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ECONOMIC AND LEGAL JUSTIFICATIONS  
OF FISCAL NEUTRALITY

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## ABSTRACT

This paper compares economic and legal standards with respect to resource allocation in public elementary and secondary education. The major determinant of resource allocation to the poor, in education as in other governmentally provided services, is the publicly accepted rationale for resource allocation. Our findings are that only under very specific and often improbable assumptions can an economic efficiency argument, based upon the existence of external benefits, lead to the implementation of either present education finance systems or the systems most likely to result from a Serrano type decision. It is, therefore, important to define the constitutional values in heuristic terms so that a consensus can be developed around the importance of resource equality for the poor. Even those who are intuitively sympathetic to the notion of resource equality will lack a clear understanding of why it is important.

Economic and Legal  
Justifications of Fiscal Neutrality

For all the simplicity of its principle, the Serrano v. Priest decision,<sup>1</sup> is difficult to explain and justify. The principle of fiscal neutrality is that school spending may not depend on the wealth of localities; if local units (whether families, schoolhouses, districts, or regions) select spending levels at all, as opposed to their being set by the state under complete centralization, the state must eliminate the influence of the varying wealth of these units by some system of matching grants (the size of which would be inversely related to local wealth). Such a system is called power equalized, or resource equalized. The principle has obvious equalitarian appeal--let everyone start out with even resources--yet the formal arguments for fiscal neutrality lead in unexpected directions. This paper reaches two conclusions about fiscal neutrality: (1) Traditional theories of public finance under most circumstances do not support any thoroughly equalitarian philosophies of education, fiscal neutrality included; in order to find support one must impose strong equity constraints on what has always been considered a function of education providing mainly private benefits--the production of human capital. (2) Full fiscal neutrality is based, in part, upon an ignorance of the effect of dollars on the production of human capital; because of this ignorance, fiscal neutrality or equal access to publicly provided services makes sense as a principle of fiscal democracy, a rule of decision-making, a fiscal constitution. It, however, is true that research findings in the long run could abrogate the need for such a constitution, at least to the extent that ignorance of the input/output relationship is reduced.

The factual assumptions which could support fiscal neutrality are themselves interesting; perhaps more interesting is the unstable interplay

among positive analysis, empirical findings, and principles of justice that is necessary to settle this and other questions in public finance.

In the remainder of this paper, some general principles from economics and law and their application to fiscal neutrality will be discussed, and compared.

## I. ECONOMIC JUSTIFICATIONS

A good starting point for a discussion of a possible economic rationale for educational finance systems is a list of educational outputs. Consider the dichotomy between those outputs or benefits captured entirely by the individual (and perhaps his immediate family) and those that spill over onto the rest of society. It is difficult to fault the idea that purely private aspects of education should not be subsidized unless more direct methods of redistribution are ruled out. Private individuals are in most cases the best judges of what they desire to consume privately, and in general it would be more efficient to redistribute sums of money and allow consumers the freedom to spend it as they desire.

Almost any microeconomics or public finance text can be consulted for the proof that lump sum subsidies are normally more efficient than subsidies in kind (such as publicly provided education).<sup>2</sup> However, to the extent that education provides benefits for members of society other than the purchaser, a strong economic efficiency case can be made for government subsidy to purchasers to assure their purchase of the societally optimal level.<sup>3</sup> Only if the costs and benefits of education as equated by the local unit reflect the costs and benefits for the rest of society will an efficient solution (in the sense of using scarce resources where they provide

the greatest benefits) tend to be obtained through the political process. If the rest of society suffers net costs, too much of the services will be provided by independent local units; while too little will be provided if the rest of society receives net benefits.

In order to accommodate comparison with legal standards, however, a movement away from the private versus external benefit classifications of outputs to a slightly different classification of educational products is useful. Education can be assumed to provide three distinguishable outputs for society:

- (1) Consumption for the individual--for example, individuals enjoy both the education process and the knowledge and skills obtained.
- (2) Increased human capital for the individual--individuals become more productive inputs to the production process and more able as social and political beings.
- (3) External benefits for society emanating directly and indirectly from (1) and (2)--society operates better socially, economically, and politically with better inputs; people are less likely to become criminals, etc.

Again, if education finance is not to be used as a second best method for redistributing consumption, the economic rationale for providing government subsidies to education can hardly result from the first category, consisting as it does of purely individual enjoyment. This case of purely private consumption could be included under the externalities case, however, if members of society receive utility from equality of expenditures, output, "opportunity," or some other education quality or quantity measure. That is, the good which provides external benefits may be the quality of education

consumed by others, and the benefits may be so great as to result in political decisions for equality based upon benefits received by voters. It may make everyone (or a majority) of the society extremely happy for all to be able to consume "equal education."

With regard to the second category of products--the improvement in the ability of individuals to earn income--the rational economist would probably suggest that, while government subsidies may not be called for, the government has a good case for intervention to provide a necessary capital market which has not developed privately. The individual who wishes to invest in himself should be able to borrow funds in order to do so. Unless this can be done the society's pattern of investment will be inefficient. Money will be invested in nonhuman capital, rather than higher return human capital, because of an inability to borrow funds for the human investment. All of society will suffer. Obviously this private investment case can also be made to fit into the externalities class given certain assumptions about what provides utility and/or disutility for members of society.

It is in the third category that economic efficiency most clearly calls for government subsidy. Those who receive benefits from the education of others should pay accordingly, and these payments should be used to subsidize the purchases of those whose education provides the externalities. Only in this manner can the optimal level of educational output be approached. These principles would not require fiscal neutrality except under some implausible assumptions, however. For the externalities rationale for state and federal aid to result in a fiscally neutral system would require that the spillover benefits from districts be extremely highly correlated with school district wealth (the relationship here being inverse) so that grants inversely related to wealth would in fact be positively related to externalities produced. A centralized state system with equal expenditures per

child in each district would implicitly describe the external benefits of spending some given amount per child as being larger from the poorer districts by precisely the amount that dictated aid of a level which brought expenditures to equality. While we have limited knowledge of the magnitude of external benefits (research has not even been very successful in showing that net external benefits exist) it is doubtful that, if measurable, they would be found to fall in this pattern.

For the power-equalized system to result from an appraisal of externalities would also require a specific pattern of external benefits. Assuming that there would be no ceiling on the matching plan, it would be necessary for the poorer districts to provide greater spillovers for every dollar spent over any reasonable range of possible expenditures. And again the spillover levels would have to be so highly and universally correlated with wealth that the matching ratio based on wealth caused aid to be distributed on the basis of externalities. That having twice the wealth of another district indicates that the spillover effects created per dollar spent are only half as great is not intuitively obvious. Clearly, however, if either equal expenditures per child or equal ability to raise revenues through a given tax rate were highly valued by society and/or their absence provided much disutility, the externalities-efficiency rationale for aid could lead directly to state control or power equalizing.

If the externalities criterion is in fact the basis for educational aid, most of the present foundation systems, which do not match local funds above the approved foundation level, imply that externalities are higher in districts with less property value per pupil up to a point, and that after this point is reached no externalities are produced by added expenditures. All expenditure above the foundation level must be provided completely from local resources.

To provide additional educational aid to children from relatively poor families is to implicitly assume that the externalities produced are greater (or that the education system is being used as a less than optimal method of income redistribution); to put a ceiling upon subsidies is to assume that after some level of educational expenditures is reached, added expenditures only provide private consumption and/or investment. To disagree with these assumptions is to imply that aid should be distributed on some other basis. It is evident, however, that with the above stated assumptions, the externalities rationale for aid to education could possibly support existing systems of school finance. Slightly different (and probably much more realistic) assumptions about reality, however, obviously lead to support for a different financing system.

## II. LAW

Since economics does not readily yield fiscal neutrality as a preferred solution, it is logical to ask how the law reached that result, whether the law may be in error because it does not conform to principles of economics, and how the applicable principles from the two sources compare. This part of the paper is divided into four sections with the following conclusions:

- (1) By definition, any legal right of the child to public education must be based upon private benefits. Thus, the salient questions in economics and law are different.
- (2) The character of the legal right, insofar as it can be clearly identified, seems to compare closely to what economists call human capital formation.
- (3) Fiscal neutrality makes sense as a way of removing inequities in the production of human capital while

preserving those features of the present system which the legislature desires to retain and which the courts, in any event, should not prohibit.

- (4) If it were certain that education does not produce human capital efficiently (or at all), the court cases probably would not have been won. But neither would there be a public school system nor laws relating to such systems. The strong inequities in the present system cannot be justified on the basis of education being ineffective; the constraint of fiscal neutrality is desirable as long as the state is convinced that it is doing something called "education."

(1) The Legal Right Is to Private Benefits

1.1 By definition

At the first level, the basic difference between legal and economic justifications of state subsidy to education is very nearly a matter of definition. A legal right is by definition something private. If a person can show no private injury from an alleged wrong his case will be thrown out of court; courts are not usually places where an individual can complain about wrongs in general; when private damage has been shown, the remedial action of the court is often limited to redress of the injury to the complaining party. Certainly, any legal right to equal resources in education must be based upon benefits wrongfully withheld from the individual child ("benefits not received" being the proper definition of "harm" under the Fourteenth Amendment in a case like Serrano).<sup>4</sup> The nonredistributive economic justifications of state subsidy to education concern things which others receive from the education of the child. Should an analogous legal right

be fashioned from such justification, it would perhaps be the right of those who pay for the child's education to be partially reimbursed by all others who benefit.<sup>5</sup> Justice is often concerned with factors other than efficiency. The institution of the contract (a legally enforceable promise) may be economically efficient, leading to a greater number of productive agreements than would be made if no enforcement were available; but in particular cases the law will enforce both the efficient and nonefficient. A simpler and more germane example is the Bill of Rights whose principles may be efficient in the long run but whose application to individual cases does not depend on efficiency; indeed, the Bill is designed to operate in the short run in a counter-majoritarian fashion. The right of equal access to educational resources founded in the Bill of Rights likewise does not necessarily depend on efficiency. Of course, the very concept of equality of opportunity may derive from the fact that some defined "equality" is highly valued in our society and therefore can be said to provide externalities of such magnitude that they overwhelm the effects of all other benefits and costs of any public action. Perhaps the greatest possible externality from any public good can flow from its availability to all on equal terms. If this is believed to be true, then economic efficiency and legal equity arguments tend to become indistinguishable, at least in the long run.

#### 1.2 As distinct from public benefits which are well recognized

The public benefits of public education have been explicitly recognized by the Supreme Court. Public benefits become an issue because they support the power of the state to require and subsidize public education, sometimes at the partial compromise of jealously guarded First Amendment freedoms (for example, speech, political association, religion). The power of the state to subsidize education because of its special functions was supported in

Interstate Ry. Co. v. Massachusetts<sup>6</sup> which upheld a statute requiring a street railway to transport children at half fare. Mr. Justice Holmes hinted that the special nature of this tax, benefiting a particular class of users, was permissible for education and students, but perhaps not for more "private" activities:

Education is one of the purposes for which what is called the police power may be exercised . . . . Massachusetts always has recognized it as one of the first objects of public care. It does not follow that it would be equally in accord with the conceptions at the base of our constitutional law to confer equal favors upon doctors, or workingmen, or people who could afford to buy 1000-mile tickets. Structural habits count for as much as logic in drawing the line. And, to return to the taking of property, the aspect in which I am considering this case, general taxation to maintain public schools is an appropriation of property to a use in which the taxpayer may have no private interest, and, it may be, against his will. It has been condemned by some theorists on that ground. Yet no one denies its constitutionality. People are accustomed to it and accept it without doubt.<sup>7</sup>

The specific functions of education which make it valuable to the state are undoubtedly as various as the popular credos and scientific hypotheses which explain its political support. Wisconsin v. Yoder,<sup>8</sup> was a case which considered the power of the State of Wisconsin to require that Amish children continue formal education beyond the eighth grade, in effect, public high school. Although the court found no such power because the Amish objections were religiously-based, and educational purposes were satisfied by the community as a whole, the basic power of the state to require education was recognized and described:

The State advances two primary arguments in support of its system of compulsory education. It notes, as Thomas Jefferson pointed out early in our history, that some degree of education is necessary to prepare citizens to participate effectively and intelligently in our open political system if we are to preserve freedom and independence. Further, education prepares individuals to be self-reliant and self-sufficient participants in society. We accept these propositions.<sup>9</sup>

According to this description, the state has two principal interests in education: (1) effective citizenship, and (2) economic and social self-sufficiency. These are also external benefits recognized by economics, especially in light of other language in the opinion suggesting that the mere ability to read and stay off welfare might suffice to fulfill these general purposes.<sup>10</sup> Even the intelligent selfish citizen might wisely pay a fair share for the literacy and economic self-sufficiency of others. A related purpose which the state seeks from public education is the inculcation of civic values and a sense of national unity. The public school is "the most powerful agency for promoting cohesion among a heterogeneous democratic people . . . at once the symbol of our democracy and the most persuasive means for promoting our common destiny."<sup>11</sup> Thus, the public school enhances the two most basic functions of government and indeed of any power relationship: control by the people of their leaders and each other (through political, economic, and social preparedness); control of the people by the government (through socialization of civic values).<sup>12</sup>

### 1.3 The "adequate" education--no private right

It is often said that the child should have a right to an "adequate" education. In theory, "adequate" might refer to a program which prepares the child to do the important things in life as well as anyone else. In practice the adequate is usually nothing more than the minimum amount the state is willing to guarantee; and this amount, plausibly, represents the public's valuation of the external benefits of public education.

Judging from the greater aid to poor districts in current foundation programs, perhaps we must conclude that the public does value equality to a degree. Political support for equalitarian values exists. But the public also loves inequality; at least so it may be judged from the great disparities

in local spending for which foundation programs do not adjust. In any event, again almost by definition, the "adequate" education provided by the legislative process affords nothing to the individual child that he would not get without a right. The majority will pay for the literacy of children who may become workers in the system; and literacy is a true benefit to these children. No court is needed to secure this literacy, however; indeed, a court will not recognize the right to remain illiterate. In other words, leaving matters entirely to the legislature--imposing no equity constraints on majority choice--we can expect enough education for most people to perform some useful function in society. By the same token, that is all we can expect. A small minority of children may be so little valued that even economic self-sufficiency is denied. As to the "get ahead" values of public education, there is scarce call for its equal distribution to anyone who cannot provide it on his own.

There is an unfortunate but seductive confusion embodied in the notion of an "adequate" education. When Thomas Jefferson speaks of the decent citizen prepared by a basic education to take his place in society, it is easy to imagine the citizen prepared to compete for an equal place. With some thought, it seems more logical to think of him kept in his place.

#### (2) The Substance of the Right Is to Human Capital

The existence and basis of any right to equality of education resources has not been established by the Supreme Court. Rodriquez<sup>13</sup> will determine that question. For the moment the lower and state court opinions and the arguments presented to the Supreme Court in Rodriquez must be relied upon.

For purposes of the distinctions in this paper, the basic character of the right is reasonably clear, however. Human capital formed, the future of the child himself, is at issue. Constitutional doctrine may require that we

focus on selected aspects of human capital, such as political efficacy; but, clearly, the shaping and equipping of the child for life is what concerns the Court about the distribution of public education.

In now famous language the Court in Brown v. Board of Education<sup>14</sup> said:

Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms.<sup>15</sup>

In Wisconsin v. Yoder,<sup>16</sup> the Court considered the power of the state to represent the best interests of the child against the wishes of the child's parents if necessary. Part of this question was a determination of what the child's interests in public education are. This is the way Justice White (jointed by Stewart and Brennan) described the interest in his concurring opinion:

In the present case, the State is not concerned with the maintenance of an educational system as an end in itself, it is rather attempting to nurture and develop the human potential of its children, whether Amish or non-Amish: to expand their knowledge, broaden their sensibilities, kindle their imagination, foster a spirit of free inquiry, and increase their human understanding and tolerance. It is possible that most Amish children will wish to continue living the rural life of their parents, in which case their training at home will adequately equip them for their future role. Others, however, may wish to become nuclear physicists, ballet dancers, computer programmers, or historians, and for these occupations, formal training will be necessary. There is evidence in the record that many children desert the Amish faith when they come of age. A State has a legitimate interest not only in seeking to develop the latent talents of its children but in seeking to prepare them for the life style which they may later choose or at least to provide them with an option other than the life they have led in the past. In the circumstances of this case, although the question

is close, I am unable to say that the State has demonstrated that Amish children who leave school in the eighth grade will be intellectually stultified or unable to acquire new academic skills later. The statutory minimum school attendance age set by the State is, after all, only 16.<sup>17</sup>

In Yoder, the Court had to balance an extra few units of public education against alternative training and religious values asserted by the family. In Rodriguez, there is nothing to balance; families are demanding equal ability to obtain the kind of quality public education which the state has decided to offer only some of its citizens. On account of this distinction, the decision in Yoder that the state may require only a "minimum" education does not necessarily control the question in Rodriguez of the bases upon which the state is entitled to deny benefits of more than a minimum.

### (3) Fiscal Neutrality Removes Obstacles to Human Capital Formation within the Constraints of the Present System

If the child has a right to the private benefits of his future, it might be asked why the state is not required simply to give every child an equal education. In particular, why is the Rodriguez complaint directed only at those variations in expenditure which are caused by wealth? A non-wealth solution might be recommended by an economist as a way of curing existing imperfections in the human capital market given that (a) direct borrowing on one's future remains difficult (or impossible for many individuals), and (b) the fiscal responsibility of school districts is retained. The idea of making available to all districts the same amount of resources (tax base) may be the closest we can come, given the constraints just mentioned, to allowing every child the equal opportunity to invest in his future. A fiscally neutral voucher system with a self-tax, would come even closer to the formation of the needed capital market, but would entail removal of fiscal responsibility from the school districts. Of course, the

main impact of the case is to remove differentials in the present ability of parents of children to invest in the children's education. There may still be substantial underinvestment because the source of payment for the investment is the income of the parents rather than the future income of the child.

In other words, Rodriquez approves the basic free market principle which declines to governmentally establish the value of future income to a particular child, what combination of investments is most efficient, and so on. If private benefits are what the case is all about, the recipient should be free to value the benefits. On the other hand, because the weakness of the free market approach in this context is also apparent, it is easy to see why people would prefer an equal spending solution. That the parent rather than the child is the purchaser, indeed, that nonschool-using taxpayers greatly outnumber their opposites, leads some to argue that the state should make the decisions centrally. It is argued that at least by central decision, the extreme bad decisions of persons who are not interested in the future of the child at all can be avoided.

(4) Fiscal Neutrality Is Required Despite Doubts That Education Produces Human Capital Efficiently

For the last decade or so, the importance of education in producing human capital has been questioned. Although it would be foolish to terminate educational spending now on the basis of a few research efforts, it is logical to ask what the effect of these newly raised doubts should be on fiscal neutrality. Obviously, the unique equity constraint of fiscal neutrality depends upon education being in some sense different from other government services and would not make sense imposed on the activity of babysitting (and whatever else the school system is doing besides forming human capital).

4.1 Poor districts cannot be denied fiscal neutrality on the ground that higher spending is wasteful

One way for the states to justify existing systems of school finance is to argue that since doubts regarding the efficacy of education are particularly great in the higher levels of spending, districts should not be subsidized at these levels. It is true that above the foundation level districts must use their own funds; and so, it might be argued, they bear the risk of their own waste. Such an argument might well be persuasive as applied even to other fundamental rights, like voting. Imagine that elections are financed out of local wealth. Following Serrano, we could argue that "the quality of voting may not be a function of local wealth." (In fact because elections are relatively inexpensive compared to education, it is unlikely that a strong correlation would be found between local wealth and expenditures on voting; but assume that such a pattern were found.) Very possibly, the state could argue that above a certain expenditure, perhaps above the lowest expenditure in the state, no more "voting" was produced by the extra spending. There could be several interrelated reasons why such a position might be plausible. There is a plausible reason why localities might spend money on elections other than the production of superior voting opportunities, namely, sheer comfort. Two voting booths on a block might be erected to save local residents 100 yards of walking and two minutes of waiting. How can this quantum be characterized as "comfort" when, no doubt, a few more people are encouraged to vote by the convenience? Principally, it is because we have some confidence in a direct measure of "voting opportunity": if a person need walk only 200 yards and wait only four minutes, a judge could well conclude that any decline in voting associated with this obstacle was due to lack of sufficient desire to vote. The state doesn't

have to bring a voting machine into your living room just because they do it that way in West Palm Beach. According to present knowledge, this whole set of premises is inapplicable to education, however. First of all, some educational inputs are scarce; and, especially within particular areas and strata of schools, there is evidence that money is used to compete for these inputs (here the reference is mainly to quality teachers). Second, there is good reason to believe that more education can be produced almost indefinitely into the higher spending ranges because of the enormous capacity of the mind, and the great variety of educational experiences that can be presented to various groups of students. Availability of a tutor in Russian for three students is not at all a "comfort" in the same sense as a voting booth in the living room. Third, to some extent, quality education is intrinsically relative: the ability to exercise political power may depend more upon how much better you are educated than on how adequately you are educated. This may certainly be true of job opportunities (think of a school establishing a reputation as a "quality shop" over a long period of time); and the state may not be allowed, constitutionally, to in effect guarantee better jobs to those of its children who live in wealthier districts. Thus, because it is difficult to specify those educational inputs which produce equal opportunity, it is logical to fall back a step and give equal resources to localities so that no district is handicapped or privileged in its ability to compete for and choose among educational inputs. Fiscal neutrality may be regarded as a "fiscal constitution" which allocates the inevitable uncertainties of finding the effectiveness of education in an unbiased manner.

#### 4.2 The state could eliminate or greatly reduce education without offending fiscal neutrality

The state might decide in the future that education is altogether a waste of money for the production of human capital. At that point, it would

be appropriate to remove the constraint of fiscal neutrality; and, what is important here, it would be easy to do so. If the public came to regard the public "schools" solely as child-care centers, that fact would be apparent in a multitude of ways that a court could recognize. Employees with master's degrees in science would not necessarily be paid more than other employees; there would be no "ability" tests, language labs or learning machines; the "education" profession would wither away. Some activities previously thought education might be retained as recreations, but the shift of interpretation would be obvious. What seems so fantastic about this scenario is that society would abandon the activity of "training" or "educating" its children; yet until such fantasy becomes commonplace, the idea that education is not an efficient means of producing human capital is strictly academic. The Court does not impose equity limitations on activities it deems fundamental, but rather on those so regarded by the political process (the Court itself probably will have faith in education as long as a majority of the people do).

#### CONCLUSION

Some may find themselves asking how "constraints" like fiscal neutrality are imposed on the political process. Those forces which have produced the present system should be able to withstand the action of a court, particularly in a case like Rodriguez which affects so many people on a continuing basis. The counter-majoritarian power and authority of courts is an old question about which we can speculate anew if Rodriguez is affirmed and implemented. There are many reasons why the case will probably stick. Judging from the widespread support announced for the Serrano decision, we can infer that the political equilibrium which supports the present system is delicate.

Perhaps the action of the Court will only hasten the inevitable--considerably, however! (Even a delicate equilibrium might perpetuate existing systems for a century). New political support may be created by a decision, as was the case, possibly, in reapportionment. Relatively powerful people--elites--may throw their support behind a decision. The Court may also be in contact with longer-range utilitarian values held by most people, so that broad support for the decision will emerge in the long run. Courts may also have "eccentricity points," or legitimacy, which may entitle them to some "bad" decisions (and it may be difficult to overturn a bad decision without destroying the usefulness of the courts to make good ones). Ultimately, it is true that the Court, and its decisions, require political support. Hence, the "constraints" of justice ultimately are self-imposed.

NOTES

<sup>1</sup>5 Cal. 3d 584, 487 P. 2d 1241 (1971). A number of other cases have endorsed the principle, and lawsuits are pending in the great majority of states. For a not-quite-up-to-date summary, see Note, A Statistical Analysis of the School Finance Decisions: On Winning Battles and Losing Wars, 81 Yale Law Journal nn. 1 and 3, pp. 1303 and 1304 (1972).

<sup>2</sup>See for example Richard A. Musgrave, The Theory of Public Finance (New York: McGraw Hill, 1959), pp. 140-159.

<sup>3</sup>A good exposition of this efficiency argument is in Robin Barlow, "Efficiency Aspects of Local School Finance," Journal of Political Economy 78, no. 5 (Sept./Oct., 1970):1028-1040.

<sup>4</sup>The school-race cases involved situations where the excluded minorities could receive some benefits in existing schools. E.g., Brown v. Board of Education, 347 U.S. 483 (1954); Sweatt v. Painter, 339 U.S. 629 (1950).

<sup>5</sup>The compulsory education laws provide a mean of guaranteeing the external benefits.

<sup>6</sup>207 U.S. 79 (1907).

<sup>7</sup>Id. at 87.

<sup>8</sup>406 U.S. 205 (1972).

<sup>9</sup>Id. at 221.

<sup>10</sup>See, for example, n. 14 at 226 and accompanying text, at 225-26.

<sup>11</sup>Frankfurter, J., concurring, in McCullum v. Board of Education, 33 U.S. 203, 231 (1948).

<sup>12</sup>Of course, the usefulness of education in power relationships theoretically could produce liabilities rather than benefits: assume use of the public schools to entrench in power a vicious, socially harmful ruling clique.

<sup>13</sup>337 F. Supp 280 (W.D. Tex. 1971), prob. juris. noted, 92 S. Ct. 2413 (1972).

<sup>14</sup>347 U.S. 483 (1954).

<sup>15</sup>Id. at 493.

<sup>16</sup>406 U.S. 205 (1972).

<sup>17</sup>Id. at 239-40.