in currently high-spending districts would presumably be similarly displeased by the *relative* deterioration of their salaries, when compared to salaries in currently low-spending districts.

Second, there is no real reason to assume that tax revenues for education will increase significantly in the wake of *Rodriguez* and *Serrano*. If, as suggested below, state-level collective bargaining develops, long run institutional pressure toward greater educational revenues may be created. Whether those pressures will be successfully resisted is a significant political question. The usual reasons advanced for a quick and dramatic increase in educational revenues are not, however, persuasive.⁴⁶ First, it should not be assumed that the coalition opposed to equalization will remain united in pressing for greater state educational revenues. While teacher organizations in presently high-spending districts would favor such increases, local citizens (and politicians) will be less enthusiastic, as such increases would often force these citizens to pay more in additional taxes than they would receive in increased state disbursements.⁴⁷ Second, it should not be assumed that reform will

45. To equalize expenditures within each of the states at each state's ninety-fifth percentile would cost approximately \$8.8 billion nationally; at the ninetieth percentile \$6.2 billion; at the eightieth percentile, \$3.7 billion; at the seventieth percentile, \$2.6 billion. II STAFF REPORT TO THE PRESIDENT'S COMMISSION ON SCHOOL FINANCE, REVIEW OF EXISTING STATE SCHOOL FINANCE PROGRAMS 15 (1972). Total public school expenditures nationally last year were roughly \$42 billion. 49 NEA RESEARCH BULLETIN 53 (May 1971).

46. See, e.g., Finn & Leukorosky, *Serrano v. the People*, 54 COMMENTARY 68, 70 (September, 1972); Goldstein, *Interdistrict Inequalities in School Finance: A Critical Analysis of Serrano v. Priest and Its Progeny*, 120 U. PA. L.R. 504, 526-27 (1972); Moynihan, *Solving the Equal Educational Opportunity Dilemma: Equal Dollars Is Not Equal Opportunity*, 1972 U. ILL. L. FORUM 259 (1972).

47. For example, the Fleischman Commission found that if New York State instituted a statewide tax proportional to a district's share of total property and income and distributed the revenue proportionally to enrollment, New York City would pay out \$1.41 in taxes for every dollar it received in school support. I NEW YORK STATE COMMISSION ON THE QUALITY, COST AND FINANCING OF ELEMENTARY AND SECONDARY EDUCATION REPORT 2.39 (1972). An Urban Institute study for California found that if the state replaced the local property tax with a statewide property tax, the rates would increase in central cities (including Los Angeles and San Francisco), and the cities, which have thirty-seven percent of the state's public school students would contribute nearly forty-five percent of state school revenues for this tax. At the same time, if state funds were distributed on an equal per pupil basis, expenditures per pupil would decline in central cities by \$85. URBAN INSTITUTE, PAYING FOR PUBLIC SCHOOLS: ISSUES OF SCHOOL FINANCE IN CALIFORNIA

bring a shift to sales or income taxation, resulting in higher tax revenues by making taxes less "visible" or more "progressive." A complete shift from property⁴⁸ to sales or income taxation seems unlikely, given the present strain on the two latter revenue sources in most states.⁴⁹ The relative "visibility" of various taxes has never been measured; it is not clear that property taxes are less progressive than many state sales or income taxes; and it is difficult to know in each district how a marginal change in sales or income taxes will compare, in the voters' minds, with marginal increases in educational expenditures. Finally, the common assumption that power equalization would increase statewide revenues by forcing "rich" districts to tax themselves at a higher rate to maintain expenditure levels is somewhat shortsighted: The system would simultaneously permit "poor" districts to maintain expenditure levels at reduced rates. The effect of these countervailing incentives on total state tax revenues is extremely difficult to predict. Under either full state funding or power equalization, some tax increases may prove inevitable, but political pressures should keep these minimal, and it seems far more likely that the legislatures will seek political accommodation through the cost-differential and categorical and program aid routes.

32-34 (1972). Another study found the same pattern in Delaware, Michigan, and Colorado. URBAN INSTITUTE, PUBLIC SCHOOL FINANCE, PRESENT DISPARITIES AND FISCAL ALTERNATIVES 126-31 (1972). Yet another study indicates that use of a *proportional state income tax*, designed to replace the state's total local revenue raised by property taxation with revenue distributed on an equal per pupil basis, would *increase* school taxes in twenty-one of twenty-eight studied major cities and *decrease* expenditures in eighteen. U.S. SENATE SELECT COMMITTEE OF EQUAL EDUCATIONAL OPPORTUNITY, 92d CONG., 2d SESS., INEQUITIES IN SCHOOL FINANCE. See also, Note, *A Statistical Analysis of the School Finance Decisions: On Winning Battles and Losing Wars*, 81 YALE L.J. 1303, 1337-40 (1972). Rural districts may also be resistant to tax increases, though for somewhat different reasons. See note 78 *infra*.

48. If property taxation continues as a significant source of educational revenue, see note 49 *infra*, under either a fully state funded or power equalized system, states will obviously have to assure the effective equalization of assessments throughout the state. To assure comparability of assessments, the state will have either to assess centrally, or establish or improve state boards of equalization. See generally ADVISORY COMMISSION ON INTERGOVERNMENTAL RELATIONS, THE ROLE OF THE STATES IN STRENGTHENING THE PROPERTY TAX 40-46, 131-44 (1963); D. NETZER, ECONOMICS OF THE PROPERTY TAX 173-83 (1966); THE PROPERTY TAX AND ITS ADMINISTRATION (A. Lynn, Jr. ed. 1969). Cf. *Weissinger v. Boswell*, 330 F. Supp. 615 (M.D. Ala. 1971) (challenge to state's failure to assess all property at uniform ratio upheld on equal protection grounds).

49. Two of the major "quasi-official" school finance reform reports of last year recommend continued reliance on property taxation as the major revenue source, though, to be sure, they also urge special accommodation on both the tax and expenditure side for low income families. See I NEW YORK STATE COMMISSION ON THE QUALITY, COST AND FINANCING OF ELEMENTARY AND SECONDARY EDUCATION REPORT 2.26-2.37 (1972); FINAL REPORT TO THE SENATE SELECT COMMITTEE ON SCHOOL DISTRICT FINANCES 13-16 (Cal. 1972). The Urban Institute found that in California substitution of a state sales tax for local school property taxes would require an additional five percent tax (from four to nine percent), while substitution of an income tax would require a 125 percent increase in that tax. URBAN INSTITUTE, PAYING FOR PUBLIC SCHOOLS, ISSUES OF SCHOOL FINANCE IN CALIFORNIA 31 (1972).

C. *The Attraction of "Cost" Differentials*

To the extent that the courts can be persuaded that education "costs" more in some districts than in others, deviations from strict per pupil equality or equal expenditures for the same tax rate should be permitted. Cost-differentials thus become a major vehicle for political accommodation.⁵⁰ Defining and measuring district differences in the cost of education is, as we shall see, extraordinarily difficult.⁵¹ In general, however, claims that education costs more in some districts have one of two meanings: first, that some students or programs cost more than others; or second, that the costs of buying teachers, equipment, or other educational resources are greater in some districts than others.

Rodriguez, as we shall see, probably leaves the legislature considerable discretion in establishing educational priorities through categorical and other special aid programs. Such aid can be used to compromise political conflicts: Central city interests will press for compensatory programs, special subsidies for vocational education and the like, while the suburbs will seek special aid for "gifted" children, "exceptional scholarship" programs, and special equipment and teachers in advanced academic fields. Legislative logrolling is likely in an effort to balance such aid formulas.

The second type of "cost difference," the variable cost of educational resources, is perhaps an even more malleable device for political accommodation. It easily has a substantial enough basis in reality to strike a responsive judicial chord, and once loosed it will not be easily contained. Suburbs and cities will proffer a welter of high-cost claims—some true, some false, some virtually impossible to appraise. The "technical" and apparently neutral label of "cost-differentials" will make them particularly appealing in both the political and judicial processes; yet they may in fact conceal a welter of political concessions and policy judgments.⁵² We shall return below to the conceptual and doctrinal problems of both categorical aid and cost differentials for *Rodriguez* and educational finance. First, however, we must examine the probable evolution of teacher organizations and of collective bar-

50. See note 165 *infra*, for a discussion of cost-differentials in the Governor of Michigan's proposals for school finance "equalization" (largely through full state funding).

51. See pp. 446-53.

52. The cost-differential justification for inter-district disparities is probably an example of what Professor Lindblom has called "partisan analysis"—essentially the use by interest groups of "scientific" analysis to persuade policy-makers to their point of view. If "legitimate persuasion" really is at the core of interest-group politics, "scientific" arguments and technical vocabularies become a major factor in influencing decision-making. See C. LINDBLOM, *THE POLICY-MAKING PROCESS* 65-69 (1968).

gaining in a political environment governed by the propositions just suggested.

II. The Institutional Accommodation: Statewide Collective Bargaining

In the previous section, it was suggested that the most likely short-run response to *Rodriguez* will be the formation of a statewide lobbying coalition which will attempt to resist the elimination of expenditure disparities. The long-run prospect is, however, somewhat different. Where the coalition includes some teacher organizations but excludes others, the long run should see the formation of a relatively centralized state teacher organization which will confront the state—and its citizens—with a single set of demands. Though the short-run prognosis is for lobbying and logrolling, with district interests closely identified, the long-run should see decisions made in a relatively formal process of statewide collective bargaining in which district interests will be more submerged and through which district expenditure disparities will be somewhat muted. Where the short-run political contest should be limited to funding and teacher salaries, this long-run collective bargaining process may well assimilate many “non-monetary” issues often involving educational policy presently determined at the local level.

A. *Toward Statewide Collective Bargaining*

School governance is today largely a local matter. While public education is in virtually all states the constitutional responsibility of the state legislature⁵³ and school districts are merely “creatures” of the state,⁵⁴ local boards of education are commonly regarded as institutions of local government.⁵⁵ No matter how detailed state statutory

53. See generally E. BOLMEIER, *SCHOOL IN THE LEGAL STRUCTURE* 63-77 (1968); N. EDWARDS, *THE COURTS AND THE PUBLIC SCHOOLS* 27-46 (1971).

54. See, e.g., *Lanza v. Wagner*, 11 N.Y.2d 317, 326, 183 N.E.2d 670, 675 (1962), characterizing local school districts and school boards as state agents “separate and distinct from the city, created by the State for the purpose of carrying out a purely state function” In practice, however, school boards are generally perceived as units of local government, and this ambiguity, often complicated by unclear “home rule” provisions, can result in complex legal-conceptual struggles among the city government, the school district, and the state legislature on a wide variety of school matters. See, e.g., *Board of Educ. v. Town of Ellington*, 151 Conn. 1, 193 A.2d 466 (1963); *Lanza v. Wagner*, 11 N.Y.2d 317, 183 N.E.2d 670 (1962); *Blue v. Stockton*, 355 P.2d 395 (Alaska 1960). See also Goldstein, *The Scope and Sources of School Board Authority to Regulate Student Conduct and Status: A Nonconstitutional Analysis*, 117 U. PA. L. REV. 373, 376-77 (1969). See generally E. REUTTER & R. HAMILTON, *THE LAW OF PUBLIC EDUCATION* 107-27, 223-44 (1970); N. EDWARDS, *THE COURTS AND THE PUBLIC SCHOOLS* 54-142 (1971).

55. For discussion of the local politics of education, see, e.g., L. IANNACONE, *POLITICS IN EDUCATION* 82-98 (1967); R. BENDINER, *THE POLITICS OF SCHOOLS: A CRISIS IN SELF-GOVERNMENT* (1969).

and administrative regulation,⁵⁶ the local board of education is still the basic unit of educational policy-making and administration.⁵⁷ Most notably, the major decisions on how much to spend for education are made locally—usually by the school board though often with the approval of other municipal institutions or the electorate.⁵⁸

It is therefore hardly surprising that teacher organizations—though often involved in statewide lobbying—have concentrated their bargaining efforts at the local level. Most states require or permit local boards to engage in relatively formal bargaining with local teacher organizations.⁵⁹ In some states, the organizations may only submit proposals or “meet and confer”⁶⁰ with the boards; in others (including several of the largest and most industrial states) the board is legally obliged, more or less like private employers under the National Labor Relations Act, to “bargain in good faith.”⁶¹ Teachers typically choose their represen-

56. Virtually all states have created state agencies to tend to the state's interests in education as defined by Statute. *See, e.g.*, N.Y. EDUC. LAW § 101 (McKinney 1969). Sometimes the state constitution itself describes the state board. *E.g.*, MICH. CONST., art. 8, § 3. *See generally* E. REUTTER & R. HAMILTON, *THE LAW OF PUBLIC EDUCATION* 61-106 (1970).

57. Pursuant, typically, to broad authorizing legislation, *e.g.*, CONN. GEN. STAT. REV. § 10-220 (Supp. 1969), local school boards exercise wide discretion in hiring, firing, and evaluating personnel, regulating students and teachers, setting curricular policy, and so forth. For cases illustrating the scope of local board authority, *see generally* E. REUTTER & R. HAMILTON, *THE LAW OF PUBLIC EDUCATION* 107-65 (1970).

58. For a more than typically realistic sense of the varying degrees of school board fiscal dependence or independence and the political dynamics of the budgetary process, *see* H. JAMES, J. THOMAS & H. DYCK, *WEALTH, EXPENDITURES AND DECISION-MAKING FOR EDUCATION* 143-77 (1963). *See also* R. GARVUE, *MODERN PUBLIC SCHOOL FINANCE* 27-65 (1969); James, Kelly & Garmis, *The School Budget Process in Large Cities*, in *GOVERNING EDUCATION* 314-41 (A. Rosenthal ed. 1969).

59. All but thirteen states (Alabama, Arizona, Arkansas, Colorado, Louisiana, Mississippi, Ohio, North Carolina, South Carolina, Tennessee, Texas, West Virginia, and Wyoming) expressly permit or require some form of consultation between local school boards and teacher organizations. *See* GOV'T EMP. REL. REP. Reference File, 51: 501-21 (March, 1972). Usually the authority is statutory. *See, e.g.*, 8 DEL. CODE ANN. 14 § 4001 *et seq.* (Supp. 1970); PA. STAT. ANN. 43 § 1101.101 *et seq.* (West Supp. 1972). In other states authority is by judicial decision. *See, e.g.*, Chicago Div. of Ill. Educ. Ass'n v. Bd. of Educ., 76 Ill. App. 2d 456, 222 N.E.2d 243 (1966); State Bd. of Regents v. United Packing House Workers, 175 N.W.2d 110 (Iowa 1970). In addition, collective bargaining may be ongoing in some of the thirteen states listed above either unofficially or as a result of local ordinance. For example, Dayton, Ohio passed city ordinances in April 1972 which permitted such negotiations. *See* GOV'T EMP. REL. REP. No. 452 (May 15, 1972), B-3.

60. *See, e.g.*, CAL. EDUC. CODE § 13085 (West Supp. 1972); 6 KAN. STAT. ANN. § 75-4327 (1971 Supp.); ORE. REV. STAT. §§ 342.440, 342.460 (1971). *See* note 61 *infra*.

61. Alaska, Connecticut, Delaware, Hawaii, Idaho, Maine, Maryland, Massachusetts, Michigan, Minnesota, Montana, Nevada, New Hampshire, New Jersey, New York, North Dakota, Oklahoma, Pennsylvania, Rhode Island, South Dakota, Vermont, Washington, Wisconsin. *See* GOV'T EMP. REL. REP. Reference File, 51: 501-21 (1972). The recent Minnesota Public Employment Labor Relations statute is typical of this kind:

A public employer has an obligation to meet and negotiate in good faith with the exclusive representative of the public employees in an appropriate unit regarding grievance procedures and the terms and conditions of employment, but such obligation does not compel the public employer or its representative to agree to a proposal or require the making of a concession.
MINN. STAT. ANN. § 179.66(2) (West Supp. 1972). A few states distinguish the mandatory duty to “negotiate in good faith” certain subjects from the duty to “meet and confer” about others. *See, e.g.*, 13 ME. REV. STAT. ANN. tit. 26, § 965 (West Supp. 1972).

tative organization from an affiliate of either the National Education Association (NEA) or American Federation of Teachers (AFT),⁶² and in most states the chosen union is the exclusive bargaining representative for all teachers in the district.⁶³ The subjects of bargaining include not only teacher salaries and benefits, but a wide range of other matters that directly or indirectly affect teachers as well;⁶⁴ the fine line between bargainable "terms and conditions of employment" and non-bargainable "matters of educational policy" is very clouded and increasingly litigated.⁶⁵ If the teachers and the board fail to agree on a contract, various devices including mediation and arbitration are available to break the impasse, though compulsory provisions for binding arbitration are rare.⁶⁶ Finally, although teacher strikes are illegal in

62. See notes 72-74, 77 *infra*.

63. California is now the major exception to this general pattern among the states which permit formal teacher bargaining. CAL. ANN. EDUC. CODE § 13085 (West Supp. 1972) provides for proportional representation on a "negotiating council," in districts where teachers are represented by more than one organization. Both Minnesota and Oregon, states which tried the proportional representation model, have recently amended their statutes to provide for exclusive recognition. See MINN. STAT. ANN. § 179.67 (West Supp. 1972), repealing § 125.22; ORE. REV. STAT. § 342.460(5) (1971). In Wisconsin, exclusive representation, though commonly practiced, was officially established by decision of the state's supreme court. Board of School Directors of Milwaukee v. WERC, 42 Wis. 2d 637, 168 N.W.2d 92 (1969). See also H. WELLINGTON & R. WINTER, THE UNIONS AND THE CITIES 91-93 (1971).

64. See note 104 *infra*. Most statutes do not describe the subjects of bargaining beyond the phrase "wages, hours, and other terms and conditions of employment." See, e.g., MICH. COMP. LAWS § 423.215 (West 1967). Interpretation of the phrase falls to the respective state labor board, the courts, and often for want of legal challenge, simply to the parties themselves on the basis of their respective bargaining power. Subjects commonly found in collective agreements include, in addition to compensation scales, the school calendar and length of the school day, duty-free periods for lunch or preparation, attendance at off-hour school functions, secretarial duties (e.g., attendance rolls), transfer and promotion procedures, job evaluation, special leave provisions, teacher security, student discipline policy, class-size limitations, use of school facilities for union meetings or posting of union news, dues check-off, access to personnel files, and may range to personal comforts such as a teachers' lounge, cafeteria, or parking space. Compare the contract of the Aurora, Colorado, Education Association, GOV'T EMP. REL. REP., No. 377 (Nov. 30, 1970) 145, with that of the UFT of New York City, GOV'T EMP. REL. REP. Reference File, 81: 1581 (1972). See also NEA RESEARCH BULLETIN 106 (Dec. 1970), stating that 172 collective agreements, or approximately eighteen percent of all agreements, provided for teacher review of curriculum. See generally ABA COMM. ON STATE LABOR LAW—1969-70, as reported in GOV'T EMP. REL. REP. Reference File 61: 201, 202-03 (1972).

65. See notes 64 *supra* and 104 *infra*. See, e.g., Joint School Dist. No. 8, City of Madison v. WERB, 37 Wis. 2d 483, 494-95, 155 N.W.2d 78, 83-84 (1967) (school calendar is "negotiable"); Board of Educ. v. Associated Teachers, 30 N.Y.2d 122, 331 N.Y.S.2d 17, 282 N.E.2d 109 (1972) (job related personal property damage reimbursement, partial tuition repayments for approved graduate courses, retirement monetary award, and the submission to binding arbitration of disputes concerning continued qualification of a tenured teacher, all "terms and conditions of employment" under Taylor Law). See also H. WELLINGTON & R. WINTER, THE UNIONS AND THE CITIES 137-42 (1971).

66. Nevada seems to be the only state with a statute that not only permits the parties to agree to a binding fact-finding process, but also gives the governor authority, at the request of either party, before submission to the fact-finder to order that his recommendations be binding. See GOV'T EMP. REL. REP., No. 468 (Sept. 4, 1972) B-12 for the first results under this amendment and a discussion of problems raised by the procedure. A few states expressly permit the parties to agree to a binding impasse

almost all states,⁶⁷ they have recently become fairly common.⁶⁸

If *Rodriguez* is affirmed, the attention of the teacher organizations should shift to the state level. This shift will not necessarily be swift or unqualified. Even if expenditures were equalized throughout the state, teacher organizations in some districts might continue to concentrate their efforts locally, seeking a favorable allocation of dispersed state funds between teacher compensation and other educational costs. If, as we shall discuss later, wealthy districts succeed in shifting some of their school costs to other public budgets,⁶⁹ local bargaining may prove attractive in such districts. Under power equalization, unions would maintain local pressures on each district for higher tax rates, and unions in districts relatively amenable to high rates may well prefer this finance system to full state funding, where the union might confront a more frugal state legislature.

But the overwhelming trend should be toward action at the state level. The allocation of a district's education budget between teacher and non-teacher expenses is difficult to manipulate, and expenditure cutbacks on other items would adversely affect teacher working conditions.⁷⁰ Shifts from school to non-school budgets will have to be checked by the courts.⁷¹ Under full state funding, therefore, a local union will probably gain more by working at the state level to increase the district's total disbursement, than by fighting with local authorities over the intra-district allocation of funds.

Under power equalization, the state will establish the tax rate-expenditure schedule, and determine the extent to which it should be adjusted for district cost differences or categorical needs. While limited fiscal discretion will be left to districts, even powerful and mature teacher organizations will find it difficult to influence this discretion

procedure though usually reserving final approval of "cost issues" to a legislative body. See, e.g., HAWAII REV. STAT. § 89-11 (Supp. 1971); ME. REV. STAT. ANN. tit. 26, § 965 (West Supp. 1972); Providence Teachers Union v. School Comm. of City of Providence, 276 A.2d 762 (R.I. 1971). Cf. N.Y. CIV. SERV. LAW § 209 (McKinney Supp. 1972) (legislative body to resolve dispute if other stages of procedure fail to resolve dispute); Kheel, *The Taylor Law: A Critical Examination of its Virtues and Defects*, 20 SYRACUSE L. REV. 181 (1968).

67. Hawaii and Pennsylvania expressly grant teachers (and other public employees) a limited right to strike. See HAWAII REV. STAT. § 89-12 (Supp. 1971); PA. STAT. ANN. tit. 43, § 1101.1003 (Purdon's Supp. 1972).

68. The greatest number of teachers' strikes, at least 181, occurred in 1969-70. Compare GOV'T EMP. REL. REP. No. 459 (July 3, 1972), B-21 (setting the figure at 181), with H. WELLINGTON & R. WINTER, *THE UNIONS AND THE CITIES* 216 (setting the figure at 230 on the basis of Bureau of Labor statistics). Teacher strikes declined significantly, to 89, in 1971-72, probably because of the combined effect of the wage-price freeze, bond referenda defeats, and the increased supply of teachers. See GOV'T EMP. REL. REP. No. 459 (July 3, 1972), B-21.

69. See pp. 445-46 *infra*.

70. See p. 418 *supra*.

71. See pp. 445-46 *infra*.

toward higher expenditures in "rich" districts which will face unattractive tax rate-expenditure trade-offs under power equalization. Such unions will probably quickly concentrate their efforts at the state level to replace power equalization with full state funding and to achieve as generous district expenditure disparities as the courts will allow.

Of course, while collective bargaining has been primarily a local phenomenon, teacher organizations have not been inactive in the past at the state level. The NEA, by far the largest teacher organization,⁷² was in the business of lobbying at the state level long before it began local collective bargaining.⁷³ And the AFT, the Avis of teacher organizations,⁷⁴ while perhaps better known for its local efforts, has been increasingly active at the state level in recent years and is currently preparing major state lobbying efforts in New York and elsewhere.⁷⁵ These organizations lobby for favorable collective bargaining legislation, and favorable direct action on all terms and conditions of employment, even those subject to local bargaining, once lobbying at the state level proves more successful than local bargaining.⁷⁶

In a post-Rodriguez future, union activity at the state level should be transformed by two related developments: The various organiza-

72. As of May 31, 1971, the NEA had a national membership of 1,103,485 and was working for unification with all of its state affiliates which would bring its total number to 1,726,751. (Approximately seventy-five percent of all instructional staff.) NEA HANDBOOK, 1971-72, at 372, 376 (1972).

73. See note 18 *supra*. Along with its state affiliates, the NEA has elaborate mechanisms for focusing and enlisting support for educational legislation, rating legislators, and publicizing their evaluations. See M. MOSKOW, V. LOEWENBERG & E. KOZIARA, COLLECTIVE BARGAINING IN PUBLIC EMPLOYMENT 137-38 (1970). The first state laws providing for teacher collective bargaining (California, Connecticut, Oregon) were themselves largely the result of NEA pressures. E. SHILS & C. WHITTIER, TEACHERS, ADMINISTRATORS, AND COLLECTIVE BARGAINING 27 (1968).

74. As of May 31, 1972, AFT membership totaled 261,506 according to their headquarters in Washington, D.C.

75. New York City's UFT is collecting \$10 from each of its members to deal with "problems at the Albany level," since Albert Shanker has decided that "what we won can still be lost and that what we struggle to gain in our contract can be nullified through the political process in City Hall, Albany and Washington, D.C." The United Teacher, April 23, 1972 at 15.

76. For a general description of various kinds of lobbying tactics used by public employee organizations see M. MOSKOW, J. LOEWENBERG, & E. KOZIARA, COLLECTIVE BARGAINING IN PUBLIC EMPLOYMENT 266-69 (1970). During the 1960's teacher organizations often applied pressures and sanctions commonly associated with collective bargaining in situations that were more akin to "lobbying." For example, the statewide strike by Utah teachers in 1964 occurred because the governor refused to accept recommendations from a committee he had appointed under pressure from the NEA state lobby. In the months following, the teachers' interest groups succeeded in helping to elect a more favorably inclined governor and in drawing an additional \$26.4 million from the state legislature. See M. MOSKOW, TEACHERS AND UNIONS 180 (1966). See also E. SHILS & C. WHITTIER, TEACHERS, ADMINISTRATORS AND COLLECTIVE BARGAINING 47-91 (1968). See also Cass, *Politics and Education in the Sunshine State—the Florida Story*, in THE COLLECTIVE DILEMMA: NEGOTIATIONS IN EDUCATION 152 (P. Carlton & H. Goodwin eds. 1969).

tions will cooperate much more closely with each other to present a united front to the legislature, and the unions will press—probably successfully—for some form of statewide collective bargaining.

For inter-union cooperation, the immediate aftermath of *Rodriguez* will undoubtedly pose difficulties. Union locals from high- and low-spending districts will have conflicting interests, and suburban and urban interests will be divided over which types of expenditure disparities should be allowed. The conflict may split to some extent on NEA-AFT lines, since the AFT often represents teachers in the state's larger cities, while the NEA represents those in the suburban and rural areas.⁷⁷ Nevertheless, the obvious advantages of union cooperation should overcome these conflicts. All organizations will agree that total state revenues for education should be increased and that a united front is necessary to overcome legislative opposition from urban and suburban residents adversely affected by the tax consequences of full state funding or power equalization.⁷⁸ Once the unions realize that post-*Rodriguez* reforms have drained local collective bargaining of almost all of its fiscal importance, the impulse toward labor movement retrenchment and unification should prove overwhelming.

In many states, the result may be formal merger of the state AFT and NEA. To some extent, the likelihood of merger is dependent on the relative membership of each organization, with merger becoming more likely as they approach approximately equal strength. But even where the AFT is a small minority,⁷⁹ both organizations will have incentives to merge. Where the AFT realistically believes itself bound to permanent minority status and perceives that local majority status is unimportant given the demise of local bargaining, it may be attracted to merger. The NEA, even where it has a statewide majority, may welcome the opportunity to combine forces and cease destructive rivalry. The short-run may well see bitter inter-union rivalry in some

77. While the AFT has only about 250,000 members compared to approximately 1.7 million affiliated with the NEA, AFT locals are powerful, possessing exclusive representation rights in such major cities as Boston, New York City, Philadelphia, Pittsburgh, Baltimore, Cleveland, Detroit, Chicago, and Kansas City. (Source: List of Locals—AFT Headquarters, Washington, D.C.) The NEA has derived most of its large membership from its state associations, which can act independently of the national association and until recently have been much less organized for the purposes of collective bargaining than the AFT. See M. MOSKOW, J. LOEWENBERG & E. KOZIARA, *COLLECTIVE BARGAINING IN PUBLIC EMPLOYMENT* 135-41 (1970).

78. See pp. 418-22. Rural areas may also oppose revenue increases. Even though they would be substantially advantaged on the expenditure side by an equal per pupil distribution formula, their property tax rates (which are typically very low ones) would increase very substantially to raise even the same total statewide revenue as is now raised (that is, even without any revenue increase). See URBAN INSTITUTE, *PUBLIC SCHOOL FINANCE: PRESENT DISPARITIES AND FISCAL ALTERNATIVES* 56-58, 130 (1972).

79. See notes 72, 74, 77 *supra*.

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states, but it is difficult to believe that the unions will fail in the long-run to see that their common interests outweigh their differences.⁸⁰

Moreover, the ideological differences which have traditionally separated the NEA and AFT have become less important since the NEA abandoned its no-strike policy in 1966.⁸¹ There have already been mergers in some places, most notably in Los Angeles, New Orleans, and New York State,⁸² where the parties hoped to establish a "joint lobbying effort in the State legislature [and to] fuse . . . political action programs for the 1972 primary and general elections."⁸³ As New York City AFT President Shanker put it, "[T]eachers who had pinned their hopes for progress on gains that were being made at the bargaining table now see these gains being wiped out in the political arena."⁸⁴

The unions will also realize that their strike threat will be potentially much more influential after merger and centralization.⁸⁵ Strikes will probably continue to be illegal in most states, but the prohibition should prove no more effective than it is now.⁸⁶ A statewide strike would, of course, be an awesome weapon, and a centralized union would still retain the option of calling selective local strikes, even when the dispute concerned the entire state, to pressure strategic legis-

80. For a prediction of the effects of a possible NEA-AFT merger on teacher militancy—concluding that it would "simultaneously encourage some tendencies toward greater teacher militancy and some toward less militancy"—see Lieberman, *Implications of the Coming NEA-AFT Merger*, in *THE COLLECTIVE DILEMMA: NEGOTIATIONS IN EDUCATION* 44 (P. Carlton & H. Goodwin eds. 1969).

81. Besides the conflict in ideas over the strike issue, two other major ideological differences have traditionally separated the NEA from the AFT. First, partly because of its loose organization among local state affiliates and national headquarters and partly because of its "professional" orientation, the NEA has always included administrators as well as teachers in its membership. With the increase in formal negotiations across the country, however, and the retraction of the "no-strike" policy, it has already proved impractical for administrators in most instances to straddle the fence dividing labor from management. Second, the NEA has always disapproved the alliance between the AFT and the AFL-CIO, and this issue remains an obstacle in current discussions about mergers and merger possibilities. See *Gov't EMP. REL. REP. No. 459* (July 3, 1972), B-18, for the most recent NEA Convention's stand on this issue and see *Gov't EMP. REL. REP. No. 467* (August 28, 1972), B-10, for the AFT's response. See also Moskow & Doherty, *United States*, in *TEACHER UNIONS AND ASSOCIATIONS: A COMPARATIVE STUDY* 295, 298-306 (A. Blum ed. 1969); Lieberman, *Implications of the Coming NEA-AFT Merger*, in *THE COLLECTIVE DILEMMA: NEGOTIATIONS IN EDUCATION* 44 (P. Carlton & H. Goodwin eds. 1969).

82. See *Gov't EMP. REL. REP. No. 456* (June 12, 1972), B-14 (New York); *Gov't EMP. REL. REP. No. 453* (May 22, 1972), B-13 (New Orleans); *Gov't EMP. REL. REP. No. 451* (May 8, 1972), B-23 (Los Angeles); *Gov't EMP. REL. REP. No. 319* (Oct. 20, 1969), B-12 (Flint, Michigan).

83. *The United Teacher*, April 9, 1972, at 2, col. 1.

84. Shanker, *Where We Stand—The Legislative Session: A Gang-Up Against Teachers*, *N.Y. Times*, June 6, 1971, § 4, at 11, col. 6.

85. Coordinating and securing participation of all locals in a statewide strike may prove difficult at first, but the increased coordination brought by centralization will probably overcome this problem, and even a partially effective statewide strike would be a major disruption.

86. See notes 67 & 68 *supra*.

lators or to maintain a strike fund through the contributions of non-striking members.

The advantages of formal collective bargaining for the teachers are also clear. First, bargaining provides a formal process for lobbying, increasing both the visibility and legitimacy of teacher demands. Bargaining forces public officials to take teacher organizations seriously, and, perhaps more importantly, makes teachers more likely to support their own organization.⁸⁷ Provisions for exclusive representation have similar effects.⁸⁸ Requiring that the government "bargain in good faith" forces public officials at least to discuss issues they would prefer to ignore.⁸⁹ Mediation gives the bargaining process, and teacher organizations, a legitimacy lacking in mere lobbying, as it implies that the government *should* compromise with teachers, while resistance to lobbying is often viewed as virtuous. A mediator's recommendations help condition public opinion and structure subsequent attempts to break the impasse, whether through bargaining or an appeal to some different governmental institution.⁹⁰ Finally, the existence of a contract for a

87. See A. ROSENTHAL, *PEDAGOGUES AND POWER* 154-73 (1969), for a comparison of teacher unions in New York, Boston, Chicago, and San Francisco which suggests a positive relationship between the degree of collective bargaining and both the teachers' perception of their own strength as a group and their achievement of success over specific issues.

Indeed, the rise of the UFT in New York City can stand as a paradigm of how membership and power coalesced rapidly when specific bread-and-butter issues affecting the daily life of the individual teacher in the classroom became sharply outlined against a concrete demand for a collective bargaining structure. This was apparent during the period 1960-1962 when union leadership was willing to strike. See S. COLE, *THE UNIONIZATION OF TEACHERS* 19-21, 164-70 (1969).

88. Competition for exclusive representation rights between the NEA and the AFT during the sixties was an important factor in shaping the policies and strategies of the two organizations and resulted in membership gains for both, though with greater percentage gains in the AFT. See Muir, *The Tough New Teacher*, in *THE COLLECTIVE DILEMMA: NEGOTIATIONS IN EDUCATION* 34, 43 (P. Carlton & H. Goodwin eds. 1969). Exclusive representation obviously greatly reinforces this competition at the local level, and it also seems more likely to result in gaining the interest and organizational support from the national union. See R. BRAUN, *TEACHERS AND POWER* 87-124 (1972) for a disapproving description of AFT organizational practices. See Gov't EMP. REL. REP. No. 467 (August 28, 1972), B-16, at B-17 as an illustration of how the AFT leadership views the importance of legislation granting exclusive representation for spurring membership. See note 98 *infra*.

89. Even though the statutes mandating good-faith bargaining often expressly state that concessions on any matter are not thereby required, we know perfectly well that there are many "concessions"—that is, that the collective agreement is generally "negotiated" not mandated by the school board. Further, school boards may justifiably fear that a decision not to move on a particular issue and an ensuing unilateral implementation will risk an expensive and divisive challenge as a "refusal to bargain." See generally Seitz, *School Board Authority and the Right of Public School Teachers to Negotiate—A Legal Analysis*, 22 *VAND. L. REV.* 239 (1969).

90. New York's Taylor Law, for example, empowers the state Public Employment Relations Board to determine that an impasse exists in collective negotiations and to appoint a mediator to assist the parties and a fact-finding board to make public recommendations. If this stage fails, the board itself has power to make recommendations and authorize voluntary arbitration and ultimately a legislative committee may be called

fixed term—whatever its precise legal status⁹¹—shelters teachers from temporary fluctuations in public opinion.

This unification of teacher organizations at the state level and state-wide collective bargaining should reduce political pressure for large district expenditure disparities. The AFT and NEA, in competition for statewide power, will probably attempt to organize teachers in currently non-union, low-spending districts and—given that *Rodriguez* will increase the salary expectations of teachers in such districts—the gesture will probably prove successful.⁹² Moreover, their increasing sense of state organizational unity will inevitably lead teachers throughout the state to view themselves more and more as similarly situated. Such statewide unity is inconsistent with union pressure for district expenditure disparities. Moreover, the demise of local bargaining will itself remove one cause of teacher salary differentials, district differences in union power.⁹³ Finally, a strong state union might be able to increase total state educational expenditures, thus diminishing pressure for district disparities.

This is not to say that statewide collective bargaining would end all such disparities. As long as local districts remain, teachers will identify themselves somewhat with local interests, and non-teacher interests will still press for some disparities. But the collective bargaining process should mute district differences, and the collective agreement may itself prove useful in clothing those disparities which are granted in

upon to make a final decision. N.Y. CIV. SERV. LAW § 209 (McKinney Supp. 1972). While this section has not been too successful in preventing strikes and the mediation and fact-finding mechanisms are sometimes bypassed, a 1969 survey disclosed that out of approximately 400 requests for mediation and fact-finding only about fifty were unsuccessful in bringing about a settlement. See Doering, *Impasse Issues in Teacher Disputes Submitted to Fact Finding In New York*, 27 ARBITRATION J. 1 (1972). But cf. Kheel, *The Taylor Law: A Critical Examination of Its Virtues and Defects*, 20 SYR. L. REV. 181, 185-89 (1968) reciting the failure of mediation machinery in "difficult" cases and the increase of exacerbation between the parties as result.

91. See, e.g., the budgetary cutback protection discussed in note 104 *infra*. In some instances, courts have found the existence of a written contract for a definite term to be critical to disputes between school boards and teachers. See, e.g., *Providence Teachers Union v. School Comm. of City of Providence*, 276 A.2d 762 (R.I. 1971). See also, *Norton Teachers Ass'n v. Town of Norton*, 279 N.E.2d 659 (Mass. 1972) (contract held enforceable and board required to pay teachers' salary increases out of a blanket education appropriation large enough to cover the contract but not large enough to cover both the teachers' contract and other parts of board's proposed budget); *Board of Education of Huntington v. Associated Teachers of Huntington*, 30 N.Y.2d 122, 331 N.Y.S.2d 17, 282 N.E.2d 109 (1972) (following recommendations of fact-finders, school board signed agreement but brought suit questioning its own authority to bind itself to certain provisions; court finds all provisions valid). But see *Board of Educ. of Scottsdale v. Scottsdale Educ. Ass'n*, 498 P.2d 578 (Ariz. Ct. App. 1972) (board of education held without authority to enter into collective bargaining agreements and contract declared void).

92. Cf. note 88 *supra*.

93. See pp. 451-53 *infra*.

judicially acceptable garb. A statewide union will almost certainly press for a statewide salary schedule. Just as union politics will prevent the organization from offering a schedule which includes extreme district salary differentials, those differentials which are maintained will be justified in terms which will strike the entire membership as "fair": e.g., that the "cost of living" varies between districts, or that certain districts have particularly difficult working conditions. If accepted by the state, such disparities should pass judicial scrutiny, as they will appear, and will to some extent be based, on genuine district differences in the "costs of teacher services."⁹⁴ Moreover, the courts may be loathe to undo the result of presumably arduous and arms-length bargaining, although it is not inconceivable that they would impose on the union a "duty of fair representation," which might afford some protection against clear discrimination for teachers in disfavored districts.⁹⁵ In general, though, the state may find the collective agreement a useful vehicle for "validating" district disparities demanded by various non-teacher interests.

B. *The Shape of Collective Bargaining.*

1. *The Bargaining Representatives*

The statewide bargaining agent for teachers could be based either on exclusive or some form of multi-union representation. Multi-union representation could be achieved through a statewide election, with each union's membership on the negotiating team based on the pro-

94. See pp. 449-50 *infra*.

95. While the duty of fair representation originated in response to racial discrimination, *Steele v. Louisville & Nashville R.R.*, 323 U.S. 192 (1944), it has been extended to include economic discrimination as well. See *Ford Motor Co. v. Huffman*, 345 U.S. 330 (1953); *Vaca v. Sipes*, 386 U.S. 171 (1967). Although the duty of fair representation is the product of the Court's interpretation of the Railway Labor Act and Labor-Management Relations Act, it derives from general common law fiduciary principles, 323 U.S. 192, 202, and the Court has indicated that it may have a constitutional basis, *id.* at 198-99. The union is obligated "to serve the interests of all members without hostility or discrimination toward any, to exercise its discretion with complete good faith and honesty, and to avoid arbitrary conduct." *Vaca v. Sipes*, 386 U.S. 171, 177 (1967). Assuming that the duty of fair representation were made applicable to statewide teacher unions, local teachers disfavored by a state negotiated agreement would have to persuade the courts that the salary differentials were motivated by "bad faith," not by genuine cost differences or educational priority choices, and the measurement and proof problems here would be comparable to those under *Rodriguez*-based constitutional attacks on distribution formulas. See pp. 451-53. For discussions of the duty of fair representation, see H. WELLINGTON, *LABOR AND THE LEGAL PROCESS* 145-75 (1968); Summers, *Collective Power and Individual Rights in the Collective Agreement—A Comparison of Swedish and American Law*, 72 *YALE L.J.* 421, 434 (1963); Jacobs & Winter, *Antitrust Principles and Collective Bargaining by Athletes: Of Superstars in Peonage*, 81 *YALE L.J.* 1, 19 (1971).

portion of votes it receives, or through some federated system, with existing locals designating representatives to a state team.

The form of representation is likely to depend largely on the degree of NEA-AFT and inter-local rivalry. Exclusive representation will probably be preferred by most non-teacher interests, because it is familiar and appears more stable and efficient.⁹⁶ Perhaps the AFT would favor multi-union representation, since its membership is so much smaller than the NEA's, although this would not be entirely consistent with its traditional position.⁹⁷ Multi-union representation will certainly appeal to local unions skeptical that the state organization will represent their interests. We have argued, however, that inter-union tensions will diminish in the long run. NEA-AFT mergers will likely lead to exclusive representation; and exclusive representation may encourage merger, or may, in the long run, virtually eliminate either the state NEA or AFT.⁹⁸ In either case, the long-run prospect is "one big union" representing at the state level all teachers in the state.

The state will likely be represented by a legislative committee, an agent of the governor, a state administrative agency (probably the state education department), or some combination of the three.⁹⁹ Even if the legislature retains the legal authority to review and revise a negotiated agreement, the choice of state bargaining representative is critical. The negotiated agreement will structure subsequent legislative proceedings, and the bargaining representative will itself affect the political situation and the likelihood of legislative approval.¹⁰⁰

Healthy labor relations are best served if the negotiated agreement carries some presumption of validity, since this avoids the strife which

96. See note 63 *supra*. See E. SHILS & C. WHITTIER, *TEACHERS, ADMINISTRATORS, AND COLLECTIVE BARGAINING* 239-41 (1968); H. WELLINGTON & R. WINTER, *THE UNIONS AND THE CITIES* 91-93 (1971); M. MOSKOW, J. LOEWENBERG & E. KOZIARA, *COLLECTIVE BARGAINING IN PUBLIC EMPLOYMENT* 231-33 (1970).

97. See M. MOSKOW, *TEACHERS AND UNIONS* 130-31 (1966).

98. Exclusive representation would probably result in increased NEA-AFT organizational efforts. See note 88 *supra*. If, as a consequence, the state membership of each approached equality, merger would probably follow. If the AFT remained a small minority, it might eventually "go out of business" in the state. Either of these outcomes will lead to "one big state union" and, consequently, either is consistent with the predictions in the text.

99. In Hawaii, the only state that presently has state level bargaining with teachers, the statutory negotiating team consists of two members from the elected State Board of Education and at least three representatives selected by the governor's office. 2 HAWAII REV. STAT. § 89-6 (b) (Supp. 1971). During the first and only experience with bargaining under this statute the governor's representatives were all from the staff of the Department of Education, although the governor himself participated in the final settlement. See GOV'T EMP. REL. REP. No. 441 (Feb. 28, 1972), B-14.

100. Pre-legislative negotiations with the governor's office, for example, rather obviously will result in a different political configuration than if negotiations are conducted with a legislative committee or state education board.

accompanies defeated expectations and saves all parties considerable time and energy. The state's bargaining representative should therefore be technically competent and politically realistic. But other considerations will also bear on the selection. The legislature may wish to diffuse political responsibility and avoid becoming the focal point of the process.¹⁰¹ Teacher organizations may prefer, as public employee unions now sometimes do, a process in which they can pit one political actor against another.¹⁰² To specify more precisely which institution should represent the state in bargaining, we would have to know the subjects of bargaining and the nature and extent of legislative review of negotiated agreements. On both issues we can only speculate.

2. *The Subjects of Bargaining*

To the extent that "non-salary" items become subjects of state bargaining, the centralization of finance must lead to some centralization of general educational policy. At first, most formal "bargaining" may be local with state union activity focusing on total revenue decisions and distribution formulas. Even at this point, however, the state teacher organizations may press for a relatively formal process to enable them to present and discuss, in connection with every education appropriations bill, data on revenue projections, cost differences, competing wage scales, and the like. And as statewide bargaining on salaries develops, there may well be increasing pressure for discussing other items now bargained locally and some that are not now subjects of bargaining at all.

Several issues that teachers, with increasing frequency, bargain about locally are tied to revenue considerations, and these issues should follow other revenue decisions to the state level. While fringe benefits are an obvious case, such matters as teaching loads, class size, and the school calendar also have clear revenue implications. Local bargaining on these matters will therefore prove relatively ineffective after the basic revenue decision is shifted to the state.¹⁰³ Curricular and program choices, though often also involving "money" issues, have not traditionally played a major role in local bargaining, but teacher organiza-

101. In Illinois, for example, the legislature's desire to eliminate education as a source of political conflict led to the establishment of a state commission which was expected to keep proposals from the legislature until dissent had been silenced or neutralized. See L. IANNACCONE, *POLITICS IN EDUCATION* (1967).

102. Cf. M. LIEBERMAN & M. MOSKOW, *COLLECTIVE NEGOTIATIONS FOR TEACHERS* 266-67 (1966).

103. See pp. 426-27 *supra*.

tions are beginning to press for their inclusion.¹⁰⁴ Such matters seem more likely to be open to negotiation at the state level after equalization than they are presently. As noted above, "program" grants are one solution to the problem of high-spending districts, a solution which drags curriculum indirectly into the revenue debate and thus the collective bargaining process.

As local bargaining becomes less significant, and the state bargaining representative becomes a major spokesman for the "public interest" in matters of education, the lines between subjects of local bargaining, matters of state negotiation, and issues outside the scope of bargaining will probably fade. Again, change may not be dramatic and the process will vary from state to state, but teacher organizations will typically press for state bargaining on subjects on which they believe state authorities will be more pliant than local boards. It is difficult to predict what these subjects will be, but they may include teacher work regulations and evaluation procedures, some questions of student discipline, some curricular and program issues, and possibly some issues of school administration (*e.g.*, the selection and authority of principals).

Local school boards typically resist teacher demands on such issues not because an aroused citizenry demands resistance but rather out of some sense of institutional role, sometimes, probably, under the effective supervision of the local superintendent of schools and his staff¹⁰⁵ and it is not at all clear that state authorities will share these internalized norms. Local boards may resist shifting these issues to state bargaining,

104. For a list of subjects often found in collective agreement, see notes 64 & 65 *supra*. The continuing battle between the union and the board of education (recently involving the decentralized boards as well) over the More Effective Schools program (a compensatory program) is perhaps the sharpest illustration of direct union incursion into policy-making. See A. ROSENTHAL, *PEDAGOGUES AND POWER* 168-71 (1969); H. WELLINGTON & R. WINTER, *THE UNIONS AND THE CITIES* 139-41 (1971). More limited excursions into matters such as mandatory class-size maximums and school disciplinary procedures are more widespread and commonly appear in collective agreements across the country. See, *e.g.*, the 1972 statewide agreement for Hawaii, *GOV'T EMP. REL. REP. NO. 456* (June 12, 1972), X-1 to X-10. Recent teachers' strikes in Pittsburgh (Jan. 1971) and Yonkers, N.Y. (Jan. 1972) clearly keyed on the class-size issue. *N.Y. Times*, Jan. 11, 1971, at 18, col. 5; *N.Y. Times*, Dec. 26, 1971, at 47, col. 6. Budgetary pressures often make class-size and disciplinary provisions important in ways that were not apparent at the time of the board's concession. The New York City class-size provision, for example, was keyed to student registration, not actual attendance, and even though high student absenteeism would have permitted economies in distributing teachers for students in actual attendance, budgetary cuts, therefore, had to be implemented by cutting back on equipment and more vulnerable personnel. See *N.Y. Times*, May 22, 1972, at 11, col. 1. *Cf.* *N.Y. Times*, Nov. 4, 1971, at 51, col. 4.

105. *Cf.* Kerr, *The School Board as an Agency of Legitimation*, and Rosenthal, *Pedagogues and Power*, in *GOVERNING EDUCATION* 137, 291 (A. Rosenthal ed. 1969). R. OWENS, *ORGANIZATIONAL BEHAVIOR IN SCHOOLS* 89-117 (1970); C. Bidwell, *The School as a Formal Organization*, in *HANDBOOK OF ORGANIZATIONS* 972, 1009-12 (J. Marsh ed. 1965).

but they are likely to be considerably weaker politically than the teacher organizations.¹⁰⁶ Once an issue is included in state bargaining, organized teachers will wield substantial power on all but highly visible and controversial issues, not only because the state bargaining representative may lack the internalized norms of local boards, but also because the state may be quick to make "hidden" non-fiscal concessions in order to satisfy public opinion on more controversial revenue matters.¹⁰⁷

3. *The Role of the Legislature in Bargaining and Impasse Resolution*

The state legislature might delegate complete authority to the state bargaining representative to enter into binding agreements, an approach which would require state constitutional amendments to grant the representative taxing and spending powers. At the other extreme, the legislature might regard "bargaining" as merely a preliminary stage of the legislative process, to be followed by a full legislative review of every detail of the "negotiated" agreement. Quite probably the legislature will choose neither of these extremes.

The first would require a fiscally independent state board of education, a major and unlikely innovation. While fiscally independent boards are common locally, this tradition does not exist at the state level. The sheer magnitude of the revenue commitment¹⁰⁸ and the fact that distribution formulas will be important to political subdivisions with lobbying leverage make wholesale delegation of such legislative authority extremely implausible.

However, detailed legislative review of negotiated agreements is also unlikely. Much of the content of a collective agreement is likely to be regarded as appropriate for "administrative" rather than "legislative" resolution, and the legislature will wish to avoid involvement in the details of contract negotiation. Even teacher salary schedules, aside from the revenue commitment they require, seem unlikely subjects for annual or biennial legislation, and regular review of contract matters more unrelated to revenue is even more unlikely. Even with regard to matters delegated for bargaining, though, the legislature will remain a relevant influence.¹⁰⁹

106. The teacher organization has a large and directly affected constituency—the teachers. The school board, by comparison, has no clear constituency unless local public sentiment coalesces behind the board on a particular controversial issue. See L. IANNOCCONE, *POLITICS IN EDUCATION* 29-36 (1967); Kerr, *The School Board as an Agency of Legitimation*, in *GOVERNING EDUCATION* 137, 143-47 (A. Rosenthal ed. 1969).

107. See H. WELLINGTON & R. WINTER, *THE UNIONS AND THE CITIES* 21-24 (1971).

108. See note 45 *supra*.

109. Legislation will establish the scope of bargaining, and while the subjects are likely to be described in very general language, leaving considerable room for both

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For the same reasons that legislatures will not relinquish their review over *revenue* matters, they seem unlikely to establish binding arbitration in the event of a negotiating impasse. While the contract negotiations will structure the legislature's consideration of the impasse, the legislature itself will probably mediate the dispute. On *non-revenue* matters, however, legislatures may permit compulsory arbitration, perceiving these matters as "administrative" rather than "legislative." Even if compulsory arbitration is not decreed, the legislature may be inclined to permit the mediation of non-revenue issues by a non-legislative public or private organization.

C. *The Potential Consequences of Centralized Bargaining*

The danger of increasing the centralization of educational policy is not centralized indoctrination, but rather centralized rigidification. The point is not that our current system of school governance is adequately innovative or responsive, for it surely is not, but rather that centralized bargaining could worsen an already bad situation. The very ease with which the process can encompass new bargaining subjects recommends some degree of scrutiny. We may otherwise not recognize it for what it is, since the rigidity will come through "contract," not statute or regulation.

The increase in teacher union strength which may accompany centralized bargaining exacerbates the problem and also poses a fiscal threat. Public employee collective bargaining in general has been criticized by Professors Wellington and Winter as a distortion of the political process, on the ground that the union's strike capability combined with the relative inelasticity of demand for many public goods and the greater accessibility of the government to public pressure leaves competing interest groups "at a permanent and substantial disadvantage."¹¹⁰ This argument must be qualified somewhat when applied to fiscally independent school districts, where voters have demonstrated by rejecting budget increases that union power can be checked.¹¹¹ Cen-

collective negotiation and judicial interpretation, *see* note 64 *supra*, there will probably be pressure on legislatures to deal with some subjects statutorily, and thus remove them from bargaining.

110. H. WELLINGTON & R. WINTER, *THE UNIONS AND THE CITIES* 29-32 (1971). *Cf.* M. MOSKOW, *TEACHERS AND UNIONS* 86 (1966).

111. In the last few years, voters have with increasing frequency defeated proposed local school budgets, referenda for property tax increases for schools and school bond proposals. Hundreds of newspaper articles throughout the nation have reported the details of local defeats. A mid-1970 New York Times article reported that a "mounting series of defeats for school financial measures across the country in recent months has posed one of the most serious crises many educators can remember . . ." N.Y. Times, May 24, 1970, at 11, col. 5. In 1971, fifty-six percent of bond proposals for ele-

tralization of bargaining may, however, tip the balance even more toward the union.

The increase in teacher organization membership that will probably result from heightened organizational activity and the possibility of "one big union" (either through merger or exclusive representation) suggest state unions which in sheer size and disruption potential would be very powerful indeed. Moreover, full state funding will almost certainly eliminate or attenuate the check of the direct voter veto over fiscal matters. Any significant increase in the number of bargainable issues through their elevation to the state level will tend to increase union power at the same time as it decreases local control, particularly if, as seems likely, legislative review of these matters is minimal. Finally, to the extent that state authorities lack the internalized norms which have tended to stiffen the resistance of local boards to teacher demands, there may be an increased tendency to regard teacher organizations as presumptively correct on educational questions.

This picture of runaway union power may be overdrawn: The tradition of local control, which teachers share, will exert some counter-pressure, and teacher organizations clearly have no great love of school bureaucracy. Local teacher organizations may resent the complete loss of power entailed in shifting all bargaining to the state. State unions, particularly at first, may be too unwieldy to coordinate and sustain effective strikes, and may, in any event, be more fearful of incurring the wrath of the legislature than of local authorities. Other interest groups may arise to counter union power, though only a very few are likely to have an interest as great as the teachers.¹¹² Lastly, the present over-supply of teachers should, if it continues, exert some downward pressure on salaries, at least for beginning and non-tenured staff.¹¹³

mentary and secondary education were defeated, more than twice the rate of defeat in 1960. SECURITIES INDUSTRY ASSOCIATION MUNICIPAL STATISTICAL BULLETIN, Table 4 (1971); INVESTMENT BANKERS ASSOCIATION MUNICIPAL STATISTICAL BULLETIN, Table 10 (1960). See note 68 *supra*.

112. The increased costs of state as compared with local activity may well dampen the formation of effective counter-union groups, although general groups (the NAACP, United Taxpayers, etc.) may act as counterweights. Groups representing local school administrators and maintenance and custodial workers are the only ones that will have direct monetary stakes approaching (though far less in dollar amount) the teacher unions.

113. According to NEA estimates, teacher supply as of the fall of 1971 exceeded teacher demand (nationally) by between some 25,000 to 57,000 teachers at the elementary level, and 39,000 to 47,000 at the secondary level. NEA, TEACHER SUPPLY AND DEMAND IN PUBLIC SCHOOLS, 1971, at 40 (1972). This excess supply, should it continue, will presumably tend to hold down beginning teachers' salaries, since these salaries are not typically of as great concern to unions laden with senior teachers. Its effect on salary levels for tenured teachers is more problematic, however, since replacing striking teachers has not by and large proven educationally or politically feasible. Cf. note 68 *supra*.

III. Doctrinal Accommodations: Inter-district Differences in the Cost of Education

The evolution of statewide collective bargaining should thus help accommodate and at the same time moderate political pressures for inter-district expenditure disparities. The disparities will not necessarily be de minimis, however, nor unrelated to district property values. Would *Rodriguez* permit such an outcome?

The state will undoubtedly argue that having eliminated the dependence of expenditures on district tax bases, there is no longer any "wealth classification" under *Rodriguez*. The claim is at least colorable: Existing finance systems do make expenditures a "function of" wealth in a particularly direct fashion.¹¹⁴ But to the extent that district expenditures correlate with district wealth under post-*Rodriguez* systems, the disparities will obviously not be a *direct* result of variations among district tax bases. Rather, they may result from a finding (by the legislature or through collective bargaining) that the "costs" of educational goods and services are higher in districts that are also relatively wealthy or from a decision to provide special funds for "experimental" programs in specific districts or for children with particular needs or talents who live primarily in "rich" cities and suburbs.

Whether a significant district wealth-expenditure correlation would amount to a "wealth classification" presents an issue in the "de facto-de jure" quagmire,¹¹⁵ a complex set of problems we shall not discuss in any systematic way.¹¹⁶ Specifying and measuring the kind of correlations required will be difficult, and for these reasons, if no other, the

114. A district's wealth base affects its expenditures just as an individual's wealth affects his purchases of goods and services. See note 115, 116 & 117 *infra*.

115. See notes 114 *supra* & 116 & 117 *infra*. *Rodriguez* says nothing pertinent on this question. *Serrano* contains a longer, confusing and unhelpful discussion of the de facto-de jure issue. *Serrano v. Priest*, 5 Cal. 3d 584, 601-04, 487 P.2d 1241, 1252-55, 96 Cal. Rptr. 601, 612-15 (1971).

116. See notes 6 *supra* & 117 *infra*. *Serrano* and *Rodriguez* use the term "wealth" discrimination to describe a system which makes expenditures dependent not on absolute district wealth (e.g., where a district with less than X dollars in assessed value is absolutely prohibited by the state from spending more than Y amount for education) but on rather a district's "ability to pay." See Michelman, *On Protecting the Poor Through the Fourteenth Amendment*, 83 HARV. L. REV. 7, 49-50 (1969); Shanks, *Book Review*, 84 HARV. L. REV. 256,261 (1970). In virtually every case in which the Supreme Court has used wealth discrimination language, the constitutional prohibition was on the state making or permitting the distribution of "fundamental goods" to depend on ability to pay, insofar as those too poor to pay were thereby denied access to the good. See, e.g., *Douglas v. California*, 372 U.S. 353, 355 (1963). But see *Harper v. Virginia State Board of Elections*, 383 U.S. 663, 666 (1966) (voting cannot be conditioned on the payment of any tax or fee, regardless of ability to pay). See also *Askew v. Hargrave*, 401 U.S. 476 (1971), *vacating per curiam*, *Hargrave v. Kirk*, 313 F. Supp. 944 (M.D. Fla. 1970) (involving state imposed tax limit on school district spending, which is arguably more of a wealth than ability to pay classification, since poor districts are legally prohibited from spending as much as rich ones).

courts may refuse to find a wealth classification on the basis of correlations (impact) alone.¹¹⁷

A more likely challenge to continued district wealth-related disparities would be that the state had only "nominally" dismantled or was "perpetuating" an unconstitutional system, and that rich districts were still "buying" better education in the "legislative market." Such a claim would involve the little-understood and related theories of unconstitutional "taint," "motivation," and of "enlarged judicial remedial power."¹¹⁸ If cost differentials were calculated on the basis of expenditure patterns established under the former unconstitutional system, the argument would be that they are "tainted,"¹¹⁹ or, more generally, that tainted cost-differentials combined with a significant wealth-expenditure correlation proves the disparities were "discriminatorily motivated."¹²⁰ Or perhaps the argument will be framed in terms of the remedial power of the court, as in many Southern school desegregation cases where a local board's action is assessed for its efficacy in dismantling a formerly dual system, rather than as a fresh constitutional issue.¹²¹

If the court refuses to listen to both impact and "perpetuation" challenges to new finance systems, and confines *Rodriguez* to expenditure

117. The question is whether a law which has some kind of a "disproportionate wealth impact" is for this reason alone a suspect classification requiring a "compelling state interest" for justification. The answer to this question turns, presumably, on whether the state ought to be constitutionally obligated to go out of its way to protect groups disadvantaged by this impact. Professor Ely has argued that laws having a disproportionate racial impact ought not, for this reason alone, call for a state justification, since a requirement that the government go out of its way to consider race might ultimately be "turned to improper ends" and dilute the courts' moral authority. Ely, *Legislative and Administrative Motivation in Constitutional Law*, 79 YALE L.J. 1205, 1258-59 (1970). He reads the "wealth discrimination" decisions, correctly in my view, as requiring the state to go out of its way to provide fundamental goods to those too poor to pay for them and, on this basis, concludes that by virtue of the very logic of the decisions the unconstitutionality is in the impact alone (*i.e.*, lack of access to the good). *Id.* at 1255. As the notion of "wealth discrimination" is expanded beyond its particular meaning in these cases, however, it becomes very difficult to appraise the "impact alone" question without some clearer understanding than has yet been provided of the normative basis for the broadened wealth discrimination doctrine. We cannot know what impacts are "discriminatory" unless we know what evil we are trying to prevent. See notes 6 & 116 *supra*.

118. See generally A. BICKEL, *THE SUPREME COURT AND THE IDEA OF PROGRESS* 130-32 (1970); Freund, *Constitutional Dilemmas*, 45 B.U.L. REV. 13, 20 (1965); Ely, *Legislative and Administrative Motivation in Constitutional Law*, 79 YALE L.J. 1205, 1289-91 (1970).

119. See, *e.g.*, *Alexander v. Louisiana*, 405 U.S. 625, 631 (1972); *Whitus v. Georgia*, 385 U.S. 545, 550-51 (1967); *Avery v. Georgia*, 345 U.S. 559 (1953).

120. See, *e.g.*, *Gomillion v. Lightfoot*, 364 U.S. 339, 347-48 (1960). Cf. *Epperson v. Arkansas*, 393 U.S. 97, 109 (1968). See also Ely, *Legislative and Administrative Motivation in the Constitutional Law*, 79 YALE L.J. 1205 (1970).

121. See, *e.g.*, *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 18-21, 31-32 (1971); *North Carolina State Board of Education v. Swann*, 402 U.S. 43 (1971); *United States v. Montgomery County Board of Education*, 395 U.S. 225, 236 (1969). This approach rather clearly implies a motivational analysis. See note 118 *supra*.

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disparities that are a direct result of variations in tax bases, post-*Rodriguez* systems based on statewide financing would be substantially immune from constitutional attack. Disparities which could in any way be explained on the basis of cost differences or special program aid should have little trouble surviving the traditional Equal Protection rational relationship test.¹²² In this case, the forces of political accommodation discussed above will virtually determine the impact of the decision on per pupil expenditures.

It seems unlikely, however, that the courts will ignore all such claims, and we shall therefore assume that the courts will be willing to deal with a legislative or bargained continuation of district wealth-correlated expenditure disparities. It does not follow, however, that there can be no political accommodation resulting in wealth-correlated district disparities. First, some disparities may be justified by a "compelling state interest"—a subject we shall discuss only briefly. Second, some disparities will almost certainly be permitted and may even be constitutionally required under *Rodriguez*. These are disparities based on genuine inter-district differences in the "cost" of education.

A. *Education: Tasks v. Achievements*

One cannot sensibly analyze the *costs* of education without defining education.¹²³ We commonly use the word to include both tasks and achievements. Teachers use resources such as their skills, books, and equipment to perform tasks with students which result in a variety of student achievements. However, whether a teacher is "educating" a student depends ultimately on whether the student is achieving.¹²⁴ Thus we cannot sensibly speak of "better" or "worse" education without at least implicitly raising the achievement question.

There are, however, several obstacles to constructing a constitutional theory which requires "equality" in student achievement. The first is

122. The word "should" is chosen advisedly, since the core unintelligibility of the rational relationship test makes it difficult to know what classifications will survive it. See note 146 *infra*. Professor Gunther has recently suggested that a new version of the rational relationship test may be emerging, a version under which the Court will not be satisfied by "minimal rationality" but will inquire whether the "legislative means . . . substantially further legislative ends." Gunther, *In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 20-24 (1972). Even under this test, most reasonably probable cost-differential or special program aid formulas will probably survive attack, for the same reasons as, according to the argument at pp. 456-57, they will probably survive a "*de facto* wealth classification" attack.

123. For an excellent, though ultimately unsatisfying, attempt by a linguistic philosopher to unravel the philosophy of education, see R. PETERS, *ETHICS AND EDUCATION* (1966).

124. *Id.* at 4-5.

that genetically and environmentally determined student abilities are themselves among the resources that generate achievement. Since the state is not directly responsible for such disparities, state action can never be more than partially responsible for variations in student achievements.

Second, given the wide variations in students' abilities, an achievement equality goal would require massive compensatory education for children from low socio-economic backgrounds. While this may be an appealing policy, courts are unlikely to *require* it, and it is highly problematic whether even the most ambitious programs would produce achievement equality.

Third, and perhaps most importantly, education consists of a multitude of distinct, often substitutable but rarely comparable, achievements.¹²⁵ Students learn to read, do math, paint, love their country, work independently, get along with others, and earn money in an infinity of ways. Given that different students attain different types of achievements at different levels and at different times, a court, even if it wanted to equalize "achievement," would need some objective means of comparing one type, level, and time of achievement with another. No such means exist. This is presumably what prompted the district court in *McInnis v. Shapiro*,¹²⁶ to reject as nonjusticiable the claim that educational resources must be distributed in accordance with students' "needs."¹²⁷

The *Rodriguez* theory "solves" all three of these problems. Education is defined as the tasks performed with students rather than the resulting achievements. The state established the decentralized finance system leading to the distribution of task-resources in what the court found a "wealth discriminatory" fashion. Equalizing task-resources is much more "feasible" than equalizing student achievements. The comparability problem, which would be just as troublesome in a direct attempt to "equalize" a multitude of often interchangeable and rarely comparable tasks, is avoided by a simple empirical assumption: Two tasks are assumed "equal" if the resources necessary for their accomplishment cost the same.

Though concerned with the equalization of educational tasks, both

125. See note 136 *infra*.

126. 293 F. Supp. 327 (N.D. Ill. 1968), *aff'd mem. sub nom. McInnis v. Ogilvie*, 394 U.S. 322 (1969). See also *Burruss v. Wilkerson*, 310 F. Supp. 572 (W.D. Va. 1969), *aff'd mem.*, 397 U.S. 44 (1970). The *Rodriguez* court considered itself not bound by the Supreme Court summary affirmances in *McInnis* and *Burruss* because it regarded the claims therein as non-justiciable. *Rodriguez v. San Antonio Independent School District*, 337 F. Supp. 280, 283 (W.D. Tex. 1971).

127. 293 F. Supp. at 335-36.

Serrano and *Rodriguez* hold education a fundamental interest because of several of its most general achievement goals: economic, social, and life success; professional training; public responsibility and good citizenship; political and community participation; awareness of cultural values; "normal" adjustment to the environment.¹²⁸ On the question of the relationship between expenditures and achievement, *Serrano*, which was decided on demurrer, ruled that some unspecified proof would be required at trial, though the California court seems to suggest a presumption in favor of the cost-quality relationship.¹²⁹ *Rodriguez* is completely silent on the issue, but its invocation of achievement goals to establish the fundamental interest indicates that the court assumed some relationship between expenditures and achievement.¹³⁰

Much of the commentary on *Serrano* and *Rodriguez* concerns this "expenditure-quality" or "cost-quality" question.¹³¹ The pre-*Serrano* Coleman Report finding that variations in per pupil expenditures had virtually no effect on student performance on a verbal ability test is the principal basis for much of the debate.¹³² The Report and similar studies¹³³ certainly corroborate the fact that expenditure equalization is a far cry from achievement equalization, yet *Serrano* and *Rodriguez* do not pretend to speak to achievement equalization. If the Report proved expenditures have no effect on any educational achievements, the cases would then be equalizing a variable unrelated to the fundamental interest. The Report does not, however, prove this. Putting aside the fact

128. See note 6 *supra* for a general discussion of suspect classifications and fundamental interests. I have combined the overlapping, though differently articulated, versions from both decisions. See *Serrano v. Priest*, 5 Cal. 3d 584, 605, 487 P.2d 1241, 1255-56, 96 Cal. Rptr. 601, 615-16 (1971); *Rodriguez v. San Antonio Independent School District*, 337 F. Supp. 280, 283 (W.D. Tex. 1971) (the latter relying on a quotation from *Brown v. Board of Education*). No prior Supreme Court decision, of course, had held education to be a fundamental interest. Whether education is "fundamental" is also currently before the Supreme Court in *Johnson v. New York State Educ. Dept.*, 449 F.2d 871 (2d Cir. 1971), *cert. granted*, 405 U.S. 916 (1972) (challenging free elementary school book dependence on taxpayer approval of tax assessment). Cf. notes 136 & 139 *infra*.

129. 5 Cal. 3d 584, 601, 487 P.2d 1241, 1252-53 n.16, 96 Cal. Rptr. 601 (1971) n.16.

130. 337 F. Supp. 280, 283 (1971). See note 8 *supra*.

131. See note 9 *supra*.

132. OFFICE OF EDUCATION, U.S. DEPARTMENT OF HEALTH, EDUCATION AND WELFARE, *EQUALITY OF EDUCATIONAL OPPORTUNITY 314-15* (1966) [hereinafter cited as *COLEMAN REPORT*].

133. See Smith, *Equality of Educational Opportunity: The Basic Findings Reconsidered*, and Jencks, *The Coleman Report and the Conventional Wisdom*, in *ON EQUALITY OF EDUCATIONAL OPPORTUNITY* (F. Mosteller & D. Moynihan eds. 1972). See also Picarriello, *Report for Fiscal Year 1967*, in *HOW EFFECTIVE IS SCHOOLING?* (Averch ed. 1971); NATIONAL ADVISORY COUNCIL ON THE EDUCATION OF DISADVANTAGED CHILDREN, *FOURTH ANNUAL REPORT* (1966) (both concluding that funds from Title I of the ESEA do not improve learning).

that its methodology has been vigorously criticized¹³⁴ and that other studies have reached different conclusions¹³⁵—this is hardly a battle to be resolved in the courts—*Serrano* and *Rodriguez* find education a fundamental interest because it involves a wide variety of very abstract social goals.¹³⁶ The Coleman Report does not deal with such goals, and it is not clear that such complex relationships are in any sense reliably measurable.¹³⁷ The courts appear content to find on the basis of “common wisdom” or intuition that children will probably be “better educated” the more resources are devoted to their education.¹³⁸

If such thinking is not what underlies *Rodriguez* (and the opinion is concededly unclear), the decision apparently becomes inexplicable except on tax “equalization” grounds,¹³⁹ since then the only injury

134. These criticisms have generally focused on the *Report's* allegedly inadequate model of school operations, inadequate sample, improper survey questions, invalid treatment of the data, and inappropriate statistical techniques. See I CAL. SENATE SELECT COMMITTEE ON SCHOOL DISTRICT FINANCE, FINAL REPORT 29-32 (1972); J. GUTHRIE, G. KLEINDORFER, H. LEVIN & R. STOUT, SCHOOLS AND INEQUALITY 60-62 (1971).

135. For summaries of many other studies, see J. GUTHRIE, G. KLEINDORFER, H. LEVIN & R. STOUT, SCHOOLS AND INEQUALITY 65-90 (1971); I CAL. SENATE SELECT COMMITTEE ON SCHOOL DISTRICT FINANCE, FINAL REPORT 32-33 (1972).

136. As any intelligent book on the history, sociology or philosophy of education—or ideological writings—makes clear, the point of a formal educational system, rather obviously, is to develop the kinds of people that a society wishes its citizens to be. Perhaps the best “direct” evidence of the multiplicity of “goals” of American education is an elementary school report card, which will invariably contain evaluations on many dimensions other than the cognitive skill categories.

137. We should note, however, that Coleman selected verbal ability because it appeared more responsive to school characteristics than other contemplated measures, e.g., “non-verbal ability,” “reading comprehension” and “mathematical achievement.” COLEMAN REPORT, *supra* note 132, at 292-95. Nonetheless, such measures tell us something about school effects on broader attitudinal, behavioral, or particular vocational achievements *only* to the extent that they are related to and therefore surrogate for such achievements. But we have far too little understanding of the relationships among cognitive variables, much less between cognitive and emotional variables, to be confident of any such relationship. Cf. Dyer, *School Factors and Equal Educational Opportunity*, 38 HARV. ED. REV. 23 (1968) (arguing that verbal ability is particularly ill-suited as an index of achievement among black students).

138. Given *Rodriguez's* silence on the issue, the court's evidentiary use of “common wisdom” or intuition is unclear. Although the record is sparse on the cost-quality question, both sides apparently produced some evidence, and *Rodriguez* cannot, therefore, be explained on the basis that the court created a presumption shifting the burden of coming forward with evidence to the defendant. Nor does it seem possible that the court created an “irrebuttable presumption” that dollars equal quality, as this would amount to a rule of law that expenditures are fundamental regardless of their effect on achievement. See note 140 *infra*. Professor Goldstein has suggested that perhaps a showing of expenditure inequality shifts the burden of proof to the state to prove that such expenditures are irrelevant. Goldstein, *Interdistrict Inequalities in School Financing: A Critical Analysis of Serrano v. Priest and Its Progeny*, 120 U. PA. L. REV. 504, 521-22 (1972). See also *Hobson v. Hansen*, 327 F. Supp. 844, 854-55 (D.D.C. 1971). This does not, of course, explain *why* the burden of persuasion *should* be shifted, and (since there was no jury trial) the only evident reason for the shift in this case would be that the court was predisposed to believe that costs, more probably than not, do relate to quality—a predisposition presumably based on “intuition” or “common knowledge” akin to judicial notice. See generally IV J. WIGMORE, ON EVIDENCE §§ 2490-93 (1940).

139. It might be possible to avoid this characterization by constructing a different theory of the constitutional harm in *Rodriguez*. The theory of harm often proposed

caused by the current finance system would be to taxpayers.¹⁴⁰ This tax equality theory would seemingly call for the invalidation of the decentralized finance of all public services, not merely of education, a holding which the courts will very likely wish to avoid.¹⁴¹

Moreover, if the courts viewed the relationship between expenditures and achievement as irrelevant, they would have no satisfactory way of determining which tasks count as "education." The choice of per pupil expenditures as the "equalizing variable" eliminates the problem of quantitatively comparing incomparable educational achievements or tasks,¹⁴² but it does not relieve the courts of deciding which achievements (and thus which tasks) should count as education. The *Rodriguez* court, perhaps unintentionally, obfuscated this issue, by effectively holding that all the tasks performed in school and therefore all the resources which comprise them constitute "education." Presumably, this implicit holding precludes a legislature from defining

to explain *Brown v. Board of Education*, 347 U.S. 483 (1954)—that racial separation is itself the harm—does not seem honestly transplantable, given the clear differences between the use of race and local tax bases as classifications. *But cf.* Michelman, *On Protecting the Poor Through the Fourteenth Amendment*, 83 HARV. L. REV. 7, 20-21, 27-29 (1969). For a discussion of the *Brown* issue, see Kaplan, *Segregation Litigation and the Schools—Part II: The General Northern Problem*, 58 NORTHWESTERN L. REV. 157, 168-75 (1963). A more fruitful approach might be to press deeper into the fundamental interest—to argue, essentially, that education, as it has developed historically, has become charged with symbolic and ideological significance and that this symbolism and ideology can themselves be explicated in principled argument to imply certain prohibitions and obligations applicable to the state, irrespective of achievement-impact. While I do not regard an argument in this form as impossible—indeed, in gross ethical terms it rings quite true—I shall not attempt it here.

140. Both the popular press and scholarly literature, to some extent, have interpreted *Serrano* as requiring some kind of tax equality. Given the ambiguity of *Serrano* this is understandable. See 5 Cal. 3d 594, 599-600, 611, 618, 487 P.2d 1241, 1225 & 1252, 1260, 1265, 96 Cal. Rptr. 601, 611-12, 620, 625 (1971). Yet it seems clear to me that *Serrano* and *Rodriguez* no more imply tax equality (if per pupil expenditures have been equalized) than *Douglas v. California*, 372 U.S. 353 (1963), or *Harper v. Virginia Bd. of Elections*, 383 U.S. 663 (1966), imply that after the state provides free appellate counsel for indigent criminal defendants or eliminates the poll tax, equal protection further constricts the finance system used to pay for counsel or election costs. In all of these cases any taxpayer injury does not affect the respective fundamental interests. *Cf.* note 151 *infra*. For an alternative constitutional theory that would outlaw all except power-equalized decentralized finance for all public services, see Schoettle, *The Equal Protection Clause in Public Education*, 71 COLUM. L. REV. 1355, 1402-12 (1971). For a brief rebuttal, see Goldstein, *Interdistrict Inequalities in School Financing: A Critical Analysis of Serrano v. Priest and Its Progeny*, 120 U. PA. L. REV. 504, 542 n.119 (1972). See also notes 139 *supra* and 141 *infra*.

141. See notes 139 and 140 *supra*. The courts have held that the provision of municipal services in a racially discriminatory manner (using an impact test) violates the equal protection clause. *Hawkins v. Town of Shaw*, 437 F.2d 1286 (5th Cir. 1971). This has not been extended to wealth classifications, however. Indeed, in *Hadnott v. City of Prattville*, 309 F. Supp. 967 (M.D. Ala. 1970), the court held that special assessment financing of streets justified a disproportionate racial impact (or disproved any claimed racial motivation) *precisely because* the street differences were "due to the difference in the respective landowners' ability and willingness to pay for the property improvements." *Id.* at 970 (emphasis added).

142. See pp. 442-43 *supra*.

some tasks as "education" and others as "frills," severing only the former from local wealth variations.¹⁴³ But this approach does not "solve" the problem of defining education.

If education covers only the resources purchased by schools, wealthy districts will simply assign as many of their "schooling" costs as possible to non-school budgets, parcelling them out, for instance, to park and library departments, music and art workshops, and so forth. Under power equalization, this problem would be particularly acute, since rich districts would have an incentive not only to maintain luxurious programs, but also to avoid redistribution of wealth away from the district. Poor districts would have equally strong incentives to call everything imaginable education in order to receive state subsidies.

To avoid wholesale evasion of *Serrano* and *Rodriguez*, the courts will therefore have to maintain a surveillance of the local budgetary process, encountering along the way many embarrassingly close questions: Is a swimming pool education? An auditorium? A park or library (adjacent to the school or further away)? A community-run class in music appreciation? A mental health clinic for children? These judgments are hardly easy, yet *Rodriguez* makes them inevitable, and judicial line-drawing is, after all, a concomitant of constitutional litigation.

B. *Different Costs for Different Amounts of Useless Resources*

Rodriguez must be read, then, as defining task resources as educational only if they affect, or are somehow related to, achievement. This raises the possibility that the state might justify wealth-correlated deviations from equality by arguing that favored districts were indeed being empowered to buy more *particular* school resources, but that these resources were having no effect on educational achievement. This claim would also rely on the Coleman Report (contested) findings that variations in particular school resources (including pupil-teacher ratios and teacher experience and education) have virtually no effect on student performance on a verbal ability test.¹⁴⁴

Given the logic of the school finance decisions, it seems quite unlikely that a court would sustain deviations supported by such an argument.¹⁴⁵ Indeed, a court might be tempted to accept the state's claim

143. *Serrano*, also perhaps unintentionally, did recognize this issue, suggesting that school lunches do not count as education, and raising the question whether school swimming pools count, 5 Cal. 3d at 598 n.13, 609 n.26, 487 P.2d at 1251 n.16, 1258 n.26, 96 Cal. Rptr. at 610 n.13, 618-19 n.26. The *Rodriguez* approach is understandable, if, for no other reason, because of the practical impossibility of judicial cost accounting supervision, when rich districts tried to transfer "educational" expenses to "frill" accounts.

144. See note 132 *supra*. COLEMAN REPORT, *supra* note 132, at 312, 316-19.

145. See pp. 441-45 *supra*.

at face value and simply strike down the distribution scheme as irrational. (By admitting that the added dollars are not buying achievement, however, the state would be effectively avowing a “wealth redistributive” legislative purpose and the real question is the permissibility of this goal, though a court might still find the classification irrational by recharacterizing the purpose.)¹⁴⁶

But more likely, the courts would regard such a claim as a frontal assault on the central *Rodriguez* premise that two educational tasks are equal if they cost the same.¹⁴⁷ And, as in *Rodriguez*, they would probably rely on the common wisdom or intuition that students are “better educated” in smaller classes or by more experienced teachers. Over time, social science may erode this common wisdom, and the courts may have to ask themselves again, with some skepticism, whether formal education really is a “fundamental” interest. *Rodriguez* and *Serrano* would then be ripe for reversal. It is unlikely, however, that, having just accepted the basic theory of those decisions, the courts will allow the state to favor certain districts on the grounds that particular resources—ostensibly educational—were in fact useless.

As the inquiry becomes more and more discreet, however, common wisdom and intuition fade. It is also common wisdom, for example, that some parents believe young and enthusiastic teachers are “better” than elderly but more experienced ones. Even though the bald claim that particular resources are useless is unlikely to succeed, the likely appreciation of judges for this facet of the common wisdom may well have some effect in conditioning their response to continued district expenditure disparities.

C. *Differences in the Cost of the Same Things*

The *Rodriguez* premise that educational tasks are equal if their resource costs are equal, cannot be valid if districts must pay *different* prices for the *same* resource. For example, if school district A, in which publishing firms are located, can buy a particular book more cheaply than rural school district B, a court cannot maintain that all deviations from per pupil equality skew educational equality, unless it is willing to believe that the same book is “better” in district B than in district A.

146. The rational relationship test is question-begging since every classification is rationally related to its purpose, if the purpose is determined by reference to the words of the classification actually employed in the statute. Statutes become “irrational” only when the courts recharacterize their purpose. See Note, *Legislative Purpose, Rationality, and Equal Protection*, 82 YALE L.J. 123, 128-38 (1972). But see Gunther, *In Search of Evolving Doctrine on a Changing Court: A Model For a Newer Equal Protection*, 86 HARV. L. REV. 1 (1972), discussed briefly at note 122 *supra*.

147. See pp. 442-43 *supra*.

If such differences in price are not reflected as a deviation in expenditures, the state would have equalized dollars but not resources.

We can safely assume that *Rodriguez*, in using dollars as the measure of quality, did not mean to attach some intrinsic worth to green pieces of paper, for "intrinsically" (apart from their purchasing power) such pieces of paper bear no more relation to a district's resources (or student achievement) than the number of leaves on its trees. It follows that deviations from per pupil equality which correlate with district wealth cannot be regarded as "wealth discriminatory" insofar as they are based on differences among district costs for the same resources. The courts, therefore, will almost certainly *permit* post-*Rodriguez* distribution formulas which adjust disbursements for such cost differentials.

Whether the state will be constitutionally *required* to vary district expenditures to reflect differences in resource costs depends on how the courts define "wealth discrimination."¹⁴⁸ Even under decentralized finance, if all the districts in a state had the same per pupil taxable wealth and expenditures but some faced lower school resource prices than others, these districts would be able to buy more resources. This finance system might be characterized as making education a "function" of wealth (the *Rodriguez* formulation) by the argument that a district's taxable wealth must be deflated (or inflated) by its school resource prices to find its real wealth for educational purposes, *i.e.*, its ability to purchase education. If prices in one district are twenty-five percent higher than in another, and if "wealth" in *Rodriguez* is a shorthand for "ability to buy" or "purchasing power," the former district is "poorer" and this finance system makes education a function of wealth.

This line of argument would apply directly in challenges, on cost-differential grounds, to post-*Rodriguez* power-equalized systems.¹⁴⁹ The comparable challenge to full state funding would be that the district disbursements are "wealth discriminatory" unless they reflect district price differences, because the state is by definition distributing less purchasing power (*i.e.*, school resources) to "poor" (high cost) than to "rich" (low cost) districts. Logically, the argument is persuasive, since once we reject the "green pieces of paper" reading of *Rodriguez* the real equalizing variable is plainly school resource purchasing power.

The courts may, however, be reluctant to refine the wealth discrimi-

148. See notes 115, 116, 117 *supra*.

149. Cf. note 151 *infra*.

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nation prohibition in this way. To build a constitutional prohibition on other than the "formal equality" standard of dollars¹⁵⁰ might invite challenges based on differential financial "capacity" and "sacrifice" which, while possibly distinguishable, the courts might be very inclined to avoid.¹⁵¹ *Rodriguez*, by fairly clearly approving the Coons version of power equalization,¹⁵² suggests such an inclination: Two districts taxing themselves at the same rate for the same expenditures are not necessarily making an equal financial sacrifice.¹⁵³

Whether or not the courts require adjustments for price differences, it seems unimaginable that they will prohibit them. While inter-district differences in the prices of books may be de minimus, it is far from clear that differences in the "prices" districts must pay for teachers are insignificant. Current inter-district differences in per pupil expenditures are largely explained by differences in teacher costs per pupil¹⁵⁴—differences presumably reflecting in part the fact that teachers systematically charge more for working in certain districts.

These differences are reflected in variations among the salary schedules of districts. Evaluating their importance is difficult, in the first place, because the most readily available data show only teacher salary per pupil, and this reflects not only differences among salary schedules, but also differences in pupil-teacher ratios and in the relative proportion of teachers at the upper end of the schedule.

The Urban Institute study suggests that differences in pupil-teacher ratios are not a very significant factor, except between "rich" and "poor" suburbs.¹⁵⁵ A modest study of my own, using data from the

150. For a discussion of "formal equality" see *Developments in the Law—Equal Protection*, 82 HARV. L. REV. 1160-76 (1969).

151. In particular, the courts might be wary of relative fiscal capacity claims based on "municipal overburden." See note 44 *supra*. Municipal overburden challenges to a power-equalized system would, in principle, be very similar to high educational cost challenges, since both would focus upon the definition of "wealth" and thus a district's ability to buy educational resources. Municipal overburden challenges to full state funding, however, would, under my interpretation of *Rodriguez*, be distinguishable from high educational cost challenges. If the state distribution formula takes account of school resource cost differences, all districts will have equal purchasing power for these resources and that is all the decision requires. Municipal overburden, in this circumstance, is simply a taxpayers' inequity, and as such irrelevant, under my view of *Rodriguez*. See note 140 *supra*.

152. See note 22 *supra*. The decision clearly permits "fiscal neutrality," adopting the Coons' formulation of this principle, but does not expressly approve any particular system. 337 F. Supp. at 284. It seems quite unlikely, however, that the courts would permit power equalization but require a "progressive" rate schedule (*e.g.*, one that would count the ten mil tax of poorer districts as equal to the twenty mil tax of richer ones), since there are no standards for determining the appropriate progression.

153. See note 152 *supra*.

154. See notes 17 & 33 *supra*.

155. URBAN INSTITUTE, PUBLIC SCHOOL FINANCE, PRESENT DISPARITIES AND FISCAL ALTERNATIVES 90-91 (1972).

largest districts in Florida and California, suggests that only thirty percent to thirty-five percent of teacher salary per pupil variation is explained by differences in teacher experiences and education.¹⁵⁶ Thus, if we accept, even with considerable reservation, the Urban Institute's basic finding on pupil-teacher ratios, the inference is that variations among the salary schedule themselves—differences in prices paid for the "same quality" teachers—accounts for a very significant part of the variation in inter-district teacher costs per pupil.¹⁵⁷ Another recent study conducted for a California Senate Committee suggests, however, that pupil-teacher ratios *are* important in that state. Nevertheless, it indicates that roughly twenty-five percent of teacher cost differences are related to differences in district teacher "prices" in elementary and unified school districts.¹⁵⁸ These studies at least tentatively suggest that in today's teacher market a considerable part of the district disparities in per pupil expenditures is attributable to differences in teacher prices.

Of course, although we have attempted to control for differences due to variable pupil-teacher ratios and to different experience and education of teachers some part of this "price" differential may still reflect quality differences. Both common sense and social science indicate that two teachers may have the same experience and education, but one may still be a better teacher.¹⁵⁹ Current "high-price" districts may simply be hiring these teachers, and to the extent that wealthy districts tend to be "high-price" ones a cost-differential might simply perpetuate this wealth advantage.

Moreover, even if cost-differentials did not perpetuate the advantage of wealthy districts in hiring "high quality" teachers, if based on existing salary patterns they might simply subsidize powerful local teacher organizations, since some part of existing salary disparities may repre-

156. A regression model was employed on three independent variables and 97 data points. There was, however, no control for variations in pupil-teacher ratios.

157. Although not necessarily very probative, it is interesting that the Urban Institute also found that approximately seventy percent of the *inter-state* variation in teacher salary per pupil (between New York and North Carolina) reflected differences in the salary schedules themselves. URBAN INSTITUTE, PUBLIC SCHOOL FINANCE: PRESENT DISPARITIES AND FISCAL ALTERNATIVES 104 (1972).

158. This study found very little "price" differences among high school districts, however. See I CAL. SENATE SELECT COMMITTEE ON SCHOOL DISTRICT FINANCE, FINAL REPORT 36, Table 111-2 (1972).

159. The Coleman Report, for example, found some relationship between teacher verbal ability and student performance on a verbal ability test. COLEMAN REPORT, *supra* note 132, at 316. Another study found that the quality of teachers' undergraduate schools is significantly related to student verbal ability, Winkler, *The Production of Human Capital: A Study of Minority Achievement* (unpublished Ph.D. dissertation, University of California, Berkeley, 1972), cited in I SENATE SELECT COMMITTEE ON SCHOOL DISTRICT FINANCE, FINAL REPORT 33 (1972). See also J. GUTHRIE, G. KLEINDORFER, H. LEVIN & R. STOUT, SCHOOLS AND INEQUALITY 65-90 (1971).

sent differential union power.¹⁶⁰ If a court could be persuaded that a cost-differential amounted solely to such a subsidy, it would have no reason to invalidate it even if it resulted in disparities related to district wealth. Such a subsidy would present a unique variant of the “useless resource” problem, since no common wisdom or intuition suggests that additional compensation for union strength has anything to do with educational quality.¹⁶¹

The difficulty, however, is that for all practical purposes it will be impossible to separate the relative influence on district salary levels of: (1) wealth-advantaged purchases of higher quality teachers; (2) differential union strength; and (3) different prices for the same quality teachers. No matter how powerful the teacher union, some part of the higher teacher prices paid by a district may well reflect factors one and three as well. In theory, special subsidy for the first factor should be forbidden by *Rodriguez*, while subsidy for the third should be permitted, or even required. Yet the measurement problems will prevent such fine cost-accounting.

This is the core of the “cost-quality” paradox which will be most troublesome and yet practically important in the post-*Rodriguez* world. Separating the effects of union power would require a supply schedule, giving the “will work” price for each teacher *and* potential teacher in the state, in whatever the relevant teacher market. Realistically this calculation will probably have to be made from data on existing district expenditures, but such data may reflect quality differences. Cost indicators external to education, such as general cost of living indexes or local teacher-competitive wage scales, are presumably free of taint and may prove helpful, but they pose data collection and interpretation problems and, more importantly, tell us only a portion of what we need to know.¹⁶² Perhaps social scientists can develop taint-free measurement devices, but the obvious difficulties of controlling for quality and union power differences makes this problematic.

The non-measurability of the variables presents the courts with a dilemma. If they do permit cost-differentials based to some extent on existing salaries, they risk a perpetuation of wealth-related quality ad-

160. See, e.g., URBAN INSTITUTE, PUBLIC SCHOOL FINANCE, PRESENT DISPARITIES AND FISCAL ALTERNATIVES 96 (1972).

161. See note 138 *supra*.

162. Cost of living indexes typically compare data between SMSA's (Standard Metropolitan Statistical Areas), not between suburbs and cities within these areas, nor between school districts. Moreover, cost of living differences are not the only factor affecting teacher locational preferences. Teacher preferences are probably significantly influenced by factors like the condition of school buildings, the “atmosphere” of the school, the calibre of teacher colleagues, the character of the student body, the pupil-teacher ratio, and the general “reputation” of the school system.

vantage. If they do not, however, they may set teacher prices too low for truly high cost districts to compete. Moreover, the possibility that union-related costs may increase the prices that some districts must pay for the same teachers confounds the problem.

Presently the cost of teachers is often determined through collective bargaining, not a perfectly competitive market. Whether a district faces high costs because teachers find its living costs high, or its living or working conditions unattractive, or because the union it confronts is comparatively powerful, the fact remains that it is still paying more for the "same" teachers. A legislature should be permitted to take such factors into account in distributing funds; and if the courts require recognition of cost-differentials this should certainly be one of the required adjustments.

At the same time, however, it would be absurd for a court to require or a legislature to allow additional disbursements to a district merely because the union had won an increase in salaries. With full state funding, or near full state funding, such a policy could easily convert collective bargaining into a giveaway for teachers, for the local board would have little reason to resist union demands.

Yet, if—when state funding is instituted—local salaries continue to be set in local bargaining, a state policy of ignoring union-created district disparities in the salaries of the "same" teachers would also be foolish. Salary concessions won by the union would deprive local students of funds that could otherwise go for books, buildings, programs, or more or better teachers, and the local board and its constituents will be powerless to raise replacement funds through local taxation.¹⁶³ To be sure, this latter absurdity would not exist under power equalization, but a state policy of ignoring the effects of differential union power would nevertheless produce and validate large differences in the *effective* purchasing power of equal-wealth districts, thus again undermining the apparent rationale of *Rodriguez*.¹⁶⁴ The courts may thus be put to a Hobson's choice of accepting this effective undermining of their decisions or requiring a senseless teacher giveaway.

Put briefly, the *Rodriguez* doctrine is inconsistent with setting

163. We have previously argued that current expenditures, apart from teacher salaries, are very non-manipulable and we then noted that capital costs might be more so but that little is known about these. See note 36 *supra*. If we were wrong as to the first argument or if capital costs really are very manipulable, this local bargaining-cost differential paradox may prove very important indeed. Assuming we were correct, the practical problem should be relatively small under full state funding, though probably greater in the long run under power equalization, but in any event the important question is how "small" it will be.

164. See note 163 *supra*.

teacher salaries through local collective bargaining. Thus, the political movement toward state bargaining predicted above is fortunate for the doctrinal coherence of the decisions which should precipitate it.

If, as we have predicted, the political or central bargaining process itself generates cost-differential distribution formulas, the courts' role will probably be limited to reviewing them for "accuracy."¹⁶⁵ If cost-differentials are not so generated, true high-price districts will suffer a competitive disadvantage, and, the likelihood of the courts constitutionally compelling recognition of these differences may well depend less on a careful consideration of the meaning of "wealth discrimination" than on whether, as folklore and intuition suggest, central cities face particularly high teacher costs.

The courts obviously are not well equipped to evaluate the evidentiary issues involved in assessing teacher cost-differentials, and this will undercut the effectiveness of judicially required differentials just as it will limit the review of legislatively enacted or collectively bargained ones.¹⁶⁶ Given political probabilities, however, the latter seems much more likely than the former to be a practically important problem. And on this issue the courts might well decide to use the uncertainty inherent in the cost-quality question to mediate their own conflicting intuitions on the extent to which costs affect achievements, and more importantly, to accommodate the *Rodriguez* doctrine to the political forces that will dominate a post-*Rodriguez* world.

D. *Different Costs for Different Things*

Assessing adequately the legality of post-*Rodriguez* distribution schemes providing aid for a wide range of special purposes would require an extended analysis of both intractible normative issues and

165. In Michigan, the Governor's proposals for revising the school finance system, initiated before *Serrano* and *Rodriguez*, employed school staff-pupil ratios rather than per pupil expenditures as the equalizing variable. The proposed state funded system would take account of both salary level differences (on the basis of fifty-nine cost-regions, each containing several school districts) and each district's teacher training and experience. According to the analysis of this article, the former "cost-differential" (reflecting price differences) would be constitutionally permissible, subject to the measurement ambiguity, while the latter would be constitutionally impermissible (if it resulted in wealth-correlated expenditure variations). We should note, though, that the courts might permit the latter kind of adjustment for a period of years as a concession to gradual compliance. BUREAU OF PROGRAMS AND BUDGET, SCHOOL FINANCE REFORM IN MICHIGAN 56-64, app. II 13, 15-16 (1972).

166. In *Hobson v. Hansen*, 327 F. Supp. 844 (D.D.C. 1971), the court prohibited *intra*-district expenditure variations for elementary schools and decreed that no more than five percent variations from the city-wide average would be constitutionally acceptable. *Id.* at 863-64. The *intra*- and *inter*-district situations are obviously not comparable, however, since all schools in the district pay teachers according to the district salary schedule. *Cf.* note 95 *supra*.

administrative practices. We shall attempt here to shed some light on this problem by calling attention to, but not discussing the normative issues, and without considering the possible defects in and challenges to the actual administration of such categorical and special programs.

Perhaps the most important problems concern "categorical" aid—special state grants for compensatory or "gifted" student education, or vocational or science programs—to which all districts are entitled, but only to the extent they have "eligible" students; and special administratively dispensed aid for "innovative" programs and the like, which is granted to particular districts according to the merits of their proposed program. We shall discuss only the former, but the issues presented by the latter are not significantly different.

Eligibility criteria for categorical aid might depend on student "tastes" or "needs" or "abilities," none of which are likely to be distributed in equal proportion throughout districts in the state.¹⁶⁷ Thus, program expenditures will vary among districts, and might result in wealth-correlated deviations in overall per pupil expenditures. The initial question is whether any potential wealth discrimination claim could be avoided, as in the case of district cost differentials, on the ground that such deviations merely reflect differences in the "cost" of education.¹⁶⁸ The answer would appear to be no.

We have seen that the *Rodriguez* assumption that educational tasks are equal when their costs are equal, permits an exception where districts pay different prices for the same resources.¹⁶⁹ However, it does

167. This claim is based much more on intuition than data, since there appear to be no data reliably reporting the distribution among different wealth districts, of student needs, talents and tastes. Title I distribution is based not on educational need criteria but on low income families. See note 171 *infra*. The Coleman Report found regional (as well as racial) differences in participation in vocational courses, ranging for white students from nine percent in the Metropolitan South to nineteen percent in the Nonmetropolitan Non-South, and for blacks, from seventeen percent in the Non-metropolitan South to twenty-eight percent in the Metropolitan Non-South. The Report makes clear, however, that these figures probably reflect the availability of programs as well as student tastes. COLEMAN REPORT, *supra* note 132, at 545.

168. A recently brought suit in Florida challenges the state school finance system as a denial of equal protection on the basis of alleged educational cost differences between rural and urban districts. The complaint fuses together without differentiation a claim of higher costs (within our usage) of the same resources (teachers, capital costs, maintenance) and a claim of special goals or priorities (educating "culturally different" and "socially and economically deprived children"). Dade County Classroom Teachers' Assoc. v. State Bd. of Educ., circuit court, Leon County, Florida, No. 71-1687 (amended complaint, pp. 11-15).

169. See p. 448. We have focused on teacher salary differences, but the same price differential analysis is applicable to all school resources which are ultimately held to count as "education." Some cost difference claims do not fall clearly within what we have called different costs of the "same" or "different" things. We shall not analyze these systematically, but consider, as an illustration, inter-district differences in the cost of transporting children to school. Differences in the salaries of bus drivers and the costs of buses, maintenance, fuel and the like are clearly different costs of

not permit an exception when the claim is that some students or programs are more costly than others, because this would reopen the *McInnis* problem of comparing incomparable educational achievements and tasks. Thus, in *Rodriguez*, \$1000 of physics equals \$1000 of vocational educational education equals \$1000 of reading instruction for slow learners or for fast learners.¹⁷⁰ One task is more "costly" than another only when more educational resources are devoted to it. And in generating inter-district disparities through special program aid, the state is therefore not *taking account* of district cost differentials but is *creating* the differences by its choice of educational goals and priorities. Of course, the case for providing special money for slow learners is strong, but even there, such students are more costly to educate only as a result of a prior decision, namely, that they ought to learn more than they have been learning. Geography would also be very costly if we decided that every student should travel around the world.

Since categorical aid cannot be accommodated under the *Rodriguez* theory as a cost-differential, it cannot be constitutionally required under that theory and any resulting wealth-related expenditure disparities which the courts regard as a "wealth classification" would have to serve some "compelling state interest" in order to survive constitutional attack. It seems likely that both politics and educational policy judgments may result in special subsidies for both compensatory and high-achievement programs which will disproportionately benefit the relatively "rich" cities and suburbs. Moreover, attacks on categorical aid could also be based on alleged family wealth classifications. Thus, a formula for aiding gifted students that defined the "gifted" as those

the same thing. But what of cost variations due to inter-district geographical or traffic pattern differences? These do not present the educational priority choice and comparability problems associated with different costs of different things, see p. 412 *supra* and note 170 *infra*, and are probably properly regarded, like teacher salary differences, as differences in resource costs. The cost variations, in other words, are different costs of student resources.

170. See p. 442. The comparability problem has both a "horizontal" and a "vertical" dimension. Thus, the claim may be that some achievements and therefore tasks are more costly for all students (horizontal), or that some students are more costly to teach particular achievements (vertical). In both instances, however, the "high-cost" claim rests on a prior educational goal or priority claim. The relative cost of teaching science, for example, depends on whether its achievement goals are limited to teaching students to dissect frogs or include teaching them to build and operate computers, just as the relative costs of teaching reading to slow and fast learners depends on the reading achievement goals for both categories of students. If a court wishes to find that one kind of program or student is more "costly" than another, therefore, it cannot avoid making educational goal priority choices. Even if we assume this is an acceptable judicial function, a court would need some standard of "equality" (presumably, other than sameness of achievement for all students) against which financing systems might be tested for compliance. Compare with note 169 *supra*.

from rich families would presumably be challenged as a *de jure* wealth classification, as might a compensatory formula which, like Title I of the Elementary and Secondary Education Act, is based on children from low income families.¹⁷¹ The courts would presumably distinguish between these formulas, just as they have distinguished between "invidious" and "benevolent" racial classifications.¹⁷² They might reach this result by holding only the former "suspect" (given the apparent point of *Rodriguez* and of the general doctrine, to the extent that there is one, that "wealth is a suspect classification"),¹⁷³ or by finding them both wealth classifications but upholding the latter as serving a compelling interest.

De jure classifications are just the tip of the iceberg, however, for compensatory or special achievement subsidies, even if eligibility is defined in terms of apparently neutral criteria like test scores, might be challenged as *de facto* discriminations in favor of children from "rich" and "poor" families. Coherently articulating and proving a *de facto* family wealth impact claim would be difficult, given that wealth is a continuum and that there are no apparent standards for determining how much of a wealth correlation is too much. Even if we assume that

171. Title I funds are distributed under a formula based substantially upon the number of students "in families receiving an annual income of less than the low-income factor," which, for the fiscal year ending June, 1973, is \$4,000. 20 U.S.C. §§ 241(c)(1)(B) (2)(A), 241(c).

172. See, e.g., *Graves v. Walton County Bd. of Educ.*, 300 F. Supp. 188 (M.D. Ga.), *aff'd*, 410 F.2d 1152, 410 F.2d 1153 (5th Cir. 1969), *petition for rehearing denied*, 410 F.2d 1153 (5th Cir. 1969); *Tometz v. Bd. of Educ.*, 39 Ill. 2d 593, 600, 237 N.E.2d 498, 502 (1968); *School Com. of Boston v. Bd. of Educ.*, 352 Mass. 693, 698-700, 227 N.E.2d 729, 733-34 (1967), *appeal dismissed*, 389 U.S. 572 (1968). See also *Developments in the Law—Equal Protection*, 82 HARV. L. REV. 1065, 1108 n.190 (1969); Note, *A Statistical Analysis of the School Finance Decisions: On Winning Battles and Losing Wars*, 81 YALE L.J. 1303, 1319 n.75 (1972).

173. None of the prior cases involving alleged "sliding scale" fundamental interest-wealth classifications, see note 6 *supra*, has involved a discrimination "in favor of" the rich, unless a discrimination against the poor is regarded as necessarily "favoring" the rich. Nevertheless, a distribution formula based on the number of high income families would presumably be more offensive than the current system, which classifies not by wealth but by district ability to pay. See notes 115, 116, 117 *supra*. (Could the state pay minimal scheduled rates for lawyers for indigents while fully reimbursing all privately incurred costs for defendants whose income exceeds \$20,000? And is a *de jure* pro-rich educational aid formula distinguishable because wealth bears some (though a far from perfect) relationship to student performance?)

Pro-poor *de jure* classifications, by comparison, are compelled by the very cases that are often cited for the proposition that wealth is a suspect classification. In order to assure that indigent criminal defendants are provided with appellate counsel, for example, the state can obviously enact a statute keyed to defendants with less than a given income or who are unable to pay market prices. Similarly, it would seem, the point of the "wealth discrimination" prohibition in *Rodriguez* is to prevent district poverty from impairing the educational achievements of students, not to assure a regime of "wealth-blindness" in educational finance. See notes 115, 116, 117 *supra*, & note 174 *infra*.

the world is clearly divisible into three parts—the “poor,” the “middle class,” and the “rich”—can we say that a formula which channels, say sixty percent of its aid to any one of these classes is disproportionate enough to be considered discriminatory? Moreover, it is not clear whether a rich-poor balance of aid becomes non-discriminatory even though the middle class is disadvantaged.¹⁷⁴

De facto discrimination claims, whether based on district or family wealth will in any event encounter substantial state justifications. It seems extremely likely that a court, either by further explicating the normative basis of *Rodriguez* or by a simple appraisal of social reality, would find compensatory and other “pro-poor” aid either not what is meant by a “wealth classification” or justified by some compelling state interest. The more substantial question would concern “pro-rich” aid, such as advanced-placement college courses. Courts have invalidated school testing and tracking on racial discrimination grounds, and particular tests and administrative practices associated with such special aid programs might prove vulnerable to this kind of attack.¹⁷⁵ But the courts have side-stepped the fundamental question: the power of the state to nurture talent or excellence which is largely a function of family wealth or social class. Courts typically prefer to avoid value choices at this fundamental level, but if pressed, it seems unlikely that they will forbid the legislature to decide that the social welfare is served by nurturing “talent” or by “efficiently” producing more and better doctors, engineers, or playwrights.

Nor will a claim that the legislature intended or was motivated by a desire to aid rich families or districts necessarily avoid this problem. Proof problems aside,¹⁷⁶ the model of a legislature carefully determining which students or programs to subsidize in order to frustrate *Rodriguez* may bear only partial correspondence to the real world. It may be that the educational priorities embodied in the very district dis-

174. See note 173 *supra*. Even if Title I type de jure pro-poor classifications were held unconstitutional because of the over- and under-exclusiveness of family wealth as a measure of educational need, this problem could be eliminated by a formula based on low test scores and the like, which is pro-poor only in impact. But the balance of rich-poor aid presents a more complex issue.

175. See *Hobson v. Hansen*, 269 F. Supp. 401 (D.D.C. 1967), *aff'd sub nom. Smuck v. Hansen*, 408 F.2d 175 (D.C. Cir. 1969); *George v. O'Kelly*, 448 F.2d 148, 150 (5th Cir. 1971). *But see Miller v. School Dist. No. 2, Clarendon Co.*, 256 F. Supp. 370 (D.S.C. 1966). Cf. *Arrington v. Mass. Bay Transportation Authority*, 306 F. Supp. 1355 (E.D. Mass. 1969) (invalidating “racially biased” aptitude tests in determining job promotions).

176. See Ely, *Legislative and Administrative Motivation in Constitutional Law*, 79 YALE L.J. 1205, 1217-21, 1267 (1970); Note, *Legislative Purpose, Rationality, and Equal Protection*, 82 YALE L.J. 123, 142 (1972).

parities that *Rodriguez* prohibits (and those set within districts by "tracking" and its variants) are those which state legislatures favor and will wish to perpetuate. That is, some part of current expenditure disparities may reflect the different costs of different educational goals, and the real question remains whether and to what extent these goals are constitutionally permissible.

While predicting how the courts would weigh these difficult normative issues is hazardous, what can be predicted is that they will have very little taste for the endeavor. The prospect of having to balance excellence and efficiency against equalitarianism might itself make the courts reluctant to prohibit mere wealth-expenditure correlations and might induce them to steer clear of motivational analysis, save in outrageous cases where a "perpetuation" motive is absolutely clear, that is, where expenditure patterns cannot be reasonably explained on any other than perpetuation grounds.¹⁷⁷ But categorical aid and other special subsidies (*e.g.*, for innovative or experimental programs)¹⁷⁸ should not fall in this category, and their probable effective immunization from judicial review makes them another likely legislative device for political accommodation.¹⁷⁹

177. Thus, the legislature probably could not decree, irrespective of the distribution of student needs, talents, and tastes, that some districts should have science, history, or physical education programs while others should not, or that some should have better programs than others. If the legislature has this kind of discretion—to set different achievement goals for different districts and call this a difference in the cost of education—it has absolute power to manipulate inter-district expenditure variations in any way that it sees fit. Putting aside the special case of experimental program grants to particular localities, a court would probably have little difficulty checking this kind of naked manipulation. It could probably not even survive the rational relationship test, since little could be said in explanation without admitting that its purpose is the perpetuation of that which *Rodriguez* prohibits.

178. Special state subsidies for innovative or experimental programs present another problem. This kind of aid is typically distributed not automatically under a formula but by local application to a central administration (*e.g.*, the State Department of Education) which determines whether to subsidize the program, on the basis of its apparent merit. Programs of this sort provide another avenue for perpetuating inter-district wealth-related expenditure disparities, and for political accommodation. But they cannot be subjected to the same rule of "geographical neutrality" likely to apply to categorical aid, see note 177 *supra*, since the point of the kind of aid is to support programs formulated by particular districts that seem validly innovative or experimental. Again, judicial review is likely to be minimal, probably involving a "bona fide" test. The issue will essentially be one of motivational analysis, and it will probably turn on whether the distribution of such aid follows a pattern of refusing support for poor district programs while approving support for similar rich district programs.

179. The political utility of categorical aid may be somewhat limited by a probable rule of geographical neutrality, see note 177 *supra*, but the practical effect of this limitation depends on the eligibility criteria and the distribution among districts of eligible students. See note 167 *supra*. Special aid for innovative or experimental programs may be somewhat easier to manipulate for political purposes, although the courts will probably not tolerate blatant favoritism for rich districts. See note 178 *supra*.

Conclusion

This article has not addressed the institutional issue of whether the courts ought to intervene *Rodriguez*-style in school finance. Rather, we have attempted to assess the impact of *Rodriguez* by focusing on teacher organizations and collective bargaining—two elements which are crucial to the school finance decisions but which have been heretofore largely ignored by courts and commentators alike. Our consistent theme has been that the *probable* results of implementing the decision will be far more complicated than either its advocates or critics have claimed.

We have suggested that implementation will trigger political conflict and accommodation in which teacher organizations will play a major role; that this process will utilize cost-differentials and special program aid to reintroduce expenditure disparities; and that the courts will probably prove unwilling or unable to condemn most of these disparities on Equal Protection grounds. We have further suggested that a more active judicial role would carry not only the possible (though remote) danger of institutional confrontation but also of incorrect teacher price-setting and of constitutionalizing educational policy. Thus, whether one regards the “first step” of *Rodriguez* as an appropriate or inappropriate exercise of judicial review, the more palpable dangers of “activism” will come in its implementation, where, paradoxically, the courts will probably play a relatively “passive” role.

We have also contended that ultimately expenditure disparities will be moderated, though not entirely eliminated, by the development of state-wide collective bargaining. We have predicted that centralized bargaining will simultaneously tend to assimilate non-revenue and educational policy issues, a possibility which must be kept in mind when establishing new rules for the process.

Finally, centralization of decision-making at the state level, together with increased pressure against “wasting” public money, may lead to a more thorough and professional analysis of educational costs, methods, and goals. However, it is less clear that the wisdom and folly of local school boards will not simply be exchanged for the wisdom and folly of technocrats. Yet the trends toward centralization of bargaining and the “technocratization” of education are already in the winds, and *Rodriguez* will thus not significantly alter the course of American social history.

And so the question remains: Who will gain from the decisions? One is left with a feeling of unease over the likely acceleration of state bar-

gaining, with a lingering suspicion that the teachers may be its primary beneficiary and, most importantly, with an impression that neither a Supreme Court affirmance nor reversal in *Rodriguez* is likely to affect substantially the achievement of children in the public schools. Certainly, the implementation of *Rodriguez* will not cure the sickness that has led to, or remedy the deprivations that result from, racial segregation in the schools. Indeed, if the courts, legislatures, or public come to view *Rodriguez* as a "way out" of our racial dilemma, the cause of "equality of educational opportunity" will have been tragically disserved.