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## Educ. Law §§ 2022, 3602: Rational Basis Test Applied to Uphold Constitutionality of Public School Financing Scheme

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the original draft of the statute which expressly forbade consideration of marital fault,<sup>114</sup> and to afford courts the flexibility necessary to handle the various fact patterns and equities that often arise in matrimonial actions.<sup>115</sup> To hold that marital misconduct should be disregarded for purposes of marital-property division apparently negates this flexibility and ignores the legislative design of the equitable distribution statute.

*Dori Anne Kuchinsky*

### EDUCATION LAW

*Educ. Law §§ 2022, 3602: Rational basis test applied to uphold constitutionality of public school financing scheme*

Sections 2022 and 3602 of the Education Law create a public school financing scheme that is designed to ensure to all school districts throughout the state a uniform, minimum per pupil expenditure.<sup>116</sup> To achieve this objective, state aid is allocated, where necessary, to local school districts, thereby augmenting revenue generated through local property taxation.<sup>117</sup> Due to differences in

<sup>114</sup> Wels, *The Role of Fault*, in PRACTICAL GUIDE, *supra* note 93, at 289, 297-98 editor's note. The first draft of the equitable distribution statute contained a provision that expressly prohibited judicial consideration of marital fault, Foster, *Commentary on Equitable Distribution*, 26 N.Y.L. SCH. L. REV. 1, 49 (1981); Wels, *supra*, at 297, notwithstanding strong opposition from attorneys and legislators who believed that fault should be considered in the determination of maintenance awards and property distributions, Wels, *supra*, at 297. The compromise finally chosen was that "no mention would be made of marital fault in the enumerated factors but that catch-call [sic] factor (10) would be added so that the court in extreme cases might consider marital fault along with the specified criteria." Wels, *supra*, at 297-98.

<sup>115</sup> See Pauley, *A First Look at the Modern-Day Robin Hood: A Gallop Through Sherwood Forest*, in PRACTICAL GUIDE, *supra* note 93, at 17, 19 ("[a]n important aspect of this legislation is the flexibility which is incorporated due to the tremendous variation in marital situations and the equities involved"). To be sure, it has been recognized that "[f]lexibility, rather than rigidity, is essential for the fair disposition of a given case." *Id.*; see Foster, *supra* note 93, at 4, col. 1.

<sup>116</sup> See N.Y. EDUC. LAW § 2022 (McKinney 1969); *id.* § 3602 (McKinney 1981 & Supp. 1981-1982).

<sup>117</sup> See *id.* § 2022(1) (McKinney 1969). The amount of local property taxes allocated to school financing is determined by a district vote "upon the appropriation of the necessary funds to meet estimated expenditures . . . or on propositions involving the expenditure of money, or authorizing the levy of taxes . . ." *Id.* In addition to this property tax revenue, the state provides district-adjusted flat state grants per pupil, and, when the combined revenue from local property taxes and state grants does not result in the state-guaranteed minimum, the state provides supplemental funds to reach the minimum level. *Id.* § 3602 (Mc-

property wealth among the state's school districts, however, highly disparate per pupil disbursements have resulted among such districts.<sup>118</sup> In light of these disparities, it has become unsettled whether the current educational financing system comports with state and federal equal protection mandates.<sup>119</sup> Critical in determining the constitutionality of these funding schemes is the standard of judicial review under which they are scrutinized.<sup>120</sup> Recently, in *Board of Education v. Nyquist*,<sup>121</sup> the Court of Appeals, applying the rational basis standard of review, held that the state's system for financing public schools violated neither the equal protection clauses of the state and federal constitutions nor the education article of the state constitution.<sup>122</sup>

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Kinney 1981 & Supp. 1981-1982). For an explanation of this type of educational finance scheme, see *Board of Educ. v. Nyquist*, 94 Misc. 2d 466, 483-85, 408 N.Y.S.2d 606, 613-14 (Sup. Ct. Nassau County 1978), *modified*, 83 App. Div. 2d 217, 443 N.Y.S.2d 843 (2d Dep't 1981), *modified*, 57 N.Y.2d 27, 439 N.E.2d 359, 453 N.Y.S.2d 643 (1982). As one commentator has noted, however, "[t]he almost universal tradition in this country has been to rely upon local property tax to finance public education." Carrington, *Financing the American Dream: Equality and School Taxes*, 73 COLUM. L. REV. 1227, 1229 (1973); see R. HAMILTON & P. MORT, *THE LAW AND PUBLIC EDUCATION* 166-68 (2d ed. 1959).

<sup>118</sup> See Karst, *Serrano v. Priest: A State Court's Responsibilities and Opportunities in the Development of Federal Constitutional Law*, 60 CALIF. L. REV. 720, 720 (1972). Property-based finance schemes have been characterized as a "national disgrace" due to the disparities in property wealth among different school districts. *Id.* These disparities seemingly have resulted from increased differences in land value and the fact that wealthier districts are more willing to approve higher levels of spending for education than are the poorer districts. Carrington, *supra* note 117, at 1230. Accordingly, richer districts can generate more revenue for education. See Karst, *supra*, at 720. While this has been said to increase the quality of education in the richer districts, see *Robinson v. Cahill*, 62 N.J. 473, 481, 303 A.2d 273, 277, *cert denied*, 414 U.S. 976 (1973), there may be no direct correlation between monetary expenditures and quality of education, see *San Antonio Indep. School Dist. v. Rodriguez*, 411 U.S. 1, 42-43 (1973).

<sup>119</sup> See *Board of Educ. v. Nyquist*, 57 N.Y.2d 27, 35-36, 439 N.E.2d 359, 361, 453 N.Y.S.2d 643, 646 (1982). Several states' public school financing schemes have been challenged on constitutional grounds. See, e.g., *Serrano v. Priest*, 18 Cal. 3d 728, 735, 557 P.2d 929, 930, 135 Cal. Rptr. 345, 346 (1976), *cert denied*, 432 U.S. 907 (1977); *Horton v. Meskill*, 172 Conn. 615, 618, 376 A.2d 359, 361 (1977); *Robinson v. Cahill*, 62 N.J. 473, 480, 303 A.2d 273, 276, *cert. denied*, 414 U.S. 976 (1973).

<sup>120</sup> Cf. *In re Levy*, 38 N.Y.2d 653, 658, 345 N.E.2d 556, 558, 382 N.Y.S.2d 13, 15 ("[a]t the threshold of consideration of any equal protection claim is the determination of the applicable standard of review"), *appeal dismissed sub nom. Levy v. City of New York*, 429 U.S. 805 (1976). Compare *Shofstall v. Hollins*, 110 Ariz. 88, 90-91, 515 P.2d 590, 592-93 (1973) and *Thompson v. Engelking*, 96 Idaho 793, 811, 537 P.2d 635, 645 (1975) (employing rational basis test, court determined that the school financing systems were constitutional) with *Horton v. Meskill*, 172 Conn. 615, 646, 332 A.2d 113, 119 (1977) (educational financing scheme declared unconstitutional under strict scrutiny standard of review).

<sup>121</sup> 57 N.Y.2d 27, 439 N.E.2d 359, 453 N.Y.S.2d 643 (1982).

<sup>122</sup> *Id.* at 35, 439 N.E.2d at 361, 453 N.Y.S.2d at 645. The equal protection clause of the

In *Nyquist*, "property-poor" school districts<sup>123</sup> commenced a multidistrict action against, *inter alios*, the Commissioner of Education,<sup>124</sup> alleging that they were unable fiscally to provide educational programs tantamount to those provided by the property-rich districts.<sup>125</sup> Additionally, various intervenor plaintiffs,<sup>126</sup> representing the interests of school districts located in several of the state's largest cities, asserted that, due to existing city fiscal conditions, they were economically limited in their ability to provide educational opportunities.<sup>127</sup> Both classes of plaintiffs claimed that the

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New York Constitution provides that:

No person shall be denied the equal protection of the laws of this state or any subdivision thereof. No person shall, because of race, color, creed or religion, be subjected to any discrimination in his civil rights by any other person or by any firm, corporation, or institution, or by the state or any agency or subdivision of the state.

N.Y. CONST. art. I, § 11. The equal protection clause of the federal constitution provides, in pertinent part, that "[n]o state shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1. The New York State Constitution's Education Article provides that "[t]he legislature shall provide for the maintenance and support of a system of free common schools, wherein all the children of this state may be educated." N.Y. CONST. art. XI, § 1.

<sup>123</sup> 57 N.Y.2d at 35, 439 N.E.2d at 361, 453 N.Y.S.2d at 846. The group of plaintiffs that originated the suit consisted of 27 school districts located in 13 counties and 12 schoolchildren who were students in 7 of the public elementary and secondary schools operated by the plaintiff-school districts. *Id.* These districts allegedly generate less money per pupil for education than do districts with higher property wealth. *Id.* at 36, 439 N.E.2d at 361-62, 453 N.Y.S.2d at 646.

<sup>124</sup> The plaintiffs brought their action against the Commissioner of Education of the State of New York, the University of the State of New York, the State Comptroller, and the Commissioner of Taxation and Finance of the State of New York. 57 N.Y.2d at 35, 439 N.E.2d at 361, 453 N.Y.S.2d at 646.

<sup>125</sup> *Id.* at 36, 439 N.E.2d at 361-62, 453 N.Y.S.2d at 646. The original plaintiffs contended that the state's educational financing system violated the equal protection clauses of the state and federal constitutions as well as the education article of the state constitution. *Id.* at 35-36, 439 N.E.2d at 361, 453 N.Y.S.2d at 646; *see supra* note 122. These contentions were based upon the assumption that since the plaintiff-districts had lower property value than the wealthier districts, their taxes consistently would generate less revenue for educational purposes. *Id.* at 35-36, 439 N.E.2d at 361-62, 453 N.Y.S.2d at 646; *see Carrington, supra* note 117, at 1229-30; Karst, *supra* note 118, at 720. This, the original plaintiffs claimed, resulted in unequal educational opportunities among various school districts. 57 N.Y.2d at 35-36, 439 N.E.2d at 361-62, 453 N.Y.S.2d at 646.

<sup>126</sup> The board of education, officials, resident taxpayers, and students of the cities of New York, Buffalo, Rochester, and Syracuse served a separate complaint as intervenor plaintiffs. 57 N.Y.2d at 35, 439 N.E.2d at 361, 453 N.Y.S.2d at 646.

<sup>127</sup> *Id.* at 36, 439 N.E.2d at 362, 453 N.Y.S.2d at 646. The intervenors alleged the same violations of the state and federal constitutions as did the original plaintiffs. *Id.*; *see infra* note 135. Specifically, the intervenors claimed that, due to "metropolitan overburden," there was a great disparity between the educational opportunities available to children in the cities' public schools and those available to children attending public schools in districts lo-

method of distribution of state funds "perpetuated and magnified rather than remedied" these inequalities.<sup>128</sup> The Supreme Court, Nassau County, determined that the New York system for financing public education violated the equal protection and education clauses of the state constitution as to the original plaintiffs, and that such scheme also violated the federal equal protection clause as to the intervenors.<sup>129</sup> The Appellate Division, Second Department, applying the intermediate scrutiny test of equal protection review,<sup>130</sup> modified the judgment of the lower court, determining

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cated outside the cities. 57 N.Y.2d at 36, 439 N.E.2d at 361-62, 453 N.Y.S.2d at 646. Metropolitan or municipal overburden has been defined as a condition in which "[s]ome areas, particularly urban areas, have exceptionally high non-educational expenses . . . [so that] revenues raised by property taxes which might otherwise be used for education, must be diverted to non-educational purposes." *Robinson v. Cahill*, 69 N.J. 449, 466 n.5, 355 A.2d 129, 138 n.5 (1976) (per curiam) (quoting *Robinson v. Cahill* (Robinson IV), 69 N.J. 133, 169-70, 351 A.2d 713, 732 (1975) (Pashman, J., concurring in part and dissenting in part)); see Dugan, *The Constitutionality of School Finance Systems Under State Law: New York's Turn*, 27 SYRACUSE L. REV. 573, 578-82 (1976). *But see* Board of Educ. v. City of New York, 88 Misc. 2d 179, 183, 387 N.Y.S.2d 195, 200 (Sup. Ct. N.Y. County 1976) (local governments need not "sacrifice" basic municipal functions for the sake of funding education), *rev'd on other grounds*, 41 N.Y.2d 535, 362 N.E.2d 948, 394 N.Y.S.2d 148 (1977).

<sup>128</sup> 57 N.Y.2d at 40, 439 N.E.2d at 364, 453 N.Y.S.2d at 649.

<sup>129</sup> 94 Misc. 2d 466, 525-35, 408 N.Y.S.2d 606, 638-44 (Sup. Ct. Nassau County 1978). The lower court in *Nyquist* interpreted the Supreme Court decision in *San Antonio Indep. School Dist. v. Rodriguez*, 411 U.S. 1 (1973), see *infra* note 134, as support for rejecting the original plaintiffs' claim that the New York system of financing public education violated the federal equal protection clause. 94 Misc. 2d at 519, 408 N.Y.S.2d at 634. As to the intervenor plaintiffs, however, the court stated that "the State aid statute in its operational effect created a classification which as to the plaintiff-intervenors lacked a rational basis [under *San Antonio*] and was discriminatory." *Id.* at 532, 408 N.Y.S.2d at 642. Hence, the court found violations of the state and federal equal protection clauses as to the intervenors, asserting that the *San Antonio* decision did not foreclose such a finding. *Id.* Finally, the trial court stated that "measured by the standards of the so-called *sliding scale approach*, New York's current system of providing State aid to public elementary and secondary education denies the original plaintiffs equal protection of the law under the provisions of section 11 of article I of the New York State Constitution." *Id.* at 525, 408 N.Y.S.2d at 638 (emphasis added); see *infra* note 130.

<sup>130</sup> 83 App. Div. 2d 217, 242-44, 443 N.Y.S.2d 843, 859-60 (2d Dep't 1981). The intermediate scrutiny standard of equal protection review is used in cases involving discrimination against a "sensitive but not suspect class." Note, *To Educate or Not to Educate: The Plight of Undocumented Alien Children in Texas*, 60 WASH. U.L.Q. 119, 153 (1982). This standard has been labeled the "sliding scale" test. See Board of Educ. v. *Nyquist*, 94 Misc. 2d at 525, 408 N.Y.S.2d at 636; *infra* note 156. In order to satisfy the equal protection mandate, the sliding scale standard requires that a particular classification "serve important government objectives and . . . be substantially related to [the] achievement of those objectives." *Craig v. Boren*, 429 U.S. 190, 197 (1976). The standard also requires a showing that the specific governmental objectives being advanced by the classification could not be achieved by less discriminatory alternatives. See Levin, *The Courts, Congress, and Educational Adequacy: The Equal Protection Predicament*, 39 Md. L. Rev. 187, 192-93 (1979).

that there was no violation of the federal equal protection clause as to the intervenor plaintiffs.<sup>131</sup>

On appeal, the Court of Appeals, modifying the decision of the appellate division, held that the state statutory scheme for financing public education did not violate the applicable provisions of the federal and state constitutions.<sup>132</sup> Judge Jones, writing for the majority,<sup>133</sup> observed that the Supreme Court, in *San Antonio Independent School District v. Rodriguez*,<sup>134</sup> established rational basis as the definitive standard of review for federal equal protection challenges to educational financing systems.<sup>135</sup> Applying this standard, the Court concluded that the state's public school financing scheme was valid under the federal constitution,<sup>136</sup> reasoning that it was rationally related to a legitimate state purpose and unrelated to the inequalities existing within the cities.<sup>137</sup> Furthermore,

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<sup>131</sup> 83 App. Div. 2d at 244-45, 443 N.Y.S.2d at 860-61.

<sup>132</sup> 57 N.Y.2d at 49-50, 439 N.E.2d at 370, 453 N.Y.S.2d at 654.

<sup>133</sup> Judge Jones was joined in the majority opinion by Chief Judge Cooke and Judges Jasen, Gabrielli, Wachtler and Meyer. Judge Fuchsberg dissented in a separate opinion.

<sup>134</sup> 411 U.S. 1, 44 (1973). In *San Antonio*, parents of children attending school in an urban district of San Antonio, Texas brought a class action to declare the Texas educational financing scheme unconstitutional under the equal protection clause of the fourteenth amendment. *Id.* at 4-6. The Texas system was similar to New York's insofar as minimum funds were provided by the state to supplement revenue generated through local property taxation. *See id.* at 6-7. The Supreme Court upheld the constitutionality of the Texas statute, merely requiring that it bear some rational relationship to a legitimate state purpose. *Id.* at 40. The Court refused to apply the strict scrutiny test, *see infra* note 154, reasoning that the higher level of scrutiny is "reserved for laws that create suspect classifications or impinge upon constitutionally protected rights." 411 U.S. at 40. In so concluding, it appears the Supreme Court determined that education is not a fundamental right, *see id.* at 18, and that the financing scheme was not a suspect classification since it merely discriminated on the basis of wealth, *id.* at 25.

<sup>135</sup> 57 N.Y.2d at 41, 439 N.E.2d at 365, 453 N.Y.S.2d at 649. The Court of Appeals simply stated that the conclusion reached in *San Antonio*, *see supra* note 134, dictated a similar result in the *Nyquist* litigation. *Id.* It should be noted that the rational basis test, employed in both *Nyquist* and *San Antonio*, is a procedure used in examining a statute "to determine whether it rationally furthers some legitimate, articulated state purpose and therefore does not constitute an invidious discrimination in violation" of equal protection mandates. *San Antonio*, 411 U.S. at 17. Historically, New York courts have utilized this standard when faced with equal protection objections to particular legislation. *See* Gleason v. Gleason, 26 N.Y.2d 28, 41, 256 N.E.2d 513, 520, 308 N.Y.S.2d 347, 356 (1970); *Bauch v. City of New York*, 21 N.Y.2d 599, 606-07, 237 N.E.2d 211, 214-15, 289 N.Y.S.2d 951, 955, *cert. denied*, 393 U.S. 834 (1968); *Posner v. Rockefeller*, 31 App. Div. 2d 352, 353, 297 N.Y.S.2d 867, 869 (3d Dep't), *aff'd mem.*, 25 N.Y.2d 720, 255 N.E.2d 563, 307 N.Y.S.2d 224 (1969); *Gauthier v. Gabel*, 44 Misc. 2d 887, 891, 255 N.Y.S.2d 200, 205 (Sup. Ct. N.Y. County 1964), *aff'd*, 16 N.Y.2d 720, 209 N.E.2d 723, 262 N.Y.S.2d 105 (1965).

<sup>136</sup> 57 N.Y.2d at 49-50, 439 N.E.2d at 370, 453 N.Y.S.2d at 654.

<sup>137</sup> *Id.* at 41-42, 439 N.E.2d at 365, 453 N.Y.S.2d at 649-50. As to the original plaintiffs' allegation of a federal equal protection violation, the Court of Appeals relied solely on the

the Court, relying upon *In re Levy*,<sup>138</sup> stated that rational basis was also the proper standard governing state equal protection challenges to school financing schemes.<sup>139</sup> In this regard, the Court mentioned that since the education article was part of the state constitution when *Levy* was decided,<sup>140</sup> its mere existence<sup>141</sup> does not establish that education is sufficiently important to trigger a higher standard of review for state equal protection analysis.<sup>142</sup> Noting that the state legitimately may act to preserve and promote local control of education, the Court ruled that the financing

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Supreme Court's decision in *San Antonio. Id.* at 41, 439 N.E.2d at 365, 453 N.Y.S.2d at 649; *see supra* note 135. The Court also held that there was no federal equal protection violation as to the intervenor-plaintiffs, noting that it was not within the Court's power to determine how municipal funds are to be allocated. 57 N.Y.2d at 42, 439 N.E.2d at 365, 453 N.Y.S.2d at 649.

<sup>138</sup> 38 N.Y.2d 653, 345 N.E.2d 556, 382 N.Y.S.2d 13, *appeal dismissed sub nom. Levy v. City of New York*, 429 U.S. 805 (1976). In *Levy*, the Court of Appeals held that the rational basis standard should be applied to determine whether the Family Court Act constitutionally authorized the family court to direct parents of children with certain handicaps to contribute to the maintenance of such children in connection with their education. 38 N.Y.2d at 658-61, 345 N.E.2d at 558-60, 382 N.Y.S.2d at 15-17. The *Nyquist* Court construed *Levy* as holding: "rational basis [is] the proper standard for review when the challenged State action implicated the right to free, public education." 57 N.Y.2d at 43, 439 N.E.2d at 365, 453 N.Y.S.2d at 650.

<sup>139</sup> 57 N.Y.2d at 43, 439 N.E.2d at 365, 453 N.Y.S.2d at 650; *see supra* note 138. In adopting the holding of *Levy*, the *Nyquist* Court rejected the appellate division's belief that employment of the intermediate scrutiny test, *see supra* note 130, was justified by the constitutional importance of the right to education. 57 N.Y.2d at 42-43, 439 N.E.2d at 366, 453 N.Y.S.2d at 650. Furthermore, the Court of Appeals in *Nyquist* observed that the intermediate scrutiny standard only has been "applied when the challenged State action has resulted in intentional discrimination against a class of persons grouped together by reason of personal characteristics . . ." *Id.* at 43-44, 439 N.E.2d at 366, 453 N.Y.S.2d at 650-51. Thus, concluded the Court, intermediate scrutiny should not be used in the instant situation because the alleged discriminatory classification was among school districts rather than persons. *Id.* at 44, 439 N.E.2d at 366, 453 N.Y.S.2d at 651.

<sup>140</sup> *Id.* at 43, 439 N.E.2d at 366-67, 453 N.Y.S.2d at 650. The education article was first introduced in the state constitution in 1894. *See* 2 C. LINCOLN, CONSTITUTIONAL HISTORY OF NEW YORK 369-70 (1905). The *Levy* Court acknowledged the existence of the education article, 38 N.Y.2d at 657, 345 N.E.2d at 558, 382 N.Y.S.2d at 15, but nevertheless decided that the rational basis test is the appropriate standard of review when the right to public education is in issue, *id.* at 658-60, 345 N.E.2d at 558-59, 382 N.Y.S.2d at 15-16.

<sup>141</sup> 57 N.Y.2d at 43, 439 N.E.2d at 366, 453 N.Y.S.2d at 650. The *Nyquist* Court stated that there was nothing in the present case that would impel a departure from the *Levy* standard. *Id.* It is suggested that, in making this statement, the Court may have been implying that it would be willing to heighten the standard of review if unique factual circumstances exist. Furthermore, it is submitted that such circumstances, though omitted from the Court of Appeals' analysis, are present in *Nyquist*. *See infra* notes 159-60 and accompanying text.

<sup>142</sup> 57 N.Y.2d at 43, 439 N.E.2d at 366, 453 N.Y.S.2d at 650.

scheme was rationally related to the furtherance of such interest,<sup>143</sup> and, thus, did not violate the equal protection clause of the state constitution.<sup>144</sup> Finally, the Court stated that the statewide program ensuring a minimum expenditure per student was constitutionally consistent with the education article itself,<sup>145</sup> which merely requires the state to maintain and support a "system of free common schools."<sup>146</sup>

Dissenting, Judge Fuchsberg maintained that the majority failed to recognize the importance of education<sup>147</sup> and the grossly unequal educational services being provided to students attending school in property poor and metropolitan areas.<sup>148</sup> Moreover, the dissent asserted, the presence of the education article in the state constitution compels the conclusion that education is a constitutionally important right.<sup>149</sup> As such, Judge Fuchsberg concluded, the heightened level of intermediate scrutiny, rather than the rational basis standard, should be employed to determine the validity of the state's public school financing scheme.<sup>150</sup>

<sup>143</sup> *Id.* at 44, 439 N.E.2d at 366, 453 N.Y.S.2d at 651.

<sup>144</sup> *Id.* at 49-50, 439 N.E.2d at 370, 453 N.Y.S.2d at 654.

<sup>145</sup> *Id.* at 47-49, 439 N.E.2d at 368-69, 453 N.Y.S.2d at 652-53.

<sup>146</sup> N.Y. CONST. art. XI, § 1. The *Nyquist* Court observed that the language of the education article "makes no reference to any requirement that the education to be made available be equal or substantially equivalent in every district." 57 N.Y.2d at 47, 439 N.E.2d at 368-69, 453 N.Y.S.2d at 652. Hence, the Court concluded, the education article merely assures that the state will provide a minimum education to its citizens. *Id.* It is interesting to note that this view has been followed when education articles of other state constitutions have been interpreted. *See, e.g.,* San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1, 9 (1973). *See generally* Prevolos, *Rodriguez Revisited: Federalism, Meaningful Access, and the Right to Adequate Education*, 20 SANTA CLARA L. REV. 75, 78-83 (1980).

<sup>147</sup> 57 N.Y.2d at 51, 439 N.E.2d at 370-71, 453 N.Y.S.2d at 655 (Fuchsberg, J., dissenting). Judge Fuchsberg stressed that "without education there is no exit from the ghetto, no solution to unemployment, no cutting down on crime, [and] no dissipation of intergroup tension. . . ." *Id.* (Fuchsberg, J., dissenting). Accordingly, the dissent urged that "[i]n the long run, nothing may be more important—and therefore more fundamental—to the future of our country." *Id.* (Fuchsberg, J., dissenting). Moreover, Judge Fuchsberg articulated, the sponsors of the education article of the state constitution had perceived education as an extremely important state interest. *Id.* at 52, 439 N.E.2d at 371, 453 N.Y.S.2d at 655 (Fuchsberg, J., dissenting).

<sup>148</sup> *Id.* at 53-57, 439 N.E.2d at 371-75, 453 N.Y.S.2d at 656-59 (Fuchsberg, J., dissenting).

<sup>149</sup> *See id.* at 57, 439 N.E.2d at 375, 453 N.Y.S.2d at 659 (Fuchsberg, J., dissenting). Judge Fuchsberg contended that the majority gave the education clause of the state constitution a "minimized reading" in reaching its determination. *Id.*, 439 N.E.2d at 374, 453 N.Y.S.2d at 658 (Fuchsberg, J., dissenting). Furthermore, the dissent argued, such a reading of the article was inconsistent with the "hope and promise [of] the constitutional delegates who wrote it." *Id.* (Fuchsberg, J., dissenting).

<sup>150</sup> *Id.* at 58, 439 N.E.2d at 374, 453 N.Y.S.2d at 659 (Fuchsberg, J., dissenting). Judge



It is submitted that the *Nyquist* Court erred in upholding the school financing system under the state constitution. While application of the rational basis standard to the federal equal protection challenges may have been mandated by the Supreme Court's decision in *San Antonio*,<sup>151</sup> it is suggested that a higher standard of judicial review nevertheless may be utilized<sup>152</sup> to determine equal protection controversies that arise under the state constitution.<sup>153</sup>

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Fuchsberg opined that application of the intermediate scrutiny test would result in the invalidation of the statutory scheme. *Id.* at 59, 439 N.E.2d at 375, 453 N.Y.S.2d at 659 (Fuchsberg, J., dissenting).

<sup>151</sup> See *supra* notes 134-35 and accompanying text.

<sup>152</sup> States may impose a stricter standard when reviewing state constitutional guarantees than the Supreme Court employs when examining similar federal protections. *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 461 n.6 (1981); see *Oregon v. Hass*, 420 U.S. 714, 719 (1975). Indeed, "while . . . the Federal Constitution may be said to fix a floor for the rights of our people, the ceiling may be set by each State's own constitutional charter. . . ." 57 N.Y.2d at 57, 439 N.E.2d at 374, 453 N.Y.S.2d at 658 (Fuchsberg, J., dissenting). It is clear, therefore, that in selecting an applicable standard of review for a particular state constitutional provision, a state court has the right to employ a stricter protective standard than that set by the United States Supreme Court for a comparable federal constitutional guarantee. See *Serrano v. Priest*, 18 Cal. 2d 728, 764, 557 P.2d 929, 950, 135 Cal. Rptr. 345, 366 (state court is subject only to qualification that its state constitutional constructions may not limit the protections of the federal constitution), *cert. denied*, 432 U.S. 907 (1977); *Horton v. Meskill*, 172 Conn. 615, 641, 376 A.2d 359, 371 (1977) (state court in interpreting state constitutional protection, merely cannot restrict the guarantees of the federal constitution). It should be noted that in both *Serrano* and *Horton*, the right to education was considered so fundamental as to demand strict scrutiny analysis for its infringement. See 18 Cal. 2d at 766, 557 P.2d at 951, 135 Cal. Rptr. at 367; 172 Conn. at 646, 376 A.2d at 373.

<sup>153</sup> See Comment, *Adjudication of State Constitutional Questions in the New York Court of Appeals*, 40 CORNELL L.Q. 537, 537 (1955); cf. *Sonmax, Inc. v. City of New York*, 89 Misc. 2d 945, 948, 392 N.Y.S.2d 810, 812 (Sup. Ct. N.Y. County) (equal protection analysis entails examination of the particular facts and circumstances of the case), *aff'd*, 43 N.Y.2d 253, 372 N.E.2d 9, 401 N.Y.S.2d 173 (1977). Although the *Nyquist* Court interpreted *Levy* as requiring rational basis review for all alleged equal protection infringements of the right to education, see *supra* note 138, it is suggested that the *Levy* decision is limited to the situation involving a classification that distinguishes blind and deaf school children from other handicapped students, see 38 N.Y.2d at 658, 345 N.E.2d at 558, 382 N.Y.S.2d at 15. Thus, it is submitted that *Levy* did not justify the use of a rational basis test under the circumstances that existed in *Nyquist*.

In *Levy*, the parents of handicapped children claimed that section 234 of the Family Court Act denied them equal protection of the laws since it authorized the family court to require them, but not the parents of blind and deaf children, to contribute to the maintenance of their children's education. 38 N.Y.2d at 657, 345 N.E.2d at 558, 382 N.Y.S.2d at 15. After concluding that handicapped children do not constitute a suspect class, and that education is not a fundamental constitutional right, the Court determined that the proper standard of review was the traditional rational basis test. *Id.* at 658, 345 N.E.2d at 558, 382 N.Y.S.2d at 15. Employing this standard of review, the Court stated that "[a] rational basis does exist for the distinction made in relieving the parents of blind and deaf children from any financial responsibility in connection with their children's education. . . ." *Id.*, 345

Hence, though education apparently has not been considered a fundamental right for purposes of strict judicial scrutiny,<sup>154</sup> it appears sufficiently important<sup>155</sup> to demand intermediate judicial review for purposes of state equal protection analysis.<sup>156</sup> This con-

N.E.2d at 559, 382 N.Y.S.2d at 15.

<sup>154</sup> Strict scrutiny for purposes of equal protection analysis generally is applied when a given law deals with classifications affecting "fundamental interests," or employs a "suspect classification." *Alevy v. Downstate Medical Center*, 39 N.Y.2d 326, 332, 348 N.E.2d 537, 543, 384 N.Y.S.2d 82, 87 (1976). There are three generally recognized categories of suspect classes: race, *see, e.g., Loving v. Virginia*, 388 U.S. 1, 9 (1967); *McLaughlin v. Florida*, 379 U.S. 184, 196 (1964); *Korematsu v. United States*, 323 U.S. 214, 216 (1944), national origin, *see, e.g., Castenada v. Partida*, 430 U.S. 482, 495 (1977); *Hernandez v. Texas*, 347 U.S. 475, 478-80 (1954), and alienage, *see, e.g., Nyquist v. Mauclet*, 432 U.S. 1, 7 (1977); *Sugarman v. Dougall*, 413 U.S. 634, 642 (1973). In addition, various rights have been found fundamental for purposes of strict scrutiny review. *See, e.g., Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 580 (1980) (right to attend a criminal trial); *Dunn v. Blumstein*, 405 U.S. 330, 336 (1972) (right to vote in state elections); *Shapiro v. Thompson*, 394 U.S. 618, 629 (1969) (right to travel interstate); *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942) (right to procreate). Moreover, all first amendment rights are deemed fundamental for purposes of equal protection analysis. *See, e.g., Carey v. Brown*, 447 U.S. 455, 461-62 (1980); *Police Dep't v. Mosley*, 408 U.S. 92, 98-99 (1972). *See generally* L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 16-7, at 1002 (1978). At one time, it appeared that education was considered a fundamental right. *See Brown v. Board of Educ.*, 347 U.S. 483, 493 (1954). Discussion following *Brown*, however, clearly indicated that race, and not education, was the critical factor in that case. *See, e.g., Watson v. City of Memphis*, 373 U.S. 526, 531 (1963). To be sure, the Supreme Court and the New York Court of Appeals subsequently have indicated that education is not a fundamental right. *See San Antonio Indep. School Dist. v. Rodriguez*, 411 U.S. 1, 16 (1972); *In re Levy*, 38 N.Y.2d at 658, 345 N.E.2d at 558, 382 N.Y.S.2d at 15. Nevertheless, several commentators still maintain that education is a fundamental right, and, thus, that any state law implicating the right to education must be subjected to strict judicial review. *See Note, supra* note 130, at 127-28. *See generally* Ely, *The Supreme Court 1977 Term—Foreward: On Discovering Fundamental Values*, 92 HARV. L. REV. 5, 5-16 (1978).

<sup>155</sup> It is submitted that New York's inclusion of an education provision in its own constitution illustrates the state's recognition of the critical importance of the right to education for purposes of equal protection analysis. *See* N.Y. CONST. art. XI, § 1; *see also* *Serrano v. Priest*, 18 Cal. 3d 728, 735, 557 P.2d 929, 930, 135 Cal. Rptr. 345, 346 (1976), *cert. denied*, 432 U.S. 907 (1977); *Horton v. Meskill*, 172 Conn. 615, 618, 376 A.2d 359, 361 (1977). In *Serrano*, the Supreme Court of California observed that, despite the *San Antonio* decision, the State of California deems education sufficiently important to warrant treatment as a fundamental interest that is constitutionally guaranteed. 18 Cal. 3d at 765-66, 557 P.2d at 951, 135 Cal. Rptr. at 367. Clearly, California's respect for education stems particularly from the inclusion of an education clause in its state constitution. *See id.* at 770, 557 P.2d at 954, 135 Cal. Rptr. at 370. In *Horton*, the Supreme Court of Connecticut stated that "in . . . light of the Connecticut constitutional recognition of the right to education . . . it is, in Connecticut, a 'fundamental' right." 172 Conn. at 645, 376 A.2d at 373.

<sup>156</sup> Notwithstanding the *Nyquist* Court's assertion that the constitutional significance of a right is an insufficient basis for applying a heightened standard of equal protection review, 57 N.Y.2d at 42-43, 439 N.E.2d at 366, 453 N.Y.S.2d at 650, it is apparent that the constitutional importance of specific rights traditionally has been a basis for employment of such a standard. *See* L. TRIBE, *supra* note 154, § 16-31 at 1089-92. Indeed, the Supreme

cern for education properly may be inferred when a state, which has supervisory control over education pursuant to its police powers,<sup>157</sup> also has included in its constitution a provision for the maintenance and support of an educational system.<sup>158</sup> Such provision, together with the belief that education is essential to the effective exercise of several federally guaranteed rights,<sup>159</sup> militates against the *Nyquist* Court's conclusion that a school financing scheme will withstand state equal protection objections if it is found to be rationally related to a legitimate state interest.

While the Court's use of the rational basis standard effectively eliminated the need to refashion the existing financing scheme, it is submitted that retention of the present system is unwarranted in light of its practical ramifications for property-poor districts. Clearly, a financing system that perpetuates excessive class sizes, restricts extracurricular activities, and maintains inadequate library facilities, health services, and classroom supplies in property-poor districts is undesirable.<sup>160</sup> An appropriate solution to this

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Court itself employs an elevated level of review when it deems the affected interest to be of sufficient importance. See *San Antonio Indep. School Dist. v. Rodriguez*, 411 U.S. 1, 109 (1973) (Marshall, J., dissenting). Even Justice Powell, who, in *San Antonio*, stated that the rational basis test is appropriate for equal protection challenges to educational financing schemes, has recognized that "the relatively deferential 'rational basis' standard of review . . . takes on a sharper focus" when addressing constitutionally important although not fundamental rights. *Craig v. Boren*, 429 U.S. 190, 210 n\* (1976) (Powell, J., concurring). New York also has taken the view that the importance of a particular right might necessitate the application of a test "somewhere along the sliding scale between strict scrutiny at one end and rational basis at the other end." *Board of Educ. v. Nyquist*, 83 App. Div. 2d at 238, 433 N.Y.S.2d at 857 (quoting *Montgomery v. Daniels*, 38 N.Y.2d 41, 61, 340 N.E.2d 444, 456, 378 N.Y.S.2d 1, 18 (1975)); see *Alevy v. Downstate Medical Center*, 39 N.Y.2d 326, 333, 348 N.E.2d 537, 543-44, 384 N.Y.S.2d 82, 88 (1976).

<sup>157</sup> See N.Y. CONST. art. XVII, § 3. Section 3 of article 17 of the state constitution provides that "[t]he protection and promotion of the health of the inhabitants of the state are matters of public concern and provision therefor shall be made by the state . . . by such means as the legislature shall from time to time determine." *Id.* The "police power" of a state has been said to include "everything essential to the public safety, health and morals." *Lawton v. Steele*, 152 U.S. 133, 136 (1894). Moreover, under the guise of this power, "the State may interfere wherever the public interests demand it." *Id.* Hence, it would appear that the public interest in education brings it entirely within the scope of the state's police power.

<sup>158</sup> N.Y. CONST. art. XI, § 1; see *supra* note 155 and accompanying text.

<sup>159</sup> See *Karst*, *supra* note 118, at 723; see also *San Antonio Indep. School Dist. v. Rodriguez*, 411 U.S. 1, 112 (1972) (Marshall, J., dissenting) ("[e]ducation directly affects the ability of a child to exercise his First Amendment rights"). The importance of education to the exercise of various federally guaranteed rights has been found to be a legitimate basis for the use of a higher standard of equal protection review. See *Alevy v. Downstate Medical Center*, 39 N.Y.2d 326, 333, 348 N.E.2d 537, 543-44, 384 N.Y.S.2d 82, 88 (1976).

<sup>160</sup> See *Board of Educ. v. Nyquist*, 57 N.Y.2d at 53-57, 439 N.E.2d at 372-75, 453

problem, which already has been used in another state,<sup>161</sup> is a system that increases the state's role in monitoring and supplementally financing local educational expenditures.<sup>162</sup> It is suggested that such a reform would account for the constitutional significance of the right to education and would alleviate the practical difficulties that the current financing scheme has failed to remedy.

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#### DEVELOPMENTS IN NEW YORK LAW

*Juror conduct drawing upon "common sense and everyday experience" held not improper even though it includes outside observations material to issue in point at trial*

Traditionally, evidence of the conduct and statements of a juror during the course of deliberations is not admissible to impeach a duly rendered verdict.<sup>163</sup> This rule has yielded, however, when-

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N.Y.S.2d at 656-59 (Fuchsberg, J., dissenting); Board of Educ. v. Nyquist, 94 Misc. 2d at 490-94, 518-19, 408 N.Y.S.2d at 617-18, 634; see also Coons, Clune & Sugarman, *Educational Opportunity: A Workable Constitutional Test for State Financial Structures*, 57 CALIF. L. REV. 305, 316-17 (1969). Though the *Nyquist* Court seemingly recognized that significant inequities exist in the current educational financing scheme, see 57 N.Y.2d at 38, 439 N.E.2d at 363, 453 N.Y.S.2d at 647-48, its decision may be attributable to the fact that it has been the general "judicial practice to refuse to enter decrees" that would meet with "excessive cost or risk of crisis" in their enforcement. Carrington, *supra* note 117, at 1252. Furthermore, it has been noted that, with regard to equal protection attacks on property-based educational funding schemes, "it would be difficult to imagine a case having a greater potential impact on our federal system . . ." 411 U.S. at 44. Thus, it is suggested that the *Nyquist* Court's application of the rational basis standard partially was based on its hesitancy to disrupt the status quo.

<sup>161</sup> See *infra* note 162.

<sup>162</sup> See *Robinson v. Cahill*, 69 N.J. 449, 467-68, 355 A.2d 129, 139 (1976). In *Robinson*, the New Jersey Supreme Court upheld the constitutionality of a statutory public school financing scheme that complied with the mandates of the education clause contained in the state constitution. *Id.* at 458-68, 355 A.2d at 133-39. This funding system generally increased the state's role in public educational finance by permitting it to monitor local expenditures, detect inadequacies and, where necessary, either increase budgets beyond the amounts locally determined or increase state aid to supplement insufficient local budgets. *Id.* at 458-67, 355 A.2d at 133-38. Such a system grants broad discretionary power to the commissioner and board of education. *Id.* It also entails individual consideration of the specific needs and circumstances existing in the various school districts. *Id.* Although this scheme provides for flat state grants per pupil, the element of the New York system challenged in *Nyquist*, it does create an effective detection system to locate and remedy inadequacies in the functioning of these grants. *Id.*

<sup>163</sup> See *McDonald v. Pless*, 238 U.S. 264, 269 (1915); *Vaise v. Delaval*, 99 Eng. Rep. 944 (K.B. 1785). In *Vaise*, the rule excluding testimony of jurors that tends to impeach their