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Introduction

Just over a century ago, the first bill was introduced in Congress to provide federal general aid for elementary and secondary education. The centennial of this event was not commemorated in Congress, no doubt due to the fact that this bill—like every subsequent federal general aid bill—met defeat in the legislative process.

Today, however, discussion of the need for substantial non-categorical federal aid for education seems to be on the increase. This is due primarily to three facts: the increasing cost of education and the resulting strains on local real estate taxes and state budgets; the *Serrano* decision and the drive to equalize expenditures among school districts; and the Administration's interest in a proposal for massive federal aid to education in the form of real estate tax relief.

The question to be asked today is whether all this activity is simply another passing episode in the century-long debate over the proper role of the Federal Government in education, or is it indicative that the time is ripe for a fundamental change in the manner in which we finance our schools, with the Federal Government assuming a much greater share of the burden?

This article does not present a definite conclusion in answer to this question. Given the vagaries of politics and the legislative process, and given the history of the fate of similar proposals in the past, that attempt would be foolhardy. Rather, this article will explore several of the principal factors which will be involved in the congressional consideration of the issue of federal general aid during the 93rd Congress. Since my responsibilities are with the House Committee on Education and Labor, my perspective is naturally from that point in the legislative process.

Principal Factors

The best manner to gain an overview of the prospects for the passage of legislation to provide federal general aid is through a discussion of six

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principal factors which will greatly influence the legislative consideration of this idea. The first three of these factors have a long history going back the full century that federal general aid has been under consideration by Congress. Largely because of the failure to resolve the conflicts surrounding these three factors, every general aid bill since 1870 has been defeated.

These three persistent factors are: (1) the problems related to guaranteeing civil rights for minorities; (2) the question of the participation of private school children in any such program; and (3) concern about federal control of education. The three newer factors affecting the prospects for this type of legislation are: (1) the just-evolving problems associated with the equalization of state and local resources for education; (2) concerns that unrestricted general aid will diminish support for present federal categorical programs, especially Title I of the Elementary and Secondary Education Act; and (3) the issue of whether there ought to be a new federal revenue source to fund such a general aid program.

Although these six factors are not totally inclusive of all considerations affecting the prospects for federal general aid, they do embody or touch upon almost all of the considerations which will ultimately determine the fate of this type of legislation. Even though these factors have many aspects —social, economic, religious, and, of course, educational—they will be viewed for purposes of this article through the prism of their effects on the legislative process.

Civil Rights

The most difficult obstacle for proponents of federal general aid to overcome will arise from disputes concerning civil rights. From 1872, when the first amendment was accepted to a general aid bill condoning separate school systems for black and white children,[1] through the Powell amendments of the 1950's and 1960's banning aid to segregated schools,[2] the issue of civil rights has haunted and frequently completely frustrated efforts to provide federal general aid. In fact, much of the concern about federal control of education within the last eighteen years has really been a fear that substantial federal aid would mean forced integration of the schools.

Today in Congress the issue of civil rights is still very much alive. No major bill authorizing aid to education has passed Congress within the last three years without having been embroiled in a dispute over civil rights-related amendments at some stage in its passage. The most recent example of this was the Education Amendments of 1972.[3]

That bill, which originally was limited in scope to higher education

[1] Lee, The Struggle for Federal Aid: First Phase 56–87 (1949).

[2] Munger & Fenno, National Politics and Federal Aid to Education 14, 44 (1962). *See also* Cong. Q. Weekly Rep. Vol. XVIII, No. 22, 919–921 (May 26, 1960).

[3] Pub. L. No. 92-318, 86 Stat. 235 (1972).

programs, became the object of anti-busing floor amendments in the House of Representatives and also in the Senate during the period from November 1971 to March 1972. Then, after the House took the highly unusual step of instructing its conferees twice to insist on the more restrictive House amendments, the Senate-House conference committee had to meet for more than two months, including one all-night session, to reach final agreement on the entire bill.[4] And since the House conferees had accepted two of the three milder Senate anti-busing amendments, there was real doubt as to whether the House would approve the conference report. It finally did so by a narrow margin, but in the process the groundwork was laid for later passage by the House of permanent legislation to restrict the use of busing in school integration.

Since barely unsuccessful amendments have a way of reappearing in later legislation in one form or another, it may be useful to review the anti-busing amendments which were attached to the Education Amendments of 1972. The most important of the three was the "Broomfield amendment," [5] which, as accepted by the House, provided that when a federal court required the transfer or busing of students for the purpose of achieving a balance among students on the basis of race, sex, religion, or socio-economic status, the effectiveness of such order would be postponed until all appeals had been exhausted or, in the event no appeals were taken, until such time for appeals had been exhausted. An identical provision was contained in the Senate bill, but its applicability was limited solely to court orders requiring the busing of students between school districts or requiring the consolidation of two or more school districts.[6] The Senate amendment was also limited in that it provided for expiration of the effectiveness of the amendment on June 30, 1973, whereas the House version was permanent legislation. The conference committee accepted the more extensive House version of the amendment, but added an expiration date of January 1, 1974.[7] Subsequently, the United States Supreme Court severely restricted the effectiveness of this amendment by interpreting its provisions to apply only to court orders in which a racial, sexual, religious, or socio-economic balance among students has been specifically ordered.[8] And since such balances are almost never explicitly ordered (rather the elimination of segregated school systems or discriminatory practices is ordered) the amendment was thereby rendered almost totally ineffective in restricting busing.

[4] Although the length of the conference was primarily due to the extraordinary scope and complexity of the legislation, the presence of the anti-busing amendments in the legislation certainly delayed the conclusion of the conference. The final 15-hour session of the conference, the most difficult of the meetings, was almost exclusively devoted to the busing issue.

[5] S. 659 § 1701, as passed by the House, named after its author, Rep. William S. Broomfield (R-Mich.).

[6] S. 659 § 802(c), as passed by the Senate.

[7] Pub. L. No. 92-318, § 803, 86 Stat. 372 (1972).

[8] Drummond v. Acree, U.S. S.Ct. No. A-250, Mr. Justice Powell, Circuit Justice (1972).

The second amendment adopted by the House was the "Ashbrook amendment," [9] providing that no federal funds under any program administered by the U.S. Commissioner of Education could be used for the busing of students or teachers, or for the purchase of equipment for such busing, in order to overcome racial imbalance or carry out a plan of racial desegregation. The Senate amendment permitted local school districts to use federal funds for busing when they voluntarily requested such use in writing. The Senate also added a provision stating that, regardless of such a local request, no funds could be available for busing when the time or distance of travel was so great as to risk the health of the child or to impinge significantly on the educational process.[10] The conference committee adopted the Senate version of the amendment and added a further limitation that no federal funds could be available for busing when the educational opportunities available at the school to which it was proposed that a student be bused were substantially inferior to those offered at the school to which the student would otherwise have been assigned.[11] This amendment, in effect, allows a school district to use federal funds for busing when it voluntarily requests such use and when the federal law authorizing the program permits such use. But the use of federal funds for any busing is forbidden under the three conditions mentioned above. These restrictions on busing are taken almost verbatim from the Supreme Court's decision in *Swann* v. *Charlotte-Mecklenburg*.[12]

The last major amendment is the "Green amendment," [13] which provided, as originally accepted by the House, that no federal employee could urge, persuade, induce, or require any school district or private non-profit organization to use any state or local resources for busing or to condition the receipt of federal funds upon any action by state or local officials which led to busing. The Senate modified this amendment by allowing such activities when they were constitutionally required. The Senate also added to these prohibitions the same conditions concerning the health of the children, educational impingement, and inferiority of schooling as mentioned above.[14] The conference committee accepted the Senate amendment *in toto*.[15] This amendment, in effect, allows federal officials, in enforcing the Civil Rights Act of 1964, to require busing when it is permissible under Supreme Court rulings.

Since the final law contained weakened forms of the House-originated

[9] The first sentence of § 408 of the General Education Provisions Act, as added by § 1703(b) of S. 659, as passed by the House, named after its author, Rep. John M. Ashbrook (R-Ohio).

[10] S. 659 § 802(a), as passed by the Senate.

[11] Pub. L. No. 92-318, § 802(a), 86 Stat. 371 (1972).

[12] 402 U. S. 1 (1971).

[13] The second sentence of § 408 of the General Education Provisions Act, as added by § 1703 (b) of S. 659, as passed by the House, named after its author, Rep. Edith Green (D-Ore.).

[14] S. 659 § 802(b), as passed by the Senate.

[15] Pub. L. No. 92-318, § 802(b), 86 Stat. 372 (1972).

anti-busing amendments, and because additional political pressures arose against busing, the House proceeded last August to pass the most restrictive anti-busing legislation ever accepted by either House of Congress. This bill, the Equal Educational Opportunities Act of 1972,[16] restricted the powers of federal courts and agencies to require busing by limiting this remedy to the last possible remedy in any school integration case and by prohibiting the busing of any schoolchild beyond his neighborhood school or the next closest school providing the appropriate grade level and type of instruction needed. This Act also required that previous court orders must be reopened in order to conform with all the restrictions contained in the Act. In addition, the Act forbade federal courts and agencies from ignoring or altering school district lines unless they had been established for the purpose, and had the effect, of segregating students. The Act also shifted $500 million of the annual authorization of appropriations under the Emergency School Aid Act from assisting integrating school districts to compensatory education programs in schools with high proportions of low-income students. This bill, which was overwhelmingly approved by the House (282–102),[17] was defeated in the Senate by a filibuster during the last two weeks of the 92nd Congress.[18]

It can be seen from this discussion that emotions still run very strong in Congress over school integration. Therefore, unless attention is focused on another bill dealing exclusively with school integration, such as a revised Equal Educational Opportunities Act, any major education bill, including a federal general aid bill, will in all likelihood face the prospect of being embroiled in disputes, possibly fatal, over anti-busing amendments during the 93rd Congress.

In addition to these extraneous disputes over busing, there may be some problems arising from amendments to a general aid bill seeking to extend civil rights guarantees to programs funded with this aid. In considering these problems, it may be helpful to refer to the general revenue sharing bill which provides federal general aid to state and local governments for various broad purposes.[19]

Section 122 of that law provides:

> No person in the United States shall, on the ground of race, color, national origin, or sex, be excluded from participation in, be denied the benefits of,

[16] H.R. 13915, introduced on March 20, 1972, by Reps. McCulloch (R-Ohio), Quie (R-Minn.), and Gerald R. Ford (R-Mich.), 92d Cong., 2d Sess. The version voted on by the House contained modifications of the President's proposal made by Rep. Quie in H.R. 15299, which he introduced on June 1, 1972.

[17] 118 CONG. REC. H7884 (daily ed. Aug. 17, 1972, Part II).

[18] The Senate three times refused to vote cloture by votes of 45-37, 118 CONG. REC. S17319–20 (daily ed. Oct. 10, 1972); 49–39, 118 CONG. REC. S17429 (daily ed. Oct. 11, 1972); and 49–38, 118 CONG. REC. S17695 (daily ed. Oct. 12, 1972).

[19] The State and Local Fiscal Assistance Act of 1972, Pub. L. No. 92-512, 86 Stat. 919 (1972).

> or be subjected to discrimination under any program or activity funded in whole or in part with funds made available under (this Act).

This provision is a restatement of the prohibition versus discrimination contained in Title VI of the Civil Rights Act with the addition of "sex." Section 122 also authorizes the Secretary of the Treasury to follow the same procedures set out in Title VI for a termination of assistance to a non-complying grantee. New authority is granted, however, to refer a matter of non-compliance to the U.S. Attorney General, who is authorized to bring a civil action to secure compliance.

Although that section of the general revenue sharing law would seem on its face to provide adequate safeguards against discrimination, the U.S. Civil Rights Commission and other civil rights organizations contend that it may be ineffective in practice. Their principal point is that the major enforcement device—the Title VI cut-off of funds—is not workable when federal funds are intermingled with state and local funds, as can easily occur in the general revenue sharing program.

As the Civil Rights Commission has stated: "What programs or activities under a general revenue sharing program would be subject to the nondiscrimination requirement and, therefore, also subject to the sanction of the cut-off?" [20] For instance, if a state legislature decides to place its share of the general revenue sharing funds in an account with the state's regular general revenues, it would be impossible to determine which activities or programs were funded in full or in part with the federal funds. So if an employee of a partially state-subsidized soft-drink concession at a state fair proves one act of racial discrimination against his employer, does that mean that the entire state's grant of general revenue sharing funds is cut off?

The Civil Rights Commission suggested that the best way to safeguard against rendering the cut-off procedure a practical nullity would be to forbid the commingling of revenue-sharing funds with state funds.[21] The only problem with that recommendation is that it is contrary to the concept

[20] U.S. Commission on Civil Rights, Revenue Sharing Program—Minimum Civil Rights Requirements (position paper circulated among Members of Congress, 1972).

[21] The Civil Rights Commission made several other suggestions concerning the General Revenue Sharing Act which may surface in Congressional discussions of federal general aid. They included: (a) authorizing the U.S. Attorney General to institute litigation against a discriminating government; (b) authorizing the Secretary of the Treasury to issue judicially enforceable orders directing a state or local government to cease and desist from specific discriminatory practices; (c) providing criminal penalties for deliberate acts of discrimination by state and local officials; (d) authorizing private civil actions for intentional non-compliance with federal non-discriminatory requirements; (e) strengthening the entire federal civil rights enforcement effort; and (f) requiring affirmative action by state and local governments to eliminate past discrimination and encouraging passage of state and local non-discriminatory laws.

The Civil Rights Commission also recommended amending Title VII of the Civil Rights Act (prohibiting discrimination in employment) to cover state and local government employees. This suggestion was accepted by Congress in the Equal Employment Opportunities Act (Pub. L. No. 92-261, 86 Stat. 103 (1972)) and may assist in resolving this aspect of the conflict.

of general revenue sharing and carried to an extreme it would result in general revenue sharing becoming simply another federal categorical program.

The same conflict between Title VI applicability and enforcement exists in proposals for federal general aid to education. If the funds are not to be commingled with state and local funds, general aid may become just another categorical program; if general aid is commingled, Title VI enforcement may be impossible.

Of course, this problem raises the fundamental question of what type of aid is being provided in a federal general aid program. Can the funds be indiscriminately mixed with state and local funds, or are they to be used for separate identifiable programs? An answer to this question would at least clarify the civil rights issue.

In conclusion, it can safely be assumed that any federal general aid bill under consideration in the 93rd Congress will face conflicts over civil rights, most intensely in the form of antibusing amendments. Unless these conflicts are resolved more conclusively than they were during the 92nd Congress, a federal general aid bill may be impossible to enact during the next two years.

Private School Children

Another issue with a history going back the full century that federal general aid has been discussed in Congress is the question of whether children attending private schools ought to participate in any such federal program. This issue, if unresolved, shares with the civil rights issue the potential for totally frustrating all efforts at bringing about federal general aid. The most recent instance of this frustration was in 1961 when the Kennedy Administration's bill providing funds for public school construction and teachers' salaries was defeated in the House Rules Committee by unsatisfied advocates of aid to private schools. This defeat, which occurred after successful Senate passage and House committee acceptance of this legislation, effectively squelched for a decade all realistic discussion of federal general aid.[22]

Within the past few years, however, there has been greatly renewed interest at both the state and federal levels in bringing substantial assistance to private education. This is undoubtedly due to the fact that the closings of hundreds of private schools since 1965 have resulted in a 23 percent decline in private school enrollment. Since these schools are heavily concentrated in urban areas and especially in the largest cities, with two of every five schoolchildren in the Nation's twenty largest cities attending private schools, the already financially imperiled urban public schools are

[22] Cong. Q. Weekly Rep. Vol. XIX, No. 35, 1506 (Sept. 1, 1961).

facing enormous additional fiscal pressure. The President's Panel on Nonpublic Education estimates that by 1975 private school enrollment will decline another 25 percent over the enrollments for 1970 and that enrollments in Catholic schools may possibly decline a total of 65 percent for the period 1965–1980.[23] In response to these facts, numerous states have enacted laws giving substantial new assistance to private schools and private schoolchildren, and interest has been renewed at the federal level in providing additional assistance.

There are basically two questions to be asked regarding the federal role in this area: first, whether the Federal Government should seek to aid these schools and these children; and if so, then what forms should such aid assume. Since the first question will be decided on general policy considerations, I will limit my discussion to the question of the possible forms of such federal aid.

Any discussion of governmental aid to private schools and private school children must begin with a reference to the question of constitutionality. The most important recent U. S. Supreme Court cases dealing with this issue are the *Allen*, the *Walz*, the *Lemon*, and the *Tilton* decisions.

In *Board of Education* v. *Allen*,[24] the Supreme Court upheld the constitutionality of a New York statute which required local school authorities to lend textbooks free of charge to all students in grades seven through twelve whether they attended public or private schools. The Court applied a dual test: whether the law had a secular legislative purpose, and whether the primary effect neither advocated or inhibited religion. Then the Court concluded that since the law's purpose was to benefit all children regardless of the type of school they attended and since only textbooks approved by public school authorities could be loaned the law had a secular purpose and was completely neutral with respect to religion.

In *Walz* v. *Tax Commission*,[25] the Supreme Court upheld the constitutionality of a New York statute which granted tax exemptions to church properties. The Court, while emphasizing the fact that tax exemptions for churches have been part of American life since the beginning of our history as a nation, applied the test of whether the law led to an excessive governmental entanglement with religion. The Court concluded that the granting of a tax exemption was much less likely to result in excessive entanglement than would taxation of church property.

In *Lemon* v. *Kurtzman* and *Earley* v. *DiCenso*,[26] the Court overturned as unconstitutional a Pennsylvania statute providing for the purchase of secular services in private schools and a Rhode Island statute providing for

[23] THE PRESIDENT'S PANEL ON NONPUBLIC EDUCATION, NONPUBLIC EDUCATION AND THE PUBLIC GOOD 17–18 (1972).

[24] 392 U.S. 236 (1968).

[25] 397 U.S. 664 (1970).

[26] 403 U.S. 602 (1971).

a salary supplement to teachers in private schools. The Court stated the test of constitutionality as follows:

> Every analysis in this area must begin with consideration of the cumulative criteria developed by the Court over many years. Three such tests may be gleaned from our cases. First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion, *Board of Education v. Allen*, 392 U. S. 236, 243 (1968); finally, the statute must not foster 'an excessive government entanglement with religion.' *Walz, supra*, at 674.[27]

The Court found that, although the purpose of the Pennsylvania and Rhode Island statutes was legitimately secular, the programs authorized by the statutes led to an excessive entanglement between government and religion and were, therefore, unconstitutional. The Court recognized that a total separation between church and state was not possible but rather there had to exist "a blurred, indistinct and variable barrier depending on all the circumstances of a particular relationship." But the Court in *Lemon* found that the Catholic parochial schools involved substantial religious activity and purpose and therefore the states had to provide for careful governmental controls in order to insure that the state aid supported only secular activity. Thereby arose, however, what the Court considered the unconstitutional entanglements between church and state. The Court was particularly impressed by the impressionable ages of the parochial school pupils (and therefore a presumed susceptibility to religious teachings) and also by the possibility that a teacher under religious control and discipline could inject "some aspect of faith or morals in secular subjects."

The Court did state, however, in the same opinion:

> Our decisions from *Everson* to *Allen* have permitted the States to provide church-related schools with secular, neutral, or non-ideological services, facilities, or materials. Bus transportation, school lunches, public health services, and secular textbooks supplied in common to all students were not thought to offend the Establishment Clause.[28]

In *Tilton* v. *Richardson*,[29] decided on the same day as *Lemon*, the Court upheld the constitutionality of the Higher Education Facilities Act of 1963 which provides federal construction grants for college and university facilities excluding any facility used for sectarian instruction or as a place of religious worship. The Court applied its three-pronged test from *Lemon* and held that the Act did not violate that test even though some benefits accrued under the Act to religious institutions. The Court emphasized the predominantly secular character of the religiously affiliated private colleges

[27] *Id.* at 612.
[28] *Id.* at 616.
[29] 403 U.S. 672 (1971).

and the one-time, single-purpose nature of the federal construction grants to these institutions. The Court did, however, strike down as unconstitutional a provision in the Act which allowed buildings constructed with these funds to be used for whatever purpose the institution desired after twenty years and instead required a perpetual nonreligious use.

Although the *Lemon* and *Tilton* decisions are the most definite rulings to date on the question of governmental aid to private schools, the issue is far from resolved. Some experts have contended that the Court has in effect decided that aid to private colleges and universities is constitutional, while aid to private elementary and secondary schools is unconstitutional. Exponents of this opinion will generally leave open the possibility of some unusual type of limited constitutional aid to elementary and secondary education and the possibility of excessively broad and therefore unconstitutional aid to private higher education. But the thrust of their opinion seems to be buttressed by the dilemma pointed out by Justice White in his dissenting opinion in *Lemon*. He stated:

> The Court . . . creates an insoluble paradox for the State and the parochial schools. The State cannot finance secular instruction if it permits religion to be taught in the same classroom; but if it exacts a promise that religion not be so taught—a promise the school and its teachers are quite willing and on this record able to give—and enforces it, it is then entangled in the 'no entanglement' aspect of the Court's Establishment Clause jurisprudence.[30]

Other experts contend, however, that the question is still open and that it is simply a matter of time and experimentation before the states discover the proper constitutional format for massive aid to private education. Many of these proponents of aid to private education have recently focused their efforts on tax credits for tuition, tuition reimbursements, and tuition scholarships.

Even though barring the very substantial, broad-purpose aid to private elementary and secondary education which was provided by the Pennsylvania and Rhode Island statutes, the Supreme Court has allowed, as it pointed out itself in *Lemon*, the "child benefit" type of aid. This aid is usually auxiliary to the basic educational program and takes the form of payments for bus transportation, school lunches, public health services, secular textbooks and the like. This aid is allowed on the theory that it is available to every student in the state regardless of attendance at public or private schools and that it is of benefit to the child attending the private school and not directly of benefit to the private school.

Congress adopted the "child benefit" theory in 1965 when it provided in the Elementary and Secondary Education Act for the participation of educationally deprived children attending private schools in public school

[30] 403 U.S. 602, 668.

attendance areas where Title I compensatory education programs were being funded.[31]

This principle has also been advocated for federal general aid legislation, most particularly in bills introduced by Congressman William D. Ford and Senators Walter Mondale and Adlai Stevenson. The provision which their bills share in common would earmark a pro-rata share of federal general aid funds for secular, neutral, or non-ideological services, materials, and equipment for children enrolled in private schools and would assure that the services, materials, and equipment were provided under public school control and supervision. This provision adopts verbatim the Supreme Court's phrasing of the "child benefit" principle in *Lemon*.

The proponents of the Ford provision[32] contend that it meets the tripartite test of *Lemon*. The legislative purpose of these general aid bills is to aid the education of all children whether they attend public or private schools. The primary effect of the provision would not be to advance or inhibit religion, at least if the provision led to the availability of bus transportation, secular textbooks, and the other auxiliary services which have been held as constitutional by the Court in *Everson*,[33] *Allen*, etc. And any

[31] Elementary and Secondary Education Act of 1965 § 141(a)(2), 79 Stat. 30 (1965), as amended, 20 U.S.C. 241e (1970).

[32] This provision is called the Ford provision since it originated in Rep. William D. Ford's bill, H.R. 12367. It states that the local public school district receiving federal general aid funds must give assurances to the federal government that:

(A)(i) to the extent consistent with the number of children in the school district of such agency who are enrolled in private nonprofit elementary and secondary schools, such agency, after consultation with the appropriate private school officials, will provide for the benefit of such children in such schools secular, neutral, or nonideological services, materials, and equipment including such facilities as necessary for their provision, consistent with subparagraph (B) of this section, or, if such are not feasible or necessary in one or more of such private schools as determined by the local educational agency after consultation with the appropriate private school officials, such other arrangements, as dual enrollments, which will assure adequate participation of such children, and (ii) from the funds received by such agency under the provisions of section 4(a)(1), such agency will expend for the purposes of fulfilling the requirements of this paragraph, an amount which bears the same ratio to the total amount received under section 4(a)(1) as the number of children enrolled in private nonprofit schools who are counted for purposes of section (4)(a)(1)(A) and (B) bears to the total number of such children enrolled in elementary and secondary schools in the school district of such agency;

(B)(i) the control of funds provided under this section and title to property acquired therewith shall be in a public agency for the uses and purposes provided in this section, and that a public agency will administer such funds and property; (ii) the provision of services pursuant to subparagraph (A) shall be provided by employees of such public agency or through contract by such public agency with a person, an association, agency, or corporation who or which in the provision of such services, is independent of such private school and any religious organization, and such employment or contract shall be under the control and supervision of such public agency; (iii) the funds provided under this section shall not be commingled with State or local funds; and (iv) federal funds made available under this section will be so used as to supplement and, to the extent possible, increase the level of funds that would, in the absence of such federal funds, be made available from non-federal sources for the education of pupils participating in programs and projects assisted under this section.

[33] Everson v. Board of Education, 330 U.S. 1 (1947).

entanglement between church and state would seem to be minimized by the requirement for public school control and supervision although this determination may have to be made on the basis of all the facts in a particular situation.

The "child benefit" approach for including private schoolchildren in any federal general aid bill has been gaining considerable support. The President's Commission on School Finance endorsed this principle in its final report in April 1972. It recommended that "local, State and Federal funds be used to provide, where constitutionally permissible, public benefits for nonpublic schoolchildren, e.g., nutritional services such as breakfast and lunch, health services and examinations, transportation to and from school, loans of publicly owned textbooks and library resources, psychological testing, therapeutic and remedial services and other allowable 'child benefit' services." [34]

Another, newer approach to providing assistance to private education is contained in bills creating a federal income tax credit for tuition paid at private nonprofit schools. This legislation was endorsed by both President Nixon and Senator McGovern in the recent presidential campaign and has been recommended by the President's Panel on Nonpublic Schools.[35] The House Committee on Ways and Means accepted a version of this legislation at the end of the 92nd Congress in October, but due to the crush of other legislative business that bill never reached the House floor for final action. The bill, as adopted by the Ways and Means Committee, provided for an income tax credit of 50 percent of the tuition paid at private nonprofit schools, but not to exceed $200 per child and with a progressively reduced credit for families with incomes over $18,000 a year.

Many advocates of aid to private education contend that a tax credit is the most likely type of legislation to be upheld as constitutional by the Supreme Court. They assert that the entanglement between church and state would be absolutely minimal, similar to the relationship upheld as constitutional in *Walz*.

[34] THE PRESIDENT'S COMMISSION ON SCHOOL FINANCE, SCHOOLS, PEOPLE, AND MONEY: THE NEED FOR EDUCATIONAL REFORM xvi (1972).

[35] President's Panel on Nonpublic Schools, *supra* note 23. In addition to the traditional "child benefit" approach and the more recent tax credit legislation, the President's Panel on Nonpublic Education in its final report of April 1972, advocated the following three newer means of providing federal aid to private education: (1) a Federal Assistance Program for the urban poor through a four-pronged approach which includes: (a) reimbursement allowances to welfare families for expenses connected with sending their children to nonpublic schools as well as supplemental income payments to the working poor for this same purpose, (b) experimentation with voucher plans for parents of inner-city school children, (c) strict enforcement of the Elementary and Secondary School Education Act so all children receive the full benefits to which they are entitled, and (d) adoption of a Commission on School Finance recommendation for an urban education assistance program to provide interim emergency funds on a matching basis to large central-city public and non-public schools; (2) a federal construction loan program; and (3) tuition reimbursements on a per capita allocation formula in any future federal aid program for education.

But some experts contend that the question of constitutionality may be decided to a large extent on the form which the legislation assumes. For instance, if the legislation limits the availability of tax credits to parents of private school children, and if the legislation does not provide for any aid to public education, it may run afoul of the *Lemon* test requiring neutrality as concerns the advancement or inhibition of religion. The bill may be viewed as special legislation to assist religiously-affiliated schools. Of note here is the Court's rephrasing in *Tilton* of its dictum in *Lemon* regarding neutral services. It said in *Tilton* that it had allowed "church-related schools to receive governmental aid in the form of secular, neutral, or non-ideological services, facilities, or materials *that are supplied to all students regardless of the affiliation of the school which they attend.*" [36] (Emphasis added.) Although this dictum relates to the "child benefit" services, it may indicate a concern on the part of the Court that the governmental programs aiding religiously-affiliated schools must be written in the form of aid to a broad category, in this case children attending public schools as well as children attending private schools (or their parents).[37]

The legislative and judicial fate of the tax credit approach is very important for the prospects of federal general aid. If a tax credit bill is enacted by Congress and upheld as constitutional by the courts, it will minimize efforts to have a federal general aid provide more extensive aid to private education than would be provided in the "child benefit" approach. If, however, tax credits are not enacted or are declared unconstitutional by the courts, then advocates of aid to private education may focus on a general aid bill as the only means to secure substantial assistance for their schools. Such a course of events could imperil federal general aid since it would then become embroiled in an intense struggle between advocates and opponents of aid to private education.

Federal Control of Education

President Nixon in his State of the Union Message of January 20, 1972, proposed a program of massive federal assistance for the purpose of real estate tax relief. After describing his proposal, the President stated: "(My) recommendations will be . . . rooted in one fundamental principle with

[36] 403 U.S. 672, 687.

[37] The tax credit approach may also be imperiled by the Supreme Court's recent action in affirming Essex v. Wolman (October 1972). That decision, which was handed down by a three-judge panel of the U.S. District Court in Columbus, Ohio, held as unconstitutional an Ohio statute providing a tuition reimbursement of up to $100 per child for parents enrolling children in private schools. Although there are dissimilarities between the tuition reimbursement approach and the tax credit approach (*e.g.*, tuition reimbursements require an appropriation by the state legislature whereas tax credits simply mean loss of tax revenue), there is a possibility that the Supreme Court will view them as basically similar.

which there can be no compromise: local school boards must have control over local schools." [38]

A reference to belief in the principle that state and local governments must retain control over the public school system seems to be *de rigeur* in any public discussion of programs for substantial federal aid to elementary and secondary education.

Congress, in fact, for the past twenty-two years has felt compelled to insert as a standard provision in all major categorical federal aid to education laws a section prohibiting federal control of education. This provision states that no federal agency, officer, or employee shall exercise any direction or control over the curriculum, program of instruction, administration, personnel, or choice of textbooks of any educational institution, school, or school system.[39]

What exactly do these statements prohibiting federal control and affirming state and local responsibility for education mean? And how will this meaning affect the prospects for federal general aid?

Upon examination, these statements are found to mean many different things to many different people, but most would agree on the following explanation: constitutionally and historically the Federal Government has the right to exercise some responsibility in the field of education, and this exercise leads inevitably to some restrictions being placed on the actions of state and local administrators and educators. In other words, there is to a degree some federal "control" over education whenever the Federal Government provides funds for education.

For example, the Vocational Education Amendments of 1968 require that at least 25 percent of each state's basic federal grant for vocational education must be used for courses for the socially and economically disadvantaged.[40] Yet the standard provision forbidding any federal control of school administration is applicable to the Vocational Education Act. So Congress must not consider this requirement, which inevitably leads to some federal "control" over state and local administrators, as being in violation of the prohibition against federal control.

The prohibitions against federal control and the assertions of state and local supremacy in education are really directed against efforts to expand the federal control which comes with federal funds to such a degree that it imperils the traditional scheme of basic state and local responsibility for education.

But, unfortunately, once we have said this and then try to ascertain the exact degree of federal control which is permissible the area becomes fuzzy. This is true because of the simple fact that one man's "control" is another

[38] The State of the Union, H.R. Doc. No. 201, 92d Cong., 2d Sess. (1972).

[39] General Education Provisions Act § 432, 20 U.S.C. § 1232a (1970).

[40] Vocational Education Act of 1963 § 122(c)(1), 20 U.S.C.§ 1262 (1970).

man's "exercise of legitimate responsibility." For instance, a "conservative" Congressman or Senator might vote against an amendment requiring all colleges and universities to place students on their boards of trustees because that is federal control of education. At the same time, he might vote for an amendment denying the use of federal funds to local school districts which are freely applying for these funds to be used for operating entirely voluntary school busing programs because he feels that this support would be against the national interest. Similarly a "liberal" legislator might vote against an amendment denying federal funds to school districts which require sex education courses to be taught and at the same time vote for an amendment requiring that every college and university desiring federal funds must adopt a nationally prescribed accounting procedure for all its funds. "Control" obviously means different things to different people.

To be more specific about the contradictory aspects of "control," we need look no farther than the Elementary and Secondary Amendments of 1969.[41] That law made applicable to all programs administered by the U.S. Commissioner of Education the standard prohibition against federal control of education, while at the same time it amended Title I of the Elementary and Secondary Education Act to require that state and local school administrators must achieve "comparability" of state and local funds before they can receive federal Title I funds.[42] "Comparability" means that the level of expenditure per pupil of state and local funds in every Title I school must be at least equal to the level of expenditure of such funds in the non-Title I schools within the school district. Clearly this provision requires a degree of federal control over state and local funds and state and local administrators, but most of the Congressmen and Senators who voted for this provision must not have felt that it was violative of the prohibition against federal control which they were codifying in the same law to apply to most federal education programs.

Other recent instances of assertions of federal "control" result primarily from Congressional actions to bring about more accountability in education. These efforts have most often resulted in requirements for better data collection and for parental involvement in the administration of federal programs.[43]

[41] Pub. L. No. § 91-230, 84 Stat. 121 (1970).

[42] Pub. L. No. 91-230 § 141(a)(3), 84 Stat. 124 (1970), 20 U.S.C. § 241f (1970).

[43] Regarding better data collection, *see* § 123(c)(2) of S. 659, Calendar No. 576, 92d Cong., 2d Sess. Although passed by the Senate, it was deleted in the Senate-House conference committee. *See* Conf. Rept. No. 92-798, 92d Cong., 2d Sess. (1972). Regarding parental involvement, *see* § 425 of the General Education Provisions Act, 20 U.S.C. § 1231d (1970), which permits the U.S. Commissioner of Education to designate programs in which parents must participate. To date, the Commissioner has only designated programs under Title I of the Elementary and Secondary Education Act of 1965. *Also see* § 710(a) of the Emergency School Aid Act, 80 Stat. 362 (1972), which has the most extensive provision regarding parental participation which has been enacted to date.

In short, if there is to be a federal general aid program, there will be some restrictions placed on the uses of these funds. The proper focus for the debate is to ask which restrictions are necessary to carry out objectives which are conceived to be of national importance and which are potentially destructive of our traditional system of basic state and local responsibility for elementary and secondary education. What degree of "federal control" is proper for federal general aid?

We have already discussed two issues which may lead to some federal requirements concerning civil rights and the participation of private school children. The next section will show the types of requirements which may result from the recent concern with equalization. In addition to these there may be requirements directed at securing more accountability for federal funds and for educational achievement. These will be discussed briefly later.

Equalization

The factors which have been discussed so far—the civil rights disputes, the constitutionality of including private school children, and the fear of federal control of education—share the distinction of having been intrinsic elements of every congressional consideration of federal general aid legislation for the past 100 years. Therefore, they also share the virtue of familiarity to Congressmen and Senators even though they are tarnished by a lack of legislative and judicial agreement over how they can be resolved.

Three other factors important to this debate are of more recent origin, and therefore they have an unfamiliar and imprecise nature. The most important of these issues is the drive to achieve an equalization of educational expenditures from state and local sources among school districts within each state.

Although the facts documenting the enormous expenditure disparities between school districts have been available for years, attempts at eliminating these disparities did not take on critical importance for many people until the California Supreme Court handed down its decision in *Serrano* v. *Priest* on August 28, 1971.[44] The decision held that California's present method of financing its elementary and secondary schools was unconstitutional as a violation of the Fourteenth Amendment because it made "the quality of a child's education a function of the wealth of his parents and neighbors." The court ruled that henceforth in California the quality of a child's education, as measured simply in dollar terms, cannot depend on wealth, except on the wealth of the state taken as a whole.

In order to gain a better understanding of this decision, it may be helpful to refer to a fact situation in California cited by the State Supreme Court in its opinion. The Baldwin Park Unified School District has an assessed

[44] 89 Cal. Rptr. 345 (Cal. App. 1971).

property value per pupil of $3,706; and Beverly Hills, within the same county, has an assessed property value of $50,885. Baldwin Park taxes itself almost two and one-half times as heavily as Beverly Hills, yet it spends only $577 per pupil as compared to the $1,232 per pupil spent in Beverly Hills. This is due to the fact that the State of California has not only permitted the Beverly Hills school district to have this far greater property wealth but it has also failed to provide the Baldwin Park school district with sufficient State aid to compensate for its lack of property wealth.

The court ruled that California can no longer permit such great differences in wealth between school districts to result in such enormous variances in expenditure, but very significantly the court did not prescribe any substitute financing scheme for the State. Rather, the issue was left to the State legislature to resolve within the confines of the principle of the case, namely that the degree of wealth within a school district cannot be the major determinant of how much is spent to educate a child within that school district. More particularly, the court did not rule out some reliance upon the local real property tax, or require that an equal dollar amount be spent on each child, or require full State assumption of the cost of education, or abolish the practice of local school board control of education, or even require that an equitable tax system result from this revision of the State's scheme of school finance.

The *Serrano* decision was followed within a year by similar decisions in six other states, including *Rodriguez* v. *San Antonio* in Texas.[45] Since *Rodriguez* was a decision of a three-judge federal court, it was appealed directly to the U.S. Supreme Court. That Court has now heard arguments on the case (October 11, 1972) and may render a decision shortly. Since such a decision will obviously be of great importance for the prospects of federal general aid, the possible responses in Congress to the Supreme Court's decision in *Rodriguez* are of interest.

If the Supreme Court upholds the *Serrano* principle as set out in *Rodriguez*, most authorities on these lawsuits and most school finance experts expect the reaction of the states to be to seek a "leveling up" of their lower expenditure school districts to the range of spending of the higher expenditure districts (since presumably the richer school districts would not want their level of spending to be reduced to meet that of the poorer districts). If this occurs, it has been variously estimated that between $6 and $9 billion would be needed in additional revenue for the task—and this is apart from any state legislative or local school board efforts to reduce real estate taxes from their present levels.[46] Since many states contend that they are at the practical limits of their taxing capacities, there will in all probability be enormous

[45] 337 F. Supp. 280 (W.D. Tex. 1971).

[46] General Subcommittee on Education, U.S. House of Representatives, Financing of Elementary and Secondary Education 635–639 (1972).

pressure brought to bear to expand the federal role in financing elementary and secondary education beyond its present 7 percent of the total.

If Congress in response to these pressures seriously considers federal general aid legislation, it will undoubtedly feel compelled to define the degree of equalization which states will have to meet in order to qualify for this aid, *e.g.*, "leveling up" lower expenditure districts in the particular state to the level of expenditure of the districts in the eightieth or ninetieth percentile of expenditure. This effort by Congress to define the minimally acceptable degree of equalization will be heavily influenced by the nature of any positive Supreme Court ruling in *Rodriguez*. If the Court simply adopts the principle of *Serrano* without specifying the exact content of any new state financing schemes (as seems likely if there is to be an affirmance of *Rodriguez*), there will be pressure for a congressional definition of equalization, both from state legislators who would prefer guidance and guidelines from Congress (rather than the lower federal courts) and from Congressmen and Senators who would feel that federal money to assist in equalizing should only be provided on the condition that minimum standards are met.

In attempting to define an acceptable degree of equalization, Congress will be faced with a unique task. Before *Serrano* and *Rodriguez*, Congress enjoyed the luxury of being able to enact federal categorical aid programs without having to be bothered with the existing distribution of state and local funds for education. The federal categorical money was meant to be purely supplemental, that is on top of state and local funding, and was meant to be used for additional identifiable types of programs (except for aid to federally impacted areas). Therefore, the congressional task was comparatively easy because the federal requirements were usually limited to relatively self-contained federal programs. In bills for federal general aid before *Serrano*, it could be proposed that the general aid simply go to the state departments of education. Little heed had to be paid to how those federal funds or the existing state and local funds were distributed among school districts within the states because that was the state's responsibility.

But if *Rodriguez* is upheld, the states will be under a federal constitutional obligation to revise their financing schemes to accord with the *Serrano* principle; and Congress will now for the first time have to face the issue of how federal general aid funds ought to be used to cause the reallocation of state and local funds for education. Not only will this task require some knowledge on the congressional level of how state school finance schemes actually work, but it will also require innovative thinking on the part of Congressmen and Senators to formulate constitutionally acceptable new categories of classification for distribution of state and local funds, instead of the present challenged classification of wealth. It will also require a fine hand of restraint so that Congress does not go too far in these definitions so

as to leave too little flexibility with state legislators in their efforts to revise these schemes.

For example, the National Educational Finance Project (NEFP) found in a survey of education programs for the physically handicapped that the average expenditure in these programs was 225 percent more expensive than the average expenditure in the lower elementary grades.[47] So Congress could in reliance on the National Educational Finance Project study require that any state adopting a weighted pupil measure for its distribution of state and local money after *Rodriguez* would have to give a weight of 1 for the lower elementary grade students and a weight of 3.25 for physically handicapped students. But in the process of formulating a national policy encouraging the education of the handicapped Congress would be requiring an inflexible standard which might make sense in terms of national averages but would not make sense on a local level. In other words, although the NEFP survey concluded with an average cost among programs for the physically handicapped, this average cost is only a national average and not accurate for particular programs or for the same programs in different areas of the country.

Besides trying to formulate general guidelines of national applicability for educational expenditures by the states, Congress in an equalization bill may also want to legislate regarding the revenue-raising for these expenditures, particularly regarding the present reliance on the real estate tax. But again, differences are great among the states and nationally prescribed remedies for commonly assumed wrongs—if drawn too strictly—will make sense in one area of the country but not in another.

The U.S. Advisory Commission on Intergovernmental Relations warned of this possibility in a recent study of the Administration's proposal for a massive federal program of property tax relief. The Commission cautioned that such a program could have greatly varying effects in different areas of the country because of regional differences in use of the local property tax. It cited a range from seven to one in terms of per capita property tax collections between Alabama, which has the lowest per capita yield, and California, which has the highest.[48] So such a federal program would correct an injustice in one region of the country, but it would also penalize those states in another region which have avoided the generally assumed evil of relying excessively on the local property tax.

Although this discussion has pointed out some possible bad effects of federally prescribed remedies in response to a possible Supreme Court affirmance of *Rodriguez*, it is not meant to indicate that no such remedies

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[47] National Educational Finance Project, Planning School Finance Programs 29 (1972).

[48] U.S. Advisory Commission on Intergovernmental Relations, Property Tax Relief and Reform—The Intergovernmental Dimension I-7 (Sept. 14, 1972).

will be required by Congress or that some of them will not have uneven effects throughout the country. Rather, it is simply meant to show the difficulties involved in congressional action in this area; and it is also meant to show that the federal responses in this area are still in an embryonic stage with much discussion and development needed to reach maturity.

If *Rodriguez* is not upheld, there will be many of the same types of problems involved in any congressional consideration of federal general aid legislation. The *Serrano* and *Rodriguez* decisions, in explaining the inequalities in educational expenditures among school districts, have at least shown the injustice of allowing parents in one school district to pay real estate taxes at a rate two and a half times less than parents in another district and yet have twice as much (or more) spent on the education of their children.

This awareness of the inequality and injustice involved in school finance will remain on the congressional level even after an adverse ruling in *Rodriguez*, but it will undoubtedly be blunted in its power to bring about equalization as a condition for federal general aid. In fact, proponents of equalization may lose out altogether, and Congress may revert to a pre-*Serrano* attitude of providing some inter-state equalization but not bothering with intra-state equalization.

A somewhat more likely response, though, would be legislation providing for a voluntary equalization program or a combination equalization and non-equalization program. A straight equalization program might still have many of the same type of requirements as an equalization program after a positive *Rodriguez* ruling; but these requirements would most likely be in a less restrictive form, *e.g.*, only "leveling up" to the fiftieth percentile, and undoubtedly the program itself would not involve as much federal money, since the urgency for action would be missing.

A combination equalization and non-equalization approach could provide for straight general aid grants and, at the option of the state, for larger equalization grants. This legislation would have the merit of giving everyone something and rewarding with greater assistance those states which choose the more difficult task.

If either a straight general aid approach or a combination equalization and non-equalization approach is accepted, there may be an attempt made to include in the legislation a formula for intra-state distribution of the non-equalization federal funds. This would be due to the recently awakened congressional interest in the enormous intra-state expenditure disparities presently existing among school districts. If states do not undertake voluntary equalization plans, then maybe the federal general aid ought to be used to reduce the expenditure disparities resulting from state and local funding.

As can be readily seen, most of the discussion of the issue of intra-state equalization is based on conjectures because of the indefiniteness of the fate of *Rodriguez* and because of the newness of the issue in the national debate

over federal general aid legislation. But this issue, even given its impreciseness, could prove to be the strongest force pushing for federal general aid legislation because, if *Rodriguez* is affirmed, state legislatures will probably decide that they cannot meet its requirements without massive federal aid.

Safeguards for Categorical Programs

At a time when resistance to broad-based federal aid to education was high, there developed a pattern of seeking passage of narrow categorical aid programs. It was the hope of some proponents of federal general aid that the passage of these programs would slowly break down resistance to federal aid by building up constituencies with an interest in its expansion. The problem with this strategy, though, is that it is a victim of its own success. It not only has built up such constituencies, it also has given them a reason for opposing federal general aid—fear that such a program will diminish support for their own particular programs, first at the federal level and then at the state and local levels.

The librarians who receive aid through Title III of the National Defense Education Act,[49] Title II of the Elementary and Secondary Education Act,[50] and the Library Services and Construction Act,[51] do not want those programs abolished in favor of federal general aid because libraries may not receive as much aid at the state and local levels under a general purpose program. The audio-visual companies do not want NDEA III or ESEA II repealed in favor of a federal general aid program for the same reason. And so it goes for the vocational educators, the teachers of the handicapped, and especially the school administrators in districts receiving impact aid. Each of these groups, again especially the impact aid school administrators, has a certain amount of political muscle and will exercise that muscle to protect its own interests.

The largest program of federal aid to elementary and secondary education is Title I of the Elementary and Secondary Education Act, which provides more than $1.4 billion a year to local school districts for compensatory education programs for the educationally disadvantaged. The supporters of that program fear that it is one of the most vulnerable to withdrawal of support if a federal general aid bill becomes law.

Congressman Carl Perkins, Chairman of the Education and Labor Committee, and one of the foremost proponents of Title I, has had one persistent question to ask of witnesses before his committee for the last year: at what level of appropriations for Title I is it safe to authorize a federal general aid program?[52] His concern is probably that school administrators

[49] 72 Stat. 1588–1590 (1958), *as amended*, 20 U.S.C. § 441–445 (1970).

[50] 79 Stat. 36–39 (1965), *as amended*, 20 U.S.C. § 821–27 (1970).

[51] 84 Stat. 1660–69 (1970), 29 U.S.C. § 351–55e-2 (1970).

[52] Committee on Education and Labor, U.S. House of Representatives, *Oversight Hearing on Elementary and Secondary Education* (Dec. 9, 1971; Jan. 11, Jan. 13 & 14, Feb. 23, 1972).

and teachers' unions would far prefer unrestricted federal aid, which could be used for teachers' salaries, construction, and general operating expenses, to the categorical, federal regulation-controlled Title I program. This fear would seem to be particularly well-founded because of the ebbing tide of enthusiasm during the last few years for special programs for the socially and economically disadvantaged. The fear is probably also grounded in a suspicion that something definite is being given up for something indefinite, and that the Administration may find some way in a new program to cut back on total federal funding of education. Of course, pride of authorship and partisan loyalty to the accomplishments of a Democratic administration are probably also involved.

Interestingly enough, a surprising number of school administrators have testified before the House Education and Labor Committee within the last year that they, too, would prefer some kind of "safeguard" for the funding of Title I if any federal general aid legislation is passed. Although they admit that Title I is fulfilling a legitimate need in providing funds for compensatory education programs for educationally disadvantaged children, they also fear that without the federal restrictions on the use of the funds most of the money would go into other, more politically pressing areas, such as overall increases in teachers' salaries. Another part of their motivation seems to be that despite some aggravation about the federal Title I regulations they still prefer something they have had experience with for seven years and are reasonably familiar with operating than to have to start all over again with a new program and a new set of regulations and a new uncertainty about funding.

Since the authorizations for the Elementary and Secondary Education Act and Public Laws 81-874 and 81-815 expire on June 30, 1973, a number of influential legislators, mostly Democrats, will be very concerned with safeguarding Title I and/or the impact aid laws and/or various other federal categorical programs if any federal general aid legislation is under consideration at the same time. Since it commonly takes a year to a year and a half for Congress to complete action in such an important area, the debate over extension and possible safeguarding of these programs will be closely connected with any consideration of federal general aid during the 93rd Congress.

In addition to the legislators who will be concerned about safeguarding certain present programs, there will be many legislators, mostly Republicans, who will be pushing for consolidation of many of these programs into broader categories and/or the repeal of some programs in a federal general aid bill. These efforts will also be an important factor in congressional consideration of federal general aid during the next two years.

Consolidation will gain important support if the Nixon Administration

in its second term makes its Educational Revenue Sharing Act a matter of high priority. That Act,[53] which was introduced on April 27, 1971, as part of the "New Federalism," is simply a consolidation into broader categories of many of the present federal categorical aid programs. Thirty-four present formula grant programs are affected, most dramatically twelve programs providing library books, audio-visual equipment, innovative projects, and so forth, all of which are consolidated into one category called "supporting materials and services." The other four broad categories into which smaller programs are consolidated are: federally affected areas, disadvantaged, handicapped, and vocational education. Besides abolishing many of the narrower purpose programs, the most notable feature of this proposal is that it allows the state departments of education to shift up to 30 percent from any one of the category's funds to another category's purpose, except for shifts from the funding for the disadvantaged. This proposal, in one form or another, will probably be the basis for congressional efforts at the consolidation of federal categorical aid programs during the 93rd Congress.

So it can be seen that any legislative consideration of federal general aid during the next two years will be complicated by battles over extending, safeguarding, and consolidating federal categorical aid programs. The best which can be said is that the intensity of the battle will depend upon the degree to which the various groups supporting present programs see their interests threatened. For instance, if there is a "grandfather clause" guaranteeing all impact aid districts the same amount in general aid which they are now receiving from Public Law 874, then possibly those districts would accept a repeal of their special laws or at least a sharp curtailment in coverage. The same is probably true for the Title I districts, except that there the funds may have to remain categorical in order to reach the educationally disadvantaged. So it is possible that a general aid bill may emerge in the rather complicated form of not merely providing general aid, but also repealing, consolidating, and safeguarding certain present programs.

A Revenue Source

Concern about the possible cost of a federal general aid program certainly is not of recent origin. The first legislators to consider such a proposal undoubtedly shared the same apprehensions about expense as many Congressmen and Senators have today.

The facts, though, concerning the relative abilities of the three levels of government to raise revenue differ today from what they were years ago. In 1902, the Federal Government collected 38.5 percent of the tax revenue raised in the country while the state governments collected 10.8 percent and

[53] H.R. 7796, 92d Cong., 1st Sess. (1971).

the local governments 50.7 percent.[54] By 1970, the Federal Government was collecting 64 percent, the state governments were collecting 19 percent, and the local units of government only 17 percent.[55] The Federal Government's increasing revenues are due to its reliance on the personal and corporate income tax which is very responsive to economic growth. The local governmental units' decreasing share of tax revenue is due to their heavy reliance on the real estate tax which, although a constant source of revenue, is very slowly adaptable to economic growth, and also is no longer an accurate indicator of personal wealth.

These basic facts are causing state and local officials to flock to Washington for federal categorical money, federal revenue sharing money, and any other kind of money they can get. The Federal Government, though, in the process of augmenting its revenue raising ability, has not assumed a proportionately greater share of the burden of financing elementary and secondary education. In 1971, the Federal Government paid for only 7 percent of this cost while the state Governments paid 41 percent and the local school districts 52 percent.

Local school boards bear their half of the burden of financing education almost exclusively through use of the real estate tax. Since the cost of education has been increasing at an annual rate of 9.8 percent for the last decade,[56] they have had to double the revenue raised through the real estate tax by constantly increasing the tax rates in order to keep pace.[57] Therein lies the reason for the much-publicized "taxpayers' revolt" against school bond issues. In 1960 almost 90 percent of all school bond issues were routinely approved; today only 46 percent receive voter approval.[58] These rejections are causing state and local officials to seek other revenue sources for education; and this search may increasingly focus on Washington with its superior revenue sources, especially if the "leveling up" mentioned in the section on equalization results from the Supreme Court's affirmance of *Rodriguez*.

A strong indication of this trend was President Nixon's proposal, first mentioned in his State of the Union Message of January 20, 1972, for a massive federal aid program to reduce by half the real estate tax for education.[59] This proposal, which may call for an expenditure of $12 billion a

[54] U.S. Bureau of Census, Historical Statistics of the United States, Colonial Times to 1957 (1960).

[55] National Education Association, Committee on Educational Finance, What Everyone Should Know About Financing Our Schools 54 (1968).

[56] National Education Association, Research Division, Estimates of School Statistics 1971–72, at 19 (1971).

[57] Advisory Commision on Intergovernmental Relations, State-Local Finances: Significant Features and Suggested Legislation 25 (1972).

[58] Investment Bankers Association, Study on School Bond Issue Defeats, Washington, D.C. (1960).

[59] *See* note 38, *supra*.

year, is still under consideration by the Administration and has not therefore been cast into definite terms to be considered by Congress.

There are, however, two very significant facts to be noted about this proposal. First, it shows that a Republican administration is seriously considering a massive federal general aid to education program, albeit one that is described more in terms of property tax relief than in terms of upgrading education. Since a number of Congressmen and Senators, mostly liberal Democrats, have recently introduced federal general aid bills envisioning approximately the same level of expenditure, the Administration's proposal may indicate that a consensus is developing that the Federal Government ought to assume about a third of the cost of elementary and secondary education, although there will naturally be disagreements over the form that this program ought to take.

Secondly, the Administration's proposal has raised the issue of whether a federal program of this magnitude ought to be mounted without a new revenue source. Administration spokesmen have mentioned the possibility of a new federal value-added tax, and the Advisory Commission on Intergovernmental Relations has been requested by the President to study both the idea of a federal aid to education program tied in with real estate tax relief and the concept of a federal value-added tax as its source of funding. During the course of the recent presidential campaign, however, the White House equivocated on its espousal of this tax, and the exact status of its support is therefore somewhat indefinite.

The issue of a revenue source has been raised, though, by all this activity; and it will thus be part of the debate over federal general aid during the 93rd Congress. Although the Administration had not submitted any definite proposal to Congress, there was considerable debate over the merits of requiring such a new tax source in conjunction with adopting a federal general aid bill. And since the opposing sides in the debate divided rather precisely along partisan lines, there may be echoes of their arguments during the new Congress.

Most Republicans who spoke on the issue endorsed the Administration's position on the following two grounds: (1) present federal programs were creating such a strain on the federal budget that it was essential to have a new tax source for a program of such dimensions, and (2) a federal value-added tax would be less regressive in its impact than the present real estate tax.

Most Democrats who took a position opposed both the need for a new revenue source in general and the need for a value-added tax in particular. Their reasons usually were: (1) education has never had a separate revenue source before on the federal level and there was no more need to give it one now than there is to fund defense programs or other programs of national

importance from their own taxes; (2) other parts of the federal budget, especially defense programs, could be cut back to find the funds needed; and (3) the value-added tax was regressive in hurting the elderly and others on fixed incomes more than those better able to pay. The criticism was also made that the President's proposal would not mean any increased funds for education; it would simply replace local funds coming from the real estate tax with federal funds coming from a value-added tax and thereby not bring any relief to financially hard-pressed school districts, especially those in the large cities.[60]

Another element of the debate over whether a new revenue source is necessary involves questions of committee jurisdiction in Congress. If the President submits his proposal in the form of a property tax relief program financed from a value-added tax, that bill will be referred to the House Ways and Means Committee and the Senate Finance Committee since those committees have original jurisdiction in their respective Houses over tax legislation. Although both of those prestigious committees have considerable competence in the area of taxation and finance, they do not possess the same degree of expertise in the field of education that the members of the House Education and Labor Committee and the Senate Labor and Public Welfare Committee have developed over the years. Therefore, their perception of the issues will vary as will their reactions in drafting the legislation.

Although this point may seem like a minor matter of Washington politics, it has very significant implications for the form which the program finally assumes. For instance, the two taxation committees would probably be amenable to accepting the Administration's concept that the nature of any new federal general aid program ought to be simply to replace local dollars with federal dollars and have no overall increase in the level of spending for education. The members of the two education committees would undoubtedly be much more inclined to seek a substantial overall increase in expenditures for education through such a program. Therefore, the form which the Administration's bill takes is very important to the ultimate outcome of the issue of the type of federal general aid.[61]

The issue of a new revenue source to fund any federal aid program has been raised by the Administration, and it will thus be part of the debate on the program during the next two years. But the determinant of whether it is an important issue will be the intensity of the Administration's insistence since Congress can be expected otherwise to follow its usual pattern of approving federal education programs to be funded from general funds in the Treasury.

[60] General Subcommittee on Education, *op. cit.*

[61] Although the introduction of an Administration bill in the form of a property tax relief measure would not preclude action by the Committee on Education and Labor, it would significantly diminish the prospects for any general aid legislation emerging from that Committee.

Major General Aid Bills

Those six factors will be the main issues in the congressional debate over the merits of a federal general aid program during the 93rd Congress, but they are usually not considered by legislators in terms as abstract as they have been described for purposes of this article. Rather, Congressmen and Senators ordinarily frame their decisions on the issues in terms of the particular legislation before them at the time. Therefore, it may be useful to consider the major general aid bills which were before the last Congress and to analyze their prospects for enduring the more intensive consideration that the concept of federal general aid will receive during this new Congress.

Summaries

The "National Partnership in Education Act" [62] introduced by Congressman Roman Pucinski (Dem-Ill), was the first general aid bill to receive serious attention during the 92nd Congress. That bill was also the first to provide for a three-year assumption by the Federal Government of one-third of the cost of elementary and secondary education and to provide for a precise intra-state distribution of the federal money. Specifically, the Partnership Act authorized a program of entitlement grants to local educational agencies for fiscal years 1972, 1973, and 1974. These grants varied according to three factors: the rate of federal payments for the particular year (10 percent of the total state and local expenditures for education the first year, 20 percent the second year, and 33⅓ percent the third year); the "adjusted" number of children in the local educational agency (all children 5–17 in the school district plus a double count for Title I children); and the "Federal grant per pupil" for the state in which the local educational agency was located (an amount per pupil which was determined by multiplying the state and local current expenditure per public school pupil in that state by the product obtained by multiplying the current national reimbursement rate by the quotient obtained by dividing the national per capita income by the particular state's per capita income). This rather complex formula sought to achieve the following three objectives for intra-state distribution of the federal money: (1) to give proportionately larger grants to school districts in poorer states, (2) to give proportionately larger grants to school districts in states exerting a greater effort for education, and (3) to give larger grants to school districts with greater numbers of poor children. None of the federal funds could be used to supplant state or local funds.

The "Quality School Assistance Act," [63] introduced by Congressman

[62] H.R. 6179, 92d Cong., 1st Sess. (1971).

[63] H.R. 12367, 92d Cong., 1st Sess. (1971).

William Ford (Dem-Mich), adopted from the Partnership Act the concepts of a one-third assumption by the Federal Government and of an intra-state distribution of the federal funds, but it varied by prescribing a different formula for this distribution and by setting out a very carefully drafted provision for the participation of private school children. The formula provided that a local educational agency would be entitled to receive a grant for the first year equal to two amounts: 20 percent of the product obtained by multiplying the number of schoolchildren in the school district by the average current expenditure for the state or for all the states, whichever was higher; and an amount bearing the same ratio to one-third of all the regular grants for all school districts (as determined above) as the number of Title I children in the school district bore to the total number in the country. The Ford bill's formula also varied by authorizing a five-year program instead of a three-year program and by starting with a 20 percent reimbursement and increasing by 5 percent increments to 35 percent. The objectives of this formula were the same as those described for the Partnership Act. None of the federal funds could be used to supplant state or local funds. The Ford bill also authorized a two-year program of federal school construction grants and extended the impact aid laws for five years.

The next major bill was introduced by Congressman John Dow (Dem-NY).[64] The first part of this bill permitted a state, once it had been determined to be providing over 50 percent of the revenues for elementary and secondary education from state sources, to receive directly federal aid under the following programs: Titles I, II, III, V, and VII of the Elementary and Secondary Education Act: Titles III, V, and VI of the National Defense Education Act; the Vocational Education Act; the Adult Education Act; and the Education of the Handicapped Act. These funds could then be used by the state for whatever purpose it desired in the area of elementary and secondary education without regard to the provisions of those federal laws. The second part of the Dow bill authorized a program of federal aid to encourage the states to increase their expenditures of state revenues for education and to decrease the use of local revenues. A state would receive a grant equal to half of its increased expenditures from state revenue sources, except that this grant would be reduced proportionately by the amount by which local expenditures also increased or it would be increased proportionately by the amount by which local expenditures decreased. No state grant, though, could exceed $100 times the enrollment in elementary and secondary schools in the state. These grants could be used by the state for any purpose in the field of elementary and secondary education. Any state which decreased its average pupil expenditure from all revenue sources would be ineligible for grants.

The first of the bills drafted to reflect the *Serrano* decision was the "Fair

[64] H.R. 6521, 92d Cong., 1st Sess. (1971).

School Funding Act," introduced by Congressman Abner Mikva (Dem-Ill).[65] The first part of this bill authorized federal grants to the states to assist them in equalizing their expenditures. Specifically, the bill provided that a state would receive for fiscal year 1974 and for each fiscal year thereafter a grant equal to 200 percent of the excess of the total amount of state funds expended by the state in elementary and secondary schools in which the per-pupil expenditure was below the ninetieth percentile over the total amount of state funds spent in such schools the preceding year. The percentile listing had to be made separately by the state for elementary and secondary schools. (Of note is the fact that the requirement was to make the rankings of expenditures by school and not simply by school district.) The second part of the Fair School Funding Act authorized federal grants, beginning in fiscal year 1974, to states which reduced their local real estate taxes. To qualify, a state must have achieved substantial equalization of educational expenditures, defined as bringing each elementary and secondary school up to the level of the ninetieth percentile. A grant was equal to 100 percent of the aggregate reduction (over the preceding year) in local real property taxes on residences, provided that such reduction had been matched by increases in state expenditures out of state funds for elementary and secondary education. All funds under both parts of the bill had to be used solely for purposes of public elementary and secondary education, and no state could be eligible for grants if it reduced its state expenditures for public elementary and secondary education from the level of the preceding year.

The next bill to be introduced to reflect *Serrano* was the "Elementary and Secondary Education Assistance Act," [66] introduced by Senators Walter Mondale (Dem-Minn) and Adlai Stevenson (Dem-Ill). The first part of this bill authorized $5.25 billion annually for fiscal years 1974, 1975, and 1976 for the purpose of general state grants. The amount of a state's grant depended on three factors: its number of children aged 5–17 (60 percent the state grant was attributable to this factor); its relative personal income, adjusted according to regional differences in purchasing power, (20 percent of the grant); and its relative educational effort as measured by dividing its total expenditures, adjusted according to regional differences in purchasing power, by its total personal income (20 percent of the state grant). In order to receive these funds, a state had to equalize its educational expenditures so that each local educational agency in the state had a per pupil expenditure of at least 90 percent of the per pupil expenditure in the ninetieth percentile districts and each "urban center" school district had an expenditure of 100 percent of this ninetieth percentile expenditure. This requirement applied separately to total expenditures for

[65] H.R. 13398, 92d Cong., 2d Sess. (1972).
[66] S. 3779, 92d Cong., 2d Sess. (1972).

elementary school students and to total expenditures for secondary school students within each school district. If any state did not use its federal general aid to meet these standards, those funds were to be distributed to local educational agencies according to their average daily memberships (50 percent of the grant) and according to their respective numbers of Title I children (the remaining 50 percent). No state could reduce its total per pupil expenditure for elementary and secondary education. The second part of the Mondale-Stevenson bill authorized a program of education achievement grants. Under this program, a state would administer achievement tests in reading and mathematics, and the U. S. Commissioner of Education would set minimum satisfactory scores for each elementary school grade. Each participating state would then receive, beginning in fiscal year 1975, a grant to be distributed to each local educational agency in the amount of $150 or 50 percent of the average per pupil Title I expenditure (whichever was higher) for each unit of improvement by a Title I pupil whose score on the test given in the previous year was below the minimum score as prescribed by the Commissioner. To be eligible for a grant, a local educational agency had to submit to the state a plan for the improvement for reading and math skills, which plan had been prepared in consulation with parents.

The next significant general aid bill was the "Public and Private Education Assistance Act," [67] which was introduced by Congressmen Hugh Carey (Dem-NY) and Wilbur Mills (Dem-Ark), and which was referred to the House Ways and Means Committee. That bill had two titles: the first created an automatically funded trust fund for equalization grants, and the second amended the Internal Revenue Code to provide for a tax credit for tuition paid to nonprofit private schools. The trust fund, which would have an annual appropriation of $2.25 billion, would pay out grants to the states according to each state's effort to equalize its educational expenditures from state revenues. A state's expenditures would be considered as equalizing: if the state provided 90 percent of the funds for elementary and secondary education and distributed these funds on a flat grant or deferential grant basis; or if the state distributed its state revenues for education inversely according to school district wealth as measured by assessed valuation of real property. No state's grant, however, could exceed 10 percent of the total non-federal funds spent within the state on public elementary and secondary education.

The "Public and Private Education Assistance Act," [68] introduced by Congressmen Carl Perkins (Dem-Ky) and Roman Pucinski (Dem-Ill), was referred to the House Committee on Education and Labor. It basically adopted the concept of the trust fund set out in the Carey-Mills bill but

[67] H.R. 16141, 92d Cong., 2d Sess. (1972).
[68] H.R. 16202, 92d Cong., 2d Sess. (1972).

modified it to provide for a different method of distribution of the funds. A state would still have to equalize its expenditures to be eligible for funds, but its grant would be determined according to its relative number of children attending schools within the state (two-thirds of the grant) and its relative number of Title I children (the remaining one-third of the grant). The Perkins-Pucinski bill also contained an authorization of appropriations for the trust fund: $2.25 billion for fiscal 1973, $4 billion for fiscal 1974, $6 billion for fiscal 1975, and $10 billion for each year thereafter through fiscal 1978.

Before we discuss the aspects of these bills which relate to the six major factors, it may be helpful to summarize the recommendations of the President's Commission on School Finance.[69] Although its recommendations have not been reduced to bill form, they will be constantly referred to during the course of the congressional debate over federal general aid.

The Commission recommended: (1) "full" state assumption of the burden of financing elementary and secondary education; (2) retention of as much latitude as possible on the local level for determining the type of education offered; and (3) a supplementary federal role, including a temporary five-year, possibly $1 billion a year, program of incentive grants to encourage full state assumption and equalization. Regarding "full" state assumption, the Commission recommended that the state governments take over substantially all of the burden of financing but allow a local supplement of not to exceed 10 percent of the state allocation. The states were urged to incorporate in their allocation formulas differentials based on educational need, such as higher payments for handicapped and vocational students, and on varying educational costs within various parts of the state.

Regarding the role of the Federal Government in financing education, the Commission recommended, in addition to its $1 billion a year state incentive grant program, the creation of a Federal Urban Educational Assistance Program. This program, recommended for at least five years at $1 billion a year, would provide emergency financial aid on a matching basis to large central city public and nonpublic schools for: (a) experimental and demonstration projects; (b) replacement or renovation of old and unsafe buildings; (c) hiring of remedial and bilingual teachers, special teachers and other professional personnel, and teachers aids; and (d) purchase of instructional materials. No funds could be used, though, for ordinary salary increases for school personnel.

Analysis

I would now like to discuss these six bills and the Commission's recommendations in light of the major factors set out in the first part of this arti-

[69] President's Commission on School Finance, *supra* note 34.

cle. None of these bills, or the Commission's report, contains provisions or recommendations relating to all of these factors; and the deletions are most frequently intentional. The legislator introducing the bill could believe or, as in the case of the Commission, definitely does believe that a federal general aid program is not necessary, so there is obviously no need to deal with all the factors. Or possibly the legislator simply wants to introduce into the debate a new approach to one of the problems. Or the legislator could want to introduce a comprehensive bill for general aid but be undecided as of the moment on one or more of the major issues. For these various reasons we will find that none of the bills treats all these factors fully.

The first factor was the issue of guaranteeing civil rights. The Carey-Mills bill was the most extensive on this issue. It contained a non-discriminatory provision which was identical to the provisions in the general revenue sharing bill. The only point to be recalled from that earlier discussion is the problem of enforcing the Title VI termination of assistance if the general aid funds are commingled with state and local funds. The Perkins-Pucinski bill contained this same provision.

The Mondale-Stevenson bill adopted the recommendation of the U. S. Civil Rights Commission for a prohibition against the federal general aid being commingled with state and local funds. The possible conflict between this requirement and the concept of general aid has also already been discussed.

The President's Commission recommended a reorganization and consolidation of school districts with the objective of providing a better distribution of wealth among school districts and the "attainment of diversity in the school population." The Commission stated: "The most important resource of any district is the people who are served. Economic or ethnic isolation of children reduces the ability of school systems to provide equal educational opportunity and quality education." The Commission also stated that some busing may be necessary to bring about a "better racial balance" in the schools but that busing to bring about a uniform racial ratio in all the schools of a district may not be the best procedure.[70]

The Pucinski, Ford, Mikva, and Dow bills contained no provisions dealing directly with civil rights, although their proposed federal programs would naturally be covered by Title VI of the Civil Rights Act.

The second issue concerned the participation of private schoolchildren in any federal general aid program. The provision in the Ford bill was slightly modified in the Mondale-Stevenson bill by adding a prohibition against aid to intentionally segregated private schools. The Perkins-Pucinski bill contained the original Ford language.

The Carey-Mills bill did not provide for the participation of private

[70] *Id.* at 70.

school children in its federal general aid program, but it did contain as a separate title an amendment to the Internal Revenue Code allowing a tax credit for private school tuition. The Mikva and Dow bills contained no provisions relating to this issue.

The President's Commission recommended that local, state, and federal funds be used for "child benefit" services for such children. Although not as enthusiastic as its companion Panel on Nonpublic Education, it did recommend "serious consideration" of more substantial aid such as tax credits, tax deductions for tuition, tuition reimbursements, scholarship aid, and equitable sharing in any new federally supported programs. The Commission, though, added three conditions to any such aid: first, there must be equitable treatment of various income classes in private schools, especially poor, inner-city groups; second, there must be full compliance with Title VI of the Civil Rights Act; and third, the private schools must be accountable to the public by providing full information on enrollments, governance, pupil achievement, and expenditure data.[71]

The third factor which was discussed was the issue of federal control of education. The conclusion of the earlier discussion was that some degree of federal supervision and administration was inevitable in any federal general aid program. The real question to be asked is what degree of supervision and type of restriction should result.

The Pucinski bill contained provisions requiring local educational agencies applying for general aid funds to submit to the state educational agency annual assessments of the educational needs of their students and annual evaluations of the success of previous programs in meeting those needs. The state agency was required to submit these evaluations and its own evaluations of programs funded from federal general aid to the Federal Government. These provisions are standard in most present federal aid to education laws and in practice have led to very little assessment and to even less evaluation. The Ford bill contained the same type of provisions, but its requirement for an annual local assessment was much more detailed in specifying the needs to be considered.

The Mondale-Stevenson bill also contained this standard language requiring an annual local evaluation and the transmission of these evaluations by state officials to the Federal Government. But this bill also required the local school districts to send annually to the state information on school-by-school educational achievement. The local school district was also required to make all applications, reports, and related documents available to parents and other members of the general public. Five percent of the funds under the bill were set aside for state grants to conduct

[71] These recommendations show a rather interesting viewpoint: that private schools must meet higher standards in order to receive governmental aid than public schools. Such stringent accountability requirements could lead to an entanglement problem.

comprehensive educational assessments, including evaluations of programs as they affected minority groups and bilingual and educationally disadvantaged children. These grants would be in addition to the educational achievement grants mentioned in the above description of the bill.

The President's Commission recommended that better systems be developed for assessing relative costs and benefits of educational programs. In particular, the Commission recommended the establishment of statewide evaluation systems and the publication of the results of assessments of educational achievement.[72]

The Commission also saw a federal responsibility for the development of a comprehensive data collection and analysis system. The present system was found to be woefully inadequate, providing information which was "sketchy, often inconsistent, generally out-of-date, and, as a consequence, of limited use." The Commission stated: "Even in routine areas such as enrollments, expenditures, revenue sources, graduations, and dropouts, we either do not have data at all or what we do have are severely limited in value because of being too old." [73] This recommendation for better data and the other recommendation for specific information on achievement echo the concerns of many legislators for more accountability in education.

The Mikva, Carey-Mills, and Perkins-Pucinski bills contained no relevant provisions in this area. The Dow bill is only significant in that by converting the major federal categorical programs to unrestricted general aid it would remove the present policy restrictions of the Federal Government, such as the requirements for comparability and parental involvement in Title I programs.

The fourth issue was equalization of state and local expenditures among school districts. This issue highlights a clear delineation among the bills. The Pucinski and Ford bills can be thought of as "pre-*Serrano*" bills and the rest as "post-*Serrano*."

The Pucinski and Ford bills sought to assist in redressing the disparities in expenditure among school districts by bringing the federal general aid down to the local school district level and by forbidding the states to consider these Federal funds in their distribution of state aid. This approach is probably outdated *if* a state is truly equalizing its expenditures, either voluntarily or under court order. If *Rodriquez* is upheld, any federal general aid bill will undoubtedly provide for state grants to assist in equalizing up to a certain level. But if *Rodriquez* is overruled, then there may be renewed interest in using federal money intra-state in the manner of the Pucinski and Ford bills in order to achieve thereby some equalization of resources.

The post-*Serrano* bills are clearly the Mikva, the Mondale-Stevenson,

[72] President's Commission on School Finance, *supra* note 34, at xvii.

[73] *Id.* at 84.

the Carey-Mills, and the Perkins-Pucinski bills. The Mikva bill sought through a federal grant program to achieve equalization of expenditure in all schools by bringing them up to the spending of the schools in the ninetieth percentile. Once that goal was attained, the bill would permit a state to receive federal funds for local property tax relief on residences.

The Mondale-Stevenson bill authorized state grants to achieve equalization among the elementary schools considered as a whole in a school district and the secondary schools considered as a whole in a school district. A state was required to give a greater allocation of funds to central city school districts serving at least twenty-five thousand students who composed at least one-third of the total enrollment in a Standard Metropolitan Statistical Area. Presumably this larger grant was necessary because of the higher costs in a large city and because of the likelihood that the large city school district had a larger number of disadvantaged children who were more difficult to teach. This approach, though, may be too restrictive in that there may be rural districts or poor suburban districts with the same degree of high cost and the same percentages of poor students. These districts would seem to deserve the same consideration in national legislation as urban districts.

The Carey-Mills bill also sought to encourage equalization by limiting its grants to states which supplied over 90 percent of the funds for elementary and secondary education from state revenues or which distributed their state funds among school districts according to each district's relative wealth as measured by its assessed valuation of real property. The Perkins-Pucinski bill adopted these same requirements for state eligibility, although it specified a different formula for allocation of the federal funds once eligibility was achieved. The basic Carey-Mills approach, though, may be indicative again of a tendency to write the provisions too tightly. Here a state must go to full state funding or it must distribute all its state funds to local school districts according to a measure of wealth—assessed real estate—which has been attacked as being an outdated indicator of true wealth and as being unevenly, almost scandalously, administered by local officials.

The Dow bill, although introduced before *Serrano* was decided, would fit into the category of bills encouraging equalization. By converting federal categorical money into general aid and by rewarding the states which increased educational funding from state revenues, it would bring about some degree of equalization, although the exact degree was not prescribed.

Since the Dow bill was written before *Serrano*, it can be forgiven the fault of not fully addressing the issue of equalization. Unfortunately, the President's Commission does not have that excuse. The final report of the Commission contained a fairly detailed analysis of the issue of equalization and properly placed the blame for the present state of affairs, and the

chief burden to bring about reform, on the state legislatures. But then the report stated that a maximum of one billion dollars a year in new federal funds will be sufficient incentive for the state legislatures to initiate this reform.

A major objective of the Commission was to have the states shift away from their reliance on the local real property tax which task will cause, according to the Commission's own estimates, an average increase in state taxation of over 30 percent, with the figure going up to 80 percent and 90 percent in certain states.[74] Another objective of the Commission was to encourage equalization of expenditures among school districts which, because of the leveling up tendency, will cost, again according to the Commission's own estimates, at least $6 billion a year in new revenue.[75]

So the Commission has set two tasks for the states: removal of the local real estate tax as the basic support for education, which will mean the states will have to find approximately $18 billion a year in new revenue sources;[76] and equalizing expenditures, which will mean at least $6 billion a year more in new revenue. The Commission then tells the states that these tasks—costing a minimum of $24 billion a year—can be achieved by a temporary federal incentive grant program of maybe $1 billion a year. This seems like a rather limp response to the problems, especially if the sense of urgency leaves the issue of equalization due to an unfavorable ruling in *Rodriquez*.

The fifth issue concerned the problems associated with safeguarding and/or consolidating present federal categorical programs. The Ford bill, which extended unamended the impact aid program for five years, may be indicative of sentiment to protect that program, traditionally one of the most popular among Congressmen and Senators.

The Mondale-Stevenson bill contained three separate provisions in this area. First, it provided that no funds could be authorized under the federal general aid program unless the appropriations for Title I were equal to those for fiscal 1973, a safeguarding of Title I. Second, it repealed Title V of the Elementary and Secondary Education Act, aid to state departments of education, upon enactment of the general aid bill. The reason for that immediate repeal was that a percentage of the total appropriations under the new program were set aside for state administration. Third, it repealed Title II of ESEA (library books), and Title III of NDEA (textbooks and audio-visual equipment), when and only when there was full funding of the

[74] Advisory Commission on Intergovernmental Relations, State-Local Revenue Systems and Educational Finance 4–11 (1972). This study was commissioned by The President's Commission as background material for its report.

[75] Staff Report of The President's Commission on School Finance, Review of Existing State School Finance Programs, Vol. II, at 15 (1972).

[76] Advisory Commission on Intergovernmental Relations, *supra* note 74, Table 23 (1972).

general aid program. So the Mondale-Stevenson bill had some safeguarding and some immediate and some contingent repeals.

The President's Commission simply endorsed the Education Revenue Sharing Act. The other bills did not address the issue.

The last issue concerned the need for a new revenue source for the federal general aid program. The only bill which dealt at all with this issue was the Carey-Mills bill. That bill provided for an automatic appropriation annually of $2.25 billion from general funds in the Treasury for the new program. No new tax was provided for the bill to replace these general funds.

Conclusion

The purpose of this article has been to give an overview of the principal issues involved in any possible congressional consideration of federal general aid during the 93rd Congress. The complexity of these issues will be greatly increased when the inevitable political considerations and personal characteristics of the legislators are interwoven during their consideration.

These facts cause the fate of general aid to be impossible to foretell. The best which can be said is that the nature of the legislative process works against a program of this magnitude being enacted. There is, however, an important exception to this generalization: the power of an external force on the legislative process. Generally this force is the administration which works for or against what it considers to be in its best interests.

If the Nixon Administration concludes after the Advisory Commission's study that there ought to be a federal general aid program to replace local property tax dollars with federal dollars, then that decision would certainly brighten the prospects for federal general aid. If, however, the Administration decides that such a program or any similar program would be too costly or was unnecessary, that would definitely weaken the chances for a necessary coalescing of interests in Congress. In fact, if the Administration actively works against any such proposal, then its chances are probably minimal for passage.

Other external forces can develop, though, to fill the void of outside pressure or to counter the Administration's opposition. These forces would most likely develop if the Supreme Court affirmed *Rodriquez* and the states felt that they could not meet its requirements from their own resources. A somewhat less powerful force may develop from mass closing of schools and firing of teachers, or from some other event of equally grave magnitude.

Another possibility is that some federal general aid could be tied in with an extension and/or consolidation of federal categorical programs, since all the programs funded under the Elementary and Secondary Education

Act and the impact aid laws expire on June 30, 1973.[77] Since those programs have to be extended sometime this Congress, a general aid program could be made part of such an extension; and the pressures for extensions of these present programs could carry it through. This possibility is unlikely though unless one of the other external forces already mentioned is brought to bear.

[77] General Education Provisions Act § 415, 81 Stat. 814 (1970), *as amended*, 20 U.S.C. § 1224 (1970), provides for contingent extension of expiring education programs for one fiscal year beyond the terminal year specified in the authorizing legislation, if Congress has failed to act promptly. There is a good chance, therefore, that these discussions will be continued into the 2d Session of the 93d Congress.