Note

The Public School Financing Cases: Interdistrict Inequalities and Wealth Discrimination

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Since the turn of the century, discriminatory methods of allocating public school funds have resulted in the development of dual systerms of education: one for the rich districts and one for the poor districts. In most states it has become increasingly obvious that the wealthy districts, those possessing the most valuable taxable real property, receive favored fiscal treatment that permits them to provide their students with high quantities and qualities of educational facilities and opportunities with minimal tax effort. In comparison, the districts with lower tax bases receive proportionately less educational funds per pupil at the same tax rate and consequently are unable to provide their students with the same quality of educational opportunity that the wealthy districts can furnish. Although most states guarantee to all districts a minimum level of expenditure per pupil regardless of the district's wealth,[1] generally no provision has been made that equalizes fiscal disparities or minimizes the variations in the quality of education among the various school districts. As a result most poor school districts have been saddled with financing systems which make the quality of a child's education dependent upon the taxable wealth of the district in which he resides.

In *Serrano v. Priest*[2] the Supreme Court of California became the first court in the nation to recognize that public school students had stated a valid cause of action in their challenge to the constitutionality of their state's allegedly discriminatory school financing system. In a long and carefully reasoned decision, the court held by a six-to-one margin that, assuming the facts as alleged were true, the California

1. *See* discussion accompanying notes 27-30 *infra*.
2. 5 Cal. 3d 584, 487 P.2d 1241, 96 Cal. Rptr. 601 (1971).

system of public school support invidiously discriminated against all the children in those districts whose local tax bases could not produce as much revenue for education as the most affluent district, and thereby violated the equal protection clause.[3] Considering that prior decisions,[4] summarily affirmed by the Supreme Court of the United States, have held that public school financing systems structurally indistinguishable from California's are not constitutionally proscribed under the equal protection clause, the *Serrano* decision signals a new judicial attitude towards discriminatory practices which affect the quality of a child's education.

By exposing the constitutional frailty of California's school finance plan, the *Serrano* court's penetrating and incisive reasoning has had a catalytic effect upon other courts. Federal district and state courts in Minnesota,[5] Texas,[6] and New Jersey[7] have not only adopted the rationale of *Serrano* as their own, but have ruled as a matter of law that a child has a right to have the quality of his education unaffected by the taxable wealth of the district in which he lives.[8] Accordingly, they have held that the present method of financing public education in those states violates the equal protection clause of the fourteenth amendment. In approximately twenty other jurisdictions similar suits have been filed requesting the courts to invalidate the present funding schemes and force the legislatures to enact new systems of support.[9] The Texas case will probably be argued before the United States

3. The Supreme Court of California reversed the court of appeal's holding that the plaintiffs had stated no cause of action warranting judicial relief and remanded the case to the trial court for final disposition in accordance with its findings. The principal issue at trial will be whether the state can rebut the strong logical presumption that expenditure levels are a reliable index of the quality of education. In the event that this issue as well as other issues of fact are resolved in favor of the plaintiffs, the supreme court directed in its modification on denial of rehearing that the trial court could provide for an orderly transition within a reasonable period to a new system of public school support. 5 Cal. 3d at 618, 487 P.2d at 1266, 96 Cal. Rptr. at 626. For the separate reprint of the modification of the *Serrano* opinion, see 4 CCH TAX REP., CAL. ¶ 204-706 at 14,168-69 (1971). The thorough treatment and forceful resolution of the complex issues involved in this case viewed in conjunction with an express provision providing for transition to a new fiscal system implicitly suggests that the matters left undecided by the supreme court will probably be resolved in the plaintiffs' favor. For further discussion of the specific issues to be decided at trial, see note 202 *infra*.

4. Burruss v. Wilkerson, 310 F. Supp. 572 (W.D. Va. 1969), *aff'd mem.*, 397 U.S. 44 (1970); McInnis v. Shapiro, 293 F. Supp. 327 (N.D. Ill. 1968), *aff'd mem. sub nom.* McInnis v. Ogilvie, 394 U.S. 322 (1969).

5. Van Dusartz v. Hatfield, 334 F. Supp. 870 (D. Minn. 1971). "Although the Minnesota statute governing the system of financing education had expired, the court treated the system as still in effect in determining whether a cause of action had been stated, but deferred action until a new system had been enacted." 2 CCH STATE TAX REP., MINN. ¶ 200-581 at 10,185 (1971).

6. Rodriguez v. San Antonio Indep. School Dist., 337 F. Supp. 280 (W.D. Tex. 1972) (three judge court), *rev'g mem.*, 299 F. Supp. 476 (W.D. Tex. 1969).

7. The New York Times, Jan. 20, 1972, at 1, col. 7.

8. *E.g.*, Van Dusartz v. Hatfield, 334 F. Supp. 870, 872 (D. Minn. 1971).

9. The Arizona Daily Star, Dec. 25, 1971, § A, at 1, col. 4.

Supreme Court in the fall and the present status of educational finance programs may very well hinge on that decision.[10] Regardless of the Supreme Court's disposition of the controversy, the result in *Serrano* will be unaffected and the California school financing system will remain unconstitutional since the *Serrano* court found that it also violated the state constitution.[11] If, however, the Court endorses the *Serrano* reasoning, as seems likely, the public school financing systems of practically every state in the nation will have to undergo major revision in order to comply with the equal protection clause.

To comprehend fully the rationale of the *Serrano* decision, it is first necessary to examine generally the workings of public school financing systems used in various states throughout the country and the cases that upheld the constitutionality of some of those systems under the federal due process and equal protection clauses. Once having set the background for the *Serrano* case, California's school finance plan can bet set forth and the constitutional issues which it presents can be properly analyzed and the court's disposition of them evaluated. Finally, since neither the *Serrano* court nor the other courts which have definitively stricken school financing statutes have offered any guidance as to the form alternative financing systems should take, except to indicate that they must comply with the court's decisions, the legislatures of the affected states must within a reasonable period of time devise new systems of public school support. To facilitate such legislation alternative financing systems which satisfy the requirements of *Serrano* and its progeny will be evaluated.

BACKGROUND OF PUBLIC SCHOOL FINANCING

The Structure of Public School Financing Systems

While the state has the primary responsibility for funding public schools,[12] most states have given local school districts administrative

10. Rodriguez v. San Antonio Indep. School Dist., 337 F. Supp. 280 (W.D. Tex.), *appeal docketed,* No. 71-1332, 40 U.S.L.W. 3551 (U.S. Apr. 17, 1972); The Wall Street Journal, Mar 13, 1972, at 1, col. 6. Thirty states have joined the Texas case by filing amicus curiae briefs asking the Supreme Court to reverse summarily that decision, claiming that it would cost an estimated $8 billion a year to raise the expenditure level now spent on poorer districts to the level of the wealthiest districts. The Arizona Daily Star, Apr. 19, 1972, § A, at 9, col. 1.

11. *See* 5 Cal. 3d at 596 n.11, 487 P.2d at 1249 n.11, 96 Cal. Rptr. at 609 n.11. *See also* note 100 *infra.*

12. "State responsibility for education is firmly imbedded in the constitutions of the several states and buttressed by tradition and court decisions." COUNCIL OF STATE GOVERNMENTS, THE FORTY-EIGHT STATE SCHOOL SYSTEMS 4 (1949). *See also* N. EDWARDS, THE COURTS AND THE PUBLIC SCHOOLS 1 (1933); A. MUNSE, STATE PROGRAMS FOR PUBLIC SCHOOL SUPPORT 1 (HEW Pub. No. OE-22023, 1965); L. PETERSON, R. ROSSMILLER & M. VOLZ, THE LAW AND PUBLIC SCHOOL OPERATION 102 (1969).

and fiscal control over their respective school systems.[13] Local control over education is considered desirable because those most familiar with the special needs and interests of each district are thought to be in the best position to determine administrative and fiscal policy.[14] Questions of fiscal policy range from estimations of the rate at which the district as a whole can afford to tax itself for educational expenditures to decisions governing the purposes for which funds should be distributed among schools within the district. Local school districts in the majority of states depend extensively on the local real property tax to raise their shares of school revenue.[15] The various states supplement those amounts to a greater or lesser extent by placing statewide taxes on real property, by applying for federal assistance,[16] and by taxing other sources of revenue.[17] The present percentage of federal contributions to the total cost of maintaining the public school system remains relatively insubstantial,[18] and the states must rely almost entirely on their own taxpaying capacity.

In order to fulfill their fiscal responsibilities, the states have established complex school financing systems which provide for the

13. *See generally* C. HOOKER & V. MUELLER, THE RELATIONSHIP OF SCHOOL DISTRICT REORGANIZATION TO STATE AID DISTRIBUTION SYSTEMS, PARTS I & II (1970); OFFICE OF EDUCATION, DEPARTMENT OF HEALTH, EDUCATION & WELFARE, PUBLIC SCHOOL FINANCING PROGRAMS, 1968-69 (T. Johns ed., HEW Pub. No. OE-22002, 1969) (hereinafter cited as PUBLIC SCHOOL FINANCING PROGRAMS, 1968-69).

14. The virtues of decentralization were alluded to in McInnis v. Shapiro, 293 F. Supp. 327, 333 n.20 (N.D. Ill. 1968):

> Decentralized administration and decision-making are desirable for administrative and political reasons. A division of the state into local school districts is therefore necessary. The voters in any particular area are best able to weigh convenience, the desired degree of homogeneity in the student body, and other factors. These voters are the best able to draw school district boundaries. Once these boundaries are drawn, the administrators or residents of the district, being closest to the problem, are best able to determine the educational needs of the district's children. That decision takes the form of support for a certain tax rate.

15. *See* R. GARVUE, MODERN PUBLIC SCHOOL FINANCE 218 (1969); R. JOHNS & E. MORPHET, THE ECONOMICS AND FINANCING OF EDUCATION 129-35 (1969). "About 98 percent of all local school tax revenue is derived from property taxes." Johns, *The Development of State Support for the Public Schools*, in 4 NATIONAL EDUCATIONAL FINANCE PROJECT, STATUS AND IMPACT OF EDUCATIONAL FINANCE PROGRAMS 1, 19 (R. Johns, K. Alexander & D. Stollar eds. 1971). [hereinafter cited as 4 NEF PROJECT].

16. The federal government has enacted over 200 different programs which entitle the states to receive federal aid for education. *See* H. ROWLAND & R. WING, FEDERAL AID FOR SCHOOLS: 1967-1968 GUIDE at 5 (1967). *See also id.* at 334; Bededbaugh & Alexander, *Financial Equalization Among the States from Federal Aid Programs*, in 4 NEF PROJECT, *supra* note 15, at 251-91; Tiedt, *Historical Development of Federal Aid Programs*, in *id.*, at 223-50. For recent developments in federal aid to education, see President Nixon's proposal of the Equal Education Act of 1972. New York Times, Mar. 17, 1972, at 1, col. 8; *id.* at 20, col. 1.

17. For information concerning local nonproperty taxes for schools, see Moore, *Local Nonproperty Taxes for Schools*, in 4 NEF PROJECT, *supra* note 15, at 209-21.

18. In 1969-70 the federal government contributed 6.6 percent of school revenue receipts. Johns, in 4 NEF PROJECT, *supra* note 15, at 19-20. *See also* R. GARVUE, *supra* note 15, at 282; U.S. BUREAU OF CENSUS, DEP'T OF COMMERCE, GOVERNMENTAL FINANCES IN 1968-69, at 23 (Pub. No. GF69-No. 5, 1970).

collection and allocation of school revenue. No single program for public school support, however, has been adopted by all the states; each state's fiscal plan is the result of variations in such factors as population, economy, and geography.[19] Any comparison of the financing systems presently in use, therefore, must recognize the individual variables operative in each state. Nevertheless, empirical and conceptual analogies can be drawn among the various systems and some fairly accurate generalizations can be made.[20]

There are two basic types of public school financing: totally centralized financing by the state and totally decentralized financing by the local districts.[21] At last count, 43 states including Arizona[22] had adopted hybrid financing schemes which incorporated elements of each of these polar concepts. [23] Conceptually, most of the states operate with structurally similar finance plans, known as "foundation programs,"[24] that require both the state and the local districts to make substantial contributions to the funding of education.[25]

The essence of a foundation program is to establish an equitable fiscal partnership between the state as a whole and the individual school districts.[26] "Its purpose is to assure the financing of an acceptable educational offering in all school systems regardless of their tax-

19. A. MUNSE, *supra* note 12; Alexander, Hamilton & Forth, *Classification of State School Funds*, in 4 NEF PROJECT, *supra* note 15, at 29.

20. For current empirical and conceptual analyses of public school financing methods, see J. COONS, W. CLUNE & S. SUGARMAN, PRIVATE WEALTH AND PUBLIC EDUCATION 96-160 (1970) [hereinafter cited as WEALTH AND EDUCATION]; Alexander, Hamilton & Forth, *supra* note 19, at 30-47; Johns & Salmon, *The Financial Equalization of Public School Support Systems in the United States for the School Year 1968-69*, in 4 NEF PROPECT, *supra* note 15, at 119-92.

21. A. MUNSE, *supra* note 12.

22. For an empirical description of Arizona's financing system, see WEALTH AND EDUCATION, *supra* note 20, at 117-25.

23. *Id.* at 98. It is unimportant for the purpose of this analysis whether the number of states adopting this system has changed during the last two years.

24. "By far the greatest number of states—34—employ foundation plans as their basic subvention approach." Note, *Equal Educational Opportunity: A Case for the Children*, 46 ST. JOHN'S L. REV. 280, 294 (1971). This conclusion was drawn from Johns & Salmon, *supra* note 20, at 122. The term "foundation program" is synonymous with such expressions as "minimum program" or "basic program." A. MUNSE & E. MCLOONE, PUBLIC SCHOOL FINANCING PROGRAMS OF THE UNITED STATES, 1957-58, at 2 (HEW Pub. No. OE-22002, 1960).

25. Of the seven remaining states, three fall within the concept of centralized financing and four within decentralized financing. *See* A. MUNSE, *supra* note 12. Hawaii, Delaware and North Carolina, have been referred to as fully centralized jurisdictions, but the two latter states still depend on local contributions for a small percentage of educational expenses. *Id. See also* WEALTH AND EDUCATION, *supra* note 20, at 149-50. Hawaii is unique in that it has only one statewide school district; however, each county must submit a budget for its own expenditures. *See* PUBLIC SCHOOL FINANCING PROGRAMS, 1968-69, *supra* note 13, at 70. Iowa, Nebraska, New Hampshire, and South Dakota have delegated the responsibility for support of the public schools almost entirely to the individual districts. *See* A. MUNSE, *supra* note 12, at 2.

26. P. MORT, W. REUSSER & J. POLLEY, PUBLIC SCHOOL FINANCE 44 (3d ed. 1960), *quoting* NATIONAL EDUCATIONAL ASSOCIATION, COMMITTEE ON TAX EDUCATION AND SCHOOL FINANCE, GUIDES TO THE DEVELOPMENT OF STATE SCHOOL FINANCE PROGRAMS 5 (1949).

paying abilities."[27] The typical program defines the basic educational services that should be available to all the children in the state, estimates the basic amount or minimum acceptable level of support that all districts will need to furnish those basic services, and determines the fiscal obligation of the state and of each district according to their respective abilities to pay.[28] Some states provide a single state fund which is allocated among the districts without imposing any obligation for contribution on an individual district, while others require each district to levy a minimum tax rate in order to participate fully in the foundation program.[29] Despite differences in approach, the majority of states have designed foundation programs dedicated to guaranteeing a minimum amount of support for each pupil.[30]

The foundation plan, as originally conceived by Strayer and Haig,[31] attempted to implement "equalization of educational opportunity" which, in contrast to "equalization of school support," was aimed at providing each child with equal educational opportunity only up to some prescribed minimum.[32] Over and above the foundation program's minimum, each district would have the option of increasing the amount of funds available to it for education, but these additional funds would have to come exclusively from local sources.[33] The state, therefore, obligated itself to provide each student with a basic education, but not a costly quality education.

This minimum cut-off point was justified on the theory that if districts wanted their children to obtain a better education than could be provided within the prescribed minimum, they would have to make an additional sacrifice in terms of their individual tax burden. Thus it was assumed that the amounts available to various districts in excess of the foundation level of guaranteed support were a measure of each district's willingness to tax itself for educational purposes. Consequently, the foundation program condoned unequal expenditure levels from district to district on the supposition that "local vigor" for school support justified the fiscal disparities.[34] This presupposed, however, that the value of the property within each district was sufficiently equal to sustain comparable expenditures from one district to

27. *Id.*
28. *See generally* WEALTH AND EDUCATION, *supra* note 20, at 66-95.
29. *See generally* PUBLIC SCHOOL FINANCING PROGRAMS, 1968-69, *supra* note 13.
30. *Id. See also* COUNCIL OF STATE GOVERNMENTS, *supra* note 12, at 128-31.
31. *See* G. STRAYER & R. HAIG, FINANCING OF EDUCATION IN THE STATE OF NEW YORK (1923); WEALTH AND EDUCATION, *supra* note 20, at 63.
32. R. MORT, W. REUSSER & J. POLLEY, *supra* note 26, at 45, *quoting* G. STRAYER & R. HAIG, *supra* note 31.
33. *See* WEALTH AND EDUCATION, *supra* note 20, at 64-65.
34. *See* R. MORT, W. REUSSER & J. POLLEY, *supra* note 26, at 118-24. *See also* Johns, in 4 NEF PROJECT, *supra* note 15, at 4.

another,[35] and that each district's taxpaying ability was equivalent or that adequate adjustments could be made for those districts that were financially weak. Even where adjustments were made for the poorer districts, the capacity of each district to raise substantially equivalent amounts in excess of the foundation's minimum was usually unequal due in large measure to the creation by the state of school districts whose tax bases were unequal. Foundation programs, while predicated upon the principle of equal educational opportunity, failed not only to provide for the full equalization of school support but, even worse, made a high-quality education possible only for those districts that could afford it.

Aggravating this situation even further, the minimum level of guaranteed support in many states did not even provide sufficient funds to support the costs of a "basic" education. A telling comparative study of the various programs used in 48 states disclosed other faults as well, reaching the following conclusions in 1949:

> The methods of apportioning state school funds in many states are not conducive to guaranteeing a reasonable minimum of educational opportunity in all parts of the state, or to equitable distribution of the costs of schools, or to effective and economical operation. Many states report and numerous studies show that the methods of distributing state school funds tend to interfere with needed school district reorganization and to perpetuate existing small districts. The extreme variations found in the per pupil expenditures within states indicate that children in some districts have meager opportunities for education as compared with children in other districts in the same state. Analyses of school finance practices in the several states reveal bases for distributing school funds that tend either to perpetuate inequalities or to increase them. Other methods of distributing state school funds tend to encourage extravagance or to overemphasize one phase of the school program at the expense of other phases. The finance analyses likewise show that relatively few states use effective and reliable formulas based on the taxpaying ability of the local districts for distributing state school funds.[36]

Twenty-two years later, most of these observations still hold true. What is surprising is not that these inequities in allocating school revenue still persist, but that they were not brought before the courts for constitutional resolution until 1968.

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35. *Cf.* Rodriguez v. San Antonio Indep. School Dist., 337 F. Supp. 280 (W.D. Tex. 1972).

36. COUNCIL OF STATE GOVERNMENTS, *supra* note 12, at 8-9.

Pre-Serrano Cases

In contrast to *Serrano v. Priest*[37] and its progeny,[38] the pre-*Serrano* cases held that the fiscal disparities caused by the unequal distribution of wealth and spending power among school districts were neither arbitrary nor unreasonable, and did not violate the due process and equal protection clauses.[39] Although the courts readily admitted that inequalities in the method of supporting the schools were apparent,[40] every challenge to the constitutionality of school financing systems was dismissed for failure to state grounds warranting judicial relief.

McInnis v. Shapiro,[41] a three-judge federal district court decision in Illinois, is the leading case upholding the constitutionality of public school financing systems. The plaintiffs, representing elementary and secondary pupils from four districts within Cook County in a class action, alleged that Illinois' use of the local property tax to finance the public schools permitted wide variations in expenditure levels from district to district, which resulted in the provision of a good education for some and an inferior education for others.[42] The students premised their attack on the lack of nexus between the uneven spending and the educational needs of the beneficiaries of those funds. Rather than ask that the system merely be declared unconstitutional, they postulated that the equal protection clause required that school funds be distributed solely in accordance with students' educational needs.[43] Accordingly, the plaintiffs suggested that the court require either that expenditures be allocated on an equal basis to all

37. 5 Cal. 3d 584, 487 P.2d 1241, 96 Cal. Rptr. 601 (1971).

38. See cases cited in notes 5-7 *supra*.

39. *See, e.g.*, Burruss v. Wilkerson, 310 F. Supp. 572 (W.D. Va. 1969), *aff'd mem.*, 397 U.S. 44 (1970); McInnis v. Shapiro, 293 F. Supp. 327 (N.D. Ill. 1968), *aff'd mem. sub nom.* McInnis v. Ogilvie, 394 U.S. 322 (1969). *See also* WEALTH AND EDUCATION, *supra* note 20, at 289 n.5 (1970). *Cf.* Hargrave v. Kirk, 313 F. Supp. 944 (M.D. Fla. 1970), *vacated on other grounds sub nom.* Askew v. Hargrave, 401 U.S. 476 (1971).

40. *See* McInnis v. Shapiro, 293 F. Supp. 327, 331 (N.D. Ill. 1968). Per-pupil expenditures varied between $480 and $1,000 in Illinois in 1968. *Id.* at 330.

41. *Id.*

42. *Id.* at 329.

43. WEALTH AND EDUCATION, *supra* note 20, at 306, *quoting* Complaint, McInnis v. Shapiro, 293 F. Supp. 327 (N.D. Ill. 1968):

> [T]he plaintiffs argued denial of equal protection in the following respects:
> '(a) . . . *classifications* upon which students will receive the benefits of a certain level of per pupil educational expenditures are not related to the educational needs of these students and are therefore arbitrary, capricious and unreasonable;
> '(b) . . . the method of financing public education fails to consider . . . (ii) the added costs necessray to educate those children from culturally and economically deprived areas (iii) the variety of educational needs of the several public school districts of the state of Illinois . . .
> '(c) . . . the method of financing public education fails to provide each child an equal opportunity for an education . . . .'

students, or that revenue in wealthy districts in excess of a prescribed maximum be siphoned off and redistributed to the poorer districts.[44]

In dismissing the allegations, the *McInnis* court held first that the fourteenth amendment did not require "public school expenditures [to] be made only on the basis of pupils' educational needs without regard to the financial strength of local school districts";[45] and second, that even if the fourteenth amendment did contain such a requirement, the concept of "educational need" was sufficiently nebulous to render the controversy non-justiciable for lack of judicially manageable standards.[46] As to the first proposition, the court explained that the allocation of public moneys has always been a basic policy decision reserved for the state legislatures.[47] To justify this policy, the court cited statewide variations in costs and salaries and other variables as reasons why the court should restrain itself from intermeddling in matters pertaining to that kind of economic regulation.[48] It bolstered this position with a number of decisions which indicate that the constitution does not require territorial uniformity among the various subdivisions of the state.[49] The court seemed to be rationalizing that since variations in population, geography, and economy often make it impossible to require uniformity throughout the state, fiscal disparities have a reasonable basis. But the court's inference that differences may be unavoidable with respect to the costs of maintenance, salaries, and the "relative efficiency of school districts,"[50] as well as with allowing certain districts to experiment with programs that initially require special funding, does not excuse those disparities that are caused by variations or other factors having no rational basis.

Notwithstanding the inequity created by these fiscal disparities, the court determined that tested by the traditional rational basis standard which permits the states wide discretion in enacting laws that affect some groups of citizens differently from others,[51] the Illinois funding system could not be considered to discriminate invidiously. In upholding the classifications the legislature had made in the financing system, the court concluded that an inevitable consequence of a

44. 293 F. Supp. at 331-32.
45. *Id.* at 336.
46. *Id.* at 329.
47. *Id.* at 332.
48. *Id. See generally* Note, *Developments in the Law—Equal Protection,* 82 HARV. L. REV. 1065 (1969).
49. Salsburg v. Maryland, 346 U.S. 545, 550-53 (1954). *But see* Horowitz & Neitring, *Equal Protection Aspects of Inequalities in Public Education and Public Assistance Programs from Place to Place Within a State,* 15 U.C.L.A.L. REV. 787 (1968).
50. 293 F. Supp. at 332.
51. *See, e.g.,* Rinaldi v. Yeager, 384 U.S. 305 (1966); McGowan v. Maryland, 366 U.S. 420 (1961); Tigner v. Texas, 310 U.S. 141 (1940).

decentralized school system was that districts would diverge in their desire to spend money on education as opposed to police protection and other governmental services.[52] Since the foundation program at least guaranteed the basic costs of an education to every child residing within the state[53] and the legislature often updated the statutes to improve the overall quality of education,[54] the *McInnis* court refused to hold the system irrational or arbitrary.

With respect to the second proposition, the court said that " 'educational need' is a conclusory term, reflecting the interaction of several factors such as the quality of teachers, the students' potential, prior education, environmental and parental upbringing, and the school's physical plant."[55] With so many variables to be adjusted, the *McInnis* court felt that courts could not independently "provide the empirical research and consultation necessary for intelligent educational planning."[56] The plaintiffs' alternative financing proposals were rejected on the ground that equal expenditures per pupil would not solve the problems of the poor since "disadvantaged children should receive more than average funds, rather than equal expenditures, so their potentialities can be developed."[57] As to the suggestion that the wealthy districts "subsidize" the poor districts, the court reasoned that this would only have the effect of discouraging the affluent districts from ever raising their tax rates.[58] Impliedly giving voice to the fear that the invalidation of Illinois' funding system would lead to "some improvement of the worst at the expense of the best,"[59] the court acceded to the logic of Professor Kurland's thesis that the objective of education should not be "equality" of educational opportunity, but a raising of our lowest and our highest standard—quality, not

52. "In the instant case, the General Assembly's delegation of authority to school districts appears designed to allow individual localities to determine their own tax burden according to the importance they place upon public schools. Moreover, local citizens must select which services they value most highly. While some communities might place heavy emphasis on schools, others may cherish police protection or improved roads." 293 F. Supp. at 333.

53. Illinois' common school fund assured each pupil a minimum of $400 in 1968. *Id.*

54. The *McInnis* court was favorably impressed by the increase in foundation level from $330 to the present $400 in 1965-66, the consolidation of school districts, and recent reports proposing an increase in the foundation level to $600 for elementary students and $750 for high school students. *Id.* at 334 n.23. Such reports, however, do not always result in positive action. *See, e.g.,* Keyes v. School Dist. Number One, 313 F. Supp. 90, *rev'd in part,* 445 F.2d 990 (10th Cir. 1971).

55. 293 F. Supp. at 329 n.4.

56. *Id.* at 336. *Cf.* Baker v. Carr, 369 U.S. 186, 282-83 (1962) (Frankfurter, J., dissenting).

57. 293 F. Supp. at 336 n.35. For a jurisprudential analysis explaining why the courts should invalidate the present financing systems, see Kurland, *Equal Educational Opportunity: The Limits of Constitutional Jurisprudence Undefined,* 35 U. CHI. L. REV. 583, 596-600 (1968).

58. 293 F. Supp. at 336.

59. *Id. See* Kurland, *supra* note 57, at 590.

equality.[60] Without a viable alternative to replace the existing financing structure, the court was reluctant to hold the system unconstitutional and assign to the legislature the difficult task of reconstructing a new system.

Following the *McInnis* rationale, a federal district court concluded in *Burruss v. Wilkerson* that despite extreme variations in per pupil expenditures Virginia's school finance plan did not violate the equal protection clause under the rational basis standard.[61] Interestingly, the *Burruss* court excused these inequalities because there were insufficient state funds to fully equalize expenditure levels from district to district. The court, however, offered no explanation why the lack of sufficient funds should justify these fiscal disparities. Nevertheless, it said that "the courts have neither the knowledge, nor the means, nor the power to tailor the public moneys to fit the varying needs of these students."[62] When both of these decisions were summarily affirmed by the Supreme Court of the United States,[63] it seemed that state financing systems were constitutionally secure and that the only hope for change was to seek action from the state legislatures. *McInnis* and *Burruss* undoubtedly would have stymied the possibility of future judicial relief in the area of public school financing had it not been for the incisive analysis[64] of the California funding program in *Serrano v. Priest.*

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60. 293 F. Supp. at 336. *See* Kurland, *supra* note 57, at 591. The *McInnis* court noted that there simply were not enough tax dollars to meet all educational needs. Thus, it seems as though the court feared that equalization of educational opportunity might result in the wealthier districts receiving less funds to spend on education than they were then receiving.

61. 310 F. Supp. 572 (W.D. Va. 1969). The *Burruss* decision was cryptic, relying primarily on *McInnis* for precedent.

62. *Id.* at 574.

63. The Supreme Court's per curiam affirmance of *McInnis* and *Burruss* was decided without the benefit of oral argument, and cited no cases for support. The Court's jurisdiction was not discretionary, coming by way of an appeal from a three-judge federal court. 28 U.S.C. § 1253 (1970). Although the Court's affirmances were concededly a decision on the merits, only one court, a trial court, has considered them dispositive of the issue. *See* Spano v. Bd. of Educ., 40 U.S.L.W. 2475 (N.Y. Super. Ct., Jan. 21, 1972). For a discussion of the significance of summary affirmances, see R. STERN & E. GRESSMAN, SUPREME COURT PRACTICE 232-33 (4th ed. 1969). *See also* 5 Cal. 3d at 616-17, 487 P.2d at 1264-65, 96 Cal. Rptr. at 624-25; Coons, Clune & Sugarman, *Educational Opportunity: A Workable Constitutional Test of State Financial Structures,* 57 CALIF. L. REV. 305, 308-09 (1969).

64. *McInnis* and *Burruss* might have foreclosed the possibility of judicial relief had it not been for the extraordinary efforts of three commentators, John Coons, William Clune and Stephen Sugarman. By subjecting various state financing systems to rigorous empirical and conceptual analysis, they uncovered the constitutional infirmities in the existing financing systems and compiled a devastating critique of the countless flaws in foundation programs. *See* WEALTH AND EDUCATION, *supra* note 20; Coons, Clune & Sugarman, *Educational Opportunity: A Workable Constitutional Test of State Financial Structures,* 57 CALIF. L. REV. 305 (1969). The Supreme Court of California cited their work three times and followed its reasoning throughout the opinion. *See Courts Look at Public School Financing,* 58 A.B.A.J. 48 (1972).

SERRANO V. PRIEST

California's School Finance Plan

Pursuant to article IX, section 6 of the Constitution of California the legislature has empowered local districts to raise funds by levying a tax on all real property within the district.[65] Local district taxes on real property, supplemented by aid from the state school fund, provide approximately 90 percent of California's school revenue.[66]

Prior to *Serrano*, California ensured that every school district would receive annually a guaranteed minimum per-pupil amount of support for its schools, whether from state or local funds. Thus, with the exception of certain "small schools"[67] and certain districts eligible to receive "bonus funds,"[68] each district could depend upon receiving $355 per elementary pupil[69] and $488 per secondary pupil.[70] Since the state provided no equalization beyond those figures, there could be wide variation from district to district in the amount of funds available for expenditure on education.

Money from the state school fund was distributed in two ways. First, a flat grant of $125 per child was allocated to each district regardless of its wealth.[71] Even districts which had surpassed the minimum amount of guaranteed support through their own resources were entitled to receive that amount. Second, those districts that had not reached the guaranteed minimum by combining locally raised funds with the flat grant were entitled to equalization aid that brought them up to the prescribed foundation level of support.[72] Thus, if the minimum guaranteed amount to all districts were $500 per pupil and an individual district collected only $300 per pupil including $125 in flat grant, the state would make up the difference of $200 per pupil. In certain circumstances the district might qualify for supplemental funds.[73] Nevertheless, the state equalization aid was distributed only

65. CAL. CONST., art. IX, § 6; CAL. EDUC. CODE § 20701 *et seq.* (West 1969). For the definition of "taxable property" in California, see CAL. CONST., art. XIII, § 1. The conceptual basis of California's foundation program is set forth in CAL. EDUC. CODE § 17300 (West 1969) (legislative intent).

66. California educational revenues for the fiscal year 1968-69 came from the following sources: local property taxes, 55.7 percent; state aid, 35.5 percent; federal funds, 6.1 percent; miscellaneous sources, 2.7 percent. 5 Cal. 3d at 591-92 n.2, 487 P.2d at 1246-47 n.2, 96 Cal. Rptr. at 606-07 n.2. *See also* PUBLIC SCHOOL FINANCING PROGRAMS, 1968-69, *supra* note 13, at 25-35.

67. CAL. EDUC. CODE §§ 17663-17663.7 (West 1969); *id.* §§ 17663.8, 17664 (West Supp. 1972).

68. *Id.* §§ 17671-17674 (West 1969).

69. *Id.* §§ 17656, 17660 (West Supp. 1972).

70. *Id.* § 17665.

71. *Id.* § 17751 (West 1969) (basic state aid for elementary districts); *id.* § 17801 (basic state aid for high school districts).

72. *Id.* §§ 17601-17608, 17901-17970 (West Supp. 1972).

73. *See* text & notes 76-77 *infra.*

up to the minimum foundation level.[74] If a district wished to spend beyond that level, it would be obliged to raise the extra funds by further taxation of property within its boundaries.

The amount of money each district could raise to supplement the minimum depended primarily on the value of its tax base—the assessed valuation of the real property within its boundaries—and the rate at which it taxed that base.[75] The tax rate was in part a function of the tax base. In order to raise a desired sum of money to run the schools, a district with a large assessed valuation could levy a lower tax rate than a district with a small tax base. If the tax bases were relatively equal throughout the state, then variations in tax rates would theoretically reflect a difference in each district's desire to raise funds for education. In fact, however, the tax bases varied considerably; for example, in 1969-70 "the assessed valuation per unit of average daily attendance of elementary school children ranged from a low of $103 to a peak of $952,156—a ratio of nearly 1 to 10,000."[76] Due to this discrepancy, poorer districts had to levy a higher tax rate in order to raise equivalent amounts.

Although each district could have taken advantage of the maximum state funding if it elected to tax itself at the minimum prescribed tax rate,[77] the poorer districts were virtually compelled by their own indigent circumstances to maximize the yield of their taxable sources if they wanted to provide their children with something approaching a quality education.[78] Regardless of how high a tax burden these

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74. *See* CAL. EDUC. CODE § 17300 (West 1969).

75. 5 Cal. 3d at 592, 487 P.2d at 1246, 96 Cal. Rptr. at 606.

76. *Id.* at 592, 487 P.2d at 1246, 96 Cal. Rptr. at 606.
Statistics compiled by the legislative analyst show the following range of assessed valuations per pupil for the 1969-1970 school year:

	Elementary	*High School*
Low	$ 103	11,959
Median	19,600	41,300
High	952,156	349,093

5 Cal. 3d at 594 n.9, 487 P.2d at 1247 n.9, 96 Cal. Rptr. at 607 n.9, *citing* LEGISLATIVE ANALYST, PUBLIC SCHOOL FINANCE, Part V, at 7 (1970). See note 81 *infra*.
"Most school aid determinations are based not on total enrollment, but on 'average daily attendance' (ADA), a figure computed by adding together the students actually present on each school day and dividing that total by the number of days school was taught. . . . In practice, ADA approximates 98 percent of total enrollment." *Id.* at 592 n.4, 487 P.2d 1246 n.4, 96 Cal. Rptr. 606 n.4. Hereinafter figures on or references to a "per-pupil" or "per-child" basis mean per unit of ADA.

77. Although the only requirement for "basic aid" is to have a reported attendance for the current year, schools may obtain "equalizing aid" in addition dependent upon their minimum qualifying tax rate (elementary, 10 mills; secondary, 8 mills), and their adjusted and modified assessed valuation. PUBLIC SCHOOL FINANCING PROGRAMS, 1968-69, *supra* note 13, at 26. For "basic aid" provisions, see CAL. EDUC. CODE §§ 17751, 17801 (West 1969). For "equalization aid" provisions, see *id.* §§ 17601-17608, 17901-17940.

78. Each district was permitted by statute to decide how much it wants to spend on education. CAL. EDUC. CODE §§ 20701-20705 (West 1969). The legislature, how-

districts might have been prepared to carry, it would not have been feasible for them to raise their level of school spending to that enjoyed by districts with higher tax bases.[79] Ironically, the effect of the flat rate state grant of $125 per pupil was to exaggerate these basic inequities, since it served only as a substitute for equalizing aid for a district below the state-guaranteed minimum, but was equivalent to a bonus for districts above that level.[80] The inequality flowing from this system is reflected in the expenditures per pupil for 1969 which ranged from a low of $407 to a high of $2,586 at the elementary school level.[81]

In theory the California school financing system was dedicated to the principle of providing equal educational opportunity to all public school students regardless of the financial strength of the district in which they resided,[82] but in practice it favored the wealthy districts and discriminated against the poor. The inequities of the system were inflicted on both parents and children alike. Parents from economically weak districts were victims of the system in that they were forced by their indigent circumstances to pay higher tax rates than the more affluent districts and yet were unable to spend nearly as much on their children's education. Residents of Baldwin Park, for example, paying a school tax of $5.48 per $100 of assessed valuation in 1968-69, found to their dismay that they could raise only half as much as the residents of Beverly Hills, who paid only $2.38 per $100.[83] The ultimate effect on the school children from these disadvantaged districts was even more onerous. As victims of the intolerable disparities in expenditures per pupil,[84] they were compelled to attend public schools in which the physical and instructional facilities

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ever, had placed ceilings effective until July 1, 1971 on permissible district tax rates not approved by the residents. *Id.* §§ 20751-20751.1. Nevertheless, districts could vote to increase the tax rate beyond the ceiling through a legislatively sanctioned "tax override" election. *Id.* §§ 20803-20816.

79. 5 Cal. 3d at 598 & n.15, 487 P.2d at 1250 & n.15, 96 Cal. Rptr. at 610 & n.15.

80. 5 Cal. 3d at 595, 487 P.2d at 1248, 96 Cal. Rptr. at 608. Thus, the flat grant in California is "anti-equalizing." *See* Coons, Clune & Sugarman, *supra* note 64, at 315; WEALTH AND EDUCATION, *supra* note 20, at 98-116.

81. Per-pupil expenditures for the 1969-1970 school year varied as follows:

	Elementary	*High School*	*Unified*
Low	$ 407	$ 722	$ 612
Median	672	898	766
High	2,586	1,767	2,414

Id. at 594 n.9, 487 P.2d at 1247 n.9, 96 Cal. Rptr. at 607 n.9. See note 76 *supra.*

82. "The broader based taxing power of the State should be utilized to raise the level of financial support in the properly organized but financially weak districts of the State, thus contributing greatly to the equalization of educational opportunity for the students residing therein." CAL. EDUC. CODE § 17300 (West 1969).

83. 5 Cal. 3d at 598, 487 P.2d at 1250, 96 Cal. Rptr. at 610, *citing* CALIFORNIA DEP'T OF EDUCATION, CALIFORNIA PUBLIC SCHOOLS, SELECTED STATISTICS 1968-1969, Table III-16, at 43 (1970).

84. For variations in expenditures per pupil see notes 76, 81 *supra.*

were substantially inferior to the school facilities and educational opportunities made available to the children living in the wealthiest locality. A constitutional challenge to the financing system alleging that it violated the equal protection clause by making the quality of education a function of the local tax base was almost inevitable.

The Constitutional Issues

In *Serrano v. Priest* school children[85] and their parents[86] brought class actions challenging the California school financing system because it allegedly discriminated on the basis of wealth against individual school districts and their residents, and made the quality of a child's education a function of the amount of property owned by his parents and neighbors.[87] Contending that the financing legislation also infringed upon a fundamental interest—the right to an education—the plaintiffs argued that these grounds, especially in combination, presumptively established a denial of equal protection under the law and required the court to test the constitutionality of the statutes under the stricter equal protection standard, thereby imposing upon the state the burden of demonstrating " 'not only that it [had] a *compelling* interest which [justified] the law but that the distinctions drawn by the law [were] *necessary* to further its purpose.' "[88] The rejection of these contentions by both the trial court and the court of appeals set the stage for the supreme court's historic decision.

The defendants contended that the summary affirmance of *McInnis* by the Supreme Court of the United States was binding on the Supreme Court of California.[89] In the alternative, they contended

85. Plaintiff children claimed to represent "a class consisting of all public school pupils in California, 'except children in that school district, the identity of which is presently unknown, which school district affords the greatest educational opportunity of all school districts within California.' " 5 Cal. 3d at 589, 487 P.2d at 1244, 96 Cal. Rptr. at 604.

86. Plaintiff parents claimed to represent "a class of all parents who have children in the school system and who pay real property taxes in the county of their residence." *Id.* at 589, 487 P.2d at 1244, 96 Cal. Rptr. at 604. The parents alleged that as a direct result of the financing system they were required to pay a higher tax rate than taxpayers in many other districts in order to obtain for their children the same or lesser educational opportunities afforded children in those other districts. *Id.* at 590-91, 487 P.2d at 1245, 96 Cal. Rptr. at 605. The court found it unnecessary to decide the parents' claim because if the financing legislation were unconstitutional as to the students then it followed that it must also be invalid as to the parents. *Id.* at 618, 487 P.2d at 1265, 96 Cal. Rptr. at 625.

87. The defendants, state and county officials responsible for the administration of California's school finance plan, filed general demurrers to the complaint. The plaintiffs were given leave to amend their complaint which they failed to do, leading to the grant of a motion to dismiss. An appeal followed in the Court of Appeals of California. Serrano v. Priest, 10 Cal. App. 3d 1110, 89 Cal. Rptr. 345 (Ct. App. 1970).

88. 5 Cal. 3d at 597, 487 P.2d at 1249, 96 Cal. Rptr. at 619, *quoting* Westbrook v. Mihaly, 2 Cal. 3d 765, 784-85, 471 P.2d 487, 500, 87 Cal. Rptr. 839, 852 (1970), *vacated on other grounds*, 403 U.S. 922 (1971).

89. Persuaded by *McInnis* and *Burruss* which upheld similar financing systems,

that the constitutionality of the financing legislation should be tested against the traditional "rational basis" standard. Judged by that standard, the appellees asserted, the legislation was clearly neither arbitrary nor unreasonable. As a further defense, they submitted that the financing system did not discriminate on the basis of wealth and that even if it did, classification of districts on these grounds was not constitutionally proscribed. Finally, in the event that the court chose to apply the stricter equal protection standard, the defendants urged that the state's interest in promoting local fiscal control justified the present method of supporting the public school system and conclusively established the validity of the legislation under challenge. Accordingly, the defendants prayed that the court affirm the lower court's dismissal for failure to state grounds warranting relief.[90]

Though the narrow legal question confronting the Supreme Court of California was whether plaintiffs had alleged sufficient facts to state a cause of action under the equal protection clause,[91] the

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see text accompanying notes 36-64 *supra,* the court of appeals affirmed the order of dismissal. The *Serrano* plaintiffs attempted to distinguish the *McInnis* decision, arguing that that court erroneously used the "reasonable relationship" test in determining whether the school finance program violated the equal protection clause. The court of appeals, however, rejected the plaintiffs' "strict scrutiny" test on the basis that no fundamental right was in issue and cursorily dismissed their contention that the system discriminated on the basis of wealth. 10 Cal. App. 3d 1110, 89 Cal. Rptr. 345 (Ct. App. 1970).

The Supreme Court of California rejected *McInnis* as being dispositive of the novel issues presented to it. The instant complaint, the court said, alleged that the financing scheme discriminated on the basis of wealth. "By contrast, the McInnis plaintiffs repeatedly emphasized 'educational needs' as the proper standard for measuring school financing against the equal protection clause." 5 Cal. 3d at 617, 487 P.2d at 1265, 96 Cal. Rptr. at 625. *See also* text accompanying note 55 *supra.*

90. 10 Cal. App. 3d 1110, 89 Cal. Rptr. 345 (Ct. App. 1970).

91. 5 Cal. 3d at 596, 487 P.2d at 1249, 96 Cal. Rptr. at 609. The plaintiffs also alleged that the financing system violated CAL. CONST., art. 1, §§ 11, 21. Section 11 provides: "All laws of a general nature shall have a uniform operation." Section 21 provides: "No special privileges or immunities shall ever be granted which may not be altered, revoked, or repealed by the Legislature; nor shall any citizen, or class of citizens, be granted privileges or immunities which, upon the same terms, shall not be granted to all citizens." The court stated:

> We have construed these provisions as 'substantially the equivalent' of the equal protection clause of the Fourteenth Amendment to the federal Constitution. . . . Consequently, our analysis of plaintiffs' federal equal protection contention is also applicable to their claim under these state constitutional provisions.

5 Cal. 3d at 596 n.11, 487 P.2d at 1249 n.11, 96 Cal. Rptr. at 609 n.11. If the alleged violation of the state's constitutional provisions constituted an *adequate* and *independent* state ground for the court's decision, then the Supreme Court of the United States would be forced to decline judicial review. Herb v. Pitcairn, 324 U.S. 117, 125-26 (1945). "The Court will not review a case, even though it contains a federal question, if there is an adequate state ground that supports the decision of the state court. Further, the Court will accept as binding upon it the state court's decision of questions of state law." C. WRIGHT, LAW OF FEDERAL COURTS 488 (2d ed. 1970). It would appear that the court's reliance on California's equivalent to the federal equal protection clause and on California decisions that were dispositive of the issues without the aid of the Supreme Court cases cited does constitute an adequate and independent state ground.

Plaintiff children also alleged that the California financing system violated CAL.

students' attack called into question the entire rationale underlying the school financing program. After the court examined the financing system in great detail in order to appreciate its effects on the schools, the students, and the taxpayers of the various districts, it engaged in extended constitutional analysis of the two arguments that plaintiffs asserted in order to establish a prima facie case requiring the application of the strict scrutiny standard. First, the court in summary fashion delineated the dual standard for measuring the constitutionality of legislative classifications under the equal protection clause.[92] Without further analysis, the court moved directly to a general discussion of "wealth" as a suspect classification.[93] Examining the competing arguments presented by both parties, it endorsed the plaintiffs' contention that the system invidiously discriminated on the basis of wealth and rejected a barrage of counterarguments by the defendants.[94] Next the court proceeded to determine whether education is a fundamental interest deserving of special treatment under the equal protection clause.[95] Finding that the necessary and sufficient conditions for invoking the strict scrutiny test has been satisfied, the court evaluated the defendants' justification for these fiscal disparities and found the discrimination against the poor districts unnecessary to accomplish the state's purposes.[96]

As can readily be seen, the question of whether the California public school financing system violates the equal protection clause involves numerous complicated and abstruse issues. Since subsequent courts adopting the *Serrano* rationale have avoided extensive discussion of these issues,[97] a full understanding of *Serrano* is a prerequisite to an appreciation and resolution of the constitutionality of public school financing systems in general. This task involves not only a critical examination of the court's statement and application of the law to the facts, but also a questioning of the very assumptions on which the court's reasoning is based. The most crucial assumption

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CONST., art. 14, § 5, because the method of financing produced a dual system of education—one for the rich and one for the poor—in violation of the requirements that there be a unified school system. The *Serrano* court avoided this issue by first noting that the word "system" implied a "unity of purpose as well as an entirey of operation," and then holding that the constitutional provisions relied on by plaintiffs did not require, and never had been interpreted to require, equal school spending. 5 Cal. 3d at 595, 487 P.2d at 1248-49, 96 Cal. Rptr. at 608-09; *accord,* Piper v. Big Pine School Dist., 193 Cal. 669, 673, 226 P. 926, 930 (1924); Kennedy v. Miller, 97 Cal. 429, 432, 32 P. 558, 561 (1893).

92. 5 Cal. 3d at 596-97, 487 P.2d at 1249, 96 Cal. Rptr. at 609.

93. *Id.* at 597, 487 P.2d at 1250, 96 Cal. Rptr. at 610.

94. *Id.* at 598-604, 487 P.2d at 1250-55, 96 Cal. Rptr. at 610-15.

95. *Id.* at 604-10, 487 P.2d at 1255-59, 96 Cal. Rptr. at 615-19.

96. *Id.* at 610-11, 497 P.2d at 1259-60, 96 Cal. Rptr. at 619-20.

97. *E.g.,* Van Dusartz v. Hatfield, 334 F. Supp. 870 (D. Minn. 1971); Rodriguez v. San Antonio Indep. School Dist., 337 F. Supp. 280 (W.D. Tex. 1972).

is that the strict scrutiny analysis, as opposed to the traditional rational basis analysis, was the proper test by which to judge the plaintiffs' cause of action. Accordingly, prior to examining the court's analysis, it is first necessary to explore the two constitutional tests of equal protection to determine which is the more appropriate standard to be applied to the facts in *Serrano*.

The Constitutional Tests of Equal Protection: Rational Basis Versus Compelling Interest

Through a long series of decisions interpreting and giving substance to the meaning of the expression "equal protection under the law," the Supreme Court of the United States has established that the fourteenth amendment demands as a minimum that legislative classifications which affect some citizens differently from others be justified by being reasonably related to the achievement of a legitimate state purpose.[98] Accordingly, whenever state-created rights and benefits are accorded to one class of individuals but denied to another, the constitutional question arises whether the excluded group has been denied equal protection under the law.[99] Under the fourteenth amendment, a member of the excluded group has the right both in an individual and representative capacity to question the grounds upon which exclusionary state action was based.[100] If he can demonstrate that there are no fair and substantial differences between the two classes, but that the distinctions between them are palpably arbitrary, illusory, or invidiously discriminatory, then absent a legitimate state interest justifying the classification, he has been denied equal protection.[101] Thus, the equal protection clause has developed into a constitutional safeguard which protects persons from state action, usually in the form of exclusionary legislation, which differentiates among persons "similarly situated" with respect to the purpose of the law without any rational basis.[102]

The general test of the constitutionality of legislative classifications under the equal protection clause, therefore, has traditionally been the rational basis standard. This standard, however, has hardly

98. McGowan v. Maryland, 366 U.S. 420, 425-26 (1961); Salsburg v. Maryland, 346 U.S. 545, 552-53 (1954).
99. *See* Note, *supra* note 48, at 1084-87.
100. *See* Mitchell v. United States, 313 U.S. 80, 97 (1941).
101. *See* Reed v. Reed, 404 U.S. 71, 75-76 (1971); F.S. Royster Guano Co. v. Virginia, 253 U.S. 412, 415 (1920).
102. National Union of Marine Cooks v. Arnold, 348 U.S. 37, 41 (1954); Louisville Gas Co. v. Coleman, 277 U.S. 32, 37 (1928); Traux v. Corrigan, 257 U.S. 312 (1921); Tussman & tenBroek, *The Equal Protection of the Laws*, 37 CALIF. L. REV. 341, 344-53 (1949).

produced the univocal and consistent results which a test of such importance is supposed to promulgate. As a result of exercising their discretion as to what is and is not a rational basis for making legislative classifications, courts have been accused on the one hand of substituting their wisdom for the legislature's[103] or, on the other hand, of failing to protect minority interests from the despotism of the state.[104] In addition to fostering an abuse of judicial power, the rational basis standard has encouraged courts to substitute slogan for analysis.[105] Thus, too many opinions have labelled legislative classifications either reasonable or invidiously discriminatory without discussing or justifying the resolution of the crucial issues at bar. To offset these disparities and to minimize the likelihood of faulty analysis, the Supreme Court has often laid down maxims of judicial interpretation to assist the courts in rendering their decisions under the rational basis standard. One that stands proud as a paragon of irrationality was articulated in *McGowan v. Maryland:* "A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it."[106] Assuming that legislatures are not entirely comprised of unreasonable persons, it is difficult to imagine any legislative classification which cannot be justified,; no matter how sorrily, by some state of facts calculated to bring about the results intended.[107] The far-reaching effect of this maxim is diminished somewhat by the fact that it relates principally to the invalidation of state economic or social regulation, two fields in which the states traditionally have been permitted to exercise substantially autonomous supervision.[108] Nevertheless, the result of the uncritical application of the rational basis standard has been to excuse the courts from giving most cases arising under the equal protection clause the rigorous analysis appropriate to adjudication in such an important area. Furthermore, it has had the deleterious effect of allowing courts to render judgment on matters concerned not only with social and economic questions but also with matters of fundamental import as though they deserved no special treatment under the equal protection clause.[109]

Recognizing that cases involving fundamental rights or categories that are inherently suspect require closer judicial scrutiny than is

103. Ferguson v. Skrupa, 372 U.S. 726, 728-30 (1963).
104. *Cf.* United States v. Carolene Products Co., 304 U.S. 144, 152 n.4 (1938).
105. Schoettle, *The Equal Protection Clause in Public Education,* 71 COLUM. L. REV. 1355, 1416 (1971).
106. 366 U.S. 420, 426 (1961).
107. See Schoettle, *supra* note 105, at 1415.
108. Dandridge v. Williams, 397 U.S. 471, 484-85 (1970).
109. *E.g.,* McInnis v. Shapiro, 293 F. Supp. 327 (N.D. Ill. 1968); Serrano v. Priest, 10 Cal. App. 3d 1110, 89 Cal. Rptr. 345 (Ct. App. 1970).

ordinarily given to matters of economic regulation, the Supreme Court has recently fashioned a stricter equal protection standard which preempts the rational basis standard when matters deserving of special attention are before the courts.[110] Under the stricter equal protection test, the state is required to demonstrate that the distinctions drawn by a statute are necessary to achieve the purpose for which the law was enacted and, further, that the purpose of the law is justified by something more substantial than merely a "conceivably legitimate state objective"—it must be justified by what the Court has termed a "compelling state interest."[111] Although Justice Harlan expressed serious misgivings concerning the wisdom of articulating a dual standard for measuring the validity of legislative classifications under the equal protection clause,[112] the compelling interest test, though far from being firmly entrenched, has filled a gap in equal protection analysis that needed to be closed.[113]

Because of its relative newness, the parameters of the compelling interest test have not been completely delineated.[114] Thus in hybrid constitutional questions involving issues both of economic regulation and fundamental rights, there has been confusion as to which test should govern. The confusion results first from a failure to recognize that under both standards the assailant must initially overcome the presumption of constitutionality that is granted to all legislative enactments.[115] Second, there is a distinction between the two standards with respect to the kind of proof the assailant must offer to establish a prima facie case. Third, and perhaps most important, the state

110. *E.g.*, Dunn v. Blumstein, 40 U.S.L.W. 4269 (U.S. Mar. 21, 1972); Shapiro v. Thompson, 394 U.S. 618 (1969); 5 Cal. 3d at 597, 487 P.2d at 1249-50, 96 Cal. Rptr. 609-10, *quoting* Westbrook v. Mihaly, 2 Cal. 3d 765, 784-85, 471 P.2d 487, 500, 87 Cal. Rptr. 839, 852 (1970).

111. Shapiro v. Thompson, 394 U.S. 618 (1969).

112. Katzenback v. Morgan, 384 U.S. 641, 660-61 (1966) (Harlan, J., dissenting):

> It is suggested that a different and broader equal protection standard applies in cases where 'fundamental liberties and rights are threatened,' . . . which would require a State to show a need greater than mere rational policy to justify classifications in this area. No such dual-level test has ever been articulated by this Court, and I do not believe that any such approach is consistent with the purposes of the Equal Protection Clause, with the overwhelming weight of authority, or with well-established principles of federalism which underlie the Equal Protection Clause.

Justice Harlan believes that legislative classifications which are suspect or which impose an undue burden upon fundamental rights should be properly invalidated under the due process clause. Shapiro v. Thompson, 394 U.S. 618, 656-63 (1969) (Harlan, J., dissenting).

113. *See, e.g.*, Schoettle, *supra* note 105, at 1367-69. *See generally* Houle, *Compelling State Interest vs. Rational Classification: The Practitioner's Equal Protection Dilemma*, 3 URB. LAW. 375 (1971).

114. *See* Cox, *Constitutional Adjudication and the Promotion of Human Rights*, 80 HARV. L. REV. 91, 95 (1966).

115. *See* Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61 (1911); Madden v. Kentucky, 309 U.S. 83, 88 (1940); Metropolitan Cas. Ins. Co. v. Brownell, 294 U.S. 580, 584 (1935).

must sustain a heavier burden of persuasion under the stricter standard. Before turning to the question of which test should govern in *Serrano*, it is necessary to further contrast the principal attributes of the two standards.

1. *Rational Basis Test.* Under the rational basis standard, the burden of demonstrating that the distinctions drawn by the statute have no reasonable basis rests upon the assailant.[116] He must offer evidence tending to show that the legislative classification is arbitrary, unreasonable, illusory, or invidiously discriminatory in order to remove the presumption of constitutionality. Once having overcome that presumption by the requisite proof, the assailant has made a prima facie case. The burden of persuasion then shifts to the state, which is required to demonstrate a rational basis for the classification.[117] As already explained, the state can offer the skimpiest of grounds to justify the classification.[118] If such grounds are found to be reasonably related to the purpose for which the classification was made, the state has sustained its burden and the statute has withstood attack under the rational basis test. If it fails to demonstrate sufficient legitimacy for the distinction, the state will not sustain its burden; the classification will fail the rational basis standard and will be declared unconstitutional.

Legislatures have wide discretion in their choice of classifications under the rational basis standard, allowing them to enact statutes which may result in some inequalities.[119] This is particularly illustrated in the field of economic regulation. In *Dandridge v. Williams* the Court said:

> In the area of economics and social welfare, a state does not violate the Equal Protection Clause merely because the classifications made by its laws are imperfect. If the classification has

116. *See* Pacific States Box & Basket Co. v. White, 296 U.S. 176, 185 (1935).

117. An illustration of the transfer of the burden of persuasion is found in Turner v. Fouche, 396 U.S. 346, 360-61 (1970), in which the Court considered the constitutionality of Georgia's system of selecting jurors:

> [T]he [plaintiffs] demonstrated a substantial disparity between the percentages of Negro residents in the county as a whole and of Negroes on the newly constituted jury list. They further demonstrated that the disparity originated, at least in part, at the one point in the selection process where the jury commissioners invoked their subjective judgment rather than objective criteria. *The appellants thereby made out a prima facie case of jury discrimination, and the burden fell on the appellees to overcome it.* The testimony of the jury commissioners and the superior court judge that they included or excluded no one because of race did not suffice to overcome the appellants' prima facie case. . . . *'If there is a "vacuum" it is one which the State must fill, by moving in with sufficient evidence to dispel the prima facie case of discrimination.'* [Emphasis added, citations omitted.]

118. *See, e.g.*, McGowan v. Maryland, 366 U.S. 420 (1961).

119. *See* Williamson v. Lee Optical, 348 U.S. 483, 489 (1955).

> some 'reasonable basis,' it does not offend the Constitution simply because the classification 'is not made with mathematical nicety or because in practice it results in some inequality.'[120]

The reason the courts have tended to be so permissive in the area of economic regulation, for example, is that so often the rationality of a classification depends upon local conditions about which the legislative body is better informed.[121] Needless to say, the timidity of courts passing under the guise of judicial restraint has no place in the judicial process.

Especially when legislative classifications involving taxation are in dispute, the state has been granted wide latitude in determining what the promotion of the general welfare commands and how the public moneys shall be allocated.[122] The Court has articulated no precise formula for adjudicating tax cases involving equal protection; rather it has adopted and encouraged a case-by-case approach.[123] Nevertheless, certain fairly accurate generalizations can be made: first, tax legislation which results in some inequalities may be upheld if the state can show reasonable grounds for enacting a discriminatory tax classification;[124] second, tax measures which involve varied legislative classifications directed to accomodating diverse factual situations, governmental interests, and fiscal programs will be upheld by the Court, despite their eclectic nature, if the legislation conceivably incorporates an economic policy of the state which is within the state's taxing power.[125] Thus the courts will not monitor the spending programs of a state or its taxing policies since these are matters properly within the jurisdiction of the legislature to control. Accordingly, unless palpably arbitrary, state tax legislation which differently affects persons apparently similarly situated may be justified by an appeal to

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120. 397 U.S. 471, 485 (1970), *quoting* Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61, 78 (1911).

121. *See* Dominion Hotel v. Arizona, 249 U.S. 265 (1919). *See also* Note *supra* note 48, at 1128.

122. *E.g.*, F.S. Royster Guano Co. v. Virginia, 253 U.S. 412 (1920). In the area of taxation for educational purposes, see Hess v. Mullaney, 213 F.2d 635 (9th Cir. 1954); Sawyer v. Gilmore, 109 Me. 169, 83 A. 673 (1912); Dean v. Coddlington, 81 S.D. 140, 131 N.W.2d 700 (1964).

123. *See* cases collected in Sholley, *Equal Protection in Tax Legislation*, 24 VA. L. REV. 229 (1938). Professor Sholley's analysis of the equal protection clause in tax legislation still stands as one of the leading articles on this subject. Furthermore, Bell's Gap R.R. v. Pennsylvania, 134 U.S. 232 (1890), still commands the attention of every person concerned with the limitation upon the power of the states to tax under the equal protection clause.

124. "[T]he Fourteenth Amendment was not intended to compel the State to adopt an iron rule of equal taxation." 134 U.S. at 237. *See also* Note, *Property Taxation of the Mining Industry in Arizona*, 12 ARIZ. L. REV. 763, 777-78 (1971); "Constitutionality of Property Tax Classifications," 13 ARIZ. L. REV. 313, 528, 534-35 (1971).

125. *See* Sholley, *supra* note 123, at 234.

differences between those persons that seem, at least on their face, less than substantial.

2. *Compelling State Interest Test.* Under the compelling state interest standard, the burden of demonstrating that the legislative classification deserves close scrutiny is upon the assailant of the statute.[126] He must likewise offer evidence tending to show that the legislative classification has no rational basis; the kind of evidence he introduces, however, is quite different from that offered under the rational basis standard. Whereas in the latter the legislative classification is discussed in depth in order to determine its actual effects upon the injured party, in the former the assailant is trying to prove either that the legislative classification distinguishes on the basis of a suspect category or touches on a fundamental interest.[127] Though it is far from clear, it would appear that in certain instances he must prove that the classification involves both a suspect category *and* a fundamental interest.[128] Nevertheless, having established that the classification is of that special kind deserving of strict scrutiny, the assailant has made a prima facie case and has overcome the presumption of constitutionality.[129] Just as in the rational basis standard, the burden of persuasion at this point shifts to the state. Under this test, however, the state is required to demonstrate a compelling state interest that not only justifies the classification but also makes the classification appear to be necessary to achieve the state's interest.[130] Thus, the state must show that less drastic means of achieving its purpose are not available, or are so impracticable that the state is forced

126. *See, e.g.*, McDonald v. Board of Elec. Comm'rs, 394 U.S. 802, 806 (1969). *See also* Yick Wo v. Hopkins, 118 U.S. 356, 370 (1886).

127. *See* Shapiro v. Thompson, 394 U.S. 618, 658-61 (1969) (Harlan, J., dissenting).

128. *See* Note, *supra* note 48, at 1120-21 (footnotes omitted):

> Professor Cox has noted that recent equal protection decisions 'appear to rest upon two largely subjective judgments,' one as to 'the relative invidiousness of the particular differentiation' and the other as to 'the relative importance of the subject with respect to which equality is sought.' The interaction of these two factors can be visualized by imagining two gradients. Along the first of these gradients is a hierarchy of classifications, with those which are most invidious—suspect classifications based on traits such as race—at the top. Along the second, arranged in ascending order of importance, are interests such as employment, education, and voting. When the classification lies at the top of the first gradient, it will be subject to strict review even when the interest it affects ranks low on the second gradient—for example, the denial of a driver's license on the basis of race. As the nature of the classification becomes less invidious (descending on the first gradient) the measure will continue to elicit strict review only as it affects interests progressively more important (ascending on the second gradient).

129. *See, e.g.*, Kramer v. Union Free School Dist., 395 U.S. 621, 627-28 (1969); Loving v. Virginia, 388 U.S. 1, 9 (1967); United States v. Carolene Products Co., 304 U.S. 144, 152 n.4 (1938).

130. *See* Dunn v. Blumstein, 40 U.S.L.W. 4269 (U.S. Mar. 21, 1972); McLaughlin v. Florida, 379 U.S. 184, 196 (1964).

131. In this respect, the compelling interest test is similar to the strict scrutiny given laws that infringe first amendment rights. *See, e.g.*, Keyishian v. Board of

to act in a discriminatory manner to achieve its purpose or not act at all.[131] If the state can establish the compelling nature of its interest and show that it outweighs the discrimination imposed on the injured class, the classification has passed the compelling state interest test.[132] If, on the other hand, the state's interest is not compelling, or if it is compelling but it is not necessary to classify on this basis in order to achieve the state's interest, the legislative classification will be held in violation of the equal protection clause.[133]

Apart from the mechanics of the test, its conceptual foundation rests upon two principles. The first is that certain kinds of distinctions are so invidious, so inherently unreasonable, that unless the state has an extremely good reason for classifying on this basis and classifying on this basis cannot be avoided, the classification should not stand.[134] The Court has been breaking new ground here, which accounts in large measure for the lack of discrete and unambiguous criteria for determining if such classifications are ever permissible. Justice Harlan expressed his opinion that a suspect classification is invidious in all cases "regardless of the seriousness of the consequences."[135] The Court as a whole has not gone this far; rather it has acknowledged that while classification on the basis of a suspect category is not decisive, it is nonetheless worthy of special consideration under the equal protection clause.[136] Classifications which have been identified as highly suspect include those based on race,[137] national ancestry,[138] alienage,[139]religion,[140] political ideology,[141] and wealth.[142]

Regents, 385 U.S. 589 (1967); NAACP v. Button, 371 U.S. 415 (1963). For a discussion of the less-drastic-means of financing public education, see text accompanying notes 209-18 *infra*. For a discussion of the less-drastic-means test in the incarceration context and samples of statutes, see Project, *The Administration of Psychiatric Justice: Theory and Practice in Arizona*, 13 ARIZ. L. REV. 1, 140-46, 243-49 (1971).

132. *E.g.*, Johnson v. New York State Educ. Dep't, 319 F. Supp. 271 (E.D. N.Y. 1970).

133. *E.g.*, Dunn v. Blumstein, 40 U.S.L.W. 4269 (U.S. Mar. 21, 1972); *In re* Antazo, 3 Cal. 3d 100, 110-11, 473 P.2d 999, 1005, 89 Cal. Rptr. 255, 261 (1970).

134. *See* Cox, *supra* note 114. *See also* Note, *supra* note 48, at 1087-1127.

135. "It is no answer to say that equal protection is not an absolute, and that in other than criminal cases the differentiation is 'reasonable.' The resulting *classification* would be invidious in all cases, and an invidious classification offends equal protection regardless of the seriousness of the consequences." Griffin v. Illinois, 351 U.S. 12, 35 (1956) (Harlan, J., dissenting).

136. Korematsu v. United States, 323 U.S. 214, 216 (1944):

> It should be noted, to begin with, that all legal restrictions which curtail the civil rights of a single racial group are immediately suspect. That is not to say that all such restrictions are unconstitutional. It is to say that courts must subject them to the most rigid scrutiny. Pressing public necessity may sometimes justify the existence of such restrictions, racial antagonism never can.

137. *See, e.g.*, Loving v. Virginia, 388 U.S. 1 (1967); McLaughlin v. Florida, 379 U.S. 184 (1964).

138. *See* Korematsu v. United States, 323 U.S. 214 (1944).

139. *See* Takahashi v. Fish & Game Comm'n, 334 U.S. 410 (1948); Sei Fujii v. State, 38 Cal. 2d 718, 242 P.2d 617 (1952).

140. Sherbert v. Verner, 374 U.S. 393 (1963).

141. Williams v. Rhodes, 393 U.S. 22, 30 (1968).

142. Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966).

These categories are considered suspect because membership therein is beyond the control of the individual and because distinctions among individuals on this basis are usually irrelevant if not highly prejudicial with respect to the purpose of law.[143]

The second principle upon which the stricter equal protection standard is based is that certain rights and interests are so fundamentally important that no democratic society may permit their infringement except for the most compelling of reasons.[144] Interests which have been designated as being of fundamental importance have been few in number. Among others, they include the rights to vote,[145] procreate,[146] and travel,[147] the rights of the criminally accused,[148] and to a lesser extent, education.[149] It is important to note, however, that although there is a significant distinction between a "fundamental right" and a "fundamental interest," both have been accorded the same status under the stricter equal protection standard.[150] Although fundamental interests usually refer to state-created rights and benefits which must be distributed to all on an equal basis, it does not necessarily follow that an *interest* which is fundamental would be accorded the same protection under the due process clause as a *right* which is fundamental. Thus, for example, the state may not be required to make an appeal to an intermediate court available to its criminally accused under the due process clause, but once having undertaken to make that appeal available to its citizens, the equal protection clause forbids the conditioning of its exercise upon qualifications that prevent indigent defendants from gaining access to those courts.[151] To say an interest is fundamental, therefore, does not necessarily mean that it has the independent status usually associated with fundamental rights under the due process clause. Rather it places emphasis on the fact that it is of such a nature that its distribution cannot be conditioned on criteria other than those which have a compelling basis.

There is as yet no fundamental right to an education under the

143. *See* Note, *supra* note 48, at 1124-27.
144. *See* Cox, *supra* note 114; *cf.* Michelman, *The Supreme Court 1968 Term, Forward: On Protecting the Poor Through the Fourteenth Amendment*, 83 HARV. L. REV. 7, 11-13 (1969).
145. *E.g.*, Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966); Reynolds v. Sims, 377 U.S. 533 (1964).
146. Skinner v. Oklahoma *ex rel.* Williamson, 316 U.S. 535 (1942).
147. Shapiro v. Thompson, 394 U.S. 618 (1968).
148. *E.g.*, Douglas v. California, 372 U.S. 353 (1963); Griffin v. Illinois, 351 U.S. 12 (1956).
149. Brown v. Board of Educ., 347 U.S. 483 (1954); Hobson v. Hansen, 269 F. Supp. 401 (D.D.C. 1967), *aff'd sub nom.* Smuck v. Hobson, 408 F.2d 175 (D.C. Cir. 1969); Note, *supra* note 108, at 1128-29.
150. *See* Shapiro v. Thompson, 394 U.S. 618, 661-62 (1968) (Harlan, J., dissenting).
151. Douglas v. California, 372 U.S. 353 (1963); Griffin v. Illinois, 351 U.S. 12 (1956).

due process clause in the sense that the state must provide its residents with schooling; but if it does make an education available, it must make it available to all on an equal basis. Thus, while education has not achieved the status of a fundamental right under the due process clause, it is entitled to protection under the equal protection clause as a fundamental interest.

3. *Applicability of the tests to Serrano.* The question of which equal protection standard should be applied to *Serrano* is crucial because two very different results might be obtained. Under the rational basis standard, the financing legislation could conceivably be justified by the state's purpose of permitting each district to determine the quality of education it desired and its corresponding tax burden.[152] On the other hand, under the compelling interest standard, it is doubtful whether any state could justify these fiscal disparities and the principles of taxation which it fosters.

Two courts that decided similar cases under the compelling interest test indicated the possibility that the system was unconstitutional even under the rational basis standard.[153] Because those courts held the constitutionality of their states' financing program came squarely within the stricter test, there was no need to pursue this question further. Additionally, Professor Schoettle has advanced sound reasons why the financing systems used in most states should be invalidated under the rational basis standard.[154] Furthermore, considering that a system of taxation which permits the wealthy districts to pay lower tax rates than the poor and to receive more in return seems to run afoul of basic notions of fair play and to contradict traditional principles which have justified taxing systems that tax the wealthy more heavily because they are wealthier,[155] the invalidation of

152. *See, e.g.*, McInnis v. Shapiro, 293 F. Supp. 327 (N.D. Ill. 1968); Serrano v. Priest, 10 Cal. App. 3d 1110, 89 Cal. Rptr. 345 (Ct. App. 1970).

153. Van Dusartz v. Hatfield, 334 F. Supp. 870, 874 (D. Minn. 1971):

> This test of the relation of means to ends might plausibly be applied to the Minnesota system here attached. If the State's objective is a 'general and uniform system' of education, as Article VIII, Sections 1 and 2 of the Minnesota Constitution declare, it might be wondered whether the means chosen are rationally adapted to that goal.

In Rodriguez v. San Antonio Indep. School Dist., 337 F. Supp. 280, 287 (W.D. Tex. 1972), the court said: "Not only are defendants unable to demonstrate compelling state interests for their classifications based upon wealth, they fail even to establish a reasonable basis for these classifications."

154. Schoettle, *supra* note 105, at 1401-12.

155. Professor Sholley tersely sets forth the justifications of taxing the wealthy more heavily than the poor:

> It is axiomatic that the burden of taxation may be varied directly with the value of the property owned by the taxpayer, as in the case of ad valorem property taxation, or of that dealt with by him, as in the case of ad valorem excise taxation. This fundamental rule is not based solely upon the principle that the state may exact a payment proportionate to the benefit it confers upon the property and transactions, but also upon the principle that

these financing systems even under the traditional rational basis standard is not foreclosed.

Given the present permissiveness accorded to state legislatures under the rational basis test in matters of economic regulation, however, it seems unlikely that any court would hold that a state is denying a student equal protection because some students are receiving an allegedly better quality of education, especially when every student is receiving a basic education. Extending to the indigent school districts the analogy of those cases that held indigent defendants in criminal cases cannot be denied an opportunity for an adequate defense by being refused an appeal because of a lack of funds to retain effective counsel,[156] it follows that a district which could not afford to raise enough funds to provide its children with a basic education would be denied equal protection of the law if the state failed to provide those students with an adequate education. By the same logic that a state is not compelled to supply every indigent defendant with the most effective attorney, however, the state would probably not be held under the rational basis test to the requirement of providing indigent districts with the best quality education money can buy. Justice Frankfurter's concurring opinion in *Griffin v. Illinois* addresses itself directly to this point:

> Of course a State need not equalize economic conditions. A man of means may be able to afford the retention of an expensive, able counsel not within reach of a poor man's purse. Those are contingencies of life which are hardly within the power, let alone the duty, of a State to correct or cushion.[157]

Thus, under the rational basis standard, those courts that have upheld school financing legislation have had some justification for holding that the financing system is not constitutionally proscribed under that standard.

Those same myopic courts have refused even to recognize the possibility that the compelling state interest test is the more appropriate standard by which to test the constitutionality of public school financing systems.[158] They have justified this by denying that the financing legislation discriminates on the basis of a suspect category

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upon each person enjoying the protection of government may be imposed a duty to contribute to the support thereof according to his ability.

Sholley, *supra* note 130, at 256 (citations omitted); *cf.* J. MILL, UTILITARIANISM, in THE UTILITARIANS 464-65 (Dolphin Books ed. 1961). *See also* cases collected and analyzed in text and notes, Sholley, *supra* note 130, at 256-65.

156. *E.g.*, Anders v. California, 386 U.S. 738 (1967); *cf.* Griffin v. Illinois, 351 U.S. 12 (1956).

157. 351 U.S. at 23 (Frankfurter, J., concurring).

158. *E.g.*, 293 F. Supp. 327; Serrano v. Priest, 10 Cal. App. 3d 1110, 89 Cal. Rptr. 345 (Ct. App. 1970).

or touches upon a fundamental interest. The Supreme Court of California, however, found that California's system did both and went on to apply the compelling interest standard. Utilizing the *Serrano* rationale, other courts have followed the same course. Though it may be argued that none of these systems discriminate on the basis of wealth, and likewise, that education does not rank as a fundamental interest, any court confronted with the constitutionality of a school financing program must at least consider these questions seriously.

In the event that the system does discriminate on the basis of a suspect category, wealth, and in addition infringes upon a fundamental interest—the right to an education—the application of the stricter compelling interest test is mandated. If a court were to find only that a fundamental interest was involved but that the system did not discriminate on the basis of wealth, there is authority for the proposition that the court would still be obliged to apply the compelling interest standard.[159] If, however, it found only that the system discriminated on the basis of wealth but that education were not a fundamental interest, then the court *might* be justified in refusing to apply the stricter standard on the theory that wealth discriminations deserve the application of the stricter standard only when conjoined with infringement on an interest of fundamental importance.[160]

If California's school finance plan does discriminate on the basis of wealth and does affect a fundamental interest, then the court was correct in applying the stricter equal protection standard. In deciding these two questions, however, it is not enough to declare flatly that the requirements for invoking the compelling interest test are satisfied because a suspect category and fundamental interest are involved. A decision as to whether the requirements for establishing a prima facie case under the stricter standard have been met can only be made on the basis of convincing evidence subjected to rigorous analysis. This the Supreme Court of California has complied with, and it is now to their analysis that this inquiry shall be directed.

Discrimination on the Basis of Wealth

Traditionally the Court has disfavored classifications which dis-

159. "We have long been mindful that where fundamental rights and liberties are asserted under the Equal Protection Clause, classifications which might invade or restrain them must be closely scrutinized and carefully confined." Harper v. Virginia Bd. of Elections, 383 U.S. 663, 670 (1966). *See also* Baxstrom v. Herold, 383 U.S. 107 (1966); Carrington v. Rash, 380 U.S. 89 (1965); Cox v. Louisiana, 379 U.S. 536, 580-81 (1965) (Black, J., concurring); Reynolds v. Sims, 377 U.S. 533, 561-62 (1964); Skinner v. Oklahoma *ex rel.* Williamson, 316 U.S. 535, 541 (1942).

160. *See* Note, *supra* note 48, at 1124. No court has as yet held that discrimination on the basis of wealth is invidious per se.

criminate on the basis of an individual's wealth.[161] Justice Jackson in his concurring opinion in *Edwards v. California*[162] was one of the first to advocate that wealth, because a neutral category, be treated as a classification which is not merely disfavored, but constitutionally forbidden.

> We should say now, and in no uncertain terms, that a man's mere property status, without more, cannot be used by a state to test, qualify, or limit his rights as a citizen of the United States. 'Indigence' in itself is neither a source of rights nor a basis for denying them. The mere state of being without funds is a neutral fact—constitutionally an irrelevance, like race, creed, or color.[163]

More recently the Court has formalized Justice Jackson's view, holding that lines drawn on the basis of wealth which infringe upon the exercise of a fundamental right require justification by a compelling state interest. In *Harper v. Virginia Board of Elections*[164] the Court emphasized its current position that making the exercise of a fundamental right conditional upon the payment of a fee to the state is constitutionally suspect because it adversely affects lower income groups. In a number of cases in which the state made a person's dealings with the courts depend upon his financial situation, the Court has held that discrimination on the basis of wealth constitutes a denial of equal protection.[165] Though the Court has not held that discrimination on the basis of wealth is invidious per se, it has indicated in dicta that distinctions made on the basis of wealth "would independently render a classification highly suspect and thereby demand a more exacting judicial scrutiny."[166] The rationale for this has been made quite clear: there cannot be equal justice for all where the enjoyment of rights and benefits is conditioned on wealth.[167] Consequently, the Court has forbidden, under the auspices of the equal protection clause, the dilution by the state of an individual's constitutional rights on the basis of his poverty.

The *Serrano* court extended the Court's reasoning just one step further, holding that discrimination on the basis of district wealth is equally invalid as discrimination on the basis of individual wealth.[168]

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161. *E.g.*, Harper v. Virginia Bd. of Elections, 383 U.S. 663, 668 (1966); Edwards v. California, 314 U.S. 160 (1941).
162. 314 U.S. 160 (1941).
163. *Id.* at 184-185 (Jackson, J., concurring).
164. 383 U.S. 663 (1966).
165. *See, e.g.*, Tate v. Short, 401 U.S. 395 (1971); Williams v. Illinois, 399 U.S. 235 (1970).
166. McDonald v. Board of Elections, 394 U.S. 802, 807 (1969). *See also* Tate v. Short, 401 U.S. 395 (1971); Williams v. Illinois, 399 U.S. 235 (1970); Roberts v. La Vallee, 389 U.S. 40 (1967); Anders v. California, 386 U.S. 738 (1967).
167. Griffin v. Illinois, 351 U.S. at 19.
168. 5 Cal. 3d at 601, 487 P.2d at 1252, 96 Cal. Rptr. at 612.

The fact that certain districts have more funds or more taxable property should be a constitutionally neutral fact and the state should be foreclosed from granting benefits to some districts and denying those same benefits to other districts because of the absence of sufficient wealth. Justice Sullivan, speaking for the majority in *Serrano*, indicated that the effect of California's financing legislation was to classify the recipients of the funds on the basis of a classification which is irrelevant to school funding:

> The commercial and industrial property which augments a district's tax base is distributed unevenly throughout the state. To allot more educational dollars to the children of one district than to those of another merely because of the fortuitous presence of such property is to make the quality of a child's education dependent upon the location of private and industrial establishments. Surely, this is to rely on the most irrelevant of factors as the basis for educational financing.[169]

Accordingly, classification based on the collective wealth of a district's residents was found by the *Serrano* court to be as much a suspect category as its individual counterpart.

The court made no express attempt to justify its analysis on the additional ground that the financing system discriminated against the individual residents of each district, though it did so by implication. Wealthy or poor individuals who resided in the low tax base districts had to pay a higher tax than they would have had to pay if they lived in an affluent district, and yet their children received an inferior education. Making the quality of education dependent upon the assessed valuation per pupil of each district discriminated invidously against all of the individual residents living in the low-tax-base districts. As a corollary, of course, the system favored both the rich and poor residents living in the wealthy districts. The court, however, chose not to find the system invalid because it treated individuals similarly situated as though they were different, or to find it defective because it lumped rich and poor individuals together in any district and taxed them alike, but rather to hold that the system discriminated on the basis of the wealth of the district as a whole, regardless of the circumstances of the individual district residents—rich or poor, black or white, culturally advantaged or deprived. The financing system thus had set one school district against another, making it advantageous for educational purposes to live in one locality as opposed to another according to whether the wealth of the community was substantial or

169. *Id.*, 487 P.2d at 1252-53, 96 Cal. Rptr. at 612-13.

insubstantial in relation to the number of students that had to be educated.

In support of its conclusion that California's finance plan did invidiously discriminate on the basis of a district's wealth, the court focused its attention on the mechanics of the plan and its effects on the districts' taxpayers. The court took into consideration that state assistance, at least with respect to the flat grant, made the gap in expenditures even wider in certain circumstances. In addition it noted that "as a practical matter, districts with small tax bases simply [could] not levy taxes at a rate sufficient to produce the revenue that more affluent districts [reaped] with minimal tax efforts."[170] What was conclusive, however, was that "the wealth of a school district, as measured by its assessed valuation, [was] the major determinant of educational expenditures . . . . The foundation program partially [alleviated] the great disparities in local sources of revenue, but the system as a whole [generated] school revenue in proportion to the wealth of the individual district."[171] Based on these considerations, the *Serrano* court concluded that California's school funding scheme "classified its recipients on the basis of their collective affluence" and thereby discriminated on the basis of a district's wealth.[172]

The constitutional infirmity in California's financing system, then, was that the quality of a child's education as measured by the per pupil expenditure level was made a function of the local tax base. Accordingly, the system was premised on a "have more, pay less, get more" principle of taxation.[173] Though every district could enjoy an equal tax rate so long as it elected to tax itself at the minimum rate, once a district elected to surpass the minimum those districts with lower tax bases had to pay higher tax rates in order to collect an equal amount of funds per pupil. As a result of the gross variations in tax bases, the taxing system was based on a progressively graduated descending rate; that is, the bigger the tax base the lower the rate. While a graduated ascending tax scale can be justified on the theory that those who have a greater ability to pay should pay the most, a graduated descending tax rate cannot be justified, especially when those who pay the least rates can receive the greatest returns. Making the quality of educational services a function of local taxable wealth therefore results in depriving the poor districts of the educational opportunities to which they are entitled. In terms of the traditional

170. *Id.* at 598, 487 P.2d at 1250, 96 Cal. Rptr. at 610.
171. *Id.*, 487 P.2d at 1250-51, 96 Cal. Rptr. at 610-11.
172. *Id.* at 614, 487 P.2d at 1263, 96 Cal. Rptr. at 623.
173. *Cf.* Rodriguez v. San Antonio Indep. School Dist., 337 F. Supp. 280, 282 (W.D. Tex. 1972).

principles of taxation, it seems unlikely that there can be any rational basis for this kind of discrimination.

Assuming for the sake of argument that the financing system did discriminate on the basis of wealth, the defendants attempted to exonerate themselves on the theory that the finance program did not discriminate invidiously because the discriminatory effects of the system were inflicted unintentionally.[174] The underlying rationale of the defense was based on the theory that the plaintiffs were required to show a "specific intent" to discriminate. Thus analogizing from the cases holding that de facto school segregation on the basis of race is not constitutionally proscribed,[175] the defendants maintained that if any unequal treatment did exist among the school districts, it was the result of *de facto*, not *de jure*, discrimination on the basis of wealth. Therefore, the state could not be held responsible.

The *Serrano* court quickly disposed of this argument by citing to prior decisions which had invalidated classifications based on wealth despite the absence of a discriminatory motivation.[176] Turning to the question whether state action was responsible for these wealth classifications, the court rejected the notion that the fortuitous growth of commercial property in certain districts proved that the discrimination was only de facto.

> Indeed, we find the case unusual in the extent to which governmental action *is* the cause of the wealth classifications. The school funding scheme is mandated in every detail by the California Constitution and statutes. Although private residential and commercial patterns may be partly responsible for the distribution of assessed valuation throughout the state, such patterns are shaped by zoning ordinances and other governmental land use controls which promote economic exclusivity.[177]

The court's point was well taken. "Exclusive zoning" ordinances do prevent poor individuals from purchasing property in wealthy districts because such ordinances restrict the minimum lot size or house size, making it impossible to buy real estate without a substantial investment.[178] In addition, governmental land use controls do not

174. 5 Cal. 3d at 601, 487 P.2d at 1253, 96 Cal. Rptr. at 613.

175. *E.g.*, Deal v. Cincinatti Bd. of Educ., 369 F.2d 55 (6th Cir. 1966); Sealy v. Department of Public Instruction, 252 F.2d 898 (3d Cir. 1958).

176. Tate v. Short, 401 U.S. 395 (1971); Boddie v. Connecticut, 401 U.S. 371 (1971); Williams v. Illinois, 399 U.S. 235 (1970); Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966); *In re* Antazo, 3 Cal. 3d 100, 473 P.2d 999, 89 Cal. Rptr. 255 (1970).

177. 5 Cal. 3d at 603, 487 P.2d at 1254, 96 Cal. Rptr. at 614.

178. *See* Freilich & Bass, *Exclusionary Zoning: Suggested Litigation Approaches*, 3 URB. LAW. 344 (1971); Sager, *Tight Little Islands: Exclusionary Zoning, Equal Protection and the Indigent*, 21 STAN. L. REV. 767 (1969).

provide for the even distribution of commercial property within the state. The *Serrano* court thus properly concluded that state action was responsible for the variations in assessed valuation among the several districts.

Finding no substance in defendants' arguments, the court concluded that California's public school financing system discriminated invidiously on the basis of wealth against the poorer districts and their residents. The court, however, did not immediately invoke the stricter equal protection standard. Despite the dictum of the Supreme Court of the United States in *McDonald v. Board of Election Commissioners*[179] that lines drawn on the basis of wealth would *independently* render a classification subject to a more exacting judicial scrutiny, the Supreme Court of California rejected the opportunity to implement the stricter equal protection standard without considering whether education is a fundamental interest. The court might have considered that such a holding would have had the ultimate consequence of invalidating the financing systems of possibly all governmental services which are tax supported and which cause fiscal inequalities from locality to locality, but a more substantial reason was that wealth classifications have been subjected to the compelling interest test only when accompanied by a limited number of fundamental interests.[180] Despite the *McDonald* dictum, the Supreme Court's own treatment of wealth classifications indicates that distinctions based solely on affluence are not sufficient of themselves to require the application of the stricter standard.[181] Thus, in order to justify measuring the constitutionality of the financing legislation by that stricter standard, the *Serrano* court deemed it essential to determine whether the financing system, besides discriminating on the basis of wealth, also infringed upon an interest of fundamental importance.

Education as a Fundamental Interest

Having determined that the gross disparities in the amount of money spent per pupil from district to district were caused by California's discriminatory method of financing the public schools, the court turned to the second branch of the compelling interest test—the determination of whether education is a fundamental interest which may not be conditioned on wealth. There is no direct support for this proposition.[182] Nevertheless, so many of the decisions of both

179. 394 U.S. 802, 807 (1969).
180. 5 Cal. 3d at 604, 487 P.2d at 1255, 96 Cal. Rptr. at 615.
181. *See* note 160 *supra.*
182. *Id.*

the Supreme Court and the California court have commented upon the significance of learning and the paramount importance of education to society and to the individual child that its position as a fundamental interest seems undeniable.[183] The best-known support for this position was expressed in *Brown v. Board of Education*:

> Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms.[184]

In implementing *Brown's* prohibition against de jure racial segregation in public schools, the Court had another occasion to recognize the importance of the right to attend school.[185] While accepting that each county in Virginia had an option to operate or not to operate the public schools, the Court held that a single county could not close the schools in order to avoid desegregation. Such an invidious act, Justice Black explained, would deny school children their right to an education equal to that afforded by the public schools in the other counties of Virginia.[186] Furthermore, in response to the state's contention in *Shapiro v. Thompson* that minimum residency requirements for welfare benefits could be sustained on the theory that new residents had made no contribution to the state through the payment of taxes, the Court indicated in dictum that the equal protection clause prohibits discrimination on the basis of wealth in the area of education:

> We recognize that a State has a valid interest in preserving the fiscal integrity of its programs. It may legitimately attempt to limit

183. *See, e.g.*, Brown v. Board of Educ., 347 U.S. 483 (1954); Meyer v. Nebraska, 262 U.S. 390 (1923). *See also* Abington School Dist. v. Schempp, 374 U.S. 203, 230 (1963) (Brennan, J., concurring): "Americans regard public schools as a most vital civic institution for the preservation of a democratic system of government." *See* Illinois *ex rel.* McCollum v. Board of Educ., 333 U.S. 203, 216, 231 (1948); Piper v. Big Pine School Dist., 193 Cal. 664, 226 P. 926 (1924).

184. 347 U.S. 483, 493 (1954).

185. Griffin v. County School Bd., 377 U.S. 218 (1964).

186. *Id.* at 234.

> its expenditures, whether for public assistance, public education, or any other program. But a State may not accomplish such a purpose by invidious distinctions between classes of its citizens. It could not, for example, reduce expenditures for education by barring indigent children from its schools.[187]

The Supreme Court of California also has recognized the indispensable role education plays in the modern industrial state in a variety of its decisions. In considering the validity of an anti-busing statute the court observed: "Unequal education, then, leads to unequal job opportunities, disparate income, and handicapped ability to participate in the social, cultural, and political acitivity of our society."[188] Similarly, in a case in which school districts gerrymandered to avoid integration, the court said: "In view of the importance of education to society and to the individual child, the opportunity to receive the schooling furnished by the state must be made available to all on an equal basis."[189]

The *Serrano* court made it quite clear that the fundamental interest in an education today means significantly more than merely the right to attend school. It encompasses the opportunity to compete successfully in the economic marketplace, to develop as a citizen, and to became a self-reliant individual.[190] Accordingly, the court found the right to an education to be as fundamental an interest as the rights of defendants in criminal cases or the right to vote, two fundamental interests which had already been protected by the Supreme Court from discrimination on the basis of wealth.[191] It also took note that the drafters of the Constitution of California had expressly endorsed the position that education is essential "to the preservation of the rights and liberties of the people."[192] With such clear indications of the "distinctive and priceless function of education in our society," the court was compelled to include education within the inner circle of fundamental interests deserving of special treatment under the equal protection clause.[193]

The defendants did not deny that education is a fundamental interest. Instead they attempted to reduce plaintiffs' position to an

187. 394 U.S. 618, 633 (1969).
188. San Francisco Unified School Dist. v. Johnson, 3 Cal. 3d 937, 950, 479 P.2d 669, 676, 92 Cal. Rptr. 309, 316 (1971).
189. Jackson v. Pasadena City School Dist., 59 Cal. 2d 876, 880, 382 P.2d 878, 31 Cal. Rptr. 606 (1963).
190. *See generally* 5 Cal. 3d at 605-09, 487 P.2d at 1255-58, 96 Cal. Rptr. at 615-18.
191. *Id.* at 607-08, 487 P.2d at 1257-58, 96 Cal. Rptr. at 617-18.
192. CAL. CONST., art. IX, § 1, *quoted, id.*: "A general diffusion of knowledge and intelligence being essential to the preservation of the rights and liberties of the people, the Legislature shall encourage by all suitable means the promotion of intellectual, scientific, moral, and agricultural improvement."
193. 5 Cal. 3d at 608-09, 487 P.2d at 1258, 96 Cal. Rptr. at 618.

absurdity, relying on the fact that the funding of other tax-supported governmental services depended upon the wealth of individual districts. They hypothesized that if the court were to hold that education is a fundamental interest which may not be conditioned on wealth, the eventual result would be to invalidate all tax-supported public services and to spell the destruction of local government.[194] The court unhesitatingly rejected this hypothesis. Without committing itself as to whether services such as police or fire protection are fundamental interests, the court ruled that education's unique role in society sufficiently distinguishes it from other public services to justify treating it as a fundamental interest[195] which may not be conditioned on the wealth of individual districts without a compelling state interest.

The court's recognition of the fundamental importance of education marks an historic occasion. By elevating education to the status of a protected interest under the equal protection clause, the court has virtually forced the state to adopt a posture of fiscal neutrality with respect to the collection and distribution of funds earmarked for education.[196] The right to an education may no longer be invaded, diluted, or denied without a compelling state justification. Thus the court's ruling makes it possible to posit that a child will be guaranteed an education equal to that afforded any other child in the same grade attending public school within the state. What possible interest could the state have in denying certain public school students as good an education as any other public school student in the state?[197] What possible interest could the state have in creating a system of financing

194. *Id.* at 613-14, 487 P.2d at 1262-63, 96 Cal. Rptr. at 622-23.

195. *Serrano* may inspire challenges to a variety of tax-supported public services other than education. *Cf.* Hawkins v. Town of Shaw, 437 F.2d 1286 (5th Cir. 1971), *rev'g* 303 F. Supp. 1162 (N.D. Miss. 1969). The quality of each of these public services is dependent upon the wealth of the individual taxing district. While the wealthy districts can afford to apportion their taxable revenue so as to provide quality in all these public services, the less wealthy districts cannot provide their residents with quality schools and quality law enforcement and fire protection. The rationale for making any of these vital services dependent upon a district's wealth is highly suspect. Even under the rational basis standard, it is difficult to justify. *See generally* Ratner, *Inter-Neighborhood Denials of Equal Protection in the Provisions of Municipal Services,* 4 HARV. CIV. R.-CIV. LIB. L. REV. 1 (1968).

196. In the field of education, *Serrano* will probably inspire challenges to bonding statutes which limit a school district's maximum indebtedness to borrow funds for educational purposes. In Arizona, for example, school districts are forbidden to issue bonds for educational purposes in excess of six percent of the value of the taxable property within the district. *See* ARIZ. REV. STAT. ANN. § 15-1301 (1956). This means that the less wealthy districts may have to manage with insufficient funds and thus be effectively prevented from providing their public school students with a sufficient number of quality, adequately equipped schools. There simply is no compelling state reason to discriminate against the poorer school districts in this manner and prevent them from providing their children with the quantity and quality of schools necessary to provide a proper education. *Cf.* Rodriguez v. San Antonio Indep. School Dist., 337 F. Supp. 280, 286 (N.D. Tex. 1972).

197. *Cf.* Hargrave v. Kirk, 313 F. Supp. 944 (M.D. Fla. 1970), *rev'd on other grounds sub nom.* Askew v. Hargrave, 401 U.S. 476 (1971).

designed to create gross disparities in the level of expenditure per pupil from one district to another? That the state must assume a posture of fiscal neutrality in regard to the apportionment of school revenue is not merely a principle which is fundamentally sound; it is a principle which the state is now compelled to accept. The *Serrano* court's ruling that education is a fundamental interest and that a student has the right to an education unaffected by wealth, are constitutional precepts that are part and parcel of the equal protection clause in California and the other states which adopt the *Serrano* rationale.

Compelling and Necessary State Interest

Having determined that California's school finance plan discriminated on the basis of a suspect category, wealth, and touched on a fundamental interest, education, the court examined the state's purpose in enacting the present system to see whether it was necessary to classify on the basis of wealth in order to effectuate a compelling state objective. The principle defense and justification for the present system was the state's policy "to strengthen and encourage local responsibility for control of public education."[198] The court saw this goal as being divided into two possible aspects: first, giving to each school district administrative decision-making control of the public schools; and second, promoting local fiscal choice over the amount of money to be spent on education.[199]

Treating these goals separately, the court assumed for the sake of argument that decentralized administration was a compelling state interest. Nevertheless, the court could find no discernible reason why it was necessary to permit gross disparities in the level of expenditures per pupil among the districts in order to further that interest. "No matter how the state decides to finance its system of public education," the court said, "it can still leave this decision-making power in the hands of local districts."[200] As to the state's second objective, the court found no reason why the present method of financing the schools was necessary to promote local fiscal choice. Such fiscal free will was a cruel illusion for the poor district that could not "freely choose to tax itself into an excellence which its tax rolls [could not] provide. Far from being necessary to promote local fiscal choice, the present financing system actually [deprived] the less wealthy districts of that option."[201]

198. 5 Cal. 3d at 610, 487 P.2d at 1260, 96 Cal. Rptr. at 620.
199. *Id.*
200. *Id.*
201. *Id.* at 611, 487 P.2d at 1260, 96 Cal. Rptr. at 620.

The illusion to which the court referred, and the very assumption upon which the state's goal in promoting fiscal free will was based, was that every district could decide, if its residents so elected, to spend as much money on education as any other district. By treating the state's interest in promoting fiscal choice as illusory, however, the court did not forever proscribe local control over public school financing. The court did not hold that local fiscal control is not a compelling state interest. It held rather that it was not necessary to finance the public schools on the basis of each district's taxable wealth in order to give such fiscal free will to each district. The decision makes it quite clear that so long as the state's funding program does not make the quality of a child's education a function of the wealth of the individual district, each district can still exercise complete control over the amount of money to be spent on education.

Having determined that it was not necessary for the state to make a student's education a function of the wealth of his place of residence in order to accomplish a compelling state objective, the court ruled that under the facts as alleged California's system of financing public education violated the equal protection clause of the fourteenth amendment and the equivalent provisions of the California Constitution. Accordingly, the court ruled that plaintiffs had stated a valid cause of action and that it was error for the trial and appellate courts to grant defendants' motion to dismiss. The case was remanded for trial with an allowance to defendants of ample time to answer the plaintiffs' charges. Since the supreme court took judicial notice of so many of the facts in issue, it would appear that the defendants have relatively few issues on which to make a case.[202] Hopefully the trial

202. The principal issue at trial will be whether variations in the level of educational expenditures affect the quality of a child's education. Although the *Serrano* court recognized that there is "considerable controversy among educators over the relative impact of educational spending and environmental influences on school achievement," it also noted that even the decisions on which the defendants relied for support uniformly rejected defendants' contention that there is no cost-quality relationship. 5 Cal. 3d at 601 n.16, 487 P.2d at 1252 n.16, 96 Cal. Rptr. at 612 n.16. It would appear from the judicial opinions on this matter that there is a logical presumption that the correlation is high. *See id.* The presumption results from 26 studies of the cost-quality relationship which demonstrated conclusively that such a relationship was strong. MORT, REUSSER & POLLEY, *supra* note 26, at 80-87. One commentator has said: "No single item of information about a school system has been identified that yields as much insight into the character of the education it may be expected to produce as the expenditure level." *Id.* at 102. The word "presumption" is used advisedly, however: "The studies individually and collectively do not give us anything approximating a mathematical proof that this is so." PROBLEMS AND ISSUES IN PUBLIC SCHOOL FINANCE 9 (R. Johns & E. Morphet ed. 1952). But the preponderance of evidence rests so heavily with the conclusion that there is such a relationship that the defendants could probably not meet their burden of proof. For recent studies confirming the cost-quality relationship, *compare* J. GUTHRIE, G. LEINDORFER, H. LEVIN & R. STOUT, SCHOOLS AND INEQUALITY (1971) *with* OFFICE OF EDUCATION, U.S. DEP'T OF HEALTH, EDUCATION & WELFARE, EQUALITY OF EDUCATIONAL OPPORTUNITY (1966) (the Coleman Report). For a general analysis of the meaning and

court will ultimately grant plaintiffs' motion for summary judgment and provide for an orderly transition to a new system of public school support.

ALTERNATIVE SYSTEMS OF SCHOOL FINANCING

Serrano has exposed the fatal weaknesses in California's public school financing system and thrown the future of educational finance into turmoil. At the same time it has gravely endangered existing financing systems in practically every state across the nation. Regardless of whether the states employ a foundation program, flat grant, or percentage equalizing approach,[203] educational funding is a function of the wealth of the individual district in every state except Hawaii.[204] Moreover, the amount of money a district in these states can spend per pupil on its educational program is directly linked to that district's assessed valuation per pupil. Thus few states can boast a financing plan that does not result in gross disparities in expenditure levels from locality to locality.[205] Since these finance programs are so similar in structure and effect to California's and to the ones categorically invalidated in Texas, Minnesota, and New Jersey, their downfall appears imminent. If the Supreme Court endorses the *Serrano* rationale through its decision in the Texas case,[206] it will pave the way for the invalidation of almost every public school financing system in the continental United States, and will change the face, nature, and quality of American education. Since the *Serrano* and subsequent courts properly left the task of formulating alternative school financing systems to the state legislatures, the latter will be faced with massive problems, but will have a remarkable opportunity to reconsider the very tenets upon which American education is based, and provide for the expanding needs of public education in general and of the poor in particular. *Serrano* and its progeny do not require the legislatures to adopt any particular kind of financing system, but they do proscribe certain attributes; legislatures will be obliged to comply with these negative mandates.

Serrano held that the quality of a child's education may not be a function of local wealth. This rule has subsequently been termed the principle of fiscal neutrality: "the rule is that the level of spending

significance of the Coleman Report, see HARVARD EDUCATIONAL REVIEW, EQUAL EDUCATIONAL OPPORTUNITY (1969); *cf.* Schoettle, *supra* note 105, at 1378-88. *See also* Van Fleet & Boardman, *The Relationship Between Revenue Allocations and Educational Need as Reflected by Achievement Test Scores,* in 4 NEF PROJECT, *supra* note 15, at 293-309.

203. *See* Note, *supra* note 24.

204. *See* Alexander, Hamilton & Forth, *supra* note 19.

205. *See* Briley, *Variation between School District Revenue and Financial Ability,* in 4 NEF PROJECT, *supra* note 15, at 49-118.

206. *See* text accompanying note 10 *supra.*

for a child's education may not be a function of wealth other than the wealth of the state as a whole."[207] No district is permitted to obtain favored fiscal treatment in the area of educational expenditures because it has a high tax base or disfavored treatment because it has a low tax base. Any financing system designed to replace the present system must be free, therefore, of any link between spending and wealth.[208]

One of the positive implications of this rule is that local districts, if they are given the option to determine their own tax rates, must have equal taxable sources available to them for school revenue; that is, each district must have equal capacity to raise equivalent or comparable funds per pupil at the same tax rate. In this respect, each district is guaranteed an equal chance at the same rate per district to provide its children with those educational opportunities indicative of a quality education and those learning experiences essential to the formation and development of the child. If a state chooses to levy a uniform statewide tax on property as an alternative to its present system, local districts may be precluded from exercising any power whatsoever to raise school funds. On the other hand, if the state retains a decentralized financing system which permits each district to choose the rate at which it will tax itself for education, then each district must have equal power to raise equal funds per pupil at the equivalent tax rate, unless variations in expenditure levels can be justifield by compelling reasons.

Treating these formats separately, the alternative financing system that seems most likely to prevail is a centralized plan in which the state assumes full responsibility for funding of public schools. It is instantly more attractive than a decentralized approach because it has the virtue of being neutral with respect to district wealth and at the same time compatible with local administrative control. Simply stated, the centralized plan would eliminate local control of school funding and would require the state to levy a statewide uniform tax on property, income, or sales, and then distribute the revenue collected to the individual districts on a per-pupil or other reasonable basis.[209] Moreover, the state may require the districts to spend the funds on a per-pupil or other reasonable basis, or compel them to allocate funds to various categorical uses such as aid for blind, gifted, or disadvantaged children.[210]

207. Van Dusartz v. Hatfield, 334 F. Supp. 870, 872 (D. Minn. 1971).
208. *See* Coons, *Equal Dollars for School Districts*, N.Y. Times, Nov. 1, 1971, at 41, col. 3.
209. *See* WEALTH AND EDUCATION, *supra* note 20, at 431-32.
210. *Id.*

Though the centralized approach may be the most practical alternative, it may not necessarily be the best approach. This would depend in large measure on how the plan was instituted and whether it was designed to produce minimum or maximum educational benefits. If the centralized approach were to achieve equality of expenditure per pupil by lowering the expenditure levels of the most affluent districts to that of the poorest districts rather than raising the expenditure levels of the lowest districts to that of the highest, then quality would be sacrificed for equality.[211] This is a result greatly to be feared that may very well force certain states to examine more closely a decentralized approach.

Under a decentralized system,[212] the state would create a partial local financing plan where each district would be allowed to place a tax on the district's real property and determine its own tax burden. The state, however, would have to guarantee to supplement, from state taxes, the funds collected by each district in order to equalize the spending power per pupil of each district. In order to equalize the wealth distribution, the state would have to adopt the "power equalizing" approach,[213] which is based on the proposition that each school district has equal power to raise equal funds per pupil. This is achieved by requiring that equal tax rates result in equal dollars per pupil for a district's educational programs. Thus, if a district elected to tax itself at a certain level of tax effort, every other district that elected the same tax rate would receive the same amount of money per pupil. There would be a statutory minimum and maximum tax rate within the bounds of which each district could set its own rate. Furthermore, each district would be guaranteed, according to a preestablished schedule, a fixed sum of money which corresponded to the tax rate it levied, regardless of the amount of money collected from purely local taxes. The following chart[214] helps to illustrate this approach:

TABLE I: HYPOTHETICAL LIMITS ON TAX RATES AND EXPENDITURES

Local Tax	*Maximum Permissible Expenditure Per Pupil*
$1 per $100 valuation (Minimum)	$ 900
$1.01	950
$2	$1,400
$3 (Maximum)	1,900

211. *See* Kurland, *supra* note 57, at 591.
212. *See* WEALTH AND EDUCATION, *supra* note 20, at 201-42.
213. For an analysis of the intricacies of this approach, see *id.*
214. Modified from Coons, *supra* note 208, at 41, col. 4.

Assume, for example, that a district elected to tax itself at a rate of $1.00. If at that rate the district raises less than $900 per pupil, the state would be required to supplement local revenue so that the district would have $900 available to spend on each child's education. The state could obtain its local assistance funds from an increase in statewide taxes. If at that rate, the district raised more than $900 per pupil, the excess would be redistributed to other districts.

The tax rates and permissible expenditures suggested here are only used for the purposes of exemplification. The local tax rate and permissible expenditures could vary from any minimum to any maximum; however, the state must ensure that the highest expenditures do not require a prohibitive tax rate for the poorer districts. Furthermore, the increments of permissible expenditure corresponding to increments of tax rate could vary according to any reasonable plan. An oversimplified example illustrates this approach:

> Imagine a state divided into two school districts, *A* and *B*, each with 100 pupils. District *A* has a total wealth of $10,000 ($100 per pupil). District *B* has a total of $90,000, or $900 per pupil. Each decides to tax its wealth at the rate of 10 percent for schools, yielding respectively $10 and $90 per pupil. Under our basic value judgment, district *A* is $80 short—it tried just as hard, so it should be able to buy just as good a school. The $80 must come from a state tax. Since the total wealth of the state is $100,000, in order to raise the $80 per pupil for district *A* the state chooses to levy a flat 8-percent tax, producing $72 per pupil from district *B* and $8 from district *A*. Now look at the example from the other side. In *gross taxes* per pupil district *A* has paid $10 (local) plus $8 (state), or $18. District *B* has paid $90 (local) plus $72 (state), or $162. *As a percentage of local wealth, each total tax is exactly the same*, while the redistribution of wealth has produced equal expenditures. Each is taxed at 10 percent locally and 18 percent totally, each has $90 to spend—from each according to his ability, to each according to his effort.[215]

This method of financing the public schools has a number of advantages. It not only guarantees to each district the power to provide its children with equal educational programs but also gives each district the choice of how much it will spend on education. Furthermore, the system is sufficiently flexible that adjustments can be made for variations in costs per district and for other non-commensurable items.[214] Finally, it gives each district the administrative power to determine how it will spend its educational funds. The cum-

215. WEALTH AND EDUCATION, *supra* note 20, at 34-35.
216. *See id.* at 226-42.

ulative effect of these advantages is that the scheme equalizes variations in wealth and puts district spending on a sounder overall basis because it makes the quality of education a function of tax effort.

On the other hand, the system does require a state to take an extended look at its total financial capacities. The state must be prepared to raise the total amount of revenue guaranteed, assuming that each district might opt for the maximum tax rate. The major disadvantage of the scheme, however, is that it permits a district to opt for the minimum level of permissible expenditures if it so chooses, resulting in its children receiving less funds than other districts. The simple solution to this problem is for the state to set a minimum permissible expenditure level that guarantees each student an acceptable level of funds regardless of local choice. This seems a more desirable alternative than a centralized approach which completely eliminates local fiscal control.[217]

The minimum required by the equal protection clause is that variations in local wealth be neutralized and that students receive educational opportunities which adequately reflect their local district's tax sacrifice. It is premature to expect the states to endorse wholeheartedly a new system which provides each student with an educational program tailored to his educational needs. Perhaps the most that realistically can be accomplished is that in those districts which have been systematically denied those opportunities made available to the rich, the state will make an asserted attempt to raise the quality of education so that each child has an equal chance to realize his full potential.[218]

217. *Id.* at 203. This may be an appropriate opportunity for state legislatures to consider the desirability of retaining the property tax as a lucrative revenue source or dispensing with it as an anachronism. It is beyond the scope of the present analysis to join the long-standing debate on the merits or otherwise of property taxes as a source of revenue. It is worth noting, however, that any financing system that is developed may work a greater hardship on the poor districts than on the rich even though they are taxed at the same rate. Attempting resolutions of this problem would involve many complex and intangible considerations. See *id.* at 212-24.

218. In addition to implementing new systems of public school finance, the states must ask themselves whether further action is required to provide truly equal educational opportunity to all the public school students within the state. In order to improve the achievement levels of students located in economically depressed areas, the states may have to consider making new cultural, social, and economic programs available to the poor. Equal distribution of other tax-supported public services may help considerably here. Exclusionary zoning laws must be critically examined and housing reform rejuvenated. Perhaps the legislatures ought to consider preschool programs for the poor in order to bring them up to the achievement level that other students possess when they enter the public school system. The state may want to engage in a coordinated campaign to alleviate the cultural deprivation facing the poor by educating the public to proper methods of baby care, health, and nutrition. The state may also have to reconsider whether the neighborhood school concept has become dysfunctional. It is clear, however, that the problems of providing equal educational opportunity are not merely confined to overhauling the financing of the public school system. Alternative methods of supporting the public schools must be supplemented with alternative methods of providing the school children with an environment that is conducive to learning and good citizenship.

CONCLUSION

The result in *Serrano* and the other public school financing cases hinged on which equal protection standard to apply: the rational basis or compelling interest test. The courts broke new constitutional ground by elevating the right to an education to the status of a fundamental interest and finding that in combination with invidious discrimination on the basis of wealth, a suspect category, the application of the stricter compelling interest standard was appropriate. Under that standard, the courts unanimously concluded that it was not necessary to deprive the poor districts of the opportunity to provide their children with a quality education in order to promote the states' interest in granting local fiscal control to each district. Accordingly, they proscribed state public school financing systems that permitted the quality of a child's education to be adversely affected by the size of the property tax base in the school district in which he resided.

Serrano and its progeny herald the demise of similar financing systems in states throughout the nation. The Supreme Court of the United States will have an opportunity to slow or accelerate this trend in the fall when it reviews the Texas case. If the *Serrano* rationale is upheld, interdistrict inequalities will be neutralized and indigent school districts will no longer be required to assume a heavier burden of taxation than the more affluent districts in order to produce comparable educational revenue and provide equal educational opportunities for their children. State legislatures will be obliged to design systems of school financing which comply with *Serrano's* negative mandate that the quality of education may not be a function of local district wealth. If the Supreme Court rejects the *Serrano* rationale, state courts will not be precluded from finding their systems of public school support unconstitutional under provisions of their own state constitutions.

By recognizing that wealth differentials do not justify favored fiscal treatment for the wealthy districts, *Serrano* moves one step beyond *Brown v. Board of Education* toward making a quality education available to all on an equal basis. It is an occasion for state legislatures not only to remove the invidious effects of wealth discrimination from the public schools, but also to reexamine the whole nature, function, and significance of American education. The goal must be equal educational opportunity for all in every respect, a goal which must transcend parochical boundaries and permit the child to experience the richness and diversity of the world in which he lives.

[**EDITORS NOTE:** As this issue went to press, the school financing system in Arizona was declared unconstitutional. Hollins v. Shofstall, No. C-253652 (Maricopa Co. Ariz. Super. Ct. June 1, 1971) (Hardy, J.).]