

William & Mary Law Review

Volume 15 (1973-1974)
Issue 3 Symposium: *The Nuclear Power Plant
Licensing Process*

Article 14

March 1974

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Ronald C. Brown, *School Financing in Legal and Nonlegal Perspective*, 15 Wm. & Mary L. Rev. 739 (1974), <https://scholarship.law.wm.edu/wmlr/vol15/iss3/14>

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COMMENTARY

SCHOOL FINANCING IN LEGAL AND NONLEGAL PERSPECTIVE

REFORMING SCHOOL FINANCE. BY ROBERT D. REISCHAUER AND ROBERT W. HARTMAN WITH THE ASSISTANCE OF DANIEL J. SULLIVAN. Washington, D.C.: The Brookings Institution, 1973. Pp. xiii, 185. \$6.95.

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Present systems of financing public and private education are either under direct siege or falling from the weight of their inadequacies. School bond issues are being defeated at the polls, teachers are unionizing and striking for higher compensation levels, disparities in educational benefits are being litigated, and closures of private schools portend possible swelling of public school enrollment. Taxpayer dissatisfaction has increased to a crescendo of outrage, demanding a solution to the complex problems of educational finance.

In a pluralistic society such as ours, diversity in education is deemed important. Inherent in diversity, however, is inequality, evidenced by differences in educational opportunity and benefits. Time-honored American tradition places primary responsibility for educating our children¹ on state and local governments, and it is at this level that authors Reischauer and Hartman initiate their evaluations. *Reforming School Finance* boldly tackles the complex and amorphous problem of how to pay for education. Desirable and undesirable aspects of present systems of financing are placed in economic, political, and social perspective, and alternatives are discussed. The authors have compiled a comprehensive and usable handbook for school finance reform, ably collecting statistics from recent studies to provide up-to-date facts and figures on the economic implications of each alternative which they evaluate.

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1. There are currently 51 million school children, 10.3 percent of them in nonpublic schools. *The Question of Financing Elementary and Secondary Education*, 51 Cong. Dig. 193, 194 (1972) [hereinafter cited as CONG. DIG.].

The timeliness of the book is unquestionable. The Supreme Court has indicated that constitutional remedies to repair existing disparities in educational opportunities are limited. In recent decisions, the Court has upheld the constitutionality of property taxes as a method of financing schools² and has struck down public aid to private schools in the form of reimbursements for tuition or state-required testing, as well as income tax benefits to parents.³ Additionally, recent completion of a myriad of studies has, for the first time, provided decisionmakers with sufficient comparative and authoritative facts to arrive at informed determinations on optimal methods of school financing. Finally, the rising national controversy over greater involvement of the federal government in financing as a realistic alternative to state and local reform must soon be faced,⁴ since most federal education legislation expires over the coming year.⁵

Reforming School Finance begins with an examination of the public school financing system, followed by consideration of the interrelated system of nonpublic schools, and concluding with a discussion of whether the dilemma of educational finance, which has assumed national dimensions, should be resolved through federal initiatives.

I. PUBLIC SCHOOL FINANCING

A. Present Financing and Suggested Alternatives

In the 1971-1972 school year, "elementary and secondary education ranked third only to national defense and income security as a consumer of government resources,"⁶ with almost \$49 billion spent on the approximately 48 million public school children.⁷ Although states traditionally have borne much of the responsibility for meeting and administering these obligations, providing approximately 40 percent of all funds allocated to public schools, the largest proportion, presently 55 per-

2. *San Antonio Independent School Dist. v. Rodriguez*, 93 S. Ct. 1278 (1973).

3. *Levitt v. Committee for Public Education and Religious Liberty*, 93 S. Ct. 2814 (1973); *Committee for Public Education and Religious Liberty v. Nyquist*, 93 S. Ct. 2955 (1973); *Sloan v. Lemon*, 93 S. Ct. 2982 (1973).

4. See generally CONG. DIG., *supra* note 1.

5. R. REISCHAUER & R. HARTMAN, *REFORMING SCHOOL FINANCE* 172 (1973) [hereinafter cited as REISCHAUER & HARTMAN].

6. *Id.* at 4.

7. This was almost double the \$26.5 billion cost for the 1965-66 school year, a mere six years earlier. CONG. DIG., *supra* note 1, at 194-95.

cent, is drawn from local revenues; the federal government provides the remaining five percent.⁸

State support is usually derived from general revenue funds, approximately half from sales tax receipts. These funds are earmarked to supplement local programs, to stimulate new programs, and, through minimum foundation plans or equalization schemes, to minimize the effects of disparate tax bases of local school districts. Of the localities' share of support, 82 percent comes from property taxes, which in many cases is the only form of taxation available to school districts.⁹

Reischauer and Hartman open their evaluation of the seriousness of the general fiscal dilemma with an examination of expenditures of existing monies. Since 1960, outlays for education have risen an incredible 10 percent a year.¹⁰ To a large extent, these figures merely reflect spiraling inflation and increased enrollment, rather than any improvement in the quality of education. New school construction costs grew by almost 65 percent during the 12 years from 1958 to 1970, a rate considerably higher than that for other types of construction.¹¹ Burgeoning instructional costs also have placed a burden on the budgets of local governments, with most of the increases coming in the form of salaries for teachers and other instructional personnel, which rose between 1965 and 1970 at a rate one-third faster than private sector wages. The increase in teachers' salaries has been explained as resulting from the hiring of better qualified teachers and from a teacher shortage during the 1960's, as well as the increased unionization of teachers.¹² Whatever the cause of increased expenditures, they have skyrocketed to a level where taxpayer discontent is evident.

8. REISCHAUER & HARTMAN, *supra* note 5, at 4. Proportions of revenues can vary widely, however. In New Hampshire in 1971, for example, "86 per cent of the school revenue was derived from local taxes . . . , ten per cent came from the State, and four per cent from the Federal Government. In contrast, in North Carolina 19 per cent was obtained from local sources, 66 per cent from the State, and 15 per cent from the Federal Government." CONG. DIG., *supra* note 1, at 196.

9. Maryland, Kentucky, and Pennsylvania, however, among other states, have substantial non-property taxes. REISCHAUER & HARTMAN, *supra* note 5, at 5 n.1.

10. *Id.* at 17.

11. U.S. DEPARTMENT OF COMMERCE, 51 SURVEY OF CURRENT BUS. 45 table 8.7 (July 1971).

12. Cf. Kasper, *The Effects of Collective Bargaining on Public School Teachers Salaries*, 24 IND. & LAB. REL. REV. 70 (1970). For a study concluding that nonteacher unions have little effect on raising compensation levels, see D. STANLEY, *MANAGING LOCAL GOVERNMENT UNDER UNION PRESSURE* 74 (1972), summarized in Brown, Book Review, 14 WM. & MARY L. REV. 468, 470 (1972). Teacher unionization and militancy obviously persist. As the 1973 school year began, hundreds of thousands of pupils were given

There are several factors, however, which could contribute to an easing of financial problems. In addition to a decrease in the birth rate and the abating of the teacher shortage, local governments are becoming more sophisticated buyers and users, employing innovations such as storage cooperatives among schools, "systems buildings," increased utilization of present space, and more efficient scheduling of classes. A study for the President's Commission on School Finance estimated the annual savings from such innovations could total over \$5 billion, or 12 percent of total expenditures.¹³

Although most school districts are limited to property tax as a source of revenue,¹⁴ a recent survey by the Advisory Commission on Intergovernmental Relations found that "almost half of those interviewed regarded the property tax as the worst or least fair of the major federal, state, and local taxes."¹⁵ The authors support with studies and statistics the apparent inadequacies of the property tax as presently structured and administered and point out that, apart from ever-increasing rates of taxation,¹⁶ taxpayers are more aware of a lump-sum property tax than a sales tax collected in much smaller increments. In addition, the property tax, in effect a tax on housing, tends to discourage renovation or repair of deteriorated property. Moreover, it influences decisions by businesses regarding location sites and favors those with a low ratio of property to sales. Assessment practices vary widely, lack of sufficient correlation between wealth and ownership of real property permits some individuals to escape fair contribution, and excessive burdens are placed on property owners with low or fixed incomes.¹⁷ In addition to its disadvantages to the taxpayer, the property tax fosters inequities in the availability of educational funds among jurisdictions; a poor community must have a higher tax rate than a wealthy community to

extended vacations as teachers struck in cities around the country. N.Y. Times, Sept. 6, 1973, at 15, col. 1.

13. REISCHAUER & HARTMAN, *supra* note 5, at 37. Other significant projections for the next decade forecast expenditures increasing at only half the rate of the preceding decade. *Id.* at 38.

14. Although 22 states authorize the use of non-property taxes by school districts, the costs of "collecting such taxes and the familiarity of the property tax have tended to continue principal reliance on [it] as the primary source of educational money." CONG. DIG., *supra* note 1, at 196.

15. REISCHAUER & HARTMAN, *supra* note 5, at 24.

16. For the nation as a whole, annual property tax receipts have increased from 1.41 percent of the market value of real property in 1955 to 1.80 percent in 1969 and are still rising. *Id.* at 25 tables 3-5.

17. CONG. DIG., *supra* note 1, at 196.

generate an equal amount of revenue per pupil.¹⁸ The authors note, however, that “[p]roperty value differences among districts reflect not only differences in ability to pay but also tax advantages and disadvantages that the housing market has translated into real estate values.”¹⁹ A community which acquires light industry, for example, may generate funds equivalent to preindustry property tax revenues by applying a lower tax rate to the increased tax base. Nevertheless, the assessed valuation of housing in such a community may increase, effectively canceling the benefit to the taxpayer of the reduced rate.²⁰

Despite its inadequacies and inequities, Reischauer and Hartman caution against reckless abandonment of the system, noting sound reasons for retaining the property tax as a source of revenue. Besides providing a tremendous yield,²¹ receipts from a property tax are very stable, permitting maximum government planning. In addition, taxes on real property are not easily avoided, and most benefits go directly to the residents of the district who are paying.²² Finally, a shift to an alternative local source of revenue appears unrealistic, since a sales or income tax would have to be excessively high to raise revenues equal to those lost by eliminating the property tax; moreover, neither such tax would eliminate the problem of inequitably distributed burdens.

The authors conclude that imaginative reformation of school financing systems includes retention of a property tax. They review suggestions for improvements in the system, such as consolidating school systems to provide more efficient administration and improved fairness of assessment mechanisms, and endorse innovations such as “circuit breaker systems,” whereby the old or the poor are reimbursed by the state for “excessive” tax burdens.²³ They suggest the removal of commercial and industrial property from the local educational tax base and subjecting it instead to a uniform state property levy. Although these suggested

18. The range of diversity is exemplified in New Jersey, where per-pupil property values among school districts ranges from \$62,598,621 to \$3,921, or about a 16,000 to 1 ratio. See *Robinson v. Cahill*, 188 N.J. Super. 223, 287 A.2d 187, 218-21 (1972), modified, 62 N.J. 473, 303 A.2d 273 (1973).

19. REISCHAUER & HARTMAN, *supra* note 5, at 32.

20. *Id.* at 33.

21. Property taxes currently provide about \$40 billion in annual revenues, roughly half of which is derived from taxes on residential property. Slightly more than one-half of this revenue is used to finance education. CONG. DIG., *supra* note 1, at 196.

22. *Id.*

23. Twelve states have programs which protect the elderly poor by providing either for cash rebates or state income tax credit. Only Oregon and New Mexico provide comprehensive programs for all low-income homeowners. REISCHAUER & HARTMAN, *supra* note 5, at 40.

reforms could ameliorate many complaints of existing methods of financing schools, they would not totally eliminate cries of high taxes and unequal distribution. Other sources of revenue are therefore considered, including state or federal systems of financing, as have been suggested by several study groups.²⁴

A potential source of new revenue is a value-added tax. Few states have shown interest in such a proposal, but it has been recommended at the federal level as a means of financing a new national program of residential property tax relief. Applied to the increased value of goods and services at each stage of the production process, a value-added tax would be similar in effect to a national sales tax.²⁵ Under such a system, or any other state or federal program, however, difficult problems would be posed concerning the distribution of resources. One important question is whether lost property taxes of the states or districts should be replaced, thus continuing existing disparities.²⁶ An aggregate tax increase would be likely under such a proposal, since an equitable "leveling up" among districts would seem politically inevitable.²⁷ Another significant change that could result from a shift of revenue sources from the local to the state or federal level would be the diminishing of the power of local school boards, which no longer would be able to decide upon the spending level within the districts. Thus, pressures for change would likely be placed at the state or federal level, and "local control" could become an empty slogan.²⁸

In kaleidoscope fashion the authors present seemingly limitless combinations of proposed programs of financing education, providing a wealth of ideas for the decisionmaker attempting to choose effective and equitable methods of public school finance. Hybrid combinations of state equalization and full state financing programs which would diminish the influence of community wealth on education and resolve problems of distribution of revenue are offered. The suggestion is made

24. See, e.g., COMMITTEE FOR ECONOMIC DEVELOPMENT, *EDUCATION FOR THE URBAN DISADVANTAGED: FROM PRESCHOOL TO EMPLOYMENT 71-74* (1971); ADVISORY COMMISSION ON INTERGOVERNMENTAL RELATIONS, *STATE AID TO LOCAL GOVERNMENT* (1969), cited in REISCHAUER & HARTMAN, *supra* note 5, at 42.

25. Cf. *State of the Union Address of Richard M. Nixon*, Jan. 20, 1972, printed in N.Y. Times, Jan. 21, 1972, at 18, cols. 1-5.

26. For example, in New Jersey each pupil would receive \$445, in Alabama \$32, and in Hawaii, which has no property taxes, \$0. REISCHAUER & HARTMAN, *supra* note 5, at 48 table 3-12.

27. *Id.* at 49.

28. Respectable evidence, however, indicates this result is not inevitable. B. LEVIN, *1 PUBLIC SCHOOL FINANCE: PRESENT DISPARITIES AND FISCAL ALTERNATIVES* 268 (1972).

that state-generated revenues be channelled through locales, permitting maximum feasible local control within limited and nondisparate economic perimeters. Voucher systems are suggested whereby parents would receive for each of their children a state educational voucher, which could be used to purchase schooling from any private or government-operated institution meeting state requirements. Suggested modifications of the voucher system would either permit or limit additional tuition charges for families wishing to supplement the opportunities bought by the vouchers, thereby restricting the tendency of the voucher system merely to substitute community wealth for family wealth as the cause of disparate educational opportunities.²⁹

Another proposal is for capacity equalization, which may entail redistricting school boundaries to equalize the per-pupil fiscal capacity of each district. Although this would be the least expensive attempt to achieve equality, and one which allows for retention of local control, it is the least realistic from a political standpoint. Consolidation into large geographic units creates a myriad of political ensnarlements, including centralization of power, racial unrest, fluctuating real estate values, and changing boundary lines. A variant of the capacity equalization plan includes a state guarantee of an amount of resources per student equivalent to that supplied at the local level. Such a plan, if combined with an increasing state-guaranteed minimum, would have maximum potential for providing equal "educational opportunity," however that term may be defined.³⁰

B. Public School Financing and the Courts

Disparities in educational opportunities and benefits emanating from relationships between wealth, expenditures, and tax rate were inevitably to be scrutinized by the courts. Earliest success came to those challenging the legality of the property tax as a basis for educational

29. REISCHAUER & HARTMAN, *supra* note 5, at 78-79.

30. Two basic assumptions are made by the authors in their study: "(1) the availability of money and resources is an important determinant of the quality of education, and (2) the quality of education significantly affects educational achievement." *Id.* at 3. Both assumptions, however, are currently under attack from many quarters. See, e.g., U.S. OFFICE OF EDUCATION, *DO TEACHERS MAKE A DIFFERENCE? A REPORT ON RECENT RESEARCH ON PUPIL ACHIEVEMENT* (1970); H. AVERCH, *HOW EFFECTIVE IS SCHOOLING? A CRITICAL REVIEW AND SYNTHESIS OF RESEARCH FINDINGS* (1972); ON EQUALITY OF EDUCATIONAL OPPORTUNITY (F. Mosteller & D. Moynihan eds. 1972); C. JENCKS, M. SMITH, H. ACLAND, M. BANE, D. COHEN, H. GINTIS, B. HEYNS & S. MICHELSON, *INEQUALITY: A REASSESSMENT OF THE EFFECT OF FAMILY AND SCHOOLING IN AMERICA* (1972).

finance. The California Supreme Court in *Serrano v. Priest*,³¹ for example, ruled that financing education through local property taxes unconstitutionally discriminated against poor children by making the quality of their education a function of the wealth of their school district. Other courts have agreed that disparities in school revenue availability violate the equal protection clause of the fourteenth amendment.³²

In *San Antonio Independent School District v. Rodriguez*,³³ however, the Supreme Court recently reversed this developing line of lower court decisions, holding that disparities resulting from the use of property taxes do not violate constitutional guarantees of equal protection of the laws. In reaching its decision, the Court noted that the Texas school-financing system at issue involved complex questions of local taxation, fiscal planning, educational policy, and federalism, and applied the traditional standard of review, requiring only that some rational relationship to legitimate state purposes be shown.³⁴ Plaintiffs' arguments that the system was based on wealth, a suspect classification, and infringed upon the fundamental right of education, requiring strict judicial review and a compelling state interest justification, were rejected by the Court in a five-to-four decision.

The broad nonlegal thrust of *Rodriguez* is in defining the meaning of equality of opportunity.³⁵ Previous attempts at definition had stressed equality on the basis of *merit*, equality of *treatment*, and equality of *result* in the form of compensatory programs for the disadvantaged. This last definition was advanced and accepted in *Serrano* and similar cases proceeding on the assumptions that "1) school expenditures are related to educational quality and 2) success in school is related to success in later life."³⁶ The Supreme Court in *Rodriguez*, however, questioned these assumptions, indicating that controversy as to their validity should be resolved by the legislatures, not the judiciary.³⁷

31. 5 Cal. 3d 584, 487 P.2d 1241, 96 Cal. Rptr. 601 (1971).

32. E.g., *Van Duzart v. Hatfield*, 334 F. Supp. 870 (D. Minn. 1971); *Robinson v. Cahill*, 188 N.J. Super. 223, 287 A.2d 187 (1972), *modified* 62 N.J. 473, 303 A.2d 273 (1973). See also Comment, *The Right to Equal Educational Opportunity: Serrano and Its Progeny*, 2 N.Y.U. REV. L. & SOC. CHANGE 44 (1972).

33. 93 S. Ct. 1278 (1973).

34. *Id.* at 1300.

35. For a discussion of "equality" as defined by the Court, see Michelman, *The Supreme Court, 1968 Term*, 83 HARV. L. REV. 7, 9-19 (1969).

36. See Finn, Book Review, 82 YALE L.J. 1101, 1104 (1973).

37. Studies also questioning such assumptions include the Fleischmann Report, the Coleman Report, and the controversial Jencks Study, *supra* note 30, all of which are summarized and analyzed in Finn, Book Review, *supra* note 36. See also *Financing Public*

Nevertheless, the legal issue in school finance cases has not been conclusively settled by *Rodriguez*. Already, the New Jersey Supreme Court has held that state courts remain free to use state constitutional provisions to invalidate their own educational finance systems.³⁸

II. FINANCING NONPUBLIC SCHOOLS

The fiscal dilemma of the public schools is inextricable from that of nonpublic schools. The two systems exist in somewhat of a symbiotic relationship; the economic consequence of fluctuating enrollments merely reflects the interplay between the two. Nonpublic schools in the United States currently educate five million students, or over 10 percent of all school children; between 1960 and 1970, however, while enrollment in all schools was increasing by over 20 percent,³⁹ nonpublic school enrollment declined.⁴⁰ The increasing frequency of private school closures alarms many concerned individuals as to the resulting loss of educational diversity and increased burden on the public schools. Reischauer and Hartman consider the basic factors affecting the availability of nonpublic schools and examine their financial situation, discussing legal and policy problems involved in public aid to nonpublic schools and possible solutions.

Since Catholic schools educate four of every five nonpublic students, it is with them that the problem centers.⁴¹ Decreases in their enrollment have been attributed to declining pupil-teacher ratios and cost increases brought about by the shift from religious order to lay teachers who

Education in New York State: An Analysis of the Fleischmann Commission Report, 48 N.Y.U.L. REV. 1 (1973). The potential impact of these studies is becoming evident as opponents of increased school funding cite their findings that more expenditures do not ensure better education. See Hodgson, *Do Schools Make a Difference?*, THE ATLANTIC MONTHLY, March 1973, at 35; Symposium, *Perspectives on Inequality: A Reassessment of the Effect of Family and Schooling in America*, 43 HARV. EDUC. REV. 37 (1973).

38. *Robinson v. Cahill*, 62 N.J. 473, 303 A.2d 273 (1973), *modifying* 188 N.J. Super. 223, 287 A.2d 187 (1972). The state constitutional provision which it was held had been violated stated that the state must provide a "thorough and efficient system of free public schools . . ." N.J. CONST. art. 8, § 4.1. See also Note, *A Statistical Analysis of the School Finance Decisions: On Winning Battles and Losing Wars*, 81 YALE L.J. 1303, 1320-21 (1972).

39. CONG. DIG., *supra* note 1, at 194.

40. Between 1965 and 1971, nonpublic school enrollment declined by 1.6 million students, or over 20 percent. REISCHAUER & HARTMAN, *supra* note 5, at 95.

41. From 1967 to 1971, there was an average annual closing of 343 elementary and 107 secondary Catholic schools, with the loss primarily in the suburban and rural areas. Interestingly, non-Catholic private school enrollments have been increasing moderately. *Id.* at 99.

require higher salaries, increased tuition caused by these cost increases,⁴² and demographic and preference changes. Newly suburban Catholics not only find public schools acceptable but also discover religious acceptance among increasingly tolerant neighbors.⁴³ The seriousness of the decline in parochial school enrollment is predicted to increase, until by 1980 the number of students attending nonpublic institutions will have declined by 2.4 million, or 46 percent.⁴⁴

The issue of whether public aid can or should be used to assist nonpublic schools is highly debated. In a 1970 Gallup Poll, 48 percent of those responding favored public aid to nonpublic schools, 44 percent opposed such assistance, and the remaining eight percent expressed no opinion.⁴⁵ The authors, in summarizing the usual arguments for aid, point out that nonpublic schools keep the public schools healthy by providing competition and diversity and by saving the taxpayers money (as long as any aid given is less than the cost if nonpublic students were to attend public schools). They also present some little known but significant facts in the arguments against granting aid. If, for example, all nonpublic schools were closed, an increase of only three to six percent over present costs would be needed to handle the resulting increased public school enrollment.⁴⁶ Moreover, although nonpublic schools tend to keep people in the cities, only three percent of the nonpublic Catholic school population are minority students;⁴⁷ public aid to such schools arguably would only increase present discriminatory policies.⁴⁸ The possibility of this result is greatly diminished, however, by the recent Supreme Court ruling that any state aid to a racially discriminating private school is prohibited.⁴⁹

42. Studies in New York, however, indicate no evidence that tuition increases significantly affect enrollments. *Id.* at 104. The relationship will be tested soon, as there are predictions that absent an increase in public aid, Catholic elementary school tuition between 1970 and 1975 could increase as much as 560 percent. *Id.* at 111.

43. *Id.* at 106-07.

44. Brown, Enrollment in Nonpublic Schools, Report Prepared for the President's Commission on School Finance, cited in REISCHAUER & HARTMAN, *supra* note 5, at 112.

45. THE GALLUP OPINION INDEX, Report 66, at 15 (1970).

46. In dollar figures, an increase of \$1.35 billion to \$3.18 billion would be needed. REISCHAUER & HARTMAN, *supra* note 5, at 114.

47. *Id.* at 119.

48. *Id.* at 128.

49. *Norwood v. Harrison*, 93 S. Ct. 2804 (1973). A federal district court recently limited the right of private schools to deny admission on the basis of race. *Gonzales v. Fairfax-Brewster, Inc.*, 363 F. Supp. 1200 (E.D. Va. 1973).

Constitutional objections to public aid to nonpublic schools⁵⁰ would not arise if assistance were given only to nonsectarian schools. Such limitation is unlikely, however, since such schools represent merely seven percent of the nonpublic enrollment and are for the most part in good financial standing. Consequently, legislators have continued their efforts to provide financial support to nonpublic, sectarian schools despite opposition to government assistance of religious institutions. Many aid programs have evolved which exhibit an attempt to accommodate first amendment admonitions to the obvious needs of nonpublic schools. Such programs characteristically abstain from taxing, provide for nonsecular services, equipment, materials, or facilities, or channel aid to individual parents or students.

Prior to 1971, the Supreme Court had evolved a doctrine prohibiting direct public aid to sectarian schools but permitting assistance in certain indirect ways. The Court upheld, for example, a plan designed to protect the general welfare of nonpublic school children through publicly financed bus transportation.⁵¹ The loaning of textbooks to sectarian schools for secular purposes was held constitutionally sound,⁵² and, in 1970, in *Walz v. Tax Commission*,⁵³ an indirect subsidy in the form of a grant of tax-exempt status to church-owned properties was approved. One year later, however, the Court, in declaring unconstitutional certain teacher salary supplements,⁵⁴ outlined a threefold test of constitutionality for new school aid legislation: "First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion . . . ; finally,

50. Presently existing programs of public aid to nonpublic schools include annual indirect subsidies through tax exemptions of approximately \$340 million, direct aid, such as transportation services, of approximately \$208 million, and direct federal aid of \$100 million. Indirect aid breaks down to \$207 million for property tax exemptions, \$126.3 million for deductions for charitable contributions, and \$6.3 million for reductions in state income tax liabilities. REISCHAUER & HARTMAN, *supra* note 5, at 133-34. Thirty-seven states have some form of direct aid program, with assistance for transportation and handicapped children constituting 25 percent and 20 percent, respectively. *Id.* at 135. Most of the direct federal aid goes for handicapped children and food programs in proportions of 44 percent and 33 percent, respectively. *Id.* at 136.

51. *Everson v. Board of Education*, 330 U.S. 1 (1947).

52. *Board of Education v. Allen*, 392 U.S. 236 (1968).

53. 397 U.S. 664 (1970). For an excellent analysis of the decision, see Kauper, *The Walz Decision: More on the Religion Clauses of the First Amendment*, 69 MICH. L. REV. 179 (1970).

54. *Lemon v. Kurtzman*, 403 U.S. 602 (1971).

the statute must not foster 'an excessive government entanglement with religion.'" ⁵⁵

The Court has since had three occasions to apply the above criteria, in each case ruling the form of aid unconstitutional. In *Levitt v. Committee for Public Education and Religious Liberty*,⁵⁶ the argument was rejected that a state may reimburse church-related schools for costs incurred in performing *any* service mandated by the state without an inquiry into the constitutional tests described above.⁵⁷ A New York plan to reimburse schools on a per-pupil basis for testing and record-keeping required by state law was held defective because no means were available to ensure that state-required or teacher-prepared tests, described as constituting "an integral part of the teaching process," were free of religious instruction.⁵⁸

In a second case, *Committee for Public Education and Religious Liberty v. Nyquist*,⁵⁹ the Court ruled on three currently popular programs of financial aid to nonpublic schools. A program of grants to qualifying schools in deprived neighborhoods for maintenance and repair of nonpublic schools was disapproved because the effect of the aid was to "subsidize and advance the religious mission of sectarian schools";⁶⁰ again, failure by the state properly to restrict the use of expenditures to secular purposes proved fatal. Objectionable expenditures included salaries for maintenance employees, who, it was noted, might clean classrooms used for religious teaching, as well as the costs of heating and lighting such facilities. Other plans declared unconstitutional provided tuition reimbursement grants for low-income families and tax credits for non-low-income families with children in nonpublic schools. The Court rejected any distinction between grants without restrictions on use given directly to sectarian schools and those channelled instead to parents.⁶¹ Reasoning that the change in the recipient in no way altered the effect of supporting religious activity, the Court concluded that such programs varied from the constitutional requirement of neu-

55. *Id.* at 612-13. Emphasizing that the third criterion permitted little, if any, government supervision, the Court struck down the teachers' salary supplements on the basis that excessive government supervision would be required to ensure that only secular subjects were being taught.

56. 93 S. Ct. 2814 (1973).

57. *Id.* at 2819-20.

58. *Id.* at 2819. It was noted that "the aid that will be devoted to secular functions is not identifiable and separable from aid to sectarian activities." *Id.*

59. 93 S. Ct. 2955 (1973).

60. *Id.* at 2969.

61. *Id.* at 2972-76.

trality respecting religion. The Court distinguished New York's tax credit plan from the scheme in *Walz* involving tax exemptions, observing that states had historically exempted church property from taxation, whereas the New York tax credit provision was passed into law specifically to alleviate the financial dilemma of nonpublic schools.⁶² The Court in *Nyquist*, anticipating further legislative attempts at public aid programs, specifically reserved judgment on the legality of tax deductions for charitable contributions to sectarian schools.⁶³

A third 1973 decision involved Pennsylvania grants to parents in reimbursement of nonpublic school tuition. The plan was held indistinguishable from a similar one in *Nyquist* and was struck down.⁶⁴

These decisions portend the complicated and perplexing task facing drafters of nonpublic school aid legislation. Certainly, categorical benefits may be given for secular purposes; however, programs must incorporate restrictions sufficiently specific to avoid improper use yet not so specific as to result in excessive entanglement of the state in supervising the funds.⁶⁵ There is a narrow path to constitutionality, and constitutionality predetermines the utility of any suggested method of providing aid to nonpublic schools. In this light, suggestions in *Reforming School Finance* as to methods of improving the fiscal position of nonpublic schools are worth noting.

There are essentially three approaches to solving the financial dilemma of nonpublic schools: first, the private schools may exercise self-help under existing programs; second, existing aid programs may be expanded; or third, new programs may be created. It has been suggested that costs could be reduced significantly by increased coordination and cooperation between presently autonomous schools. One

62. *Id.* at 2975. The Court also noted that the plan lacked sufficient restrictions and that the amount of tax benefit was unrelated to the amount of tuition actually paid.

63. *Id.* at 2974 n.49.

64. *Sloan v. Lemon*, 93 S. Ct. 2982 (1973).

65. It would appear that the Supreme Court is applying a more diluted neutrality test in cases involving higher education. In *Hunt v. McNair*, 93 S. Ct. 2868 (1973), for example, the Court found no excessive entanglement in a state-administered revenue bond scheme for use by church-related colleges. In addition, the Court has left the door open for continued federal assistance to higher education under such programs as the "G.I. Bill." *Committee for Public Education & Religious Liberty v. Nyquist*, 93 S. Ct. 2955, 2970 n.38. The Virginia Supreme Court, however, recently struck down a portion of a Virginia assistance program which provided higher education loans repayable by establishment of residency in the state after graduation, holding that such a scheme improperly aided sectarian schools. *Miller v. Ayres*, 214 Va. 171, 198 S.E.2d 634 (1973). For a discussion of this case, see McFarlane, Chronister & Howard, *State Aid for Virginia's Colleges*, 2 J. OF LAW & EDUC. 593, 611 (1973).

study indicates that "an extensive consolidation program [in Catholic schools] might reduce [their] total costs by \$900 million, or by 35 percent of the amount that would be required in 1975 to operate an unconsolidated system."⁶⁶ Similarly, increased utilization of existing federal programs of support should be considered; the federal school lunch program has been implemented by only 35 percent and library service grants accepted by only 60 percent of Catholic schools.⁶⁷

If self-help measures prove insufficient, expansion of existing aid programs could be attempted. Although such expansion may be difficult in some areas in light of the recent Supreme Court decisions, careful and full utilization of such programs could prove valuable.⁶⁸ Reischauer and Hartman suggest, for example, encouraging the use of present tax deduction schemes by charging low tuition rates and soliciting special collections or parental donations.⁶⁹ This approach, however, would be advantageous only to taxpayers who itemize deductions (most often individuals with high incomes), and the economic advantage to nonpublic schools would likely be slight.⁷⁰ A program offering attractive possibilities in the financing of public as well as nonpublic schools involves the voucher system, whereby a parent could choose a school for his child and have the cost defrayed by a state grant. The legality of such a system, however, should be scrutinized in the context of the recent Supreme Court rulings on other programs of public aid.⁷¹

The authors close this part of their book with the prophetic observation that the future vitality of nonpublic schools will depend more upon developments in public school financing than upon innovations in nonpublic school aid programs.⁷² Indeed, bold initiatives and far-reaching improvements in the quality of public education would remove much of the current demand for private schools, whereas continuation of the present crisis in public school financing could force marked changes in attitude toward the position of nonpublic schools in the education system.

66. REISCHAUER & HARTMAN, *supra* note 5, at 137.

67. *Id.* at 138-39.

68. For example, state funding for construction of nonsectarian facilities was approved in *Tilton v. Richardson*, 403 U.S. 672 (1971).

69. REISCHAUER & HARTMAN, *supra* note 5, at 143. The Supreme Court has reserved judgment on the validity of permitting tax deductions for such contributions. See note 63 *supra* & accompanying text.

70. REISCHAUER & HARTMAN, *supra* note 5, at 143-44.

71. See notes 56-64 *supra* & accompanying text.

72. REISCHAUER & HARTMAN, *supra* note 5, at 145-46.

III. FEDERAL PARTICIPATION IN SCHOOL FINANCING

Having explored the problems and attempted solutions in financing public and nonpublic schools, the authors discuss establishment of a major federal role in the financing of American education. Proponents of such a step argue the superior ability of the federal government to raise and disburse revenue with minimal disparities. In response, critics of federal involvement advocate the desirability of diversity in solutions by the various states and the American tradition of placing with the states the primary responsibility for education. Political sentiment undoubtedly favors the retention by the states of the balance of power on educational matters. Nevertheless, the authors suggest that solutions properly directing federal objectives could maintain local control despite extensive federal involvement.

The strengthening of present federal programs is an obvious possibility. Such programs at the elementary and secondary levels generally are categorical, that is, earmarked for specific purposes, rather than being general in nature.⁷³ A particular area in which the authors argue for increased federal responsibility is educational research, where it is noted that the "investment is large, the payoff is uncertain, and successful research will be broadly disseminated and benefit many school districts."⁷⁴

The use of federal initiatives to remove inequities resulting from over-reliance on the property tax at the local level is explored. A federal incentive program providing matching funds for state-generated revenues could encourage such a result, as could reduction or elimination of federal income tax deductions of the portion of property taxes used for educational purposes.⁷⁵

The authors examine several proposals for federal programs analogous to plans suggested for implementation at the state level. A federal capacity equalization scheme, for example, could ensure each state exerting the same effort an equivalent amount of educational resources and, hopefully, equal educational quality. Inequities and disparities within and among states could be diminished by the setting of minimum criteria for state finance plans or by provision that each state assume an

73. For a list of categorical programs, see CONG. DIG., *supra* note 1, at 195.

74. REISCHAUER & HARTMAN, *supra* note 5, at 153.

75. *Id.* at 156. A mechanism for state-local relief has already been created in the State and Local Fiscal Assistance Act of 1972 (general revenue sharing), which provided for the distribution of \$5.3 billion in the first full year. Although present wording of the legislation precludes use of federal funds by local governments for school finance, there is no such restriction with respect to state governments. *Id.* at 154-55.

increasing minimum share of financing education.⁷⁶ The authors caution, however, that such programs would probably increase, rather than lessen, total tax burdens.

IV. CONCLUSION

What is to be gained by assessing and reassessing various systems of school financing if taxpayers' bills for supporting education are not decreased? The answer, or at least the objective, suggested through the collection in *Reforming School Finance* of proposed alternatives, is a system with fewer disparities and increased equities in educational opportunity. The authors' assessment indicates that change is imminent, that the legal process is but one method of change, and that means are available to channel our energies into creative legislation to meet the needs of our educational system. Although its economic analyses are at times tedious, the book should prove invaluable to anyone seeking to meet the challenges of educational finance.

76. *Id.* at 167. The President's Commission on School Finance has recommended that 90 percent of public education financing be assumed by each state. *Id.*