Cornell Law Review

Volume 55
Issue 1 *November 1969*

Article 10

Rich Schools Poor Schools the Promise of Equal Educational Opportunity and Quality of Inequality Urban and Suburban Public Schools

William A. Kaplin

Rich Schools, Poor Schools: The Promise of Equal Educational Opportunity. ARTHUR E. WISE. Chicago and London: University of Chicago Press. 1968. Pp. xiv, 228. $9.00.

I received my copy of Arthur Wise's *Rich Schools, Poor Schools* on the day the Supreme Court announced its decision in *McInnis v. Ogilvie*,[1] a case from Illinois involving the very problem to which the book is addressed. There the similarity ended. Whereas the book's thesis (so says the introduction) is that "the absence of equal educational opportunity within a state, as evidenced by unequal per-pupil expenditures, . . . constitute[s] a denial by the state of the equal protection of its laws,"[2] the *New York Times* stated that "the Supreme Court ruled today that it is not unconstitutional for states to spend more money on public education in wealthy districts than is spent in poor neighborhoods."[3] The contrast was as unsettling to me as it was apparent, since I am inclined to agree more with Mr. Wise than with the Court.

Although the *McInnis* decision provides a somewhat unfavorable climate in which to read *Rich Schools, Poor Schools,* the case should not detract from the book's importance. Mr. Wise grapples with a problem whose solution is vital to the future of public education in the United States—the existence in many states of gross inter-district inequalities in the availability of educational resources. This inequality is a product of state allocation systems that leave local school districts to depend on local property taxes as their major source of educational revenues, thereby making the availability of funds largely a function of the size of the local tax base. The problem is aggravated by the fact that areas with smaller tax bases (per pupil), and thus with less access to resources, are often the areas with the greatest educational needs.[4] The struggle for funds is basically one between the central cities and the suburbs, with the cities continually falling farther behind.[5]

---

1 394 U.S. 322 (1969), *aff'g* McInnis v. Shapiro, 293 F. Supp. 327 (N.D. Ill. 1968). At the time *McInnis* was decided, five other equal-educational-opportunity cases were in progress in the lower courts. Board of Educ. of Ind. Sch. Dist. No. 20 v. Oklahoma, 286 F. Supp. 845 (W.D. Okla. 1968); Rodriguez v. San Antonio Ind. Sch. Dist., 299 F. Supp. 476 (W.D. Tex. 1969); Burrus v. Wilkerson, Civil No. 68-C-13-H (W.D. Va., filed July 2, 1968); Serrano v. Priest, No. 938254 (Calif. Super. Ct., Los Angeles Co., filed Aug. 23, 1968); Detroit Bd. of Educ. v. Michigan, Gen. Civil No. 103342 (Mich. Cir. Ct., Wayne Co., filed Feb. 2, 1968).

2 P. 4.

3 N.Y. Times, March 25, 1969, at I, col. 3 (city ed.).

4 *See* Campbell, *Inequities of School Finance,* SATURDAY REVIEW, Jan. 11, 1969, at 44.

5 The problem of matching resources to needs in education was created by a redistribution of population in the United States. The result has been that poor,

Everyone would probably agree that this problem should be primarily one for the state legislatures. But except for the traditional use in many states of equalization grants which make slight inroads into the problem,[6] legislatures have not acted to resolve inequalities in the allocation of educational resources, and Mr. Wise does not believe that they will. He compares the problem to legislative reapportionment, which was finally accomplished only after Supreme Court intervention, and suggests that similar action is necessary if equality of educational opportunity is to be achieved. Thus *Rich Schools, Poor Schools* treats equal educational opportunity as a constitutional issue arising under the equal protection clause.

Wise contends that the present system of school financing allocates resources essentially on the basis of wealth and geography, thereby discriminating against children in poorer school districts. He argues against this discrimination by weaving together three lines of authority —the desegregation cases,[7] the indigent defendant cases,[8] and the reapportionment cases.[9] Just as discrimination in education on the basis of race, discrimination in criminal proceedings on the basis of wealth, and discrimination in legislative apportionment on the basis of geography are unconstitutional, so, argues the author, is discrimination in education on the basis of wealth and geography unconstitutional. While lawyers may find the long historical discussions by Mr. Wise (a non-lawyer) of these three lines of authority[10] rather elementary, and his legal reasoning somewhat oversimplified,[11] the argument is nevertheless a good one. Unfortunately, essentially the same argument was made in *McInnis* and was rejected by the district court, whose opinion the Supreme Court summarily affirmed.[12]

---

less educated, non-white Americans are staying in the central cities, while higher-income, white families, and a substantial part of the industrial sector are moving to the suburbs and taking their tax base with them.

Id.

6 Pp. 130-32, 197-98.

7 *E.g.*, Brown v. Board of Educ., 347 U.S. 483 (1954).

8 *E.g.*, Douglas v. California, 372 U.S. 353 (1963); Griffin v. Illinois, 351 U.S. 12 (1956).

9 *E.g.*, Reynolds v. Sims, 377 U.S. 533 (1964); Baker v. Carr, 369 U.S. 186 (1962). Mr. Wise also discusses the poll tax case, Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966), in conjunction with the reapportionment cases.

10 Pp. 11-92.

11 For more sophisticated legal discussions see Horowitz, *Unseparate but Unequal—The Emerging Fourteenth Amendment Issue in Public School Education*, 13 U.C.L.A.L. REV. 1147 (1966); Brief for Urban Coalition as Amicus Curiae, McInnis v. Ogilvie, 394 U.S. 322 (1969).

12 The Supreme Court did not explain its affirmance since it wrote no opinion. Although the district court did discuss the precedent relied on by plaintiffs, it did so in rather sketchy and conclusory terms indicating that "[t]he decided cases established significant, but limited principles." 293 F. Supp. at 334.

The three-judge district court's opinion in *McInnis* is a broad one, upholding the constitutionality of the Illinois school financing scheme on alternative grounds—it is neither arbitrary nor discriminatory so as to violate the fourteenth amendment; and even if it were, the controversy is non-justiciable because of the lack of judicially manageable standards.

The rationale behind the court's first holding is that the Illinois school financing legislation reflects a rational policy of decentralization:

> [T]he General Assembly's delegation of authority to school districts appears designed to allow individual localities to determine their own tax burden according to the importance which they place upon public schools. Moreover, local citizens must select which municipal services they value most highly. While some communities might place heavy emphasis on schools, others may cherish police protection or improved roads. The state legislature's decision to allow local choice and experimentation is reasonable, especially since the common school fund assures a minimum of $400 per student.[13]

Wise flirts briefly with this question when he suggests that

> equalization per se has no necessary implications for changes in the control of public education. All that is implied by a policy of equalization is a redistribution of school revenues . . . . Present patterns of local control can be maintained under [such] a policy . . . .[14]

But he does not convincingly dispose of the kind of argument made by the *McInnis* court.[15] Nor does he discuss the legal doctrine of the "less onerous alternative"[16] which, if applied to the problem of school financing, would dilute the effectiveness of the local control argument by establishing more strenuous equal protection standards to guide the state.

In contrast to his cursory treatment of local control, Wise spends considerable time on the problem of judicially manageable standards. Whereas the *McInnis* court concluded that "the only possible standard

---

13 *Id.* at 333.

14 P. 206. *See also* p. 197.

15 For one possible refutation of the local control argument see Horowitz & Neitring, *Equal Protection Aspects of Inequalities in Public Education and Public Assistance Programs From Place to Place Within a State*, 15 U.C.L.A.L. REV. 787, 808-11 (1968).

16 Under this doctrine courts will sometimes inquire not merely whether there is a rational or reasonable basis for differences in the treatment accorded different individuals, but whether there is a "less onerous alternative" by which the government's purpose can be achieved in a manner which lessens the injury to individuals adversely affected. *See generally* Horowitz, *supra* note 11, at 1161-66.

is the rigid assumption that each pupil must receive the same dollar expenditures,"[17] Wise stresses that "it would be most unfortunate if the present study were to be read as a call for 'one student, one dollar.' "[18] He argues for flexibility and for the necessity of deviating from an "equal dollars" principle in order to account for differences in the cost of equivalent services in various parts of a state, differences in costs attributable to economies of scale, and differences in the educational needs of the children served.[19]

But Wise seems to speak of such deviations only as "permissible" departures from an equal dollars standard. He does not answer the more difficult questions, whether such deviations should be *required*,[20] and, if so, how all the variables can realistically be taken into consideration in allocating funds to local school districts. Nor does he mention what is probably the most important variable of all—the differences in the amounts of non-educational services provided by cities and suburbs which compete with educational services for a share of the local tax dollar.[21] Because of this phenomenon of "municipal overburden," even if a city's per-pupil tax base were as large as that of its neighboring suburbs, the city would still find it considerably more difficult than the suburbs to provide educational resources.[22] This fact of life must be taken into account before any effective equalization of educational opportunity can be achieved.

Another aspect of the standards problem that Wise does not directly confront is the "put-the-lid-on" argument. If a state were required to equalize the educational resources of its local school districts, the per-pupil expenditure level of each district would be limited to the

---

17 293 F. Supp. at 335.

18 P. xiii.

19 Pp. 133, 159, 184, 200-06.

20 It has been argued, at least with respect to compensatory education, that additional funds for special programs should be constitutionally required. *See* Horowitz, *supra* note 11, at 1166-72; Kirp, *The Poor, The Schools, and Equal Protection*, 38 HARV. EDUC. REV. 635, 652, 665 (1968); *cf.* Hobson v. Hansen, 269 F. Supp. 401, 515 (D.D.C. 1967), *aff'd sub nom.* Smuck v. Hobson, 408 F.2d 175 (D.C. Cir. 1969).

21 Cohen, *The Economics of Inequality*, SATURDAY REVIEW, April 19, 1969, at 64.

> [T]he central cities usually experience more than average competition for tax dollars; they have more problems which local taxation is supposed to alleviate (poverty, aging, ill health), and they provide services for people who work there, but live elsewhere (fire and police protection, sanitation). Thus, a smaller proportion of the average property tax dollar is available for spending on schools in central cities than in their neighboring suburbs.

Id.

22 Non-educational expenditures constitute 68 per cent of total public expenditures in the central cities of the thirty-seven largest metropolitan areas. The comparable percentage for the suburbs is only 47 per cent.

Campbell, *supra* note 4, at 46.

level of expenditure in the poorest or most miserly district; *i.e.*, the state would have to "put the lid on" (and in all likelihood decrease) the amount of money which wealthier school districts could spend on education.[23] This would seem to be a difficult pill to take—and the *McInnis* court specifically refused to swallow it.[24] Yet Wise's silence regarding this problem suggests that he is willing to take the pill, with no real complaint or apology, as an unavoidable effect of equalization.

Unquestionably, the problem of judicially manageable standards is an extremely difficult one. Wise's discussion of the problem and his attempt to construct standards are very helpful—as far as they go. But in chopping away at the trees, Wise may not have glanced hard enough at the forest. For me, the most troubling aspect of the school finance quagmire is not just that wealthier communities have more money per pupil than poorer communities, but that they have more *while taxing themselves less.* Although Wise recognizes this inverse relationship between tax effort and per-pupil expenditures,[25] his equalization proposals are not directed specifically at this aspect of the inequality problem.

In contrast, I would focus more on equalizing "fiscal pain" than on equalizing dollars—the purpose being not to give every school district an equal number of dollars per pupil, but to insure that school districts making similar tax efforts receive similar amounts of dollars per pupil.[26] This view of the problem makes it possible both to compensate for discrepancies in tax-base size[27] and to alleviate, by considering tax effort for non-educational expenditures, the problem of municipal overburden. And educational excellence would not be unduly stifled by "putting the lid on" spending, since communities that choose to tax themselves at higher rates would have more money to spend.

Under this approach, a state could treat cost differences resulting from varying regional price levels or economies of scale in whatever manner it thought best. Differences in educational needs would con-

---

23 *See* Kurland, *Equal Educational Opportunity: The Limits of Constitutional Jurisprudence Undefined*, 35 U. CHI. L. REV. 583, 590-92 (1968).

24 293 F. Supp. at 331 n.11, 336.

25 P. 127.

26 *See* Cohen, *supra* note 21, at 76.

27 For examples of how this might be accomplished consistently with the "equal fiscal pain" principle, see the proposed legislation in the *1968 State Legislative Program of the Advisory Commission on Intergovernmental Relations* at 248-58, and the discussion of a proposal by John Coons in Cohen, *supra* note 21, at 76-77. A similar proposal made by Stephen Bailey is discussed in *Rich Schools, Poor Schools.* Pp. 204-06. Wise calls this proposal "a specific compromise plan which might be acceptable to the courts . . . ." P. 204.

tinue to be a problem, but, at least until the level of knowledge concerning their identification and treatment has increased, a state should not be constitutionally compelled to provide additional funds for any particular educational need. For the present it should be free, absent a clear showing of discriminatory or arbitrary action, to identify the special educational needs it wishes to serve and to treat them at the state level or through a system of categorical grants.[28]

Admittedly this is but a sketch of an approach to achieving equal educational opportunity, and the extent to which it is constitutionally viable in the aftermath of *McInnis v. Ogilvie* is by no means clear. But, as *Rich Schools, Poor Schools* makes clear, the inequalities inherent in existing methods of school financing are far too important to be forgotten; new approaches and new legal arguments for alleviating these inequalities must continually be tested. Because it provides so useful and thought-provoking a discussion of the concept of equal educational opportunity and its many complexities—educational, legal, and political—Mr. Wise's book should play a significant role in this endeavor.

*William A. Kaplin**

28 Wise makes a similar suggestion for giving preferred treatment to special educational needs. Pp. 183-84.

* Member of the District of Columbia Bar. A.B. 1964, University of Rochester; LL.B. 1967, Cornell University. Attorney, Education Division, Office of the General Counsel, Dept. of Health, Education, and Welfare. The opinions herein are the author's and do not necessarily represent the views of HEW.