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# Note, Board of Education, Levittown Union Free School District v. Nyquist: A Return to Federal Equal Protection in School Financing Cases

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# *BOARD OF EDUCATION, LEVITTOWN UNION FREE SCHOOL DISTRICT v. NYQUIST:* A RETURN TO FEDERAL EQUAL PROTECTION IN SCHOOL FINANCING CASES

## I
## INTRODUCTION

Since 1968, courts in sixteen states[1] have considered challenges to public school financing laws. In each case plaintiffs charged that reliance on local property taxes to support public education discriminated against children in school districts where property values were relatively low. School districts with little valuable real estate complained that although they were compelled to impose higher than average tax rates to raise necessary school revenues, they were unable to match the spending of school districts with wealthier tax bases. Courts in eight states invalidated state-wide school funding schemes as discriminatory[2] under various state constitutional provisions[3] and the United States Constitution's equal protection clause.[4] In eight other states the courts upheld

1. The 16 states with school financing adjudications, in chronological order, are Illinois (1968), Virginia (1969), California (1971), Minnesota (1971), Kansas (1972), Texas (1973), New Jersey (1973), Arizona (1973), Michigan (1973), Washington (1974), Idaho (1975), Oregon (1976), Connecticut (1977), Ohio (1977), New York (1978), and Colorado (1979). For citations to each of the rulings, see notes 2 & 5 *infra*.

2. Serrano v. Priest, 5 Cal. 3d 584, 487 P.2d 1241, 96 Cal. Rptr. 601 (1971); Van Dusartz v. Hatfield, 334 F. Supp. 870 (D. Minn. 1971); Caldwell v. Kansas, No. 50616 (Johnson County Dist. Ct., Aug. 30, 1972); Robinson v. Cahill, 62 N.J. 473, 303 A.2d 273, *cert. denied*, 414 U.S. 976 (1973); Horton v. Meskill, 172 Conn. 615, 376 A.2d 359 (1977); Cincinnati Bd. of Educ. v. Essex, No. A7602725 (Ct. of C.P., Hamilton County, Dec. 5, 1977); Board of Educ., Levittown Union Free School Dist. v. Nyquist, 94 Misc. 2d 466, 408 N.Y.S.2d 606 (Sup. Ct. 1978); Lujan v. Colorado State Bd. of Educ., No. C73688 (Dist. Ct., Denver, Mar. 13, 1979).

3. In California, Connecticut, Ohio, New York, and Colorado, equal protection provisions of the state constitutions provided grounds for invalidation. Serrano v. Priest, 5 Cal. 3d 584, 596 n.11, 487 P.2d 1241, 1249 n.11, 96 Cal. Rptr. 601, 609 n.11 (1971); Horton v. Meskill, 172 Conn. 615, 649, 376 A.2d 359, 374-75 (1977); Cincinnati Bd. of Educ. v. Essex, No. A7602725, Judgment (Ct. of C.P., Hamilton County, Dec. 5, 1977); Board of Educ., Levittown Union Free School Dist. v. Nyquist, 94 Misc. 2d 466, 525, 527, 530, 535, 408 N.Y.S.2d 606, 638-39, 641, 644 (Sup. Ct. 1978); Lujan v. Colorado State Bd. of Educ., No. C73688, Judgment (Dist. Ct., Denver, Mar. 13, 1979).

In New Jersey, Connecticut, Ohio, and New York, state constitutional provisions mandating operation of public schools provided grounds for invalidation. Robinson v. Cahill, 62 N.J. 473, 515, 303 A.2d 273, 295, *cert. denied*, 414 U.S. 976 (1973); Horton v. Meskill, 172 Conn. 615, 649, 376 A.2d 359, 374-75 (1977); Cincinnati Bd. of Educ. v. Essex, No. A7602725, Judgment (Ct. of C.P., Hamilton County, Dec. 5, 1977); Board of Educ., Levittown Union Free School Dist. v. Nyquist, 94 Misc. 2d 466, 528, 534, 408 N.Y.S.2d 606, 640, 643 (Sup. Ct. 1978).

4. In California, Minnesota, New York, and Colorado, invalidation was based on the equal protection clause of the fourteenth amendment to the United States Constitution. Serrano v. Priest, 5 Cal. 3d 584, 614-15, 487 P.2d 1241, 1263, 96 Cal. Rptr. 601, 623 (1971); Van Dusartz v. Hatfield, 334 F. Supp. 870, 877 (D. Minn. 1971); Board of Educ., Levittown Union Free School Dist. v.

school financing schemes.[5]

In the pivotal case of *San Antonio Independent School District v. Rodriguez*,[6] the United States Supreme Court rejected claims that the Texas school financing system violated the equal protection clause of the fourteenth amendment. Following the *Rodriguez* decision in 1973, the focus in school finance litigation shifted from the federal equal protection clause to state constitutional provisions guaranteeing equal protection of the laws or a right to education itself. It was not until 1978 that a court once again relied upon the equal protection clause of the United States Constitution in a school financing decision. In *Board of Education, Levittown Union Free School District v. Nyquist*,[7] Justice L. Kingsley Smith of the Nassau County Supreme Court in New York declared the state's school financing statute invalid under both the New York and the United States Constitutions. The *Levittown* court ruled on state constitutional grounds alone that there existed an unwarranted link between property wealth and school spending. The court's federal equal protection ruling came on the separate question whether the school districts of New York's largest cities were treated unfairly due to the effects of "municipal overburden" on the cities' educational spending. Municipal overburden is the cumulative weight of inexorable demands for municipal services outside the educational sphere; its effect is to leave a relatively small share of urban property tax revenues for public education. On the issues of municipal overburden and a number of other "burdens" unique to large city school districts, the *Levittown* court found the *Rodriguez* holding distinguishable, and ruled that the New York system violates the federal equal protection clause.

This Comment begins with an extensive summary of the *Levittown* litigation and the New York court's findings of fact, followed by a description and analysis of the court's conclusions of law. The Comment concludes with a brief discussion of the remedial task confronting the state legislature.

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Nyquist, 94 Misc. 2d 466, 523, 535, 408 N.Y.S.2d 606, 642, 644 (Sup. Ct. 1978); Lujan v. Colorado State Bd. of Educ., No. C73688, Judgment (Dist. Ct., Denver, Mar. 13, 1979).

The United States Supreme Court's decision in San Antonio Independent School District v. Rodriguez, 411 U.S. 1 (1973), repudiated the fourteenth amendment reasoning in the California and Minnesota cases. *See* text accompanying notes 94-116 *infra*. The California decision, however, rested on adequate and independent state grounds, *i.e.*, the equal protection clause of the California Constitution, and was therefore unaffected by *Rodriguez*. Serrano v. Priest, 18 Cal. 3d 728, 762-68, 557 P.2d 929, 949-53, 135 Cal. Rptr. 345, 365-69 (1976), *cert. denied*, 432 U.S. 907 (1977). The Minnesota decision, although repudiated, has never been explicitly overruled. In the New York case, *Rodriguez* was distinguished. Board of Educ., Levittown Union Free School Dist. v. Nyquist, 94 Misc. 2d 466, 531, 408 N.Y.S.2d 606, 641-42 (Sup. Ct. 1978).

5. McInnis v. Shapiro, 293 F. Supp. 327 (N.D. Ill. 1968), *aff'd per curiam sub nom.*, McInnis v. Ogilvie, 394 U.S. 322 (1969); Burruss v. Wilkerson, 310 F. Supp. 572 (W.D. Va. 1969), *aff'd per curiam*, 397 U.S. 44 (1970); San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1 (1973); Shofstall v. Hollins, 110 Ariz. 88, 515 P.2d 590 (1973); Milliken v. Green, 390 Mich. 389, 212 N.W.2d 711 (1973); Northshore School Dist. No. 417 v. Kinnear, 84 Wash. 2d 685, 530 P.2d 178 (1974); Thompson v. Engelking, 96 Idaho 793, 537 P.2d 635 (1975); Olsen v. State, 276 Or. 9, 554 P.2d 139 (1976).

6. 411 U.S. 1 (1973). For a summary of the *Rodriguez* facts and holdings, see text accompanying notes 94-116 *infra*.

7. 94 Misc. 2d 466, 408 N.Y.S.2d 606 (Sup. Ct. 1978).

## II
## SCHOOL FINANCING IN NEW YORK

To comprehend the *Levittown* dispute it is necessary to understand the New York school financing scheme.[8] In each school district, a portion of school operating expenses is paid by the state; most of the remainder is paid from the school districts' own property tax revenues.[9] At the time of the *Levittown* trial, the aid statute's primary formula guaranteed that school districts which imposed a fifteen mill tax on the property within their borders would receive enough state aid to bring their total revenues to $1200 per pupil annually.[10] Districts with relatively greater property wealth per pupil received proportionally less aid from the state, because a fifteen mill local tax would bring the wealthier districts nearer the $1200 per pupil guaranteed minimum. The state's contribution was thus inversely tied to the school districts' property wealth per pupil: the greater the property wealth per pupil, the smaller the state's contribution.

School districts were free to tax their real property at rates higher than fifteen mills, and many did, thereby raising expenditures on their own beyond the $1200 minimum. The state's contribution, however, was computed as if the tax rate in every district were fifteen mills. A significant minority of New York's school districts could receive no state aid at all under the primary formula be-

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8. The *Levittown* court passed on the validity of New York's school financing statute as amended in 1974, the year the lawsuit was initiated. The statute was subsequently amended in 1977 and 1978, prior to the court's judgment on December 22, 1978. The amendments did not alter the overall design of the system. The discussion of the statute in this Comment will refer to the 1974 version, which was the object of the court's examination. Pertinent differences and similarities between the 1974 and 1978 versions will be mentioned in the footnotes. *See* 1974 N.Y. Laws, ch. 241, § 8; 1977 N.Y. Laws, ch. 71, § 7 (current version at N.Y. EDUC. LAW § 3602(11), (12) (McKinney Supp. 1978-1979)).

9. Federal aid to education has historically made up a sufficiently small proportion of total school funds in New York that it may be disregarded for purposes of this Comment. Federal aid has amounted to less than five percent of the state's school expenditures in most years. By contrast, at the time of the *Levittown* trial, state aid made up 40% of school expenditures. Findings of Fact (Plaintiffs) at 24, Board of Educ., Levittown Union Free School Dist. v. Nyquist, 94 Misc. 2d 466, 408 N.Y.S.2d 606 (Sup. Ct. 1978).

10. 1974 N.Y. Laws, ch. 241, § 8. A tax of 15 mills is a tax of $.015 on each dollar of a property's assessed value. School districts with tax rates of less than 15 mills were likely to have total revenues of less than $1200 per pupil because the state distributed aid as if districts were taxing at 15 mills. The statute even penalized districts for taxing at rates below 15 mills by reducing their state aid. N.Y. EDUC. LAW § 3602(14)(b) (McKinney Supp. 1978-1979). Evidence presented at trial indicated that the district with the lowest combined state and local revenues spent annually $936 per pupil. *Levittown*, 94 Misc. 2d at 489, 408 N.Y.S.2d at 616.

The 1977 amendments raised the guaranteed minimum amount per pupil from $1200 to $1400. 1977 N.Y. Laws, ch. 71, § 7. The 1978 amendments raised the minimum to $1450 per pupil, and discarded the 15 mill tax rate standard. The new formula enacted in 1978 utilizes a different property wealth standard, the state average of property wealth per pupil. Under the new formula, districts whose property wealth is equivalent to the state's average are granted 49% of $1450 per pupil, or $710.50 per pupil. Districts above the state average receive proportionally less state aid, and districts below the state average receive proportionally more. N.Y. EDUC. LAW § 3602(11)(b)-(f) (McKinney Supp. 1978-1979).

cause they had sufficient property wealth to produce more than $1200 per pupil from a fifteen mill levy.[11] Such wealthy districts, however, were not overlooked by the aid statute. They all received state funds under the statute's "flat grant" provision, which assured that every district, no matter how wealthy, would receive some state aid. Under the flat grant, no district received less than $360 per pupil from the state, even where high property wealth rendered districts ineligible for aid under the primary formula.[12] The effect of the flat grant was largely to negate the equalizing effect of the main state aid formula.

A third method of computing state aid, optional to all districts, allowed a majority to exceed the aid available under either the main formula or the flat grant. School districts could elect to receive funds according to either of two "save harmless" provisions,[13] designed to prevent decreases in state aid to individual districts. Under the "per pupil save harmless" provision, districts were assured of receiving at least as much state aid per pupil each year as they received the preceding year.[14] The per pupil save harmless provision benefited districts in which real estate values were appreciating rapidly. Without the save harmless provision, the rise in property values would have resulted in an increase in property wealth per pupil, which would trigger a decrease in the state's contribution to the district's guaranteed $1200 per pupil. The "total save harmless" provision, on the other hand, assured districts of receiving at least as much total state aid each year as they received the preceding year.[15] Total save harmless was important for districts experiencing declining student enrollments. Without save harmless, the decline would have resulted in an increase in per pupil property wealth, which would cause a decrease in state aid.

Rising real estate values and declining enrollments became so widespread in New York during the early and mid-1970's that by 1977, 699 of New York's 708 school districts were electing one or the other of the save harmless provisions over the primary formula and the flat grant.[16] The effect of nearly universal reliance on save harmless provisions had been to subvert the self-adjusting operation of the statute's primary formula, which was designed to adjust the state's contribution downward in districts which showed increased property wealth per pupil. In a save harmless system a district's state aid can be adjusted upward but never downward.

Another feature of the school aid statute pertinent to the *Levittown* case concerned the determination of the number of pupils in each district. When a district had computed the amount of state aid per pupil to which it was entitled, it multiplied that figure by the number of pupils in the district to find its

11. Over 10% of New York's school districts were in this category. The court cited evidence that the "wealthiest" school district in the state had property wealth of $412,370 for each pupil in its school system. *Levittown*, 94 Misc. 2d at 486, 408 N.Y.S.2d at 615. A 15 mill tax on $412,370 would yield $6185 per pupil, more than five times the guaranteed $1200 per pupil.

12. 1974 N.Y. Laws, ch. 241, § 8 (current version at N.Y. EDUC. LAW § 3602(12)(d) (McKinney Supp. 1978-1979)).

13. *Id.* (current version at N.Y. EDUC. LAW § 3602(18)(a)(2) & (3) (McKinney Supp. 1978-1979)).

14. *Id.* (current version at N.Y. EDUC. LAW § 3602(18)(a)(2) (McKinney Supp. 1978-1979)).

15. *Id.* (current version at N.Y. EDUC. LAW § 3602(18)(a)(3) (McKinney Supp. 1978-1979)).

16. 94 Misc. 2d at 485, 408 N.Y.S.2d at 614; Findings of Fact (Plaintiffs), *supra* note 9, at 23.

total operating aid. Some pupils, however, were "weighted," *i.e.*, they were treated as more than one pupil. For example, each elementary school pupil counted as 1.0 pupil, each secondary school pupil counted as 1.25 pupils, and each handicapped pupil counted as 2.0 pupils.[17] The pupil weightings represented a judgment by the legislature that some groups of pupils are more expensive to educate than others.

Finally, the statute defined the number of pupils in a school district as the number who were in attendance on an average school day,[18] and not the total number who were enrolled. The effect of an average daily attendance measure of school population was to understate population and put a premium on high student attendance. The fewer students a district appeared to have, the greater property wealth per pupil it would show.

## III
## THE CASE

The *Levittown* suit was brought by a group of New York State school districts and school children [hereinafter referred to as "original plaintiffs" or "plaintiffs"] against the State Commissioner of Education in June of 1974.[19] Shortly thereafter, a second group of school districts and children [hereinafter referred to as "plaintiffs-intervenors" or "intervenors"] requested and were granted permission to intervene as plaintiffs in the action.[20] Most of the original plaintiff school districts could be characterized as suburban or rural; the four intervenor districts were those of the four largest cities in New York.[21] The two groups of plaintiffs offered distinct but overlapping analyses of the relevant facts and the applicable law. The significant differences in the impact of the financing system upon urban and suburban school districts necessitated separate approaches to the case.

### *A. Original Plaintiffs*

The original plaintiffs' challenge was directed at the close relationship between school spending and property wealth. They presented evidence of wide

17. N.Y. EDUC. LAW § 3602(9), (9-a) (McKinney Supp. 1978-1979). The other pupil weightings in the statute were as follows: pupils with special educational needs, 1.25 pupils; summer session pupils, 1.12 pupils; and evening school pupils, 1.50 pupils. *Id.* § 3602(9).

18. *Id.* § 3602(8).

19. The original group of plaintiffs was made up of 27 school districts in various parts of the state and 12 school children. In addition to the Commissioner of Education, the defendants were the University of the State of New York, the State Comptroller, and the State Commissioner of Taxation and Finance.

20. The intervening group of plaintiffs was made up of four urban school districts, 17 school children, New York City, the mayor of New York City, the mayor of Syracuse, the director of the New York City Bureau of the Budget, the United Parents Associations of New York, Inc., the superintendents and presidents of the school boards of the intervenor school districts, and a taxpayer.

21. The intervenor school districts were New York City, Buffalo, Rochester, and Syracuse. One district, the city school district of Buffalo, was both an original plaintiff and a plaintiff-intervenor.

variations in property wealth per pupil among the school districts in New York.[22] They showed also that school spending per pupil varied significantly around the state despite the ameliorative impact of the state aid formula.[23] Third, the plaintiffs proved a close relation between the first two sets of facts: levels of expenditures were directly tied to property wealth.[24] To demonstrate that the plaintiff school children were harmed by the relationship, the original plaintiffs offered proof that differences in expenditures gave rise to important differences in the educational services provided by the schools.[25] The plaintiff school districts showed, for example, that they operated with generally larger class sizes, less curricular breadth, and fewer programs for disadvantaged or specially gifted students than did wealthier districts.[26]

The original plaintiffs argued that these facts established a denial of the rights of plaintiff school children under the equal protection clause of the United States Constitution,[27] the equal protection clause of the New York Constitution,[28] and the education article of the New York Constitution.[29] To summarize briefly, the original group of plaintiffs demanded a financing system in which the amount spent on a child's education would not depend upon property values in the child's community.

### *B. Plaintiffs-Intervenors*

Although the plaintiffs-intervenors recognized the inequitable effect of using property taxes as a basis for school funding, they challenged the means selected by the state to equalize school spending, *i.e.*, providing additional state aid to the districts with low property wealth.[30] The intervening large city school districts had property wealth figures that were high in comparison with the rest of the state because their boundaries contained some of the most valuable real estate in the world. The state's contribution to their resources for education was correspondingly low.[31] The intervenors alleged, however, that inner-city schools were among those most desperately in need of additional as-

22. Findings of Fact (Plaintiffs), *supra* note 9, at 25-28. The court adopted with minor changes the proposed findings of fact submitted by the original plaintiffs as well as those submitted by the plaintiffs-intervenors. For convenience, all references herein to factual showings by either group of plaintiffs will be cited to the court's Findings of Fact.

23. *Id.* at 28-30.

24. *Id.* at 30-35.

25. *Id.* at 36-76.

26. *Id.* at 38-42, 49-57, 67-70.

27. The equal protection clause of the United States Constitution provides, "nor shall any State . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1.

28. The equal protection clause of the New York Constitution provides in part that "[n]o person shall be denied the equal protection of the laws of this state or any subdivision thereof." N.Y. CONST. art. I, § 11.

29. The education article of the New York Constitution provides that "[t]he legislature shall provide for the maintenance and support of a system of free common schools, wherein all the children of this state may be educated." N.Y. CONST. art. XI, § 1.

30. Plaintiffs-Intervenors' Amended Complaint § 5(A)(24), at 2-3, Board of Educ., Levittown Union Free School Dist. v. Nyquist, 94 Misc. 2d 466, 408 N.Y.S.2d 606 (Sup. Ct. 1978).

31. *Id.*

sistance.[32] They sought to demonstrate that property wealth was an unreliable gauge of local capacity to support public schools, particularly in the large cities of the state. The intervenors presented evidence of a number of factors responsible for distorting their ability to pay for education:

(1) Municipal overburden. Although the cities had much larger tax bases than other school districts, the cities had also vastly greater non-school expenditures.[33] The intervenors' evidence showed that the cities must devote far greater proportions of their local tax revenues to police and fire protection, welfare, health care, mass transit, parks, and public housing than other localities.[34]

(2) Reduced purchasing power. The higher cost of living and higher general wage scales in urban centers reduced the purchasing power of each dollar spent for city schools.[35]

(3) The pupil attendance measure. Use of average total enrollment to compute property wealth per pupil resulted in exaggeration of wealth in urban districts due to their relatively high absenteeism levels. The consequence of exaggerated property wealth was reduced state aid.[36]

(4) Special-need pupil weightings. Weightings which increased aid for special-need pupils were applied to per pupil aid figures already reduced by municipal overburden, reduced purchasing power, and high absenteeism, resulting in smaller state aid supplements for each special-need pupil.[37]

(5) Educational overburdens. The cities had the greatest concentrations of pupils who were difficult to educate, and therefore more expensive to educate.

The intervenors demonstrated that discrimination in school spending had affected the quality of education in the cities. Unlike the original plaintiffs, however, who pointed to differences in school services between wealthy and poor districts,[38] the intervenors showed that the urban districts lagged far behind the rest of the state in pupil achievement.

On the law, the intervenors' case mirrored that of the original plaintiffs, alleging violations of the state and federal equal protection clauses and the state constitution's education article. To summarize, the plaintiffs-intervenors called for a financing system in which state aid would be allocated on the basis of each district's true capacity to support its schools. To the extent that finding such true capacity would require investigating factors other than property wealth, such as municipal overburden, the plaintiffs-intervenors and the origi-

32. *Id.* § 6(38)-(41).

33. Findings of Fact (Plaintiffs-Intervenors) at 2-3, Board of Educ., Levittown Union Free School Dist. v. Nyquist, 94 Misc. 2d 466, 408 N.Y.S.2d 606 (Sup. Ct. 1978).

34. *Id.* at 8, 10-15.

35. *Id.* at 20-21.

36. *Id.* at 24.

37. *Id.* at 29. Each handicapped pupil, for example, was counted as two pupils, *i.e.*, the handicapped pupil weighting was 100%. N.Y. EDUC. LAW § 3602(9) (McKinney Supp. 1978-1979). The intervenors claimed that because per pupil aid was artificially reduced by municipal overburden and other factors, the 100% additional aid per each handicapped pupil was likewise distorted. *See* Findings of Fact (Plaintiffs-Intervenors), *supra* note 33, at 29.

38. *See* text accompanying notes 25-26 *supra*.

nal plaintiffs were fundamentally adverse parties. If the property-rich large cities were entitled to greater state aid on account of municipal overburden and other factors, they could receive such aid only to the relative detriment of other school districts, many of which were low on the property wealth scale.

## IV
## THE COURT'S FINDINGS

### *A. Original Plaintiffs*

The *Levittown* court adopted, with some changes, the proposed findings of fact submitted by the original plaintiffs. The court made all four of the findings that were fundamental to the plaintiffs' case: (1) school districts had vastly unequal access to taxable property wealth; (2) school spending per pupil varied widely among school districts; (3) disparities in property wealth and in educational spending were strongly connected; and (4) expenditure disparities had meaningful educational and non-educational consequences.

The court found that the wealthiest school district in the state had more than fifty-two times the property wealth per pupil of the poorest district.[39] Gross differences in property wealth, however, were not confined to a few very wealthy and a few very poor school districts. A majority of the state's school children were found to live in districts that were more than twenty-five percent above or below the average in property wealth per pupil.[40] Disregarding the wealthiest ten percent and the poorest ten percent of the state's school districts, the ratio of the richest to the poorest school district was still greater than four-to-one.[41] Wide disparities were found within individual counties as well as throughout the state.[42]

Turning to disparities in expenditures, the court found the ratio of the highest to the lowest district in school spending per pupil to be four-and-one-half to one.[43] Spending variations, like wealth variations, were not limited to the richest versus the poorest school districts. When the highest ten percent and the lowest ten percent were eliminated, some districts still spent twice as

39. The most recent property wealth statistics before the court were from the 1975-76 school year. The 52-to-1 ratio in property wealth had widened from a 46-to-1 ratio in the 1974-75 school year, when the wealthiest district, Fisher's Island, had $412,370 in property wealth per pupil, and the poorest district, Salmon River, had $8,884 per pupil. Findings of Fact (Plaintiffs), *supra* note 9 at 25, 27.

40. The wealthiest 25% of school districts had property wealth exceeding $61,870 per pupil; the poorest 25% had less than $37,122 per pupil. *Id.* at 26.

41. The school district at the 90th percentile had property wealth of over $86,000 per pupil; the district at the 10th percentile had $20,840 per pupil. *Id.* at 25.

42. Nassau County had three districts, Manhasset, North Shore, and Great Neck, with property wealth over $124,000 per pupil, and three other districts, Levittown, Roosevelt, and North Merrick, below $30,000 per pupil. Suffolk County had three districts with more than $370,000 per pupil, and three districts below $27,000 per pupil. Westchester County had one district over $330,000 per pupil, and others below $37,000 per pupil. *Id.* at 26.

43. The highest spending school district had annual expenditures of $4,215 per pupil; the lowest spending district spent $936 per pupil. *Id.* at 28.

much per student as others.[44] Sixty-three percent of the state's school districts spent at least twenty-five percent more or twenty-five percent less than the average.[45]

The court found that the plaintiffs had proved a strong direct correlation between property wealth disparities and expenditure disparities among the school districts.[46] Eighty percent of spending variations were attributable to differences in property wealth.[47] Linkage was evident at every level of wealth and spending.[48] Most importantly, the court found that the statutory financing scheme itself explicitly linked wealth and spending.[49] The statute assumed the same fifteen mill tax rate for all districts receiving aid under the main formula. Given the vast differences in property wealth among school districts, a uniform fifteen mill tax rate would necessarily produce greatly varying local revenues. The court found that despite the equalizing effect of the statute's primary formula, the legislative scheme enabled wealthy districts to achieve high levels of spending that were difficult or impossible for poorer districts to attain.[50]

The court also found evidence of a number of significant consequences of spending differentials, many of them non-educational. Districts low in property wealth found it necessary to impose higher than average tax rates.[51] The court found that in one school district the increased tax burden had led to an unusually high incidence of foreclosures on mortgages and had operated as an incentive for residents to move out of the district.[52] In another district, voters had defeated two proposed school budgets, forcing the district to operate on a "contingency" or "austerity" budget.[53]

The educational consequences of spending variations were more numerous. Low-spending school districts were found to have significantly lower ratios of teachers and other professionals to students.[54] Larger classes were the result.[55] The court noted that the apparent lack of agreement among educational experts concerning the relation, if any, between class size and academic achievement did not preclude a finding of denial of meaningful educational opportunities where it was shown that wealthy districts could provide small clas-

44. The school district at the 90th percentile spent $2,051 per pupil; the district at the 10th percentile spent $1,089 per pupil. *Id.* at 28-29.

45. *See id.* at 29.

46. *Id.* at 30.

47. *Id.* at 32.

48. *Id.* at 31-32.

49. *Id.* at 32.

50. *Id.* at 32-35. A 15 mill tax in the state's wealthiest district would yield more than six thousand dollars per pupil. The same tax rate in the state's poorest district would yield $133 per pupil. The district at the 90th percentile in property wealth would generate $1,283 per pupil with a 15 mill tax, and the district at the 10th percentile would raise $314 per pupil. *Id.* at 33.

51. *Id.* at 36.

52. The court found as well that homes vacated by families leaving the district had been converted from single family occupancy to double and triple family occupancy, compounding the drain on educational resources. *Id.*

53. *Id.* at 37.

54. *Id.* at 38.

55. *Id.* at 40-41.

ses when they were deemed desirable, but poor districts could not offer them under any circumstances.[56] The court also found that poorer districts' professional staff deficiencies prevented them from offering the breadth and variety of curricula available in wealthier districts.[57] Districts with low expenditures generally were unable to provide advanced placement courses for gifted secondary school students, variety or extended study in foreign language offerings, adequate instruction in art and music, and supplemental educational experiences such as field trips.[58] These were curriculum offerings that were routinely made available in wealthy school districts.[59]

Certain teacher characteristics were found to differ between wealthy and poor districts. Statistics showed that high-spending school districts hired teaching staffs with more experience and more graduate degrees, characteristics which must be paid for in the form of higher salaries.[60] Sociological evidence showed a direct correlation between teacher experience and advanced degrees on the one hand and pupil achievement on the other.[61] In addition, the court found that low spending districts compared poorly with wealthy districts in numbers of guidance counsellors, school psychologists, and speech therapists; age and condition of instructional equipment; and quantities of basic school supplies and textbooks.[62]

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56. *Id.* at 41. The court made specific findings that wealthy districts uniformly took advantage of their high levels of expenditure to reduce class sizes. In courses where more than specified maximum numbers of students enrolled, wealthy districts were able to create additional sections rather than turn students away or increase class size. Wealthy districts maintained their smallest classes for advanced placement and remedial courses. If few students signed up for advanced or remedial courses, enrollments in wealthy districts were allowed to drop below normal minimums to avoid dropping such courses entirely.

Administrators and teachers from wealthy school districts testified at trial to the following reasons for maintaining small classes: (1) Teachers and parents generally believe small classes are educationally desirable, and it is important to please both groups. (2) In classes of more than 25 students, teachers lose track of individual students' problems. (3) Individualized instruction in the early years of school promotes a healthy self-image for the pupil. (4) Classes for disadvantaged pupils or those with learning disabilities are effective only when they are small. (5) Advanced classes in languages, sciences, and math must be small because few students enroll. (6) Advanced placement courses require greater teacher preparation and individualized instruction. (7) Instruction in English composition requires time-consuming evaluation of students' papers. (8) Science laboratory courses must be small so that each student can actually perform experiments. *Id.* at 42-49.

57. *Id.* at 49.

58. The plaintiff Levittown Union Free School District had abandoned advanced placement programs due to their cost, and had eliminated foreign language study in the junior high schools. Plaintiff Roosevelt School District employed no art or music specialists for the elementary grades. Teachers in Levittown planned very few field trips because they disliked asking students to pay part of the cost. *Id.* at 50-58.

59. *Id.* at 51-52, 55-58. The Great Neck School District offered advanced placement courses in English, American and European history, calculus, biology, chemistry, physics, French, Latin, and Spanish. The Half Hollow Hills School District offered junior high instruction in French, Spanish, German, and Italian, with a possible six-year sequence in each language, and had offered independent study in Hebrew, Latin, Japanese, Modern Greek, and Portuguese. *Id.* at 51, 56.

60. *Id.* at 59.

61. The court pointed out that it was not clear whether teacher experience and education affect student achievement or are merely proxies for other characteristics which do. *Id.* at 61-62.

62. *Id.* at 63-76.

### B. *Plaintiffs-Intervenors*

The court adopted the plaintiffs-intervenors' proposed findings of fact with some changes. The court found in favor of the intervenors on each of the major factual points in their case. First, the aid statute's underlying equalization purpose was defeated by four circumstances that diminished the large cities' educational resources: municipal overburden, reduced purchasing power, the pupil attendance measure of school population, and reduced supplemental aid for special-need pupils. Second, the aid formula disregarded the city schools' severe educational overburdens with the result that their pupils' serious achievement deficiencies were not ameliorated.

The court found initially that the intervenors' fiscal capacity was exaggerated by municipal overburden, or the burden of non-educational services which large cities must finance by property taxes. The evidence showed that the cities devoted far greater amounts per capita than did suburban and rural communities to non-educational expenditures, and that the cities set aside significantly smaller proportions of their local revenues for schools, although they had substantially higher overall tax rates.[63] The court proceeded to find that the cities' higher non-educational expenditures had been undertaken in response to demands that were so compelling that they could not be ignored. Some physical and population characteristics of New York's cities which made higher municipal spending necessary were their large proportions of young, old, poor, and less educated persons; high unemployment; dense population; old and deteriorated housing stock; and old and heavily used street, sewer, and water systems.[64] The cities were powerless to influence population migrations,[65] and could improve their physical facilities only at great expense. The court found that cities could not ignore the need for large police forces to deal with high urban crime rates, millions of commuters and tourists, major public events, and organized crime.[66] Nor could volunteer fire departments adequately serve the major cities as they do other communities.[67] The court found the operation of New York City's mass transit system to be essential to the city's functioning.[68] Much of the cities' responsibility in the provision of cor-

63. Findings of Fact (Plaintiffs-Intervenors), *supra* note 33, at 2. For example, in 1974 New York City's per capita locally financed expenditures excluding education were more than double those for the balance of the state. In the 1972-73 school year, the four intervenor cities devoted 28.3% of their locally raised revenues to schools, while the remainder of the state spent 45.1% of local revenues for schools. *Id.* at 2-3. The intervenor cities' property tax rates were just below the constitutional maximum. *Id.* at 19. *See* N.Y. CONST. art. VIII, § 10(b) & (f).

64. Findings of Fact (Plaintiffs-Intervenors), *supra* note 33, at 3-5.

65. In Shapiro v. Thompson, 394 U.S. 618 (1964), the Supreme Court recognized the fundamental constitutional right of interstate travel. The Court held constitutionally impermissible a legislative purpose of discouraging migration of indigent persons to a state. 394 U.S. at 629-31. *See also* United States v. Guest, 383 U.S. 745, 757-59 (1965).

66. The intervenor cities' per capita expenditures for police were from two to six times the amounts spent by their suburbs for police. New York City's violent crime rate in 1974 was 14 times that of Long Island's Nassau and Suffolk Counties. Findings of Fact (Plaintiffs-Intervenors), *supra* note 33, at 8-9.

67. *Id.* at 10.

68. *Id.* at 13. New York City's annual per capita expenditures for mass transit were more than

rectional facilities, health care, housing, and welfare was found to be mandated by state and federal statutes and regulations over which the cities exercised no control.[69]

Turning to the matter of reduced purchasing power in urban districts, the court found that the school aid formula's failure to account for regional cost differences caused the intervenors' financial capacity to be overstated again.[70] The cost of living in metropolitan areas was higher than in rural areas, and educational costs were found to parallel consumer costs.[71] Likewise, wage scales in private employment were higher in the cities, and teaching salaries were found to conform to the private sector pattern.[72] The evidence showed that most teachers preferred not to work in large city districts due to their large classes, high proportions of minority and disadvantaged pupils, deteriorating buildings, limited materials and supplies, violence, and vandalism.[73] The cities could maintain teacher quality amid these obstacles only by offering relatively high teacher salaries.[74]

The court found as well that use of a pupil attendance measure of school population deprived the cities of millions of dollars in state aid to which they would be entitled under a total enrollment measure.[75] Due to their high rates of absenteeism, the cities' school populations were understated more than those in other districts by the average daily attendance count.[76] The result of their appearing to have fewer pupils was that the intervenor districts showed greater property wealth per pupil, and were therefore eligible for less state aid per pupil. The diminished pupil count affected the aid computation a second time when the already reduced per pupil aid figure was multiplied by the number of pupils in the district to determine the aggregate state aid for the district. The court found that the intervenor schools were thus doubly penalized for their high absenteeism.[77]

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five times those of the rest of the state. Of the three million persons who commute to the center of New York City each day, 56% use mass transit. *Id.*

69. *Id.* at 11-12, 14. For example, the intervenor cities' public assistance obligations are not within their control. Eligibility for welfare and the kinds and levels of benefits payable to those eligible are fixed by federal and state law. *Id.* at 11. *See* 42 U.S.C. §§ 601-603 (1976); N.Y. SOC. SERV. LAW §§ 86-a, 88, 91-93, 131-133 (McKinney 1976 & Supp. 1977-1978).

70. Findings of Fact (Plaintiffs-Intervenors), *supra* note 33, at 20.

71. The New York City metropolitan area was second in the United States only to Boston in the cost of living. In New York State, the average per pupil expenditure necessary to provide a minimum educational program was 29% higher in metropolitan area districts than in rural districts. *Id.*

72. In the 1974-75 school year, the average classroom teacher's salary was 30% higher in the New York City metropolitan area than upstate. The large differential was due not only to attractive salaries in alternative occupations in the metropolitan areas, but also to the greater concentration of school districts, all of which competed for teachers. *Id.* at 20-21.

73. *Id.* at 21.

74. *Id.* at 21-22.

75. *Id.* at 24.

76. The state's five largest cities had an average daily attendance rate of 84%; the remainder of the state averaged 93.83%. *Id.*

77. The court rejected the defendants' contention that the aid penalty was an effective spur to school districts to improve their attendance rates. The cities' high absenteeism rates were found to

With regard to supplemental state aid for handicapped and special-need students, the court found that the large cities were subject to further discrimination. Multiplying the weightings for handicapped and special-need pupils by the cities' already-reduced per pupil aid resulted in a reduced state aid supplement for each pupil. If the cities' basic per pupil aid computation had taken account of municipal overburden, reduced purchasing power, and the higher absenteeism rates in the cities, then supplemental aid for special-need pupils could have been fairly calculated. The cities had greater concentrations of handicapped and special-need pupils and therefore received the greatest total supplemental aid, but their "advantage" was illusory because the supplemental aid for *each* handicapped and special-need pupil was improperly reduced by applying the weightings to per pupil aid figures that were too low. The discrimination was found to affect fifty-two percent of the state's handicapped and special-need students, who attended school in the four intervenor cities, where only thirty-six percent of all the state's pupils resided.[78]

The court also found that the intervenors had satisfactorily proved that their schools operate under eight "educational overburdens," or barriers to learning, which the state aid statute failed to address.[79] The educational overburdens were poverty-related characteristics of many city school pupils which the court found made their achievement of normal progress in school extremely unlikely, including:

(1) Impaired learning readiness. Many children entered urban schools unprepared to grasp the material that was taught.[80]

(2) Impaired learning progress. Many students' out-of-school environments were inimical to achievement as they continued through school.[81]

(3) Impaired mental and emotional health. Statistics showed a much greater incidence of mental health problems in inner-city schools than elsewhere, with results including lower intellectual functioning and withdrawn and disruptive behavior.[82]

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be unalleviable, and had numerous poverty-related causes, including more frequent illness, lack of warm clothing, family babysitting responsibilities, lack of parental encouragement to attend school, lack of success in school, and impaired mental and emotional health. *Id.* at 24-26.

78. *Id.* at 29.

79. *Id.* at 35.

80. Some poverty-related urban conditions that contributed to impaired learning readiness were lack of toys, books, and other materials in the home; lack of direct adult attention; lack of exposure to standard English; overcrowded living conditions; and excessive noise. Some in-school manifestations of impaired learning readiness were unfamiliarity with books and writing materials; inability to make refined visual discriminations and recognize alphabet letters; failure to grasp concepts such as color, time, sequence, and cause and effect; underdeveloped facility with language; low levels of curiosity; brief attention span; and underdeveloped memory skills. *Id.* at 35-36.

81. Some conditions of urban poverty which impeded academic progress were deficiencies in food, clothing, medical care, and recreation; parental abandonment and abuse; exposure to violence and drug and alcohol abuse; overcrowding and excessive noise; frequent household moves; lack of parental assistance or encouragement to learn; part-time employment; attitudes inimical to school attendance and achievement; and disruptive pupils in school. Some of the academic consequences of these conditions were failure to do homework; poor performance in school due to anxiety; lack of motivation to attend and achieve; interruption of sequential learning; narrow ranges of out-of-school learning; and generally poor academic achievement. *Id.* at 38-40.

82. *Id.* at 42-43.

(4) Impaired physical health. Children living in poverty were shown to be subject more frequently to illness and injury, with consequent absence from school and poor performance in the classroom.[83]

(5) Handicapping conditions. Poverty was a cause for many city pupils' physical and mental handicaps, which made learning difficult or impossible in the absence of expensive special services.[84]

(6) Foreign language. Over 100,000 of the intervenor school districts' pupils could not participate effectively using English; court decisions require bilingual education for these pupils.[85]

(7) Occupational education. The large cities had higher than average proportions of pupils who would ultimately enter trades, and consequently had the highest enrollments in costly occupational education programs.[86]

(8) Absenteeism. The cities' high rates of absenteeism had the effect of interrupting many pupils' progress, and made necessary extensive remedial assistance as well as large numbers of attendance officers.[87]

The court found finally that the failure of the intervenor school districts to deal adequately with the eight educational overburdens, as a result in part of their reduced state aid, had had a substantial effect on their pupils' academic achievement.[88] Most importantly, the court found that every year significant numbers of urban pupils failed to achieve even basic minimal educational skills.[89] The large city districts consistently had by far the greatest proportions of pupils scoring below minimum competency for their grade levels on national achievement tests and state-administered reading and mathematics proficiency tests.[90] Some New York City high school students were found to be totally illiterate, and thousands were below the state's own measures of minimum educational competency.[91] The evidence showed that underachieving pupils tended

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83. *Id.* at 46, 48.

84. *Id.* at 49-56.

85. *Id.* at 56-58. *See* Lau v. Nichols, 414 U.S. 563 (1974); Aspira of New York, Inc. v. Board of Educ., 72 Civ. 40002 (S.D.N.Y., Aug. 29, 1974).

86. In the Buffalo schools occupational education cost $724 more per pupil than academic education. The higher cost of occupational education was due in part to large capital expenditures for equipment, which must be maintained and replaced with advances in technology. Moreover, highly skilled teachers and small classes were necessary, especially where tools and machinery were dangerous. Substantial numbers of interested students could not be offered occupational education on account of the cost. In New York City approximately 15,000 students, or half the applicants for occupational education, were turned down each year. Findings of Fact (Plaintiffs-Intervenors), *supra* note 33, at 59-60.

87. *Id.* at 61.

88. *Id.* at 34, 63.

89. *Id.* at 63-65.

90. On the Gates-MacGinitie Reading Test, administered in 1976, 16% of Rochester's twelfth grade pupils scored at a fifth grade level or lower. In New York City, the proportion of ninth graders reading at fourth grade level or below on the Metropolitan Achievement Test was 14% in 1974, 9% in 1975, and 12% in 1976. Half the pupils who enter the ninth grade each year in New York City eventually drop out of school. *Id.* at 63-64. The consequence of such a high drop-out rate is that educational incompetence cannot adequately be measured by reference solely to the proportions of underachieving pupils *within* the school system. *Id.* at 63-64.

91. The New York State Pupil Evaluation Program tests were used to measure proficiency in reading and mathematics of third, sixth, and ninth grade pupils across the state. Over 52% of the

to fall further behind their grade levels as they passed through school. Pupils' failure to acquire skills in the early grades rendered inaccessible much of the upper grades' curriculum.[92] Remedial programs adequate to address the problems of great numbers of underachieving students were found to be too expensive for the intervenor districts to provide.[93]

## V
## THE *RODRIGUEZ* DECISION

In *San Antonio Independent School District v. Rodriguez*[94] the United States Supreme Court upheld the Texas system of school financing against a federal equal protection attack. Every school financing decision since *Rodriguez*, including *Levittown*, has been shaped to some degree by the Supreme Court's ruling.[95] State courts that have struck down financing schemes in the wake of *Rodriguez* have relied on state constitutional provisions, as to which the federal law precedent of *Rodriguez* carries naught but persuasive force.[96] The *Levittown* case was the first school financing adjudication in which the scope of *Rodriguez* was examined in its own context, namely federal constitutional law.[97]

The Texas school financing scheme challenged in *Rodriguez* was similar in structure and purpose to the New York system.[98] The state of Texas provided almost half the school funds state-wide, and local school districts supplied most of the rest.[99] State aid was apportioned according to a complex formula designed to take account of each school district's resources.[100] Local contributions, however, differed sufficiently due to variations in property wealth to negate much of the equalizing effect of the aid formula.[101] The case presented by the *Rodriguez* plaintiffs [hereinafter referred to as appellees] was much the same as that presented by the original plaintiffs in the *Levittown* case.

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pupils scoring below minimum competency as determined by the state's own standards were enrolled in the four intervenor school districts, which had just under 36% of the state's total school enrollment. Each of the intervenor districts had between 25 and 35% more pupils scoring below minimum competency than the rest of the state. When only inner city scores were compared with the balance of the state, the gap was even wider. *Id.* at 64-65.

92. *Id.* at 65-66.

93. *Id.* at 67.

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

95. *See, e.g.*, Robinson v. Cahill, 62 N.J. 473, 486-90, 303 A.2d 273, 279-82, *cert. denied*, 414 U.S. 976 (1973); Horton v. Meskill, 172 Conn. 615, 640-50, 376 A.2d 359, 371-75 (1977).

96. *See, e.g.*, Robinson v. Cahill, 62 N.J. 473, 515, 303 A.2d 273, 295, *cert. denied*, 414 U.S. 976 (1973); Serrano v. Priest, 18 Cal. 3d 728, 761-68, 557 P.2d 929, 948-53, 135 Cal. Rptr. 345, 364-69 (1976); *cert. denied*, 432 U.S. 907 (1977); Horton v. Meskill, 172 Conn. 615, 649, 376 A.2d 359, 374-75 (1977).

97. The only other post-*Rodriguez* school financing decision in which the federal equal protection clause was a ground for invalidation was Lujan v. Colorado State Bd. of Educ., No. C73688 (Dist. Ct., Denver, Mar. 13, 1979).

98. For a description of the New York system, see text accompanying notes 8-18 *supra*.

99. 411 U.S. at 9 n.21.

100. *Id.* at 9-10.

101. *Id.* at 12-16.

Interdistrict spending variations were attacked as violative of the federal equal protection clause.[102]

Justice Powell's majority opinion in *Rodriguez* examined the appellees' claims on two levels of equal protection review. First was the strict scrutiny standard, which itself divides into two distinct branches, labeled "suspect class" and "fundamental rights." The second level of review was the rational basis standard. On neither level did the Court find an equal protection violation.

Appellees claimed that the division of the state of Texas into school districts for financing purposes constituted an impermissible classification on the basis of wealth. The majority found it unnecessary to determine even whether classifications according to wealth are "suspect," for it found that appellees had failed to prove any recognizable wealth discrimination.[103] There was no evidence that poor persons were concentrated in districts low in property wealth.[104] Nor was there evidence that the system absolutely deprived any poor pupils of an education.[105] Furthermore, if the class were defined as those pupils residing in poor districts, it would lack the features of powerlessness and disability usually required to activate the extraordinary protection of the strict scrutiny test.[106]

On the fundamental rights branch of strict scrutiny analysis, appellees' claims were again rejected.[107] To the appellees' claim that variations in school spending constituted discrimination as to the fundamental right to education, the Court responded that no fundamental right to education exists.[108] The only rights sufficiently "fundamental" to trigger strict scrutiny are those which are protected expressly by the Constitution or which can fairly be implied from its text.[109] Education is not expressly guaranteed by the United States Constitution, and the majority was unwilling to interpret the rights to free speech and

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102. The *Rodriguez* appellees did not rely on any provision of the Texas Constitution. Although the state constitution contained an equal protection clause, TEX. CONST. art. I, § 3, and an education clause, *id.*, art. VII, § 1, neither was raised in the *Rodriguez* litigation. It is likely that appellees decided to forego state constitutional claims to avoid an abstention ruling by the federal court. *See* Railroad Comm'n v. Pullman Co., 312 U.S. 496 (1941).

The *Rodriguez* appellees made no allegations regarding municipal overburden, regional variations in purchasing power, or any other of the factual elements of the *Levittown* plaintiffs-intervenors' case.

103. 411 U.S. at 28. The suspect class branch of strict scrutiny analysis prohibits state-imposed classifications of persons according to certain particularly invidious criteria, notably race, absent some compelling state interest. *See, e.g.*, Korematsu v. United States, 323 U.S. 214 (1944); Oyama v. California, 332 U.S. 633 (1948).

104. *Id.* at 23, 27.

105. *Id.* at 23-24.

106. *Id.* at 28.

107. The fundamental rights branch of strict scrutiny analysis prohibits discrimination touching on the exercise of fundamental constitutional rights, absent a compelling state interest requiring such discrimination. *See, e.g.*, Police Dep't v. Mosley, 408 U.S. 113 (1973); Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966); Douglas v. California, 372 U.S. 353 (1963); Griffin v. Illinois, 351 U.S. 12 (1956); Skinner v. Oklahoma, 316 U.S. 535 (1942).

108. 411 U.S. at 35.

109. *Id.* at 33.

voting as implying a right to education.[110] Justice Powell added that even were such an inference made, appellees could not fairly claim that the Texas system deprived pupils of the basic minimal skills necessary to exercise effectively speech and voting rights.[111]

Having found the strict scrutiny test inapplicable in both of its embodiments, the Court considered appellees' equal protection claims on the more traditional "rational basis" level of review.[112] The Court held that a rational justification existed for maintaining a financing system in which variations in expenditures are permitted.[113] The legislative purpose rationally promoted by the Texas arrangement was preservation of local control of public education.[114] Justice Powell hypothesized that the people of Texas may have believed that a more equalized system would require greater financial participation by the state, and that "along with increased control of the purse strings at the state level [would] go control over local policies."[115] The majority refused to interfere with that judgment. It found that the Texas system was neither irrational to the point of being invidiously discriminatory nor was it the result of purposeful discrimination.[116] It was a "rough accommodation" of disparate interests by a legislative body honestly attempting to narrow differences in spending while preserving local control.

In its rational basis discussion the majority noted the implications of the case for the relationship between national and state governments. The majority cautioned that invalidation of the Texas system by the Supreme Court would pose a threat to school financing systems in virtually all the states.[117] The Court explained that its concern with federalism was important not only to the level of judicial review appropriate to the case but also to the question whether there existed a rational basis for the challenged discrimination.[118] Such dicta render the *Rodriguez* decision peculiarly susceptible to an interpretation in which the federalism balance was the Court's primary consideration. In this view the Court assumed an especially deferential equal protection stance to avoid intrusion into a field traditionally reserved to state and local authority.

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110. *Id.* at 35-36.

111. *Id.* at 36-37.

112. Under this standard, legislative enactments enjoy judicial deference unless there exists no rational basis for the classification of persons occasioned by them. *See, e.g.*, McGowan v. Maryland, 366 U.S. 420 (1961); Royster Guano Co. v. Virginia, 253 U.S. 412 (1920).

113. 411 U.S. at 55.

114. Freedom to decide to spend more on the education of one's children and local participation in decisions as to how the money will be spent are major components of local control. *Id.* at 49-50.

115. *Id.* at 51-53.

116. *Id.* at 55. The final consideration supporting deference to the legislature was the lack of tested alternatives to the method of financing employed universally in the states at the time of *Rodriguez*. *Id.*

117. "[I]t would be difficult to imagine a case having a greater potential impact on our federal system than the one now before us, in which we are urged to abrogate systems of financing public education presently in existence in virtually every State." *Id.* at 44. The importance of the federalism question is evident from the majority's reiteration of its concern in the final paragraph of the opinion. *Id.* at 58.

118. *Id.* at 44.

If concern for the federal-state distribution of power is entitled to a great deal of credit for the outcome of the case, *Rodriguez* may be more important as a "forum allocation" decision than as an equal protection decision. That is, the Supreme Court may have been saying more about the proper forum in which to examine school financing than about the rules of decision appropriate to the subject. In a similar lawsuit brought in state court, alleging violations of a state equal protection clause, the equal protection analysis appropriately might be more stringent.[119] Commentators widely preceived *Rodriguez* in this light. The case was interpreted as spelling the end of federal constitutional adjudication in the school finance area, and as inaugurating a new era of state constitutional adjudication in the field.[120]

The *Levittown* court proved the commentators both right and wrong. In *Levittown*, the trend toward state constitutional adjudication in school finance was continued. The court confronted as well, however, the federal equal protection question, and made a considered determination that the *Levittown* facts were sufficiently different from those in *Rodriguez* to warrant a contrary fourteenth amendment resolution. The *Levittown* court distinguished *Rodriguez* and announced the reappearance of federal constitutional law in school financing adjudication.

## VI
## THE COURT'S CONCLUSIONS: ORIGINAL PLAINTIFFS

### *A. Federal Equal Protection*

The original plaintiffs alleged that the equal protection clause of the fourteenth amendment forbids a state to allow the quantity and quality of educational services to be a function of district property wealth. The plaintiffs chose not to press their federal equal protection claim in light of the United States Supreme Court's resolution of the same legal issues in the *Rodriguez* case. The

119. There are good reasons for assuming as well that state court analysis could be more stringent than federal court analysis on the same *federal* equal protection questions. The argument is that where federal courts decline to enforce a federal constitutional provision in certain contexts due merely to institutional concerns, such as the federalism concern in *Rodriguez*, they do not thereby limit the reach of the constitutional provision itself, but only of their own power of review. If the same federal provision can be enforced by another body which is not bound by the same institutional concerns, the full reach of the constitutional provision may come into play. For example, state courts can enforce federal constitutional rights, but are not bound by the federalism concerns which restrain the federal courts. Therefore, in a context such as school financing where a federal court would exercise restraint on the federal equal protection question primarily out of deference to the states, a state court should be free to enforce the federal equal protection clause to its fullest doctrinal extent. *See* Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 HARV. L. REV. 1212 (1978).

120. *See, e.g.*, Dugan, *The Constitutionality of School Finance Systems Under State Law: New York's Turn*, 27 SYRACUSE L. REV. 573, 573-74 (1976); 12 DUQ. L. REV. 989, 998-99 (1974); 76 W. VA. L. REV. 72, 79 (1973-74); 8 U.S.F.L. REV. 90, 91 (1973); 8 U. RICH. L. REV. 88, 94-95 (1973); *but see* Tractenberg, *Reforming School Finance Through State Constitutions:* Robinson v. Cahill *Points the Way*, 27 RUTGERS L. REV. 365, 373-84 (1974); Carrington, *Financing the American Dream: Equality and School Taxes*, 73 COLUM. L. REV. 1227, 1259 (1973).

court therefore rejected the original plaintiffs' federal claim, noting that post-*Rodriguez* challenges like the plaintiffs' have failed to the extent that they relied on the fourteenth amendment.[121]

### *B. State Equal Protection*

The New York State Constitution contains an equal protection clause that is nearly identical to its federal counterpart: "No person shall be denied the equal protection of the laws of this state or any subdivision thereof."[122] In contrast with the two-tiered federal equal protection review in *Rodriguez*,[123] the *Levittown* court utilized three distinct levels of review on the plaintiffs' state equal protection claims. In addition to the strict scrutiny and rational basis tests, the court applied an intermediate test, labeled the "sliding scale."

#### *1. Strict Scrutiny*

##### *a. Suspect Class*

In both New York and federal equal protection doctrine, strict scrutiny analysis is divided into two separate tests, the "suspect class" and "fundamental rights" branches. Statutory classifications are stricken under the suspect class branch if they are founded upon race or some other invidious criterion, unless some compelling state interest justifies the discrimination.[124] The original plaintiffs contended that the demonstrated correlation between the property wealth of school districts and the wealth of district residents[125] established an impermissible classification of persons on the basis of their wealth.[126]

The court declined to reach the wealth question. It considered the "classification" of the state into school districts merely a means by which a local component of the financing system could be devised. The court viewed the creation of school districts as a legitimate delegation of a portion of the state's responsibility for education. Although variations in revenue-raising ability were inescapable given local financing units, the state-supported component of the financing system was intended to narrow such variations. It would have been inappropriate for the court to invalidate the local component without examining the state component if spending inequities were the result of failure by the state component to perform its equalizing function. The court was unwilling to isolate the act of dividing the state into local units from the state-furnished component of the system for purposes of determining whether there was a suspect classification.[127] The court stated that it was reviewing only the validity of

121. 94 Misc. 2d at 519, 408 N.Y.S.2d at 634.
122. N.Y. CONST. art. I, § 11.
123. *See* text accompanying notes 103-16 *supra*.
124. *See* Alevy v. Downstate Medical Center, 39 N.Y.2d 326, 332, 348 N.E.2d 537, 543, 384 N.Y.S.2d 82, 87 (1976).
125. Although plaintiffs introduced evidence on this correlation, the court made no specific finding of such a correlation. *See* Plaintiffs' Post-Trial Memorandum of Law at 13, Board of Educ., Levittown Union Free School Dist. v. Nyquist, 94 Misc. 2d 466, 408 N.Y.S.2d 606 (Sup. Ct. 1978).
126. *Id.* at 13-14.
127. 94 Misc. 2d at 520, 408 N.Y.S.2d at 635.

the "end product" of the system as a whole.[128]

Even if the court had reached the suspect class question, the plaintiffs' presentation would have failed to establish a violation for at least two reasons. One barrier to the plaintiffs' challenge, which had proved dispositive for the suspect class claims of the *Rodriguez* plaintiffs,[129] was the difficulty in the school financing context of making any showing of wealth discrimination. The intervening urban school districts had proved that the correlation between property wealth and income level of residents was imperfect. These districts combined the greatest concentrations of families below the poverty level with the most valuable real property in the state.[130] Moreover, even supposing the correlation between income wealth and property wealth had been nearly perfect, wealth discrimination would have been an inappropriate claim. The isolated "wealthy" child living in a district with little property wealth would have as much cause to complain of discrimination in school spending as would a "poor" child in the same district. The class of persons harmed by the New York scheme was all pupils in low-spending districts, and not only the poor children of the state.

The other major hurdle for plaintiffs' suspect class claim would have been the difficulty of persuading any court to add wealth classifications to the brief list of classes deemed "suspect." Suspect classes in New York, according to dicta by the Court of Appeals, include race, national origin, and alienage.[131] Neither the United States Supreme Court nor any New York State court has held that wealth is a suspect class.[132] In a New Jersey school financing case, Chief Justice Weintraub of the New Jersey Supreme Court noted that wealth is not in all circumstances an invidious classification. "Wealth is not at all 'suspect' as a basis for raising revenues. . . . Obviously financial lack is a laudable basis when a statute seeks to ameliorate poverty."[133] Although wealth is potentially an extremely invidious basis on which to classify persons, it is not so inherently repugnant as to have achieved widespread acceptance by the courts as suspect.

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128. *Id.*

129. 411 U.S. at 18-28.

130. 94 Misc. 2d at 494, 497, 408 N.Y.S.2d at 619-21.

131. Alevy v. Downstate Medical Center, 39 N.Y.2d 326, 332, 348 N.E.2d 537, 543, 384 N.Y.S.2d 82, 87 (1976).

132. In each case where the United States Supreme Court has found wealth classifications invalid under the Equal Protection Clause, the discrimination has affected some fundamental interest. *See, e.g.*, Bullock v. Carter, 405 U.S. 78 (1972) (access by candidates to ballots); Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966) (voting); Douglas v. California, 372 U.S. 353 (1963) (right to appointed counsel in criminal appeal); Griffin v. Illinois, 351 U.S. 12 (1956) (right to appeal from criminal conviction). The Supreme Court has rejected every challenge to wealth classifications where no established fundamental interest was involved. *See, e.g.*, San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1 (1973); Jefferson v. Hackney, 406 U.S. 535 (1972); Lindsey v. Normet, 405 U.S. 56 (1972); Richardson v. Belcher, 404 U.S. 78 (1971); Dandridge v. Williams, 397 U.S. 471 (1970).

133. Robinson v. Cahill, 62 N.J. 473, 492, 303 A.2d 273, 283, *cert. denied*, 414 U.S. 976 (1973).

*b. Fundamental Right*

Apart from the suspect class doctrine, federal and New York courts direct strict scrutiny to legislative classifications which limit some persons' exercise of fundamental rights.[134] Only a compelling state interest may overcome the equal protection guarantee in the fundamental rights context. In *Rodriguez* the Supreme Court held that there exists no fundamental right to education.[135] The original plaintiffs in *Levittown* urged the court to interpret the state equal protection clause more broadly than the federal clause and to declare education a fundamental right in New York.[136] The court rejected the claim without analyzing the question; the New York Court of Appeals had previously decided the issue in the negative,[137] and the *Levittown* court adhered to the precedent.[138]

A unanimous Court of Appeals had held in *Matter of Levy* that education is not "such a 'fundamental constitutional right' as to be entitled to special constitutional protection," citing *Rodriguez*.[139] The *Levy* case was an equal protection challenge to a New York statute granting free tuition, room, and board to blind and deaf pupils at state boarding schools, but providing only free tuition for all other handicapped pupils. The Court of Appeals emphasized that handicapped children in New York do have a right to a free education pursuant to the state constitution.[140] Rejecting the claims that handicapped children form a suspect class and that education is a "fundamental" right, the court applied the rational basis test and upheld the classification.[141]

The original plaintiffs in *Levittown* contended that all references in *Levy* to a right to education were dicta because *Levy* did not concern education.[142] The issue was not unequal tuition payments, but unequal provision for "maintenance expenses" at state boarding schools. The *Levittown* court was unwilling, however, to dismiss so readily the Court of Appeals' expression on the right to education. It interpreted the *Levy* decision as examining the difference between an education that is wholly free and an education that is free except for room and board expenses. *Levy* was therefore an education case, and the refusal to grant fundamental right status to education was not dictum.[143]

134. *See* Alevy v. Downstate Medical Center, 39 N.Y.2d 326, 332, 348 N.E.2d 537, 543, 384 N.Y.S.2d 82, 87-88 (1976). The court of appeals listed as fundamental rights under the strict scrutiny test voting, travel, procreation, free speech, appeal from criminal conviction, and, "perhaps, the right of privacy." *Id.*

135. 411 U.S. at 35. *See* text accompanying notes 107-10 *supra*.

136. Plaintiffs' Post-Trial Memorandum of Law, *supra* note 125, at 11-12.

137. Matter of Levy, 38 N.Y.2d 653, 658, 345 N.E.2d 556, 558, 382 N.Y.S.2d 13, 15 (1976), *accord*, Alevy v. Downstate Medical Center, 39 N.Y.2d 326, 332-33, 348 N.E.2d 537, 543, 384 N.Y.S.2d 82, 88 (1976).

138. 94 Misc. 2d at 522, 408 N.Y.S.2d at 636.

139. Matter of Levy, 38 N.Y.2d at 658, 345 N.E.2d at 558, 382 N.Y.S.2d at 15.

140. *Id.* at 657, 345 N.E.2d at 558, 382 N.Y.S.2d at 15. For the right to education, the court of appeals cited N.Y. CONST. art. XI, § 1; N.Y. EDUC. LAW § 3202(1); and Matter of Wiltwyck School for Boys v. Hill, 11 N.Y.2d 182, 182 N.E.2d 268, 227 N.Y.S.2d 655 (1962).

141. Matter of Levy, 38 N.Y.2d at 658, 345 N.E.2d at 558-59, 382 N.Y.S.2d at 15.

142. Plaintiffs' Post-Trial Memorandum of Law, *supra* note 125, at 12-13.

143. 94 Misc. 2d at 522, 408 N.Y.S.2d at 636. The court's reading of *Levy* comported with the

In the event the *Levittown* case is reviewed in the Court of Appeals,[144] an opportunity to reconsider *Levy* will be presented. The outcome of such a reconsideration would turn on a combination of factors. A number of points would favor reversal of *Levy*. In *Rodriguez* the Supreme Court expressed its test for determining whether education is fundamental as "whether there is a right to education explicitly or implicitly guaranteed by the Constitution."[145] If the same test were applied under the New York Constitution, the outcome would be contrary to *Levy*, because a right to education is guaranteed in the state constitution.[146]

Another pertinent consideration is that education is uniquely bound to the exercise of certain recognized fundamental rights, such as freedom of speech, freedom of the press, and the right to vote. None of these rights can be exercised effectively by an illiterate population.[147]

Moreover, New York has been providing free education for its children since 1849.[148] The state constitution has protected the right to education since 1894.[149] Public education is consistently the single largest item in the New York State budget, exceeding three billion dollars in the 1978-79 school year.[150] The state's own recognition of the paramount importance of education along with the practical necessity for educational skills in contemporary society argue in favor of its inclusion on the list of fundamental rights.[151]

On the other hand, the doctrine of *stare decisis* supports allowing the *Levy* holding to stand. The fundamental right question has been resolved once by the Court of Appeals, and the justification must be substantial for the court even to consider overturning its own ruling. In the present context, resort to the extraordinary step of overruling a previous decision would be pointless, for overruling *Levy* would not alter the outcome of the *Levittown* case.

More to the point, when examining fundamental state constitutional rights, the New York courts need not follow the United States Supreme Court's test of "explicitly or implicitly guaranteed by the Constitution."[152] The test does pose some difficulties when transported to the state constitutional environment. Numerous rights are guaranteed by the New York Constitution which state

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court of appeals' language throughout the *Levy* opinion. Reference was made repeatedly in *Levy* to maintenance as a component education, and the issues were resolved as if education were at stake. The *Levittown* court's reading of *Levy* coincided also with the institutional context of such education. Because there were only six public schools for the deaf in the state, Matter of Levy at 659, 345 N.E.2d at 559, 382 N.Y.S.2d at 16, living at school was a practical requisite for attendance for great numbers of eligible pupils.

144. The *Levittown* defendants filed notice of appeal to the Appellate Division, Second Department, of the New York Supreme Court on February 1, 1979.

145. 411 U.S. at 33-34.

146. N.Y. CONST. art. XI, § 1. *See* Plaintiffs' Post-Trial Memorandum of Law, *supra* note 125, at 11-13.

147. This contention was rejected in *Rodriguez*. *See* note 110 *supra*.

148. *See* An Act Establishing Free Schools Throughout the State, 1849 N.Y. Laws, ch. 140, § 1 (current version at N.Y. EDUC. LAW § 3202(1) (McKinney Supp. 1978-1979)).

149. *See* N.Y. CONST. of 1849, art. IX, § 1 (current version at N.Y. CONST. art. XI, § 1).

150. N.Y. Times, Jan. 29, 1979, § A, at 1, col. 1.

151. *See* Plaintiffs' Post-Trial Memorandum of Law, *supra* note 125, at 12.

152. *See* note 145 *supra*.

courts would understandably be reluctant to label "fundamental." Among these are the right of employees of public contractors to be paid local prevailing wage rates,[153] the right to toll-free use of the Erie Canal,[154] and the right of the people to authorize, by majority vote in a municipality, the conduct of bingo games by bona fide religious, charitable, or non-profit organizations.[155] More suitable methods for denominating fundamental rights for state equal protection purposes would be simply to adopt the rights elevated by the United States Supreme Court to fundamental status, as opposed to adopting the Supreme Court's test, or to determine independently which rights shall be fundamental in New York.[156] On balance, either of these alternatives would be superior to overruling *Levy*.

*2. Intermediate Review*

The second level of review on which the original plaintiffs claimed a state equal protection violation was the "sliding scale" test.[157] This intermediate test is the most recent addition to equal protection doctrine; it has been utilized by the New York Court of Appeals only since 1975.[158] In the principal case of *Alevy v. Downstate Medical Center*,[159] a reverse discrimination challenge, the Court of Appeals found both the strict scrutiny and rational basis levels of review inappropriate, and resorted to a "middle ground" test.[160] For authority, the New York court cited several sex discrimination and other cases decided by the United States Supreme Court purportedly on the rational basis standard, but revealing, according to the Court of Appeals, a departure from traditional

153. N.Y. CONST. art. I, § 17.

154. *Id.* art. XV, § 3.

155. *Id.* art I, § 9(2). The bingo provision, as well as the provision guaranteeing local prevailing wage rates for employees of public contractors, are in the "Bill of Rights" article of the New York Constitution.

156. One candidate for a fundamental rights standard independent of the *Rodriguez* test is the standard formerly utilized by the Supreme Court to define "fundamental rights" in the context of fourteenth amendment due process. In its delineation of the conceptual boundaries of the word "liberty" in the fourteenth amendment, the Supreme Court early determined that only rights which are "fundamental" should be included. Twining v. New Jersey, 211 U.S. 78, 106 (1908); Snyder v. Massachusetts, 291 U.S. 97, 105 (1934). Justice Cardozo characterized such fundamental rights as those "implicit in the concept of ordered liberty." Palko v. Connecticut, 302 U.S. 319, 325 (1937). Justice Frankfurter spoke of rights "basic to our free society," repeating as well the Cardozo formulation. Wolf v. Colorado, 338 U.S. 25, 27 (1949). Countering the objection that such a vague standard leaves judges free to apply wholly subjective notions of what is fundamental, Justice Frankfurter declared that judges applying the standard are bound by "considerations deeply rooted in reason and in the compelling traditions of the legal profession." Rochin v. California, 342 U.S. 165, 171 (1952). In Justice Harlan's words, judges must "attempt to define [liberty] in a way that accords with American traditions and our system of government." Duncan v. Louisiana, 391 U.S. 145, 176 (1968) (dissenting opinion).

157. Plaintiffs' Post-Trial Memorandum of Law, *supra* note 125, at 19-20.

158. *See* Matter of Malpica-Orsini, 36 N.Y.2d 568, 577-78, 331 N.E.2d 486, 493, 370 N.Y.S.2d 511, 520-21 (1975). *Cf.* Montgomery v. Daniels, 38 N.Y.2d 41, 61, 340 N.E.2d 444, 456, 378 N.Y.S.2d 1, 18 (1975) (court of appeals recognized the sliding scale test but found it inapplicable).

159. 39 N.Y.2d 326, 348 N.E.2d 537, 384 N.Y.S.2d 82 (1976).

160. *Id.* at 334-36, 348 N.E.2d at 544-46, 384 N.Y.S.2d at 89-90.

doctrine.[161] Despite the Supreme Court's failure to adopt expressly a third standard for equal protection review, it was nonetheless that Court's decisions,[162] along with analysis of their implications for equal protection doctrine in key dissents by Justice Marshall,[163] which prompted the New York Court of Appeals to accept the new standard.

The middle level of review, as applied in *Alevy*, involves two steps. First the reviewing court must determine whether the challenged discrimination satisfies a substantial state interest. If it does, the court must determine whether the state interest could be achieved by some less objectionable alternative means, requiring less or perhaps no discrimination.[164]

The *Levittown* court began its middle level inquiry by identifying the governmental interest that the discriminatory financing scheme was designed to satisfy, namely the fulfillment of the state's obligation under the constitution to " 'provide for the maintenance and support of a system of free common schools, wherein all the children of this state may be educated.' "[165] Included

161. *Id.* at 334, 348 N.E.2d at 544, 384 N.Y.S.2d at 89; *citing* Stanton v. Stanton, 421 U.S. 7 (1975); Jimenez v. Weinberger, 417 U.S. 628 (1974); James v. Strange, 407 U.S. 128 (1972); Eisenstadt v. Baird, 405 U.S. 438 (1972); and Reed v. Reed, 404 U.S. 71 (1971).

162. *See* cases cited in note 161 *supra*.

163. San Antonio Independent School Dist. v. Rodriguez, 411 U.S. at 98-99 (dissenting opinion); Dandridge v. Williams, 397 U.S. 471, 519-21 (1970) (dissenting opinion). Although the court of appeals in *Alevy* quoted the dissenting opinions of Justice Marshall, the intermediate test applied in *Alevy* must be distinguished from the "sliding scale" associated with Justice Marshall. Justice Marshall envisioned a "spectrum of standards" ranging from strict scrutiny at one extreme to the rational basis test at the other. San Antonio Independent School Dist. v. Rodriguez, 411 U.S. at 98-99 (dissenting opinion). The New York Court of Appeals in *Alevy*, by contrast, adopted a single intermediate test, lying somewhere between strict scrutiny and the rational basis test, and did not use the label "sliding scale." 39 N.Y.2d at 336, 348 N.E.2d at 545-46, 384 N.Y.S.2d at 90. The *Levittown* court meticulously applied the "middle level" test outlined in *Alevy*, but referred to the test as "the so-called sliding scale approach." 94 Misc. 2d at 525, 408 N.Y.S.2d at 638. The term "sliding-scale" has not been used by Justice Marshall himself, but was coined by Professor Gerald Gunther. Gunther, *The Supreme Court 1971 Term, Forward: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 17-18 (1972).

164. Alevy v. Downstate Medical Center, 39 N.Y.2d at 336, 348 N.E.2d at 545-46, 384 N.Y.S.2d at 90. There is no compelling reason to apply the *Alevy* dual-step approach in all cases where middle level review is appropriate. The *Alevy* decision can be read to intend its dual-step inquiry to be useful only or primarily in reverse discrimination cases. *Id.* A somewhat less confined mode of analysis is suggested in New York's first case involving intermediate review: "a realistic examination of the conflicting policies and interests involved in the challenged statute—without the straitjacket of the two-tier approach with its 'tired formulations' and 'stock responses.' " Matter of Malpica-Orsini, 36 N.Y.2d 568, 577-78, 331 N.E.2d 486, 493, 370 N.Y.S.2d 511, 521 (1975). Adopting the *Alevy* dual-step method in all applications of middle level review might amount merely to exchanging one straitjacket for another.

165. 94 Misc. 2d at 523, 408 N.Y.S.2d at 636. The court accepted the substantiality of the governmental interest without any expression to that effect. There can be no doubt that obeying the constitutional command to provide a free school system rises above the level of a permissive legislative interest at least to the level of a substantial interest.

The court did not inquire whether the state interest satisfied by the discriminatory treatment might be some interest other than the "overarching interest" advanced by the statute as a whole. The court apparently concluded that the legislature's interest in fulfilling its constitutional obligation subordinated all other interests.

within that purpose, according to the court, was provision of equal educational opportunity.[166] An additional purpose was to remedy inequalities in educational opportunities.[167]

Summarizing its findings of fact as to the original plaintiffs, the court indicated that although the state aid formula was designed to satisfy the substantial state interest of providing a free public school system for all the children of the state, it did so in a discriminatory manner.[168] The court therefore found it necessary to inquire whether a less objectionable alternative existed by which the statutory purpose could be met.[169]

The court noted that numerous states have reformed their school financing systems in recent years to achieve greater equality.[170] Moreover, the evidence showed that in New York less objectionable alternatives had been studied and proposed in detail by special committees, task forces, consultants, and the Regents of the State University.[171] The picture presented by the court contrasted sharply with the *Rodriguez* Court's assertion in 1973 that "the alternatives proposed are only recently conceived and nowhere yet tested."[172] The *Levittown* court expressly disclaimed any intention of commenting on the constitutionality of any of the alternatives. The court concluded only that the aid system failed to meet the intermediate test of state equal protection.[173]

*3. Rational Basis*

The third level of equal protection review applied by the court to the original plaintiffs' case was the rational basis test. The rational basis doctrine can be characterized as a constitutional ban on arbitrary statutory classifications. Where some persons are treated differently from others by legislative enactments, the distinctions must bear a rational relation to the purpose of the legislation.[174] The plaintiffs claimed that the system's unequal treatment of pupils in various school districts was not rationally related to achievement of the statute's objectives.[175]

The court found merit in the plaintiffs' claim. In order to emphasize the lack of any rational correlation between the statute's discrimination and the statutory purpose, the court restated the legislative purpose as remedying in-

166. *Id.*

167. The court had pointed to this statutory purpose in the preceding portion of its opinion: "Implicit in the long history of state aid to education has been the state's recognition that additional financing over and above that generated by local tax revenues was needed in order for the state to discharge its constitutional obligation." *Id.* at 520, 408 N.Y.S.2d at 635.

168. *Id.* at 523-24, 408 N.Y.S.2d at 637.

169. *Id.* at 524, 408 N.Y.S.2d at 637.

170. *Id.*

171. *Id.* at 525, 408 N.Y.S.2d at 638.

172. 411 U.S. at 55.

173. 94 Misc. 2d at 525, 408 N.Y.S.2d at 638.

174. Montgomery v. Daniels, 38 N.Y.2d 41, 61, 340 N.E.2d 444, 456, 378 N.Y.S.2d 1, 18 (1975); Matter of Patricia A., 31 N.Y.2d 83, 88, 286 N.E.2d 432, 434, 335 N.Y.S.2d 33, 36-37 (1972).

175. Plaintiffs' Post-Trial Memorandum of Law, *supra* note 125, at 20.

equalities in educational opportunities.[176] The legislature's recognition that such a remedial purpose was a corollary to its "overarching interest" in providing a free school system was shown by the state's long history of providing additional state aid for districts low in property wealth.[177] The court concluded that the overall operation of the aid statute perpetuated rather than remedied inequalities among school districts, and therefore failed to satisfy, and even ran counter to, the statute's purpose. The aid formula's operation enabled districts high in property wealth to exceed appreciably the guaranteed minimum expenditure of 12 hundred dollars per pupil. Flat grants of state aid enabled wealthy districts to spend even more. Moreover, "save harmless" restrictions allowed district spending to remain constant when declining enrollments would have required a reduction in state aid on the terms of the primary formula.[178]

The court refused to follow the approach proposed by defendants of justifying the discriminatory impact of the system as a whole by the independent rationality of each of its numerous parts. It may be true that discrete elements of the statute, including even the flat grant and save harmless provisions, are not discriminatory and are rationally related to legitimate purposes in isolation. The court repeated, however, that the discriminatory operation of the statute as a whole had been challenged, and that no rational relation between the overall discriminatory effect and the statute's equalizing purpose could be found.[179]

The court's rejection of a piecemeal review of each component of the financing scheme may explain the omission of the question of local control from its rational basis and sliding scale inquiries. A legislative interest in local control of public schools would be an appropriate defense only to a challenge directed specifically to the state's delegation of taxing and spending responsibility to the school districts. Such an attack would encompass only the local component of the financing system. Although the original plaintiffs did raise such a challenge, the court rejected it on grounds that the state had broad discretion in designing the individual components of a financing system so long as the scheme as a whole was not impermissibly discriminatory.[180] The court no longer had occasion to consider a state interest in local control because it had specifically upheld discretion to delegate taxing authority to school districts, and any such interest was therefore satisfied.

### *C. The State Education Article*

The education article of the New York Constitution provides, "The legislature shall provide for the maintenance and support of a system of free common schools, wherein all the children of this state may be educated."[181] The original plaintiffs claimed that the legislature's delegation of financing responsibility to the school districts was an abdication of its obligation under the education

176. 94 Misc. 2d at 526, 408 N.Y.S.2d at 638.
177. *See* note 167 *supra*.
178. 94 Misc. 2d at 526-27, 408 N.Y.S.2d at 639.
179. *Id.* at 527, 408 N.Y.S.2d at 639.
180. *Id.* at 527-28, 408 N.Y.S.2d at 639-40.
181. N.Y. CONST. art. XI, § 1.

article.[182] Although the court rejected the plaintiffs' claim attacking delegation to school districts, it held the statute inadequate to fulfill the state's ultimate responsibility for the "end product" of the system.[183] The statute's shortcoming was not delegation, but delegation without adequate recognition of the districts' varying revenue-raising capabilities.[184]

The court's conclusion that the state is ultimately responsible for any discrimination in the financing system flowed inexorably from the constitution's education mandate. All public educational services are provided pursuant to the state's constitutional obligation under the education article; school districts are merely arms of the state, furnishing services on its behalf. School districts owe their existence to the state[185] and can raise revenues only by virtue of the state's delegation to them of authority to tax.[186] The state and local components of school funding, therefore, are indistinguishable from a constitutional viewpoint. Both are provided by "the state" although the local component is raised by specialized agencies of the state, the school districts. The state's contribution to public schools is not limited to "state aid," which is distributed in proportion to each district's inability to raise funds itself. Rather the state's contribution is the combined totals from the state and local components of the system, which sums vary dramatically in proportion to property wealth. In the court's view the vast discrepancies in school spending were inconsistent with the mandate of the education article.[187] The responsibility for remedying discrimination in school spending does not lie with the poorer school districts, but with the state. The state must either compel such districts to raise greater revenues, or fill the deficiency itself.[188]

## VII
## THE COURT'S CONCLUSIONS: PLAINTIFFS-INTERVENORS

### *A. State Equal Protection*

The plaintiffs-intervenors' equal protection claims were predicated entirely on the irrationality of the financing scheme.[189] The court found that the intervenors' aid was reduced by municipal overburden, reduced purchasing power, the attendance measure of school population, and the weighting system for special need pupils.[190] It concluded that the statutory scheme had created by its operation a classification of large urban districts and had discriminated

182. Plaintiffs' Post-Trial Memorandum of Law, *supra* note 125, at 28-30.

183. 94 Misc. 2d at 527-28, 408 N.Y.S.2d at 639-40, *quoting* Robinson v. Cahill, 62 N.J. 473, 513, 303 A.2d 273, 294, *cert. denied*, 414 U.S. 976 (1972).

184. *Id.* at 528, 408 N.Y.S.2d at 640.

185. N.Y. EDUC. LAW §§ 1501, 1504 (McKinney 1969).

186. N.Y. REAL PROP. TAX LAW § 1306 (McKinney 1972).

187. 94 Misc. 2d at 528, 408 N.Y.S.2d at 640.

188. *Id.*, *citing* Robinson v. Cahill, 62 N.J. 473, 513, 303 A.2d 273, 294, *cert. denied*, 414 U.S. 976 (1973).

189. The intervenors made no allegations regarding a fundamental right to education or a suspect classification, nor did they propose a sliding-scale inquiry.

190. *See* notes 63-93 *supra*.

against the class. The court found no rational relation between such a classification and the statute's equalizing purpose.[191]

It is difficult to imagine any legislative purpose that could remotely be served by treating the cities differently on the basis of such unintended drains on fiscal capacity as municipal overburden, caused by the cities' greater inexorable needs for municipal services, and reduced purchasing power, caused by regional cost variations. It is especially difficult to imagine any way the New York statute's purpose of remedying district inequities could be advanced by such discrimination. Given a striking instance of urban-suburban economic disparity, therefore, the doctrinal difficulties in a "municipal overburden case" like the intervenors' are minimal. There is no need for challengers to invoke strict scrutiny or the sliding scale, and the irrationality of the effect of non-educational factors on school spending is virtually undeniable. The intervenors' case demonstrates that the principal difficulties in making out an overburden case are factual; it must be shown that an imprecise measure of urban districts' fiscal capacity results in a loss of aid, and that the loss is significant.

### *B. Federal Equal Protection*

The intervenors stated their federal equal protection claim in tandem with their state equal protection claim;[192] therefore the two were identical. An important preliminary question was whether the Supreme Court's decision in *Rodriguez* barred the federal claim. In *Rodriguez* the Supreme Court found that a legislative interest in preserving local control of public schools was rationally promoted by a school financing system that had some discriminatory impact.[193]

The intervenors' rationale for distinguishing *Levittown* from *Rodriguez* rested on differences in the type of challenge asserted in each case. The *Rodriguez* appellees, like the original *Levittown* plaintiffs, had attacked the Texas statute's inadequate provision for poorer districts. The *Levittown* intervenors, however, challenged only the application of a financing scheme already oriented to fiscal capacity. The intervenors demanded only that the New York system more rationally distribute its equalizing aid by more accurately measuring fiscal capacity. The intervenors acknowledged that state aid in New York assists poor districts. They claimed only that the wrong districts had been designated as poor districts. In contrast with the *Rodriguez* appellees' "direct attack on the way in which Texas has chosen to raise and disburse state and local tax revenues,"[194] the *Levittown* intervenors sought a modification in the aid formula's measure of local capacity and burdens in education.[195]

A complicating factor was the New York Court of Appeals' ruling nearly

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191. 94 Misc. 2d at 530, 408 N.Y.S.2d at 641.

192. The intervenors concluded their single equal protection presentation with the allegation that the system violated both the state and federal equal protection clauses. Pre-Trial Memorandum for Plaintiffs-Intervenors, *supra* note 125, at 54.

193. 411 U.S. at 51-53. For a summary of the *Rodriguez* facts and holdings, see text accompanying notes 94-116 *supra*.

194. 411 U.S. at 40.

195. *See* Pre-Trial Memorandum for Plaintiffs-Intervenors at 66-68, Board of Educ., Levittown Union Free School Dist. v. Nyquist, 94 Misc. 2d 466, 408 N.Y.S.2d 606 (Sup. Ct. 1978).

three decades earlier, in *Dorsey v. Stuyvesant Town Corporation*,[196] that the coverage of the state and federal equal protection clauses is identical.[197] The *Dorsey* case can be interpreted as barring any interpretation of the New York equal protection clause that is more expansive than the prevailing interpretation of the federal clause. If *Rodriguez* proved fatal to the intervenors' federal claim, the court's finding of a state equal protection violation would have been precluded by the *Dorsey* principle.

The *Levittown* court held that *Rodriguez* was distinguishable.[198] The court found a federal equal protection violation in precise conformity with the state equal protection violation.[199] The *Dorsey* principle of coincidence between federal and state equal protection was not disturbed. The court acknowledged, citing *Matter of Levy*,[200] that the *Rodriguez* decision was authority for the proposition that education is not a fundamental constitutional right for equal protection purposes.[201] In the court's view, however, the *Rodriguez* decision did not preclude subsequent applications of the rational basis standard to determine whether financing discrimination violates the fourteenth amendment.[202] The *Rodriguez* majority's rational basis holding was addressed to the facts presented in that case,[203] and the *Levittown* court perceived it as limited to those facts.[204] The *Levittown* court had little difficulty making its rational basis determination; it had already concluded that under the state constitution the challenged discrimination bore no rational relation to the statute's purpose.[205] It is not clear whether the court relied upon the distinction between *Levittown* and *Rodriguez* suggested by the intervenors.[206] It is certain only that the court viewed the facts before it as different from those in *Rodriguez*, and that it could find no rational relationship between discrimination against urban districts and the statute's purpose.

Although the *Levittown* trial court did not question the vitality of the *Rodriguez* decision in the context of the traditional school finance claims of the sort raised by the original plaintiffs,[207] it did recognize a new class of federal constitutional claims in the school financing field. Due to the utter lack of rationality in financing discrimination traceable to municipal overburden and regional cost variations, the *Levittown* court showed that the rational basis test of federal equal protection doctrine is still available to urban plaintiffs and perhaps others, consistent with the *Rodriguez* ruling. A renewed round of federal

196. 299 N.Y. 512, 87 N.E.2d 541 (1949).
197. *Id.* at 530, 87 N.E.2d at 548.
198. 94 Misc. 2d at 531, 408 N.Y.S.2d at 641-42.
199. *Id.* at 532, 408 N.Y.S.2d at 642. *See* text accompanying notes 210-13 *supra*.
200. 38 N.Y.2d 653, 345 N.E.2d 556, 382 N.Y.S.2d 13 (1976).
201. *Id.* at 531-32, 408 N.Y.S.2d at 642. *See* notes 137-41 *supra*.
202. 94 Misc. 2d at 531-32, 408 N.Y.S.2d at 642.
203. 411 U.S. at 54-55. By contrast, the *Rodriguez* holding that education is not a fundamental right was not intended to be limited to the facts of that case. *See id.* at 35.
204. 94 Misc. 2d at 531, 408 N.Y.S.2d at 641-42.
205. *Id.* at 532, 408 N.Y.S.2d at 642.
206. *See* text accompanying notes 193-95 *supra*.
207. The original plaintiffs raised but did not press a claim that the financing system violated the Equal Protection Clause. *See* text accompanying note 121 *supra*.

equal protection litigation in the school financing field could result from the success of the plaintiffs-intervenors in New York.[208] Any such federal constitutional litigation is likely to occur in state courts, due to the desirability of including various state constitutional claims in any school financing complaint. As a result, any state court decisions on federal claims of the *Levittown* type are likely to be immune from Supreme Court review because of adequate and independent state grounds of decision.[209] The prospect raised by the *Levittown* case, therefore, is the development of a new body of federal constitutional law on municipal overburden and related concepts, developed entirely by state courts and not subject to Supreme Court review. The potential for independent development of federal constitutional law by state courts has always existed in the federal system. State courts have always been bound, as are the federal courts, to enforce the Constitution of the United States. No strictly state-developed federal constitutional law, however, has arisen. As a result of the Supreme Court's resolution of the *Rodriguez* case, school financing became a pioneer field for development of state constitutional rights.[210] It is conceivable that school financing will be the context for another innovation in constitutional litigation: protection of federal constitutional rights on the basis of doctrines developed solely in state courts.

### C. *The State Education Article*

The intervenors' presentation on the education article[211] was even more compelling than that of the original plaintiffs, for the intervenors introduced evidence, which the court accepted,[212] that significant numbers of pupils in the urban school districts had failed to acquire basic minimal educational skills. In its analysis upholding the intervenors' claim, the court began by noting that the education article has been interpreted to assure every child in New York an educational program that is appropriate to the child's needs.[213] The court added

208. Less than nine months after the *Levittown* ruling, a state court in Colorado invalidated that state's school financing law on both state and federal equal protection grounds. Lujan v. Colorado State Bd. of Educ., No. C73688 (Dist. Ct., Denver, Mar. 13, 1979); *see also* N.Y. Times, Mar. 14, 1979, § A, at 16, col. 6.

209. Under the doctrine of adequate and independent state grounds, the United States Supreme Court is without jurisdiction to review a state court judgment which rests on both state and federal grounds, if the state ground is adequate to support the judgment independently of the federal ground. *See, e.g.*, Jankovich v. Indiana Toll Rd. Comm'n, 379 U.S. 487, 489 (1965); Fox Film Corp. v. Muller, 296 U.S. 207, 210 (1935).

210. *See* cases cited in note 3 *supra*.

211. For the text of the relevant portion of the New York Constitution's education article, see text accompanying note 181 *supra*.

212. Findings of Fact (Plaintiffs-Intervenors), *supra* note 33, at 63-65. *See* text accompanying note 89 *supra*.

213. This proposition was first relied upon in a lower court decision establishing the right to free education for handicapped children in New York. Matter of Downey, 72 Misc. 2d 772, 773, 340 N.Y.S.2d 687, 689 (Fam. Ct. 1973). In *Downey*, the court granted the petitioning handicapped child the difference between the cost of the child's tuition, $6496, and the two thousand dollars in state aid the child had been receiving. *Id.* at 773, 775, 340 N.Y.S.2d at 689, 690. The *Downey* principle was endorsed by the New York Court of Appeals in Matter of Levy, 38 N.Y.2d 653, 345 N.E.2d 556, 382 N.Y.S.2d 13 (1976). In that case, the court of appeals declared, "There can be no

that the state's historical concern for providing free education, a concern much older than the constitution's education article itself,[214] compelled the conclusion that the article guarantees to school children equal opportunity to acquire basic minimal educational skills.[215] Because the need for aid was greatest in the intervenor districts, where there were disproportionate numbers of under-achieving pupils, the assurance of *equal* opportunity to acquire basic skills required in the court's view *greater* than average expenditures in those districts.[216] The state's provision of reduced aid per pupil and reduced supplemental aid per pupil with special needs did not assure intervenor pupils an equal chance to acquire minimal skills. In the court's words, supplying reduced aid to the most needy pupils was "tantamount to excluding those many under-achieving pupils from the educational program."[217] Such an exclusion violated their constitutional right to education.[218]

The court's holding that the education article was violated raises the question whether spending levels have anything to do with educational achievement. If there is no relation between money and pupil achievement, the court's conclusion is surely misplaced. Some degree of correlation between spending and achievement must exist; failure by the state to make any provision for public schools would constitute a complete failure to assure opportunities to attain basic skills. An indication of the importance of spending beyond merely providing schools was the attitude of administrators and teachers in high-spending school districts toward the costly benefits which their districts were in a position to provide. At the *Levittown* trial several professionals from wealthy districts testified to the genuine educational value of such benefits as advanced placement programs, small classes (particularly in remedial programs), and extended foreign language instruction.[219]

Moreover, money is almost universally regarded as a benefit, especially when it is given to public service institutions such as schools. No evidence before the court indicated that any school district had ever returned unused any part of its operating aid to the state. It would be disingenuous for wealthy districts to justify their monopoly on high spending levels by asserting that money makes no difference.

### *D. Equal Protection and Equal Educational Opportunity*

On the intervenors' education article claim, the *Levittown* court determined that the state aid statute failed to provide pupils equal opportunity to acquire basic minimal educational skills.[220] In its final holding, the court con-

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doubt that a handicapped child has a right to a free education in the State of New York. The handicapped child is further assured such free specialized educational training as may be required." *Id.* at 657-58, 345 N.E.2d at 558, 382 N.Y.S.2d at 15 (citations omitted).

214. The State of New York had been providing tuition-free public schools for 45 years when the constitution's education article was adopted in 1894. *See* notes 148-49 *supra*.

215. 94 Misc. 2d at 532-33, 408 N.Y.S.2d at 643.

216. *Id.* at 533, 408 N.Y.S.2d at 643.

217. *Id.*

218. *Id.* at 534, 408 N.Y.S.2d at 643.

219. Findings of Fact (Plaintiffs), *supra* note 9, at 39, 45-50, 53.

220. *See* note 216 *supra*.

cluded that the demonstrated denial of educational opportunity was sufficient to establish a violation of the state and federal equal protection provisions as well.[221] The court found that the Supreme Court's *Rodriguez* decision was not to the contrary.[222] The *Rodriguez* majority noted that the record in that case did not establish a failure by the State of Texas to make available basic minimal skills.[223] In *Levittown*, by contrast, the court found that great concentrations of urban pupils were seriously deficient in minimal skills, and were therefore denied an opportunity for meaningful participation in the educational program.[224] Without referring to any particular level of equal protection review, the *Levittown* court declared that the system's effective exclusion of pupils deficient in basic skills was an impermissible discrimination, violative of both the New York and federal equal protection clauses.[225]

The least that the state and federal constitutions can require of a statewide public school system is that it make *some* education available for all of its intended beneficiaries. It is baldly irrational for the state to direct the highest levels of expenditure to non-urban districts while significant numbers of urban pupils do not receive an adequate education.

## VIII
## REMEDIES

The *Levittown* court limited its relief as to both groups of plaintiffs to a judgment declaring the school finance system unconstitutional.[226] The court retained jurisdiction of the action for an unstated interval to afford the legislature an opportunity to remedy the system.[227] The court noted that there is no lack of knowledge on the subject of more equitable alternatives to the present system, nor of proposals for reform addressed specifically to the New York system, generated from within and without state government.[228] The court expressly withheld comment on the appropriateness of any particular alternative for New York.[229]

The primary difficulty with enacting any equalizing reform in public education is the practical political consideration, for most state legislators, that voting for a reduction of school aid for their home districts would diminish their chances for reelection. Equalizing revisions are, as a rule, politically feasible only if all districts throughout the state receive at least some increase in aid. A revision of the New York system sufficient to comply with constitutional requirements, however, would necessitate either a massive infusion of

221. 94 Misc. 2d at 534-35, 408 N.Y.S.2d at 643-44.
222. *Id.* at 534, 408 N.Y.S.2d at 643-44.
223. 411 U.S. at 37.
224. 94 Misc. 2d at 535, 408 N.Y.S.2d at 644.
225. *Id.*
226. Board of Educ., Levittown Union Free School Dist. v. Nyquist, 94 Misc. 2d 466, 525-37, 408 N.Y.S.2d 606, 638-45 (Sup. Ct. 1978).
227. *Id.* at 535-37, 408 N.Y.S.2d at 644-45.
228. 94 Misc. 2d at 536, 408 N.Y.S.2d at 645.
229. *Id.*

additional state funds for poorer districts, or a drastic paring of wealthy districts' aid, or a combination of the two, *i.e.*, a less than massive but nonetheless hefty infusion of new money for the poorer districts, coupled with a reduction of state aid for only the wealthiest of the state's school districts.

The great virtue of a judicial declaration like that in *Levittown* is that legislators can take advantage of it to justify votes that adversely affect or do not benefit their constituents' schools. Representatives can insist that the sole alternative to legislative reform is court-ordered redistribution of funds following a judicial determination that the legislature has proceeded too slowly or in bad faith. Although even a declaratory judgment might be insufficient to bend the most stubborn representatives from the wealthiest districts, the weight of judicial authority is likely to sway others whose constituents have nothing to lose from reform but who would ordinarily oppose it out of political partisanship or out of consideration for colleagues in the legislature.

The *Levittown* defendants asserted in their answer that "[t]hese complaints ought to be addressed to the Legislature for redress."[230] The court ultimately did not dispute the defendants' assertion. Rather it implied that when legislative majorities consistently oppose a constitutionally compelled resolution of a difficult problem of distribution, the pressure of a judicial declaration may be necessary to effect appropriate legislative action. It was the court's duty to remind members of the State Senate and Assembly, however forcefully it deemed necessary, that the only alternatives available to them are a financing system that is compatible with the constitutions, or no system at all.

## IX
## CONCLUSION

The *Levittown* court displayed a remarkable degree of sensitivity and judicial craftsmanship in a case involving a mountain of complex evidence and a number of delicate legal questions. The court was presented with, and decided, two cases at once. The original group of plaintiffs presented a "traditional" school financing case, challenging the relationship between property wealth and school spending. The court followed the post-*Rodriguez* trend in school finance litigation and resolved the traditional claims on state constitutional grounds, citing violations of the equal protection and education guarantees. The plaintiffs-intervenors presented a more novel "municipal overburden" case, challenging the state's measure of fiscal capacity for apportionment of state operating aid. The court found state constitutional violations as alleged by the intervenor cities, and initiated a new trend as well on their claims. It found federal equal protection violations in both the irrationality of discrimination against the large cities and the denial of equal educational opportunity in those cities, where many pupils failed to attain even basic minimal skills.

The school finance litigation "score" currently stands even: eight cases for

230. Verified Answer at 12, Board of Educ., Levittown Union Free School Dist. v. Nyquist, 94 Misc. 2d 466, 408 N.Y.S.2d 606 (Sup. Ct. 1978).

plaintiffs and eight cases for defendants.[231] An examination of the chronology reveals that five[232] of the eight decisions upholding financing systems came down in the four years following the *Rodriguez* ruling. The *Rodriguez* case cast a pall on school finance litigation nationwide, a pall that recently has been lifting. Plaintiffs have prevailed in the three most recent decisions.[233] Moreover, in the two most recent cases,[234] courts have distinguished *Rodriguez* and based their rulings in part on the fourteenth amendment. The success of recent challenges can be attributed partially to the sophistication of plaintiffs, who have learned from their predecessors' mistakes. Of greater importance, though, has been the fundamental soundness of the claims brought against outmoded financing systems.

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231. *See* notes 2 & 5 *supra*.

232. Shofstall v. Hollins, 110 Ariz. 88, 515 P.2d 590 (1973); Milliken v. Green, 390 Mich. 389, 212 N.W.2d 711 (1973); Northshore School Dist. No. 417 v. Kinnear, 84 Wash. 2d 685, 530 P.2d 178 (1974); Thompson v. Engelking, 96 Idaho 793, 537 P.2d 635 (1975); Olsen v. State, 276 Or. 9, 554 P.2d 139 (1976).

233. Cincinnati Bd. of Educ. v. Essex, No. A7602725 (Ct. of C.P., Hamilton County, Dec. 5, 1977); Board of Educ., Levittown Union Free School Dist. v. Nyquist, 94 Misc. 2d 466, 408 N.Y.S.2d 606 (Sup. Ct. 1978); Lujan v. Colorado State Bd. of Educ., No. C73688 (Dist. Ct., Denver, Mar. 13, 1979).

234. Board of Educ., Levittown Union Free School Dist. v. Nyquist, 94 Misc. 2d 466, 408 N.Y.S.2d 606 (Sup. Ct. 1978); Lujan v. Colorado State Bd. of Educ., No. C73688 (Dist. Ct., Denver, Mar. 13, 1979).