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## SAN ANTONIO INDEPENDENT SCHOOL DISTRICT v. RODRIGUEZ: ON OUR WAY TO WHERE?

STEPHEN W. GARD\*

*The future of any country which is dependent on the will and wisdom of its citizens is damaged, and irreparably damaged, whenever any of its children is not educated to the fullest extent of his capacity . . . .*

PRESIDENT JOHN F. KENNEDY<sup>1</sup>

### INTRODUCTION

In recent years few subjects have aroused the interest and, in many cases the wrath, of the American people so much as the judiciary's role in the affairs of the public schools. The United States Supreme Court this past term rendered its most important decision in the area since *Brown v. Board of Education*.<sup>2</sup> In *San Antonio Independent School District v. Rodriguez*<sup>3</sup> the Court refused to overturn the Texas school financing system which makes the relative wealth of the individual school district the basis for school funding in that district — a system which results in gross inequalities.<sup>4</sup> By so deciding, the Court rejected the *Serrano*<sup>5</sup>-type of school financing challenge that had been endorsed by an unusually large number of judicial scholars and had become something of a cause celebre for many parents and educators.<sup>6</sup> *Rodriguez* was a landmark decision,

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1. State of the Union Address, January 14, 1963.

2. 347 U.S. 483 (1954).

3. 411 U.S. 1 (1973).

4. *Id.* at 15.

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

6. A long line of lower federal and state court decisions had held, contrary to *Rodriguez*, that gross interdistrict disparities in public school financing violate the fourteenth amend-

not because of what the Court did, but because of what it refused to do.

Reaction to *Rodriguez* was immediate. In his dissent Mr. Justice Marshall succinctly stated the reaction of many commentators:

[T]he majority's holding can only be seen as a retreat from our historic commitment to equality of educational opportunity and as unsupportable acquiescence in a system which deprives children in their earliest years of the chance to reach their full potential as citizens.<sup>7</sup>

As important as reasoned evaluation and scholarly criticism of *Rodriguez* is, however, the most important question facing Americans is "where do we go from here?" America is the land of opportunity, and it is beyond question that education is the essence of opportunity. To be concerned with our nation's future, one *must* be concerned with the birthright of every American child to an adequate educational opportunity.

Following the *Rodriguez* decision, the first recommendation for future judicial action came from Mr. John Coons, co-author of the *Serrano* school financing challenge,<sup>8</sup> who suggested that the school financing battle be continued in the state courts as a "kind of consolation prize."<sup>9</sup> Doubtless, equality of school financing is an impor-

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ment equal protection clause. See *Van Dusartz v. Hatfield*, 334 F. Supp. 870 (D. Minn. 1971); *Hollins v. Shofstall*, Civil No. C-253652 (Super. Ct. Maricopa Cty., Ariz., July 7, 1972); *Serrano v. Priest*, 5 Cal. 3d 584, 487 P.2d 1241, 96 Cal. Rptr. 601 (1971); *Milliken v. Green*, 389 Mich. 1, 203 N.W.2d 457 (1972), *vacated*, 42 U.S.L.W. 2327 (U.S. Dec. 25, 1973); *Robinson v. Cahill*, 118 N.J. Super. 223, 287 A.2d 187 (1972). See also *Sweetwater County Planning Commission v. Hinkle*, 491 P.2d 1234 (Wyo. 1971), *juris. relin.*, 493 P.2d 1050 (Wyo. 1972). But see *McInnis v. Shapiro*, 293 F. Supp. 327 (N.D. Ill. 1969), *aff'd, mem. sub nom.* 394 U.S. 222 (1970); *Burruss v. Wilkerson*, 310 F. Supp. 572 (D. Va. 1969), *aff'd mem.* 397 U.S. 44 (1970).

In addition, legal scholars had virtually unanimously supported the *Serrano*-type of school financing challenge. See, e.g., Bateman & Brown, *Some Reflections on Serrano v. Priest*, 49 J. URBAN L. 701 (1972); Berke & Callahan, *Serrano v. Priest: Milestone or Millstone for School Finance*, 21 J. PUB. L. 23 (1972); P. Ridenour, *Serrano v. Priest: Wealth and Kansas School Finance*, 20 KAN. L. REV. 213 (1972); Vieira, *Unequal Educational Expenditures: Some Minority Views on Serrano v. Priest*, 37 MO. L. REV. 617 (1972).

7. 411 U.S. 1, 71 (1973) (Marshall, J., dissenting). But see the statement of Mr. Justice Powell for the Court majority: "Nothing this Court holds today in any way detracts from our historic dedication to public education." *Id.* at 30.

8. J. COONS, W. CLUNE, & S. SUGARMAN, *PRIVATE WEALTH AND PUBLIC EDUCATION* (1972).

9. 216 THE NATION 556 (April 30, 1973). Mr. Coons in this short, highly critical article on *Rodriguez* stated that the decision "poses clearly the unprecedented responsibility of state judges to face the basic constitutional issues."

tant constitutional issue, but it is certainly not the *only* constitutional issue in the educational field. In this post-*Rodriguez* era legal scholars must examine new means of assuring America's children their right to an adequate education. The purpose of this article is to spur consideration of judicial remedies to the educational crisis by suggesting one possible course of legal action. It is imperative to note, however, that there are numerous potential courses of action and never again should one theory be pursued to the exclusion of all others.

#### EDUCATION—FAILURES OF THE PRESENT SYSTEM

In developing new legal approaches in the wake of *Rodriguez*, one must first clearly define exactly what problem is being attacked:

Children are at once our most precious national resource and our most vulnerable minority. Education—and for the overwhelming number of American children that means public school education—is our best hope of developing that resource to its fullest potential. Education is basic to the exercise of even those interests recognized by the United States Supreme Court as so fundamental that they constitutionally require special protection. Its infringement is a denial of what Americans have always professed to value most about the theory of our system: the opportunity to begin adult life free of competitive disadvantage, save that of a wholly personal nature.<sup>10</sup>

Thus the purpose and the duty of public schools is clear: to educate the nation's children.<sup>11</sup> Such a fact seems self-evident, but an objective review of public schools indicates that such a duty to educate is *not* clear to those in authority. Despite much fine oratory, the public schools simply are not educating their children.<sup>12</sup> This

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10. Note, *Equal Educational Opportunity: A Case for the Children*, 46 ST. JOHN'S L. REV. 280 (1971).

11. Butts, *Assaults on a Great Idea*, 216 THE NATION 553, 554 (April 30, 1973).

12. Thus, the following dismal account appeared recently in the Indianapolis News:

Fifteen to 20 per cent of the freshmen entering most city high schools are reading below the fourth-grade level, high school principals told the Indianapolis School Board in a discussion on discipline Tuesday.

The principals indicated to the board that reading failures are probably the No. 1 cause of discipline problems.

George Gale, principal of Northwest High School, said his school had more academic failures this past grading period than ever before.

situation was recently emphasized by Senator Walter Mondale of Minnesota:

[E]veryone agrees that the present educational predicament of poor children in America is a national disgrace and a national scandal. Practically every test and survey we have seen has demonstrated that these children by the millions are not learning the rudimentary skills, are not achieving.<sup>13</sup>

The failure of public schools to educate has been documented by numerous journalists, and every year more books appear explaining why Johnny cannot read.<sup>14</sup> Nevertheless, Johnny still cannot read, and there seems to be little headway towards solving the problem.

Perhaps one factor which inhibits significant progress is the

"We have more students who cannot read than we've ever had," Gale said. "In a classroom situation this is very bad because the students can't keep up with what is going on and they become bored and frustrated."

"We have remedial programs . . . but these people are below remedial programs. They are reading at the first and second-grade level."

"I'd say 20 per cent of the freshman class of about 600 students [are thus deficient]." Gale answered.

Cloyd Julian, principal of Washington High School, estimated one out of seven students in his freshman class reads below the fourth-grade level.

Julian said the school has remedial classes which are doing some good, but added, "Many students have terrible attendance records and emotional problems, and are not helped by the remedial program."

Earl Donaldson, principal of Attucks High School, estimated 15 per cent of his freshmen have reading problems.

Ray Reed, principal of Tech, said, "If you've got money to spend on reading, it ought to be spent in the elementary schools. We need to get at as many of the problems as quickly as possible."

Reed said he spends about 85 per cent of his time in the schools dealing with discipline problems. "Not only am I spending time in school dealing with them," he added, "but I'm running into cars on the street because I'm thinking about them." Indianapolis News, Nov. 1, 1973, at 1, col. 1.

The dismal record of public school administrators in failing to provide an adequate education to their students gives credence to Samuel Clemens' classic observation, "In the first place God made idiots; this was for practice; then he made school boards." TWAIN, *DICTIONARY OF HUMOROUS QUOTATIONS* 203 (No. 59, Esar ed. 1949).

13. *Hearings before the Subcommittee on Education of the Committee on Labor and Public Welfare*, United States Senate, 92d Cong., 2d Sess. 24 (1972).

14. S. ENGLEMAN, *PREVENTING FAILURE IN THE PUBLIC SCHOOLS* (1969); R. FLESCHE, *WHY JOHNNY CAN'T READ AND WHAT YOU CAN DO ABOUT IT* (1955); J. HOLT, *HOW CHILDREN FAIL* (1967); C. WALCUTT, *TOMORROW'S ILLITERATES: THE STATE OF READING INSTRUCTION TODAY* (1961).

continuing tendency to view the problem as one affecting only poor and black children. It is true that these children suffer most at the hands of the schools.<sup>15</sup> As a field representative for the National Education Association has commented:

They [disadvantaged children] are relegated to the arena of the untouchable, unteachable, undesirable, where nothing is expected of them. People treat them as if they are nothing, have nothing (including brains) and will amount to nothing. Hence they end up with nothing—having never really had a chance.<sup>16</sup>

One school of thought widely disseminated by public school teachers and administrators is that most students receive an adequate education and those who do not are affected by circumstances or personal defects beyond the control of the school. In at least one well-documented instance, this line of thinking has been shown to be pure myth.

The 1964 Haryou Report showed actual academic regression in New York City's Harlem where "twenty-two per cent of the third grade students in that area were reading above grade level, while thirty per cent were reading below grade level . . . . By the sixth grade twelve per cent were reading above grade level, and eighty-one per cent were reading below grade level."<sup>17</sup> In conclusion the Haryou Report found that the educational problems of these students resulted in processes which occurred during the time they were in school and not in processes found previous to their entry into school.<sup>18</sup> In other words,

[t]he fact that the achievement deficit of these children is cumulative and increases over time seems to reflect some basic weakness in both curriculum and school practices for these children.<sup>19</sup>

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15. See *Senate Fact Finding Committee on Revenue and Taxation*, California Senate, *State and Local Fiscal Relationships in Public Education in California* (1965):

"The cities feed environmentally handicapped children into the school and the schools feed uneducated young adults back into the cities." *Id.* at 59.

16. G. Jones, *Compensatory Education for the Disadvantaged*, NEA JOURNAL 22 (April 1, 1967).

17. NEW YORK: HARLEM YOUTH OPPORTUNITIES UNLIMITED, INC., *YOUTH IN THE GHETTO 168-70*, 179 (1964). Results of other studies with similar findings are reported in R. HURLEY, *POVERTY AND MENTAL RETARDATION 262* (1969).

18. NEW YORK: HARLEM YOUTH OPPORTUNITIES UNLIMITED, INC., *supra* note 17 at 227.

19. S. SILVERMAN, *COMPENSATORY EDUCATION FOR CULTURAL DEPRIVATION 74* (1965).

There is danger, however, in considering a problem only from a statistical point of view, for one does not see the human tragedies behind, and buried within, the statistics.

“Lester B.” is a recent dropout from an Indianapolis high school.<sup>20</sup> Lester entered the Indianapolis Public School system in kindergarten and attended schools within that system continuously until the tenth grade. Two years after he entered school, the system gave Lester a Pinter-Cunningham Intelligence Test which indicated that he was of average intelligence. Throughout Lester’s “academic” career he was periodically graded by his teachers on his personality traits, and never received less than a “C”, indicating average. His cheerfulness, cooperation, courtesy, dependability, industry, punctuality, scholastic interest and study habits were always considered by his teachers to be average or above average. In addition, there does not appear from his school records to have ever been any problem with attendance.

Despite this history which would indicate no reason why Lester was not continually ready, willing and able to benefit from whatever educational opportunity the schools had to offer, the record nevertheless indicates that education was something denied Lester. In the tenth grade, by the Indianapolis Public Schools’ own records, and on the basis of their own achievement tests, Lester had a reading level of *less than third grade*.<sup>21</sup> After ten years’ attendance in the Indianapolis Public School system, Lester left little better off than when he began; he was a functional illiterate. Today he is unable to get a job because he cannot read, and is not eligible for military service. Perhaps as great a tragedy is the fact that neither Lester nor his parents were ever informed of his academic shortcomings.<sup>22</sup>

Another example of the quality of education provided by the Indianapolis Public School system is that of “Tom R.”<sup>23</sup> According to Indianapolis Public School records, Tom has an I.Q. of 76, and

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20. In order to preserve this young man’s human dignity and self-respect his true identity will not be disclosed here. Further documentation will be made available to those with a legitimate need therefor.

21. On the basis of the Wide Range Achievement Test for reading ability administered by the Indianapolis Public Schools “Lester” scored on the second grade nine month level.

22. “Lester’s” official school achievement record discloses that he was passed on to the next grade at the end of each term and was never failed or retained in a grade. In addition “Lester” was generally given “C’s” in reading and only received three “D’s” throughout his academic career.

23. See note 20 *supra*.

on that basis he was assigned to a special class for "slow" students in which expectations are lowered and more rudimentary education is provided.<sup>24</sup> Tom was independently tested by two private psychologists. One found that he had an I.Q. of 106, and the other found that he had an I.Q. of 97.<sup>25</sup> These tests also indicated that Tom, a tenth grade student, was able to read on the fifth grade level, do math on the fourth grade level, and spell on the third grade level. These findings are corroborated by the school system's own records.

Tom, a young man with an extraordinary desire to learn, went to the head of the English department after learning of his academic deficiencies and requested remedial help. He was told that the school had no such classes available to children reading above the second grade level. Over Tom's protests, he was further informed that he had no cause to complain since his reading ability was better than the majority of students in his high school. This author personally attempted to intervene on Tom's behalf with the school authorities but met with a singular lack of success. After months of frustra-

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24. In segregating students the IQ test is used as the principal grounds for determining which students are "slow" (and should be made even slower) and which are "fast" (and should therefore be given special advantages and removed from contamination from other students).

P. SEXTON, *EDUCATION AND INCOME* 43 (1966).

Kenneth Clark, the noted social scientist, has remarked on the treatment of children like "Tom" by the public schools:

When a child from a deprived background is treated as if he is uneducable because he has a low test score, he becomes uneducable and the low test score is thereby reinforced. If a child scores low on an intelligence test because he cannot read and then is not taught to read because he has a low test score, then such a child is being imprisoned in an iron circle and becomes the victim of an educational self-fulfilling prophecy.

K. Clark, *Educational Stimulation in Racially Disadvantaged Children*, in *EDUCATION IN DEPRESSED AREAS* 142, 150 (Passlow ed. 1963).

The situation is aggravated in the Indianapolis Public School System because of its reliance on the Otis-Lennon Mental Ability Test. Indianapolis Public Schools, Response to questionnaire requested by Indianapolis Marion County Human Rights Commission, July 17, 1973 [hereinafter cited as Human Rights Commission questionnaire]. The Otis-Lennon Mental Ability Test is widely recognized as being inappropriate for measuring innate learning potential and the authors of the test themselves caution against results being accepted as accurate for children who do not have normal backgrounds. *THE SEVENTH MENTAL MEASUREMENTS YEARBOOK* 690-93 (O. Buros ed. 1972).

25. On August 17, 1972 "Tom" was given extensive psychological tests by Dr. David Blumenthal, Indianapolis, Indiana, and found to have a full scale IQ of 106. Shortly thereafter similar tests were administered by Dr. David Lucas, Riley Children's Hospital, Indianapolis, Indiana, who found that "Tom" had a full scale IQ of 97, thereby confirming that "Tom" was a child of normal intelligence.



tion and failure, Tom dropped out of public school and entered a private remedial tutoring academy.

Lester and Tom are not isolated cases. At Shortridge High School in Indianapolis, 40 per cent of the freshman class has only a fourth, fifth or sixth grade reading level.<sup>26</sup> The Indianapolis Public Schools, as a matter of policy, refuse to release statistics of average achievement levels, or otherwise to provide any objective indicia of student academic accomplishment.<sup>27</sup>

Thus, while it is necessary to consider the judicial remedies to the educational crisis in somewhat abstract terms within the framework of constitutional doctrine, we as lawyers and citizens must remember Lester and Tom and the millions like them nationwide. Any legal approach recommended must be tested by the degree to which it will directly benefit these children. To do otherwise would subject the schools to ineffective regulations which would only further anger the American people by holding out more empty promises of a solution.

There are several specific practices and policies by which schools deprive children of their educational opportunity. These practices may vary from school to school and city to city, but on the whole they appear to be widely used. The best known of these policies is the reckless and often discriminatory use of Intelligence (I.Q.) Tests by the public schools. The results of these tests—frequently biased by racial or ethnic background—are often used as the primary basis for placing a child in “slow” classes where he may remain for years.<sup>28</sup> The fact that the school system considers him “slow” is often well known to the child.<sup>29</sup> Fortunately, the use of

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26. The Indianapolis News, Feb. 19, 1973, at 4, col. 1. Even more disconcerting is the revelation that students at Mapleton-Fall Creek Junior High School, a Shortridge High School “feeder” school, have an average reading level of fifth-sixth grade. The Indianapolis News, Feb. 21, 1973, at 4, col. 1.

27. On August 7, 1973, a request was made to the office of Mr. Paul Brown, Supervisor, Testing and Evaluation, Indianapolis Public Schools, for official Indianapolis Public School achievement test results. This request was refused. On August 30, 1973, a similar request was made of Mr. Brown personally by certified letter. This writer has not been paid the courtesy of a response to that letter.

28. See note 24 *supra* and accompanying text. Further, the report of public school principals in a major metropolis recently declared: “There isn’t too much we can do with our children. Most of them are slow learners.” HOUSE COMMITTEE ON EDUCATION AND LABOR, A TASK FORCE STUDY OF THE PUBLIC SCHOOLS IN THE DISTRICT OF COLUMBIA AS IT RELATES TO THE WAR ON POVERTY 64 (1966).

29. Human Rights Commission questionnaire. See also Green, *Separate and Unequal Again*, 14 INEQUALITY IN EDUCATION 14 (1973).

these tests is currently under attack in both California and Massachusetts.<sup>30</sup>

Another widespread practice which operates to deprive children of an education is that of "social promotion," a practice whereby a child who fails to meet the required academic standards in one grade is nonetheless promoted to a higher grade for "social" reasons. Generally, physical size and sexual development are the explanations given to justify this policy. The tragic effects on the children are obvious, for "[a]s the child is 'promoted' from grade to grade to keep him with his age mates but before he has really mastered his tasks, failure becomes cumulative."<sup>31</sup> Such a policy is utterly senseless in a system like Indianapolis where a large number of children are under-achieving and can be placed together in classrooms, not by age but by present educational needs.

Saddest of all in this situation is the fact that these very important decisions affecting a child's life are not currently subject to the due process requirements of notice, hearing, right to confrontation and right to counsel.<sup>32</sup> Before the school takes any significant action concerning a child's educational career, it should have the responsibility of notifying the parents of the specific nature of the child's problem and presenting to them the results of the medical, psychological or educational tests. The parents should also be fully informed of the school's proposed educational plan for the child and be periodically advised of how the child is progressing in terms of the plan. Should the parents believe that the diagnosis is erroneous or hopelessly biased, they must be entitled to a hearing before an impartial arbiter where they may rebut the school's evidence and present their own. While in many areas the schools have been required to observe the rudiments of the fourteenth amendment procedural due process guarantees,<sup>33</sup> until they are recognized in this

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30. *Larry P. v. Riles*, 343 F. Supp. 1306 (N.D. Cal. 1972) (preliminary injunction issued); *Stewart v. Phillips*, Civil No. 70-1199-F (D. Mass. 1971).

31. *Task Force Report: Juvenile Delinquency and Youth Crime*, N. deB. Katzenbach, Chrm., in *TASK FORCE ON JUVENILE DELINQUENCY, THE PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE* 51 (1967).

32. *But see Mills v. Board of Education*, 348 F. Supp. 866 (D.D.C. 1972) (consent order) (public school students are entitled to a hearing before assignment to anything other than a "regular" classroom). *See also McClung, School Classification: Some Legal Approaches to Labels*, 14 *INEQUALITY IN EDUCATION* 17 (1973).

33. *See, e.g., Scoville v. Board of Education of Joliet*, 425 F.2d 10 (7th Cir. 1970) (en banc); *Dixon v. Alabama*, 294 F.2d 150 (5th Cir. 1961); *Knight v. Board of Education of New*

all-important area of classroom placement, an adequate education will be very difficult, if not impossible, for many children to achieve.

One can also approach this problem of educational deprivation from a broader point of view by looking at the resulting lack of academic accomplishment suffered by children after years of public school attendance. A legal challenge based on this approach is *Doe v. California School District*.<sup>34</sup> Peter Doe, the plaintiff in this suit, is a nineteen year old graduate of Galileo Senior High School in San Francisco who, despite good attendance and no handicap which would impede his education, remains functionally illiterate; that is, he has a reading achievement of approximately fifth grade level. The suit is based on numerous common and state law theories of action including negligence, fraud and breach of the statutory duty to instruct public school students in the basic academic skills.<sup>35</sup>

Challenges based on the United States Constitution generally fall within this second approach to the problem,<sup>36</sup> and it is this approach to guaranteeing an adequate education which will be considered at length here. In order to consider intelligently the problem of the right to an adequate education as a matter of constitutional law, it is necessary not only to evaluate *Rodriguez* and its impact but also to recognize the scope and force of the argument for the recognition of a constitutional right to an education—a right seemingly rejected in *Rodriguez*. It is only by consideration of the past judicial treatment of the constitutional status of education that the true meaning and relevance of *Rodriguez* can be understood and placed in the proper perspective.

#### EDUCATION — CONSTITUTIONAL PERSPECTIVES

The American belief in the fundamental importance of education arrived with the first colonists on the Mayflower, and the first

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York, 48 F.R.D. 108 (E.D.N.Y. 1969). See also *Kelley v. Metropolitan County Board of Education*, 293 F. Supp. 485 (M.D. Tenn. 1968) (right to a hearing before public school student can be denied the right to participate in school athletics).

34. Civil No. C-653 312 (Super. Ct. San Francisco, Cal., November 20, 1972).

35. *Id.*

36. See *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1 (1973); *Van Dusartz v. Hatfield*, 334 F. Supp. 870 (D. Minn. 1971); *Burruss v. Wilkerson*, 310 F. Supp. 572 (W.D. Va. 1969); *McInnis v. Shapiro*, 293 F. Supp. 327 (N.D. Ill. 1969). See also *Milliken v. Green*, 389 Mich. 1, 203 N.W.2d 457 (1972), *vacated*, 42 U.S.L.W. 2327 (U.S. Dec. 25, 1973); *Robinson v. Cahill*, 118 N.J. Super. 223, 287 A.2d 187 (1972); *Serrano v. Priest*, 5 Cal. 3d 584, 487 P.2d 1241, 96 Cal. Rptr. 601 (1971).

public school system in America was founded in Massachusetts in 1647.<sup>37</sup> In 1787, two years before the Constitution was adopted, the Confederate Congress declared in the Northwest Ordinance that “[s]chools and the means of education shall forever be encouraged.”<sup>38</sup> Considering the fact that the Northwest Ordinance of 1787 was “one achievement of the Confederation it would be impossible to question,”<sup>39</sup> it is unthinkable that the omission of a specific guarantee of a right to education was intended by the founding fathers to be a repudiation of the Ordinance. Clearly the omission of this specific guarantee was due either to the belief that such a guarantee was unnecessary because of the popular support and approval of the Northwest Ordinance, or to the belief that such a right was assumed to be within a broader, more general constitutional guarantee. This point of view is buttressed further by the founding fathers’ repeated emphasis on the importance of education in the development and maintenance of a democratic political system. Thomas Jefferson firmly believed that public school education was the only “sure foundation . . . for the preservation of freedom, happiness.”<sup>40</sup> Without education, Jefferson declared, “no republic can maintain itself in strength.”<sup>41</sup> George Washington also strongly believed in the importance, indeed the necessity, of universal, effective public school education:

Promote then as an object of primary importance Institutions for the general diffusion of knowledge. In proportion as the structure of a government gives force to public opinion, it is essential that public opinion be enlightened.<sup>42</sup>

In addition to Washington and Jefferson, both James Madison and

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37. W. DOUGLAS, *AN ALMANAC OF LIBERTY* 138 (1954). On November 11, 1647, the General Court of Massachusetts Bay Colony ordered

that every township in this jurisdiction, after the Lord hath increased them to the number of fifty householders, shall then forthwith appoint one within their town to teach all such children as shall resort to him to write and read. . . .

Quoted in D. BOORSTIN, *THE AMERICANS: THE COLONIAL EXPERIENCE* 300 (1958).

38. 1 U.S.C. XXXIX (1959).

39. E. WRIGHT, *FABRIC OF FREEDOM: 1763-1800* 160 (1961).

40. Letter from Thomas Jefferson to Whyte, August 13, 1786, in 5 *WRITINGS OF THOMAS JEFFERSON* 396 (Berg. ed. 1907).

41. Letter from Thomas Jefferson to John Tyler, May 26, 1810, in 12 *WRITINGS OF THOMAS JEFFERSON* 393 (Berg. ed. 1907).

42. George Washington, *Farewell Address*, in 35 *THE WRITINGS OF GEORGE WASHINGTON* 230 (Bicentennial ed. 1956).

John Adams advocated governmental responsibility for free public education.<sup>43</sup>

Except for the temporary disruption of the Civil War, the nineteenth century was a chronology of progress for public school education.<sup>44</sup> An excellent illustration of the historical American commitment to public education is the emphasis given to it during the period immediately following the Civil War. The thirty-ninth Congress, which drafted the fourteenth amendment, cited public education as one of the fundamental tenets of Republicanism<sup>45</sup> and public education was imposed as a precondition for readmission to the Union for confederate states.<sup>46</sup> The importance which the founding fathers placed on education is now reflected in the laws and constitutions of every state except South Carolina (which repealed its constitutional provision for free public education shortly after *Brown v. Board of Education* was decided).<sup>47</sup> In addition, every state except Mississippi (in a similar reaction to *Brown*) provides that school attendance is compulsory.<sup>48</sup>

43. See, e.g., Letter from George Washington to Samuel Chase, January 5, 1785, in 28 WRITINGS OF GEORGE WASHINGTON 26 (Fitzpatrick ed. 1938); T. JEFFERSON, NOTES ON THE STATE OF VIRGINIA 146-49 (Peden ed. 1955); Letter from James Madison to Thomas Gilmer, September 6, 1830, in THE COMPLETE MADISON 314-15 (Padover ed. 1953); J. Adams, *Dissertation on the Canon and Feudal Law* in 3 WORKS OF JOHN ADAMS 455-56 (C. Adams ed. 1851).

44. See generally CUBBERLEY, PUBLIC EDUCATION IN THE UNITED STATES (1934); EDWARDS AND RICHEY, THE SCHOOL IN THE AMERICAN SOCIAL ORDER (1963).

45. See, e.g., Act of July 16, 1866, ch. 200, 14 Stat. 173, 176 (1866); Act of March 2, 1867, ch. 158, 14 Stat. 434 (1867).

46. See *Illinois ex. rel. McCollum v. Board of Education*, 333 U.S. 203, 220-21 and n.9 (1948).

47. ALA. CONST. art. 14, § 256; ALASKA CONST. art. 7, § 1; ARIZ. CONST. art. 11, § 11; ARK. CONST. art. 14, § 1; CAL. CONST. art. 9, § 5; COLO. CONST. art. 9, § 2; CONN. CONST. art. 8, § 1; DEL. CONST. art. 10, § 1; FLA. CONST. art. 12, § 1; GA. CONST. art. 8, § 2-6401; HAWAII CONST. art. 9, § 1; IDAHO CONST. art. 9, § 1; ILL. CONST. art. 10, § 1; IND. CONST. art. 8, § 1; IOWA CONST. art. 9, 1st, § 12; KANSAS CONST. art. 6, § 1; KY. CONST. § 183; LA. CONST. art. 12, § 1; ME. CONST. art. 8, § 1; MD. CONST. art. 8, § 1; MASS. CONST. pt. 2, ch. 5, § 2; MICH. CONST. art. 8, § 2; MINN. CONST. art. 8, § 1; MISS. CONST. art. 8, § 201; MO. CONST. art. 9, § 1(a); MONT. CONST. art. 10, § 1; NEB. CONST. art. 7, § 6; NEV. CONST. art. 11, § 2; N.H. CONST. pt. 2, art. 183; N.J. CONST. art. 8, § 4, ¶ 1; N.M. CONST. art. 12, § 1; N.Y. CONST. art. 11, § 1; N.C. CONST. art. 9, § 2; N.D. CONST. art. 8, § 147; OHIO CONST. art. 6, § 3; OKLA. CONST. art. 13, § 1; ORE. CONST. art. 8, § 3; PA. CONST. art. 3, § 14; R.I. CONST. art. 12, § 1; S.D. CONST. art. 8, § 1; TENN. CONST. art. 11, § 3; TEX. CONST. art. 7, § 1; UTAH CONST. art. 10, § 1; VT. CONST. ch. 2, § 64; VA. CONST. art. 8, § 1; WASH. CONST. art. 9, § 1; W. VA. CONST. art. 12, § 1; WIS. CONST. art. 10, § 3; WYO. CONST. art. 7, § 1.

48. ALA. CODE tit. 52 § 297 (1958); ALASKA STAT. § 14.30.010 (1966); ARIZ. REV. STAT. ANN. § 15-321 (Supp. 1972); ARK. STAT. ANN. § 80-1502 (1960); CAL. EDUC. CODE § 12101 (West Supp. 1973); COLO. REV. STAT. ANN. § 123-20-5 (1964); CONN. GEN. STAT. ANN. § 10-

The existence of a right to education has long been recognized by the judiciary; in fact, it has never been doubted. Traditionally the right to an education has been found to be encompassed within the "liberty" which the fourteenth amendment proclaims shall not be deprived without due process of law.<sup>49</sup> As early as 1923 the United States Supreme Court, speaking of the substantive due process provision of the fourteenth amendment, stated, "[w]ithout doubt, it denotes not merely freedom from bodily restraint but also the right of the individual . . . to acquire useful knowledge . . . ."<sup>50</sup> This construction is consistent with the intent of the framers of the fourteenth amendment.<sup>51</sup>

The acceptance and recognition of the constitutional right to an education by the United States Supreme Court is further continued in the now famous school desegregation cases. In *Brown I* the Supreme Court unanimously held:

Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the per-

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184 (1967); DEL. CODE ANN. tit. 14 § 2702 (Cum. Supp. 1970); FLA. STAT. ANN. § 232.01 (Cum. Supp. 1973); GA. CODE ANN. § 32-2104 (Supp. 1972); HAWAII REV. STAT. § 298-9 (1968); IDAHO CODE § 33-202 (1963); ILL. ANN. STAT. ch. 122 § 26-1 (Smith-Hurd Supp. 1973); IND. CODE § 20-8.1-3-17 (Cum. Supp. 1973); IOWA CODE ANN. § 299.1 (Cum. Supp. 1973); KAN. STAT. ANN. § 72-1111 (1972); KY. REV. STAT. ANN. § 159.010 (1969); LA. REV. STAT. ANN. § 17:221 (Cum. Supp. 1973); ME. REV. STAT. ANN. tit. 20 § 911 (Cum. Supp. 1973); MD. ANN. CODE art. 77, § 92 (Cum. Supp. 1971); MASS. ANN. LAWS ch. 76, § 2 (Cum. Supp. 1972); MICH. COMP. LAWS ANN. § 340.731 (1967); MINN. STAT. ANN. § 120.10 (Cum. Supp. 1973); MO. ANN. STAT. § 167.031 (1965); MONT. REV. CODES ANN. § 75-6303 (Cum. Supp. 1973); NEB. REV. STAT. § 79-201 (1971); NEV. REV. STAT. § 392.040 (1971); N.H. REV. STAT. ANN. § 193:1 (1964); N.J. STAT. ANN. § 18A:38-25 (1968); N.M. STAT. ANN. § 77-10-2 (Supp. 1973); N.Y. EDUC. LAW § 3205 (McKinney 1970); N.C. GEN. STAT. § 115-166 (Cum. Supp. 1971); N.D. CENT. CODE § 15-34.1-01 (1971); OHIO REV. CODE ANN. § 3321.04 (Baldwin 1971); OKLA. STAT. ANN. tit. 70, § 10-105 (Cum. Supp. 1972); ORE. REV. STAT. § 339.010 (1972); PA. STAT. ANN. tit. 24, § 13-1327 (Cum. Supp. 1973); R.I. GEN. LAWS ANN. § 16-19-1 (1970); S.C. CODE ANN. § 21-757 (Cum. Supp. 1971); S.D. COMPILED LAWS ANN. § 13-27-1 (1967); TENN. CODE ANN. § 49-1708 (1966); TEX. EDUC. CODE ANN. § 21.032 (1972); UTAH CODE ANN. § 53-24-1 (1970); VT. STAT. ANN. tit. 16, § 1121 (Cum. Supp. 1973); VA. CODE ANN. § 22-255.1 (1973); WASH. REV. CODE ANN. § 28A.27.010 (Supp. 1972); W. VA. CODE ANN. § 18-8-1 (1971); WIS. STAT. ANN. § 40.77 (1966); WYO. STAT. ANN. § 21.1-48 (Cum. Supp. 1971).

49. *Berea College v. Kentucky*, 211 U.S. 45 (1908); *Johnson v. Town of Deerfield*, 25 F. Supp. 918 (D. Mass. 1939).

50. *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923).

51. See notes 45-46 *supra* and accompanying text.

formance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship . . . . In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education.<sup>52</sup>

Despite the confusion caused by the Supreme Court's use of *Brown I* as authority for a series of rather summary per curiam decisions invalidating racial segregation in numerous areas,<sup>53</sup> a careful study of the case clearly discloses that education, not race, was the primary grounds upon which the decision was based. That this is true is apparent not only from the above-quoted language of the Court, but also from the manner in which the Court phrased the question presented in *Brown I*:

We come then to the question presented: Does segregation of children in public schools solely on the basis of race . . . deprive the children of the minority group of equal educational opportunities?<sup>54</sup>

Thus, the precise issue with which the Court was concerned was the constitutional mandate of equal educational opportunities, and racial segregation was simply the factual situation which was alleged to result in the unconstitutional deprivation of an education. If *Brown I* was simply a "race case"—as has been claimed by some commentators—then the issues would probably have been framed by a question like: "Does the denial of equal educational opportunity deprive the plaintiffs of the equal protection of the laws guaran-

52. *Brown v. Board of Education*, 347 U.S. 483, 493 (1954).

53. See *Mayor of Baltimore v. Dawson*, 350 U.S. 877 (1955) (public beaches and bath-houses); *Holmes v. Atlanta*, 350 U.S. 879 (1955) (municipal golf courses); *Gayle v. Browder*, 352 U.S. 903 (1956) (de jure segregation of buses); *New Orleans City Park Improv. Ass'n v. Detiege*, 358 U.S. 54 (1958) (public parks and golf course); *Turner v. Memphis*, 369 U.S. 350 (1962) (segregation in airport restaurant required by administrative regulation); *Johnson v. Virginia*, 373 U.S. 61 (1963) (courtroom seating).

54. 347 U.S. 483, 493 (1954). See also *Hearings before the Subcommittee on Education of the Committee on Labor and Public Welfare*, United States Senate, 92d Cong., 2d Sess. (1972) in which HEW Secretary Richardson stated:

We must reestablish by action . . . the primacy of the educational objectives which underlie the original *Brown* cases . . . . The parents of all children — black and white alike — are demanding more and better education from our school systems . . . . To put it another way, there is a belief abroad in the land that, in enforcing the guarantees of the Fourteenth Amendment, we have forgotten this basic objective.

*Id.* at 26.

teed by the fourteenth amendment?" This is the way in which issues are phrased in other "race cases," in direct contrast to the phraseology of *Brown I*. It is inconceivable that the issue in a lunch counter segregation case would be phrased: "Does the segregation of lunch counters deprive the plaintiffs of equal gastronomical opportunities?"

This interpretation of *Brown I* is further buttressed by Supreme Court cases preceeding it. Both *Sweatt v. Painter*<sup>55</sup> and *McLaurin v. Oklahoma State Regents*,<sup>56</sup> decided in 1950, outlawed racial discrimination in specific educational situations on the grounds that such discrimination resulted in denial of the constitutional right to equal educational opportunity, and can only be understood in this context. This interpretation of *Brown I* has also been adopted by the Burger Court in *Palmer v. Thompson*,<sup>57</sup> where the Court upheld the closing of a municipal swimming pool to avoid integration, specifically distinguishing *Bush v. Orleans Parish School Board*<sup>58</sup> (school closing) on the grounds that public schools are the most important function of state and local governments.

The lower federal courts have not been hesitant to follow the Supreme Court's lead. Until *Rodriguez* the lower federal courts' view of the constitutional right to an education can be summed up by the District Court of Massachusetts in *Ordway v. Hargraves*:

It would seem beyond argument that the right to receive a public school education is a basic personal right or liberty.<sup>59</sup>

Irrespective of historical considerations, in determining whether public school education is a constitutional right, "[w]e must consider public education in the light of its full development and its present place in American life throughout the Nation."<sup>60</sup> In

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55. 339 U.S. 629 (1950).

56. 339 U.S. 637 (1950).

57. 403 U.S. 217 (1971).

58. 187 F. Supp. 42 (E.D. La. 1960).

59. 323 F. Supp. 1155, 1158 (D. Mass. 1971). See also *Cook v. Edwards*, 341 F. Supp. 307, 310-11 (D.N.H. 1972) ("No authority is needed for the fundamental American principle that a public school education through high school is a basic right of all citizens."); *Breen V. Kahl*, 296 F. Supp. 702 (W.D. Wis. 1969). Cf. *Mills v. Board of Education*, 348 F. Supp. 866 (D.D.C. 1972) (consent order); *Pennsylvania Ass'n Retarded Children v. Pennsylvania*, 334 F. Supp. 1257 (E.D. Pa. 1971) (consent order); *Hosier v. Evans*, 314 F. Supp. 316 (D.V.I. 1970); *Alexander v. Thompson*, 313 F. Supp. 1389 (C.D. Cal. 1970); *Perry v. Grenada Municipal Separate School District*, 300 F. Supp. 748 (N.D. Miss. 1969).

60. *Brown v. Board of Education*, 347 U.S. 483, 492-93 (1954).



addition to the historical acceptance of the constitutional right to an education, there are other pressing reasons why an adequate public school education is a constitutional requirement. Perhaps the most fundamental of these reasons is that the right to an adequate education is "preservative of other basic civil and political rights."<sup>61</sup> The Supreme Court has consistently recognized the relationship between education and participation in the political processes of the nation: "The public school is at once the symbol of our democracy and the most persuasive means for promoting our common destiny."<sup>62</sup>

Often the degree to which a citizen is able to communicate his beliefs and desires to his government is directly dependent on his ability to read and write. An illiterate citizen is at an overwhelming disadvantage in protecting his rights and expressing his views, whether in the courtroom, in an administrative hearing, or in a simple letter to his elected representatives. The public schools, by providing, or refusing to provide, rudimentary educational skills, in fact determine the limits of an individual's ability to participate in the political process.

Educational attainment is the most significant determinant of political consciousness and participation. In 1959, Mr. Justice Douglas, for the United States Supreme Court, held:

The ability to read and write likewise has some relation to standards designed to promote intelligent use of the ballot . . . . Literacy and intelligence are obviously not synonymous. Illiterate people may be intelligent voters. Yet in our society where newspapers, periodicals, books, and other printed matter canvass and debate campaign issues, a State might conclude that only those who are literate should exercise the franchise.<sup>63</sup>

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61. *Reynolds v. Sims*, 377 U.S. 533, 562 (1964). See also *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886).

62. *Illinois ex rel. McCollum v. Board of Education*, 333 U.S. 203, 231 (1948) (Frankfurter, J., concurring). See also *Abbington School District v. Schempp*, 374 U.S. 203, 230 (1963) (Brennan, J., concurring) ("Americans regard the public schools as a most vital civic institution for the preservation of the democratic system of government."); *West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 637-38 (1943).

63. *Lassiter v. Northampton Election Board*, 360 U.S. 45, 51-52 (1959).

Prior to the Voting Rights Act of 1965,<sup>64</sup> nineteen states made literacy a condition to the right to vote.<sup>65</sup> As the Court recognized in *Gaston County v. United States*,<sup>66</sup> the causal relationship between unequal educational opportunities and the right to vote was one of the principal reasons for the Act's literacy test suspension provisions.<sup>67</sup>

Statistics on the 1968 Presidential election graphically illustrate this causal relationship between educational achievement and participation in the electoral process:

REPORTED VOTER PARTICIPATION IN 1968  
PRESIDENTIAL ELECTION<sup>68</sup>

<u>Years of Schooling</u>	<u>Males</u>	<u>Proportion Voting</u>		
		<u>WHITES</u>		<u>BLACKS</u>
		<u>Females</u>	<u>Males</u>	<u>Females</u>
0 to 4	45.4	32.0	43.2	34.7
5 to 7	60.5	46.1	54.9	53.5
8	68.4	59.8	59.7	53.3
9 to 11	67.5	62.7	61.7	59.4
12	76.3	75.6	74.8	69.5
13 to 15	80.7	82.5	79.7	79.4
16	85.2	84.2	85.8	83.7
17 or more	86.4	88.3	88.4	—

These statistics are typical; virtually all studies have shown a strong positive correlation between educational attainment and political participation.<sup>69</sup> This relationship leads to the inevitable conclusion:

We are here dealing with an aspect of twentieth century life so fundamental as to be fittingly considered the cornerstone of a vibrant and viable republican form of democracy, such as we so proudly espouse, *i.e.*, free and unrestricted public education.<sup>70</sup>

64. Act of Aug. 6, 1965, Pub. L. No. 89-110, 79 Stat. 437.

65. VOTING RIGHTS LEGISLATION, S. REP. No. 162, 89th Cong., 1st Sess., pt. 3, at 45 (1965).

66. 395 U.S. 285 (1969).

67. *Id.* at 289.

68. U.S. DEPARTMENT OF COMMERCE, BUREAU OF THE CENSUS, YEARS OF SCHOOL COMPLETED — REPORTED VOTER PARTICIPATION IN 1968 AND 1964 FOR PERSONS 25 YEARS OLD AND OVER, BY RACE AND SEX, FOR THE UNITED STATES: NOVEMBER, 1968 (Current Population Reports, Series P.20, No. 192, Table 11).

69. H. LEVIN, THE COSTS TO THE NATION OF INADEQUATE EDUCATION, COMMITTEE PRINT OF THE SENATE SELECT COMMITTEE ON EQUAL EDUCATIONAL OPPORTUNITY, 92d Cong., 2d Sess. 46-47 (1972).

70. *Hosier v. Evans*, 314 F. Supp. 316, 319 (D.V.I. 1970). See also THE PRESIDENT'S

Like political participation, the meaningful exercise of rights guaranteed under the first amendment rely on an adequate education, for one of the primary purposes of public schools is

to nurture and develop the human potential of . . . children . . . to expand their knowledge, broaden their responsibilities, kindle their imagination, foster a spirit of free inquiry, and increase their human understanding and tolerance.<sup>71</sup>

The protection of the right to an adequate education is supported by every consideration which has historically buttressed the first amendment guarantee of free speech. The meaningful exercise of the right of free speech is dependent upon the speaker's ability to speak intelligently and knowledgeably, *i.e.*, is dependent upon the level of the speaker's educational achievement. The right of free speech is meaningless unless the speaker is capable of articulating his thoughts knowingly and persuasively. Education *is* speech, just as speech is always a form of education. In our system "competition in ideas and governmental policies is at the core of our electoral process and of first amendment freedoms."<sup>72</sup>

Education is the primary and deliberate influence of the state upon the intellectual, social and political life of its citizens. The denial of an adequate education constitutes a denial of the right to receive information, a right whose constitutional protection has repeatedly been declared by the United States Supreme Court.<sup>73</sup> The right to receive information is so important that it was the basis for the first invalidation of a federal statute on first amendment grounds in the history of the Supreme Court. In *Lamont v. Postmaster General*<sup>74</sup> it was expressly held that the recipient of ideas, even

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COMMISSION ON SCHOOL FINANCE, *Schools, People and Money: The Need for Educational Reform* 13 (1972): "Literally, we cannot survive as a nation or as individuals without . . . [education]." *Id.*

71. *Wisconsin v. Yoder*, 406 U.S. 205, 239 (1972) (White, J., concurring).

72. *Williams v. Rhodes*, 393 U.S. 23, 32 (1969).

73. See *Keyishian v. Board of Regents*, 385 U.S. 589, 603 (1967) (classroom described as a unique example of the "marketplace of ideas"); *Sweazy v. New Hampshire*, 354 U.S. 234, 250 (1957) (Court upholds the right "to inquire, to study, and to evaluate, to gain new maturity and understanding . . ."). See also *Tinker v. Des Moines Community School District*, 393 U.S. 503 (1969); *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968); *Shelton v. Tucker*, 364 U.S. 479, 487 (1960).

74. 381 U.S. 301 (1965). See also *Stanley v. Georgia*, 394 U.S. 557, 564 (1969); *Martin v. City of Struthers*, 319 U.S. 141 (1943).

unsolicited ideas and information, has a recognizable first amendment right to receive such communication.<sup>75</sup>

Certainly a school child has an equal right to receive information and ideas. Indeed, each state of the Union has created a multi-million dollar information dissemination system which is justified precisely by its specific and powerful influence upon its students' minds. Indeed, this flow of information is deemed so important that every state except Mississippi makes school attendance compulsory.<sup>76</sup> When an adult has the constitutional right to enjoy obscene materials, can a child have any less right to learn about reading, writing, American history and the sciences?<sup>77</sup>

Turning to the practicalities which mandate the effective protection of the constitutional right to an adequate education, it takes little imagination to recognize the economic impact of education. In our highly complex society, with its "nuclear physicists, ballet dancers, computer programmers, [and] historians," formal training is an absolute prerequisite to success.<sup>78</sup> The impact of education upon a child's future earnings capability clearly demonstrates the economic necessity of an education. As of 1968, the lifetime mean income of people with less than eight years of public education was \$196,000; for people with four years of high school, \$350,000; and for those with four years of college, \$586,000.<sup>79</sup> Indeed, the very opportunity of securing employment is dependent upon educational achievement.<sup>80</sup> As an extension of this thought, it cannot be disputed that education, by enabling an individual to compete economically on an equal basis regardless of socio-economic background, is essential to the maintenance of the free enterprise system America prizes and thus is vital to the economic survival of the nation in the world market place. In essence, the very survival of the nation depends on the right to an adequate education.

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75. 381 U.S. 301, 307 (1965).

76. See note 48 *supra*.

77. Cf. *Stanley v. Georgia*, 394 U.S. 557 (1969).

78. *Wisconsin v. Yoder*, 406 U.S. 205, 240 (1972) (White, J., concurring). See also, e.g., C. SILBERMAN, *CRISIS IN BLACK AND WHITE* 224-25 (1964); Note, *Equal Educational Opportunity: A Case for the Children*, 46 ST. JOHN'S L. REV. 280 (1971); H. Mann, *Twelfth Annual Report to the Massachusetts State Board of Education*, in COMMANGER, *DOCUMENTS IN AMERICAN HISTORY* 318 (1958).

79. 1972 STATISTICAL ABSTRACT OF THE UNITED STATES 114. This means that those with less than eight years of education have an annual mean income of \$3,981 while those with four years of college have an annual mean income of \$12,938. *Id.*

80. *Piper v. Big Pine School District*, 193 Cal. 664, 673, 226 P. 926, 930 (1924).

Education is also a major factor in the reduction of the crime rates.<sup>81</sup> The relationship between inadequate education and juvenile delinquency is readily apparent, and has been well documented. One recent study found that children who received an inadequate education were seven times more likely to become delinquent.<sup>82</sup> The old myth that many children have no interest in school and do not want to learn has been totally repudiated; the fact is that virtually all children place an exceedingly high value on educational achievement.<sup>83</sup> Those children unable to achieve educationally become frustrated and develop a negative self-image. Rejection by teachers and educationally successful schoolmates re-enforces this unfavorable self-image. The frustration and bitterness becomes hostility—a major cause of juvenile delinquency.<sup>84</sup>

That an adequate education is essential has been eloquently stated by a United States District Court in the Virgin Islands:

[I]t is manifestly contrary to the public good . . . to develop and foster a ghetto of ignorance, with countless numbers of untrained, untutored, and perhaps untended children . . . roaming the streets, this with the concomitant evils of crime, immorality and general social degeneracy. In the public interest a generation of illiterates is to be avoided, whatever the financial cost.<sup>85</sup>

If the constitutional right to an adequate education is not recognized, if millions of children are banished to perpetual ignorance, then the constitutional difficulties become even greater. Considering the irreparable injury an inadequate education inflicts on a child and the fact that every state, except Mississippi, makes public school attendance compulsory, then a serious eighth amendment problem is presented:

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81. PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE TASK FORCE REPORT, CRIME AND ITS IMPACT: AN ASSESSMENT 77-80 (1967).

82. PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE TASK FORCE REPORT, JUVENILE DELINQUENCY AND YOUTH CRIME 51 (1967).

83. Vinter & Sarri, *Malperformance in the Public School: A Group Work Approach*, 10 SOCIAL WORK 3-13 (1965); R. TURNER, THE SOCIAL CONTEXT OF AMBITION 43 (1964).

84. K. Polk & L. Richmond, *Those Who Fail* (unpublished paper, Lane County Youth Project, Eugene, Oregon) (1966); J. & M. TOBY, LOW SCHOOL STATUS AS A PREDISPOSING FACTOR IN SUBCULTURAL DELINQUENCY, (United States Office of Education, Cooperative Research Project, No. 526, 1961); S. & E. GLUECK, DELINQUENTS IN THE MAKING 71 (1952).

85. *Hosier v. Evans*, 314 F. Supp. 316, 321 (D.V.I. 1970).

To deprive any citizen of his or her liberty upon the altruistic theory that the confinement is for humane therapeutic reasons and then fail to provide adequate treatment violates the very fundamentals of due process.<sup>86</sup>

The eighth amendment prohibition of cruel and unusual punishment is not a static concept tied to eighteenth century standards, "but may acquire meaning as public opinion becomes enlightened by a humane justice."<sup>87</sup> The rationale behind the "adequate treatment" requirement of the eighth amendment is quite simple:

Adequate and effective treatment is constitutionally required because, absent treatment, the hospital is transformed into a penitentiary where one could be held indefinitely . . . .<sup>88</sup>

Clearly if confinement in a hospital without treatment violates due process, then confinement in a school which fails to perform the duty of educating is equally a violation. When the schools fail to provide an adequate education they, due to the compulsory school attendance laws, transform themselves into prisons and subject their "students" to cruel and unusual punishment. Since the justification for the compulsory school attendance laws is supported by the concept of *parens patriae*, fourteenth amendment fundamental fairness requires judicial intervention to assure that adequate education is the *quid pro quo* for the public schools' right to exercise *parens patriae* control and impose involuntary confinement for the better part of a child's waking life. If the schools fail to provide an adequate education, irrespective of whether a constitutional right to an adequate education exists, then the involuntary confinement becomes a clear deprivation of fourteenth amendment substantive due process.<sup>89</sup>

There can be no doubt that the Constitution protects against

86. *Wyatt v. Stickney*, 325 F. Supp. 781, 785 (M.D. Ala. 1971). See also *McNeil v. Director, Patuxent Institution*, 407 U.S. 245, 250 (1972) ("[D]ue process requires that the nature and duration of commitment bear some reasonable relationship to the purpose for which the individual is committed.").

87. *Weems v. United States*, 217 U.S. 349, 378 (1910).

88. *Ragsdale v. Overholser*, 281 F.2d 943, 950 (D.C. Cir. 1960).

89. See *Rouse v. Cameron*, 373 F.2d 451 (D.C. Cir. 1966); *Inmates of the Boys' Training School v. Affleck*, 346 F. Supp. 1354, (D.R.I. 1972); *Kautter v. Reid*, 183 F. Supp. 352 (D.D.C. 1960); *White v. Reid*, 125 F. Supp. 647 (D.D.C. 1954). See also *In Re Harris*, 2 Crim. L. Rep. 2412 (Cook Cty., Ill. Cir. Ct. Juv. Div. 1967).

subtle as well as obvious deprivations of civil rights. Clearly few cruelties are more insidious than the denial of an adequate education, despite its subtlety:

The cruelty is a refined sort, much more comparable to the Chinese water torture than to such crudities as breaking on the wheel.<sup>90</sup>

The United States Supreme Court has had a long and, until *Rodriguez*, unbroken "love affair" with education and has consistently emphasized the importance, indeed the essentiality, of an adequate public school education.<sup>91</sup> The lower federal courts have not been hesitant to follow the Supreme Court's lead.<sup>92</sup> The importance of a right to an adequate education for *all* children cannot and must not be underestimated:

The children of today are the society of tomorrow. The good society demands that their physical, mental, and moral health be safeguarded. Nonsuccess in this task could mean the end of the emergent process of the individual and society. What is more, no single group of individuals may be singled out for this safeguarding; otherwise, the process will be sorely inhibited. All children must participate, for genius respects no single group or class. Jesus and Abraham Lincoln both were sons of carpenters; Socrates' mother was a midwife; Edison's father operated a small sawmill; and Leonardo da Vinci was the bastard son of a housemaid.<sup>93</sup>

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90. *Jones v. Wittenberg*, 323 F. Supp. 93, 99 (N.D. Ohio 1971), *aff'd*, 456 F.2d 854 (6th Cir. 1972).

91. See, e.g., *Healy v. James*, 408 U.S. 169 (1972); *Weber v. Aetna Surety and Casualty Co.*, 406 U.S. 164 (1972); *Tinker v. Des Moines School District*, 393 U.S. 503 (1969); *Shapiro v. Thompson*, 394 U.S. 618 (1969); *Epperson v. Arkansas*, 393 U.S. 97 (1968); *Keyshian v. Board of Regents*, 385 U.S. 589 (1967); *Abbington School District v. Schempp*, 374 U.S. 203 (1963) (Brennan, J., concurring); *Brown v. Board of Education*, 347 U.S. 483 (1954); *McColum v. Board of Education*, 333 U.S. 203, 231 (1948) (Frankfurter, J., concurring).

92. See, e.g., *Cook v. Edwards*, 341 F. Supp. 307 (D.N.H. 1972); *Mills v. Board of Education*, 348 F. Supp. 866 (D.D.C. 1972) (consent order); *Ordway v. Hargraves*, 323 F. Supp. 1155 (D. Mass. 1971); *Hosier v. Evans*, 314 F. Supp. 316 (D.V.I. 1970); *Van Dusartz v. Hatfield*, 334 F. Supp. 870 (D. Minn. 1971); *Rodriguez v. San Antonio Independent School District*, 337 F. Supp. 280 (W.D. Tex. 1971). Cf. *Pennsylvania Ass'n Retarded Children v. Pennsylvania*, 334 F. Supp. 1257 (D. Pa. 1971) (consent order); *Alexander v. Thompson*, 313 F. Supp. 1389 (C.D. Cal. 1970); *Perry v. Grenada Municipal Separate School District*, 300 F. Supp. 748 (N.D. Miss. 1969). See also *Robinson v. Cahill*, 118 N.J. Super. 223, 287 A.2d 187 (1972); *Serrano v. Priest*, 5 Cal. 3d 584, 487 P.2d 1241, 96 Cal. Rptr. 601 (1971).

93. Swanson, "Equal" and "Equality" — *An Economic Interpretation*, 3 J. PUB. L. 47, 53 (1954).

This then is the case for the continued recognition of the constitutional right to an education, the judicial background against which the claim of the plaintiffs in *Rodriguez* must be measured. As has been shown, the constitutional right to an adequate education is persuasive. Nevertheless, the United States Supreme Court in *Rodriguez* stated flatly:

We have carefully considered each of the arguments supportive of the District Court's finding that education is a fundamental right or liberty, and have found those arguments unpersuasive.<sup>94</sup>

Thus, any attempt to formulate a legal theory based on a right to an adequate public school education must directly confront the Court's resolution of the public school equal financing controversy in *Rodriguez*.<sup>95</sup>

#### THE RODRIGUEZ CASE

In *Rodriguez* the plaintiffs brought a class action on behalf of school children in Texas who were members of minority groups or who were poor and who resided in "property-tax poor" school districts.<sup>96</sup> Specifically, the plaintiffs alleged that they were deprived of their right to equal protection of the laws as guaranteed by the fourteenth amendment because of substantial inter-district disparities in per-pupil educational expenditures resulting primarily from the impact of Texas' reliance on the property tax to finance public education. In Texas, as in forty-nine other states which rely upon the property tax to support public education, the financing of the public schools is dependent upon the revenues that the particular school district can collect. Thus, financing of each school district is dependent upon two factors: its tax rate, and the amount of taxable property within the district.<sup>97</sup> Naturally, the first factor depends to some extent upon the degree to which voters in the district wish to tax themselves to support public education.<sup>98</sup> The second factor, the

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94. 411 U.S. 1, 37 (1973).

95. For a brief analysis of the evolution of the equal school financing challenge see note 127 *infra* and accompanying text.

96. 411 U.S. 1, 5 (1973).

97. *Id.* at 73 (Marshall, J., dissenting).

98. *Id.* The taxpayers' desire to tax themselves is limited by Texas law which places a ceiling upon the tax rate the district voters may impose upon themselves. *Id.* at 67 (White, J., dissenting).



amount of the taxable property, is a restriction upon the amount of tax revenues which a district can raise to support its schools. Thus, "[t]he necessary effect of the Texas local property tax is, in short, to favor property-rich districts and to disfavor property-poor ones."<sup>99</sup> The Edgewood Independent School District, in which the appellees resided, was able to raise from all sources only \$356 per pupil, while Alamo Heights, the most affluent school district, was able to raise \$594 per pupil per year.<sup>100</sup>

In attacking the Texas school financing structure, the appellees relied on the equal protection clause of the fourteenth amendment and sought to invoke strict scrutiny upon two grounds: first, that the school financing structure discriminated on the basis of a suspect classification—wealth, and secondly, that it infringed upon a fundamental interest—education.<sup>101</sup> The federal district court invoked strict scrutiny and held unanimously that the Texas school financing system did, in fact, violate the fourteenth amendment equal protection clause.<sup>102</sup> Moreover, the three-judge panel virtually characterized the defense contentions as frivolous.<sup>103</sup>

In reversing the decision of the district court and holding that the system does not violate the fourteenth amendment equal protection clause, the United States Supreme Court, in a decision written by Mr. Justice Powell, held not only that the Texas system does not discriminate against any suspect class (in this case, poor people),<sup>104</sup>

99. *Id.* at 74 (Marshall, J., dissenting).

100. *Id.* at 12-13. This is true despite the fact that Edgewood Independent School District had an equalized tax rate of \$1.05 per \$100 valuation while the property rich district, Alamo Heights, had an equalized tax rate of \$.85 per \$100 valuation. Thus, Alamo Heights was able to raise appreciably more revenue with which to support its schools with a lower tax rate than was Edgewood District. *Id.* at 80 (Marshall, J., dissenting).

101. *Id.* at 16.

102. *Rodriguez v. San Antonio Independent School District*, 337 F. Supp. 280 (W.D. Tex. 1971).

103. Indicative of the character of defendants' other arguments is the statement that plaintiffs are calling for "socialized education." Education, like the postal service, has been socialized, or publicly financed and operated almost from its origin. *Id.* at 284.

104. 411 U.S. 1, 28 (1973). The intellectual honesty and principled use of precedent in arriving at this conclusion is outside the scope of this article. Nevertheless, the reader is invited to study the dissenting opinion of Mr. Justice Marshall:

The Court rejects the District Court's finding of a correlation between poor people and poor districts with the assertion that "there is reason to believe that the poorest families are not necessarily clustered in the poorest districts" in Texas. *Ante* at 23. In support of its contention the Court offers absolutely no data — which it

but also that education is not a fundamental right or liberty.<sup>105</sup>

In so deciding, the Court was faced with each of the arguments presented in this article for the recognition of education as a substantive constitutional right. How the Court dealt with, or refused to deal with, these arguments, is the very essence of the problem of whether education can still be recognized as a fundamental constitutional right. In this regard it must be determined whether the majority's analysis can withstand critical scrutiny and whether the flat assertion of the Court that "[e]ducation of course, is not among the rights afforded explicit protection under our Federal Constitution. Nor do we find any basis for saying it is implicitly so protected," reflects the true holding of the case.<sup>106</sup>

The majority in *Rodriguez* began its analysis of education as a

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cannot on this record — concerning the distribution of poor people in Texas to refute the data introduced below by appellees; it relies instead on a recent law review note concerned solely with the State of Connecticut, Note, *A Statistical Analysis of the School Finance Decisions: On Winning Battles and Losing Wars*, 81 YALE L. J. 1303 (1972). Common sense suggests that the basis for drawing a demographic conclusion with respect to a geographically large, urban-rural, industrial-agricultural State such as Texas from a geographically small, densely populated, highly industrialized State such as Connecticut is doubtful at best.

Finally, it cannot be ignored that the data introduced by appellees went unchallenged in the District Court. The majority's willingness to permit appellants to litigate the correctness of that data for the first time before this tribunal — where effective response by appellees is impossible — is both unfair and judicially unsound.

*Id.* at 95 n.56 (Marshall, J., dissenting).

105. We have carefully considered each of the arguments supportive of the District Court's finding that education is a fundamental right or liberty and have found those arguments unpersuasive.

*Id.* at 37.

Although *Rodriguez* was concerned with education as a fundamental interest and this Article is concerned with education as a fundamental right, the distinction is not important here because even though, arguably, a fundamental interest does not have to be a constitutional right, it is unquestionable that a substantive constitutional right is a fundamental interest. See *Id.* at 100 n.59 and accompanying text (Marshall, J., dissenting). See also *Id.* at 33-34, where the majority states that the test it will use for determining whether an interest is fundamental is whether it is explicitly or implicitly guaranteed by the United States Constitution.

106. *Id.* at 35. Despite the majority's attempt to propound this revolutionary thesis as established constitutional doctrine, the fact is that traditionally the determination of what interests qualified for special protection was dependent upon two independent factors: (1) whether the infringement of the interest causes irreparable injury, *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942); or (2) whether the interest is preservative of other basic civil and political rights, *Reynolds v. Sims*, 377 U.S. 533, 561-62 (1964). Thus, under the traditional analysis, education should undoubtedly be classified as a "fundamental interest" because it meets not just one, but both tests.

fundamental right by stating, as a rule of constitutional law, that the importance of a governmental service "does not determine whether it must be regarded as fundamental."<sup>107</sup> In support of this proposition, the majority cited *Dandridge v. Williams*.<sup>108</sup> This citation is significant because *Dandridge* cited *Shelton v. Tucker*<sup>109</sup> as illustrative of the distinction between social and economic interests, which are not entitled to recognition as fundamental interests,<sup>110</sup> and interests, such as education, which are entitled to recognition as fundamental because of the fact they are inextricably intertwined with freedoms guaranteed by the Bill of Rights. Furthermore, the argument that the importance of a governmental service is not determinative of whether an interest is constitutionally protected is, in this context, irrelevant. No one claims that education is entitled to recognition as a constitutional right simply because of its importance, but because it is essential to the rights and freedoms the Constitution does recognize as fundamental.

Thus, the majority's opinion in *Rodriguez* must stand or fall on its analysis of the relationship between education and those rights, such as the right of free speech and the right to vote, which are traditionally recognized as being constitutionally protected. The Court accorded recognition to the relationship between education and the right of free speech and the right to vote, and concluded simply, "[w]e need not dispute . . . these propositions,"<sup>111</sup> thus conceding that education is inextricably intertwined with the rights of free speech and voting. Admitting the close relationship between education and explicitly recognized constitutional rights, the Court evaded the impact of this admission by the use of three techniques.

First, the majority stated, "[w]e have never presumed to possess either the ability or the authority to guarantee the citizenry the most *effective* speech or the most *informed* electoral choice."<sup>112</sup> Presumably this statement relates to the appellant's assertion, accepted unquestioned by the *Rodriguez* majority, that the Texas

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107. 411 U.S. at 30.

108. 397 U.S. 471 (1970).

109. 364 U.S. 479, 487 (1960) ("The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools.").

110. Included in this classification are welfare payments, *Dandridge v. Williams*, 397 U.S. 471 (1970), and *Jefferson v. Hackney*, 406 U.S. 535 (1972), and an adequate home and shelter, *Lindsey v. Normet*, 405 U.S. 56 (1972).

111. 411 U.S. at 36.

112. *Id.*

Minimum Foundation School Program assures "every child in every school district an adequate education."<sup>113</sup> In fact, the Court was so impressed by the appellant's assertion that it was providing a minimally adequate education to *every* child in the State of Texas that this is cited no less than four times in the majority opinion, including a lengthy explanation of the legislative history and functioning of the Minimum Foundation School Program.<sup>114</sup> Accordingly, the conclusion of the Court was that

no charge fairly could be made that the system fails to provide each child with an opportunity to acquire the basic minimal skills necessary for the enjoyment of the rights of speech and of full participation in the political process.<sup>115</sup>

In this regard, it is important to recognize that the Court did not rely on the assertion that education is not a fundamental constitutional right but on the majority's position that if it is, the specific facts of *Rodriguez* did not prove an infringement of that right. Presumably if the Minimum Foundation School Program did not assure an adequate education, then the Court's decision might have been radically different.

Second, the Court, on the basis that Texas was providing, or at least endeavoring to provide, a basically adequate education to all children in the State, relied on the proposition that a remedial scheme should be gently examined and the greatest deference given to the nature of the State's efforts to rectify an undesirable situation.<sup>116</sup> Aside from differences of opinion as to whether the Texas system is truly "remedial,"<sup>117</sup> this rationale also goes to the issue of whether, on the particular facts presented, the Court should find a constitutional deprivation, and not to the more basic issue of whether education is a constitutionally protected fundamental right. No one questions the abstract constitutional principle that when a State attempts to extend the benefits of a constitutional right to citizens to whom it would otherwise be denied, the State cannot be faulted for failing to "strike at all evils at the same time . . . ."<sup>118</sup>

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113. *Id.* at 24, quoting Appellants' Brief at 35; Reply Brief at 1.

114. *Id.* at 8-10, 17, 24.

115. *Id.* at 37.

116. *Id.* at 39.

117. See *Id.* at 81 n.35 (Marshall, J., dissenting).

118. *Katzenbach v. Morgan*, 384 U.S. 641, 656-57 (1966) (extension of right to vote to

Third, the *Rodriguez* Court relied on the belief that appellees were engaging in a "direct attack on the way in which Texas has chosen to raise and disburse state and local tax revenues" and that the case presented "most persistent and difficult questions of educational policy."<sup>119</sup> Both of these factors led the majority to conclude that the case was an appropriate one for judicial deference to the legislature.<sup>120</sup> This rationale goes to the posture in which the issue was presented to the Court, and not to the substantive determination of whether education is a constitutional right. It is entirely possible that the right to an education could be asserted in a posture which involves neither judicial determination of educational policy nor the intrusion of the judiciary into the arena of taxation and disbursement which have traditionally been matters of legislative judgment involving local expertise.

Since the majority's disposition and rationale in no way relied on a determination of whether there is a constitutional right to an education, what is to be made of the isolated statement "Education, of course, is not among the rights afforded explicit protection under our Federal Constitution. Nor do we find any basis for saying it is implicitly so protected."<sup>121</sup> Clearly the statement is pure dicta, but even as dicta there is not a scintilla of support for its assertion.

First, it has never been thought that a right must be specifically mentioned in the Constitution. The right to travel, although not explicitly mentioned, has long been recognized as a fundamental right because it is implicit in the underlying premises of the Constitution.<sup>122</sup> Neither is the right to privacy afforded explicit protection by the Constitution, but nevertheless has been consistently recognized as a constitutional right.<sup>123</sup> That the Constitution protects rights not explicitly mentioned therein is the essence of our framers' desire to set up a government of limited powers with all rights not expressly granted by the Constitution retained by the people. This

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persons to whom it would otherwise be lawfully denied).

119. 411 U.S. at 42.

120. *Id.*

121. *Id.* at 35.

122. See, e.g., *United States v. Guest*, 383 U.S. 745, 757-59 (1966); *Crandall v. Nevada*, 73 U.S. (6 Wall.) 35, 48 (1867). See also *Shapiro v. Thompson*, 394 U.S. 618, 634 (1969).

123. *Roe v. Wade*, 410 U.S. 113 (1973); *Eisenstadt v. Baird*, 405 U.S. 438 (1972); *Griswold v. Connecticut*, 381 U.S. 479 (1965); *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting).

is the essential purpose of the ninth amendment,<sup>124</sup> and any decision holding that only explicitly mentioned rights are entitled to constitutional protection would in effect nullify the ninth amendment.

Second, the statement that the Court finds no basis for holding that education is implicitly protected by the Constitution is in contradiction to the text of the majority opinion. Not disputing the propositions that education is bound up with the right of free speech and the right to vote, the *Rodriguez* majority can only conclude, as it did:

Even if it were conceded that some identifiable quantum of education is a constitutionally protected prerequisite to the meaningful exercise of either right, we have no indication that the present levels of educational expenditure in Texas provide an education that falls short.<sup>125</sup>

So, *Rodriguez* must be read to hold that in this one particular case there was no deprivation of the right to an education, *not* that education is not a constitutionally protected right.<sup>126</sup>

#### OUTPUT ANALYSIS

In determining a method of assuring an adequate education to America's children, we must look to the origins of the school financing challenges which culminated in *Rodriguez*, for by examining where we have been, we can see more clearly where we are going. The initial school financing case was *McInnis v. Shapiro* in which the plaintiffs contended that the fourteenth amendment required that public school expenditures be made solely on the basis of the students' educational needs. The district court rejected this argument on the basis that "educational needs" was such a nebulous concept that it lacked judicially manageable standards, thus rendering the controversy non-justiciable.<sup>127</sup>

After *McInnis* the architects of the school finance challenge attempted to remedy this defect, and in the course of so doing the

124. The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

U.S. CONST. amend. IX.

125. 411 U.S. at 36-37.

126. The dissenting opinion of Mr. Justice Marshall also suggests that this is the correct interpretation of the majority opinion. *Id.* at 88.

127. *McInnis v. Shapiro*, 293 F. Supp. 327, 329 n.4 and accompanying text (N.D. Ill. 1968), *aff'd mem. sub nom. McInnis v. Ogilvie*, 394 U.S. 222 (1970).

theory became more and more removed from the true goal of achieving an adequate education for public school students and developed into an increasingly irrelevant and sterile attempt simply to accomplish equality of school financing without reference to the relationship between educational financing and the quality of education provided by the schools. Thus the theory quickly became grounded in an abstract right to an equal choice:

If money is inadequate to improve education, the residents of poor districts should at least have an equal opportunity to be disappointed by its failure.<sup>128</sup>

Therefore, in developing a realistic judicial solution to the problem of inadequate public school education, we must return to the approach of *McInnis* and find a different method of remedying the problems therein. *McInnis*, for all its flaws, was closer to the real problem than the following cases, including *Rodriguez*.

One method of attacking the cruel and callous deprivation of an adequate education by school systems, including the Indianapolis Public School System, is to focus on educational output instead of input as previous theories have done. Focusing on output—how much the child has learned—has several inherent advantages. First, as long as scholars and practitioners emphasize inputs, they are going to be frustrated, for not only does such an approach require a correlation between the input and the quality of education ultimately provided, *i.e.*, output, but there are infinite inputs, including funds, teachers, facilities, administrators and teaching materials and methods. Each of these inputs is in itself complex and involves numerous intangible factors.<sup>129</sup> The variety of inputs and

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128. J. COONS, W. CLUNE, S. SUGARMAN, PRIVATE WEALTH AND PUBLIC EDUCATION 30 (1970). See also 411 U.S. at 83-84 (Marshall, J., dissenting).

That the proponents of the equal school financing challenge were reduced to this contention was dictated by the fact that educational experts cannot agree on the significance of variations in educational expenditures. Compare, *e.g.*, J. COLEMAN, *et al.*, EQUALITY OF EDUCATIONAL OPPORTUNITY 290-330 (1966); C. Jencks, *The Coleman Report and the Conventional Wisdom*, in ON EQUALITY OF EDUCATIONAL OPPORTUNITY 69, 91-104 (F. Mosteller & D. Moynihan ed. 1972) with, *e.g.*, J. GUTHERIE, G. KLEINDORFER, H. LEVIN & R. STOUT, SCHOOLS AND INEQUALITY 79-90 (1971); S. Kiesling, *Measuring a Local Government Service: A Study of School Districts in New York State*, 49 REV. ECON. & STATISTICS 356 (1967).

In Hawaii, the only State with equal school financing, the schools produce results virtually identical to those of the other States. TIME MAGAZINE 60 (June 11, 1973).

129. See, *e.g.*, J. KOZOL, DEATH AT AN EARLY AGE: THE DESTRUCTION OF THE HEARTS AND MINDS OF NEGRO CHILDREN IN THE BOSTON PUBLIC SCHOOLS (1967).

the seeming lack of any one comprehensive input which significantly reflects all the others means that as long as the focus remains on inputs, the battle for guaranteeing an adequate education for all American children will be frustrated simply by overwhelming proof problems and the inherent disabilities of attacking a problem piecemeal.

Second, there is almost universal agreement among all who have seriously considered the problem that quality of educational opportunity must be measured by output, for "there is only one important question to be asked about education: *what do the children learn?*"<sup>130</sup> James Coleman, the recognized education expert, urges that educational quality should be measured by output, and his critics agree.<sup>131</sup> Perhaps the Committee for Economic Development has stated the necessity for output analysis most cogently:

We insist that educational equality must be judged by school "outputs," by the actual achievements of pupils in intellectual skills, knowledge, creativity, and action. We believe that the American people should refuse to settle for anything less than universal literacy and those intellectual skills which accompany literacy. Except for the less than one per cent of any population group who are incapable of normal learning, the schools should be expected and required to bring their pupils up to minimal standards of intellectual achievement—not *some* of them, but *all* of them.<sup>132</sup>

In addition to the uniformity of academic enthusiasm for output analysis, this approach has the benefit of building upon *Rodriguez* and other legal precedent. In *Rodriguez* the Court suggested that some minimum level of education was "enough" and that the flaw with appellees' position was that there was no allegation or proof that children in Edgewood Independent School

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130. Messages to the Congress by Richard Nixon, President of the United States, *Education for the 1970's: Renewal and Reform* 4 (1970).

131. See J. Coleman, *The Concept of Equality of Educational Opportunity*, 38 HARV. EDUC. REV. 7 (1968); F. Mosteller & D. Moynihan, *A Pathbreaking Report*, in ON EQUALITY OF EDUCATIONAL OPPORTUNITY 28 (1972); C. SILBERMAN, *CRISIS IN THE CLASSROOM* 69 (1970). See also Note, *A Statistical Analysis of the School Finance Decisions: On Winning Battles and Losing Wars*, 81 YALE L. J. 1303, 1317 (1972); Note, *Equal Protection in School Financing*, 43 MISS. L. J. 266, 273 (1972).

132. COMMITTEE FOR ECONOMIC DEVELOPMENT, *EDUCATION FOR THE URBAN DISADVANTAGED: FROM PRESCHOOL TO EMPLOYMENT* 13 (1971).



District were not getting an adequate education.<sup>133</sup> Clearly implicit in the *Rodriguez* rationale was the recognition that adequacy of educational opportunity must be measured by output.<sup>134</sup>

There are, however, difficulties with any output analysis that must be considered. Initially, the plaintiff must establish that he or she is ready, willing and able to learn. The establishment of ability to learn may very likely have to come from an independent, culturally non-biased psychological test rather than from reliance on the schools' own evaluation—which may very well be biased and in need of rebuttal.<sup>135</sup> In establishing the plaintiff's willingness to learn, existing school records may be of critical importance. Virtually every school system "grades" its children on habits such as cooperation, industry, punctuality, scholastic interest and study habits as well as on attendance and disciplinary problems. At a hearing, school personnel may testify that the student is unwilling to learn—an unconscious effort by the persons involved to protect themselves against blame for the failure of their students.<sup>136</sup> However, if school records reflect no behavior problems, they can be used to refute such testimony. If matters to which school personnel later testify were not worthy of action or note at the time they occurred, they should not be considered important in determining the overall ability and willingness of the student to learn.

A major difficulty with measuring educational opportunity by output is that of developing a justiciable standard for measuring output. Thus, before an output analysis can have any validity or usefulness, a simple, easily ascertainable standard must be developed for measuring the quality of the education provided by the public schools. This was the initial problem with the school financing challenge: it was unable to develop a meaningful and ascertainable standard in order to meet the justiciability requirement of the courts.<sup>137</sup>

There is, however, a standard which is simple, easily ascer-

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133. See notes 112-15 *supra* and accompanying text.

134. See, e.g., 411 U.S. at 88 (Marshall, J., dissenting).

135. See notes 28-30 *supra*.

136. See, e.g., HOUSE COMMITTEE ON EDUCATION AND LABOR, A TASK FORCE STUDY OF THE PUBLIC SCHOOLS IN THE DISTRICT OF COLUMBIA AS IT RELATES TO THE WAR ON POVERTY 64 (1966); J. KOZOL, DEATH AT AN EARLY AGE: THE DESTRUCTION OF THE HEARTS AND MINDS OF NEGRO CHILDREN IN THE BOSTON PUBLIC SCHOOLS (1967).

137. See note 127 *supra* and accompanying text.

tainable, uniformly used by the schools themselves and accepted by the courts. This is the standardized achievement tests, which have been judicially described as the "most objective standard now in use for measuring educational progress . . . ." <sup>138</sup> These standardized achievement tests are widely recognized as authoritative. In fact, the federal government uses these tests to measure the quality of education provided by the public schools nationwide as well as to measure the impact of federal education funds. <sup>139</sup> The public school systems have never in the past been hesitant to admit their reliance on achievement test scores as a measurement not only of the students' progress but also of their own performance. <sup>140</sup> Employers, both public and private, also utilize standardized achievement tests as criteria in determining whom to hire and for what positions. <sup>141</sup>

There are several advantages to a sound "output" analysis which measures the quality of public school education objectively. Initially, such an analysis is consistent with sound judicial principles. It has long been recognized on the one hand that "the courtroom is not the arena for debating issues of educational policy." <sup>142</sup> On the other hand, "[t]he vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools." <sup>143</sup> By simply looking to the results of the educational pro-

138. *Swann v. Charlotte-Mecklenburg Board of Education*, 300 F. Supp. 1358, 1360 (W.D.N.C. 1969), *aff'd*, 402 U.S. 1 (1971). *See also* *Keyes v. School District No. 1, Denver, Colorado*, 313 F. Supp. 61, 78-79 (D. Colo. 1970), *aff'd in part*, 445 F.2d 990 (10th Cir. 1971); *Hobson v. Hansen*, 269 F. Supp. 401, 460 (D.D.C. 1967).

139. UNITED STATES DEPARTMENT OF HEALTH, EDUCATION AND WELFARE, *THE EFFECTIVENESS OF COMPENSATORY EDUCATION*, *Hearings Before the Subcommittee on Education of the Committee on Labor and Public Welfare*, United States Senate, 92d Cong., 2d Sess. 75 - 259 (1972).

140. Human Rights Commission Questionnaire:

Results of the [standardized achievement] tests are used for three main purposes:

1. To help individual pupils — needs assessment.
2. To assist in developing plans within an elementary school building to meet the needs of pupils.
3. General administrative use of the results in planning overall programs to meet the needs of the school system as revealed in the test results.

141. *See, e.g.*, STANDARDS FOR THE ADMISSION OF APPRENTICES ESTABLISHED BY THE JOINT APPRENTICESHIP COMMITTEE AND TRUST FOR THE SHEET METAL INDUSTRY OF NEW YORK CITY, NEW YORK. PURSUANT TO THE "AGREEMENT" AND DECLARATION OF TRUST AND THE RULES AND REGULATIONS ADOPTED THEREUNDER BY THE TRUSTEES (1964).

142. *Minersville School District v. Gobitis*, 310 U.S. 586, 598 (1940). *See also* *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968).

143. *Shelton v. Tucker*, 364 U.S. 479, 487 (1960). *See also* *West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 637-38 (1943); *Hobson v. Hansen*, 269 F. Supp. 401, 517 (D.D.C. 1967).

cess, the courts can avoid becoming enmeshed in debates over educational policy, an area in which the judiciary lacks the necessary specialized knowledge and expertise. The use of objective standardized achievement tests to determine whether the public schools are meeting their constitutional duty to provide an adequate education reduces the courts' chore to the adjudication of a pure legal question. Either the schools are meeting their constitutional duty or they are not. At no point do the courts have to make policy judgments between competing educational theories. These delicate matters are left where they belong—to the public school administrators. In the final analysis, under this theory, "[t]he burden on a school board . . . is to come forward with a plan that promises realistically to work . . . ." <sup>144</sup> Thus all the educational policy judgments are left to the school administrators and only the final legal conclusion whether the school has met its constitutional duty remains for the courts' determination.

Another benefit of this theory is that it avoids the major pitfall of *Rodriguez* and places the troublesome issues of public school financing and expenditures in their proper perspective. Unlike *Rodriguez*, in which the constitutional standard of equal educational opportunity was the method and measure of taxation and expenditures, this theory relies on public school financing in no way whatsoever. By focusing on educational output as measured by standardized achievement test scores, this theory anticipates the inevitable defense that will be raised by the public schools: inadequate funds. Since the theory itself places no reliance on school financing, it can meet this defense by utilizing the "compelling precedent that lack of funds is no defense where fundamental constitutional rights are at stake." <sup>145</sup> This proposition is especially true where the constitutional right involved is education, <sup>146</sup> since "for such purposes [education] the Government must raise the funds." <sup>147</sup>

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144. *Green v. County School Board*, 391 U.S. 430, 439 (1968).

145. *Goldberg v. Kelly*, 397 U.S. 254, 265-66 (1970); *Shapiro v. Thompson*, 394 U.S. 618, 633 (1969).

146. See *Griffin v. County School Board*, 377 U.S. 218, 233 (1964); *Knight v. Board of Education*, 48 F.R.D. 108, 115 (E.D.N.Y. 1969); *Mills v. Board of Education*, 348 F. Supp. 866 (D.D.C. 1972) (consent order); *United States v. School District 151*, 303 F. Supp. 201, 232 (N.D. Ill. 1969).

147. *Hosier v. Evans*, 314 F. Supp. 316, 320 (D.V.I. 1970).

## CONCLUSION

*Rodriguez* must not be the end of judicial attempts to assure America's children their birthright—an adequate education. After *Rodriguez* numerous potential courses of action must be simultaneously and vigorously pursued. The theory presented here is suggested as but one method of assuring “Tom R.” and “Lester B.” and the hundreds of thousands of others like them that which society has promised them for so long and has so cruelly denied them: a minimally adequate education. “In short, our objective is—or should be—quality, not equality.”<sup>148</sup>

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148. P. Kurland, *Equal Educational Opportunity: The Limits of Constitutional Jurisprudence Undefined*, 35 U. CHI. L. REV. 583, 591 (1968).

