Equal Educational Opportunity: A Case for the Children

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NOTES AND COMMENTS

EQUAL EDUCATIONAL OPPORTUNITY:
A CASE FOR THE CHILDREN

INTRODUCTION

Children are at once our most precious national resource and our most vulnerable minority. Education—and for the overwhelming number of American children that means public school education—is our best hope of developing that resource to its fullest potential. Education is basic to the exercise of even those interests recognized by the United States Supreme Court as so fundamental that they constitutionally require special protection. Its infringement is a denial of what Americans have always professed to value most about the theory of our system: the opportunity to begin adult life free of competitive disadvantage, save that of a wholly personal nature.

So well have these principles been recognized that, since the late nineteenth century, state constitutions have typically made education a state responsibility to be met by the legislature in establishing and maintaining a system of free public schools. Within all but one of the state systems, however, great disparities in funds and facilities can be found from school district to school district. School financing schemes have, with legislative sanction, remained tied to the locally collected and retained real property tax and thus to local wealth; the disparities attest to the inability of patchwork state “equalization” plans to modify that basic structure. Fiscal commitment has simply not followed the policy recognition of responsibility.

1 A classification that might infringe upon the voting interest, for example, has been held to require very strict judicial scrutiny under the equal protection clause. Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966).

2 See, e.g., CAL. CONST. art. IX, § 5 (1879); FLA. CONST. art IX, § 1 (1968), formerly FLA. CONST. art XII, § 1 (1885), derived from FLA. CONST. art. VIII, § 2 (1868); ILL. CONST. art. X, § 1 (1970), formerly ILL. CONST. art. VIII, § 1 (1870); Mich. CONST. art. VIII, § 2 (1963), revised from Mich. CONST. art. XI, § 9 (1908); Minn. CONST. art. VIII, § 1 (1857); N.Y. CONST. art. XI, § 1 (1938), formerly N.Y. CONST. art IX, § 1 (1894); VA. CONST. art VIII, § 1 (1971), formerly VA. CONST. art VIII, § 129 (1902).

3 See generally A. Wise, Rich Schools, Poor Schools: The Promise of Educational Opportunity 93-118 (1968) [hereinafter Wise]. Primitive forms of state aid were probably available to school districts in the early 1800's. Status and Impact of Educational Finance Programs, 4 NATIONAL EDUCATIONAL FINANCE PROJECT 1-2 (1971) [hereinafter 4 NEFP].

4 Hawaii has a completely centralized system of school finance. 6 HAWAI'I REV. LAWS ch.39 (supp. 1965).

5 See notes 11-12, 80-83 and accompanying text infra.

6 Wealth is used throughout in the specialized sense of a district's assessed valuation per pupil.
Until 1968, resource distribution inequities that would have been considered intolerable in any other area of state-provided service went unchallenged in school finance arrangements. At that time, the systems came under vigorous attack but the initial skirmishes were highly discouraging, from both legal and practical standpoints, for the challengers.6

SERRANO V. PRIEST

Against this background, the California Supreme Court recently indicated that that state’s educational financing scheme will probably soon be held void under the fourteenth amendment’s equal protection clause.7 The rationale was that the California plan unconstitutionally conditions the full enjoyment of a fundamental interest on a wealth classification. The court’s holding in Serrano v. Priest is as potentially far-reaching in its political and sociological impact as in its constitutional law implications. The ruling came on an appeal from an order of dismissal entered by the Superior Court of Los Angeles County.8 The dismissal had been affirmed by California’s Court of Appeal for the Second District.9

The class action was brought by elementary, intermediate, junior high and high school students of Los Angeles County on behalf of all California public school students except those

[i]n that school district, the identity of which is presently unknown, which ... affords the greatest educational opportunity of all ... 10

They were joined by their parents and guardians (residents and property owners of Los Angeles County) acting on behalf of all parents of children in the California school system who are real property owners. Defendants were the Treasurer, Superintendent of Public Instruction and Controller of the State of California and, in a representative capacity, the Tax Collector and Treasurer of Los Angeles County.

Plaintiffs cited wealth11 differentials of over 100 to 1 among Los Angeles County school districts12 resulting in per pupil expenditures

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11 See note 5 supra.
which ranged from $1,317.64 to $428.34 among the elementary school districts of that county in 1966-1967. The legislative scheme authorizing such gross differences was alleged to violate the equal protection clause of the Fourteenth Amendment and the “fundamental law and Constitution of the State of California.” A non-equal protection claim was that the financing system was void under Article IX, section 5 of the California Constitution directing the legislature to provide “a system of common schools.”

With its heavy dependence on local taxes, the financing system was said to deny to plaintiff children, “educational opportunities substantially equal to those enjoyed by children . . . in . . . other districts of the state,” by unconstitutionally making the quality of their education “a function of the wealth of . . . [their] parents and neighbors” and of “the geographical accident of . . . [their] school district . . . .” Equal protection was alleged to have been denied California parents in that, “as a direct result of the . . . scheme,” they were required to pay higher tax rates for the same or lesser educational opportunities as those afforded children of parents in other districts.

The relief sought was a declaration of invalidity of the financing scheme, an order that school funds (including those derived from real

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13 Id., Exhibit “D”. The Los Angeles County figures were paralleled by those for the state as a whole. Id., Exhibits “A” & “C.”

14 Id. at 12. Specifically mentioned were article I, sections 11 and 21, of the California Constitution. Id. at 10. Those sections have been held to be “substantially the equivalent” of the equal protection clause. 5 Cal. 3d at 596 n.11, 487 P.2d at 1249 n.11, 96 Cal. Rptr. at 609 n.11.

Article I, § 11, reads:
All laws of a general nature shall have a uniform operation.

Article I, § 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.

15 This claim was raised, not in the complaint, but in plaintiff-appellants’ opening brief before the California court of appeal. Appellants’ Opening Brief at 34-39, Serrano v. Priest, 10 Cal. App. 3d 1110, 89 Cal. Rptr. 345 (2d Ct. App. 1970). It was, nevertheless, considered by the state court of appeal and the state supreme court as if it had been raised in the complaint.

Article IX, § 5, states:
The Legislature shall provide for a system of common schools by which a free school shall be kept up and supported in each district at least six months in every year after the first year in which a school has been established.

16 Local property taxes were found to have accounted for 57.7 percent of California’s school revenues in 1968-69; state aid and federal funds contributed 35.5 and 6.1 percent respectively of the district budgets. 5 Cal. 3d at 591-92 n.2, 487 P.2d at 1246 n.2, 96 Cal. Rptr. at 606 n.2.

17 Complaint at 12, 5 Cal. 3d 584, 487 P.2d 1241, 96 Cal. Rptr. 601 (1971).

18 Id.

19 Id.

20 Id. at 15.
property taxes) be reallocated so as not to deny California children and parents equal protection, and a retention of jurisdiction by the trial court while the legislature and defendants were given time to restructure the system.\textsuperscript{21}

The supreme court abruptly dismissed plaintiff's contentions based on article IX, section 5, of the California Constitution,\textsuperscript{22} but held that

\textsuperscript{21} Id. at 16-17.

\textsuperscript{22} 5 Cal. 3d at 595-96, 487 P.2d at 1248-49, 96 Cal. Rptr. at 608-09. The court acknowledged that it had previously held that the section implied

a unity of purpose as well as an entirety of operation, and the direction to the legislature to provide a system of common schools means one system . . . .


Nevertheless, it stated,

\textsc{[W]e have never interpreted the constitutional provision to require equal school spending; we have ruled only that the educational system must be uniform in terms of the prescribed course of study and educational progression from grade to grade.}

\textit{Id.} at 596, 487 P.2d at 1249, 96 Cal. Rptr. at 609.

In the California constitutional scheme, the declaration of state responsibility is followed by another section on school finance which was also held by the court to preclude the attack, since it "specifically authorizes the very element of the fiscal system of which plaintiffs complain." \textit{Id.}, 487 P.2d at 1249, 96 Cal. Rptr. at 609.

\textsc{Cal. Const. art. IX, § 6, reads in pertinent part:}

\textquote{The legislature shall provide for the levying annually by the governing body of each county, and city and county, of such school district taxes . . . . as will produce in each fiscal year such revenue for each school district as the governing board thereof shall determine is required . . . .}

Even if article IX, sections 5 and 6, are wholly inconsistent, said the \textit{Serrano} court, section 6 must prevail because it is the more specific provision and was adopted more recently. Answering the identical points made by defendants to the Court of Appeal (Respondents' Brief at 66-70, \textit{Serrano v. Priest}, 10 Cal. App. 3d 1110, 89 Cal. Rptr. 345 (2d Ct. App. 1970)), plaintiffs had argued:

\textquote{[T]he disparities in revenue . . . . are so substantial . . . . that the student attending school in a poor district receives an education which does not equip him to move from one grade to another . . . . Rather he is subjected to a separate, distinct, and markedly inferior school system. The result of the current school financing scheme is the creation of a series of school districts providing various kinds of education with only the veneer of uniformity.}


It seems legitimate to ask why the court so readily adopted the defendants' point of view in face of plaintiffs' assertion that the financing method "produces separate and distinct systems." 5 Cal. 3d at 595, 487 P.2d at 1248, 96 Cal. Rptr. at 608. Using the opinion's own statement that "\textsc{[e]lementary principles of construction dictate that where constitutional provisions can reasonably be construed to avoid a conflict, such an interpretation should be adopted;}" \textit{Id.} at 595, 487 P.2d at 1249, 96 Cal. Rptr. at 609 could not section 6 have been read as fitting within the framework established by, and therefore limited by section 5? Such a construction would not have necessarily required "equal spending" but would have prohibited substantial disparities. Certainly, the language of section 6, "\textsc{such revenue . . . . as the governing board . . . . shall determine is \textit{required},}" (emphasis added) does not indicate that school boards are to have unlimited discretion. The court was apparently so well disposed toward the equal protection argument that it overlooked the California constitutional possibilities. This is perhaps an unfair statement, however, since article 1, section 5, remained in the background of plaintiffs' case throughout. \textit{See} note 15 \textit{supra} and note 50 \textit{infra}. The reconciliation of sections 5 and 6 suggested above was never proposed.
a cause of action was stated under the equal protection provisions of the fourteenth amendment and California's article I, sections 11 and 21. This controversial holding was so widely misconstrued as immediately invalidating the statutory finance scheme and the use of the local property tax to support public schools\(^2\) that the court subsequently issued a modification of the original opinion.\(^2\) The modification can be of small comfort to California legislators, however, since the opinion took judicial notice of so many government-reported facts about the structure and effects of the funding plan,\(^2\) that a declaration of unconstitutionality by the Los Angeles County Superior Court seems inevitable.

Justice Sullivan's equal protection analysis\(^2\) for the majority was grounded on the premise that the United States Supreme Court has established two distinct tests of the validity of legislation under the equal protection clause. The traditional test of the rationality of the relationship between classification and ends sought to be achieved is applicable when economic regulations are challenged; a different standard involving close judicial scrutiny is employed when a classification is itself "invidious" or "suspect" or when the interest affected by it is deemed "fundamental." When the latter test is used, only a "compelling state interest" can justify the classification.\(^2\)


\(^{24}\) Serrano v. Priest, Modification of Opinion, L.A. No. 29820 (filed Oct. 21, 1971). The modification stressed that the earlier decision was "not a final judgment on the merits." Id. at 1. And that, if the trial court should declare the present system of school finance unconstitutional, relief should be purely prospective:

Obviously, any judgment invalidating the existing system of public school financing should make clear that the existing system is to remain operable until an appropriate new system, which is not violative of equal protection of the laws, can be put into effect.

Id. at 2.

\(^{25}\) Cal. 3d at 591-95, 487 P.2d at 1245-48, 96 Cal. Rptr. at 605-08.

\(^{26}\) The entire analysis was couched in terms of the content of the equal protection clause of the fourteenth amendment but the court held the discussion equally applicable to plaintiffs' claims under article I, sections 11 and 21, of the California Constitution. Id. at 596 n.11, 487 P.2d at 1249 n.11, 96 Cal. Rptr. at 609 n.11. See note 14 supra.

\(^{27}\) Id. at 597, 487 P.2d at 1249-50, 96 Cal. Rptr. at 609-10, citing the California Supreme Court's own exposition of the two-level test in Westbrook v. Mihaly, 2 Cal. 3d 765, 784-85, 471 P.2d 487, 500, 87 Cal. Rptr. 839, 852, vacated on other grounds, 403 U.S. 922 (1971). The existence of a two-level test probably first gained notice when Mr. Justice Stone, speaking for the Court in United States v. Carolene Products, 304 U.S. 144 (1938), a case involving economic regulation, stated in a footnote:

There may be narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the constitution . . . .

... [L]egislation which restricts those political processes which can ordinarily be expected to bring about the repeal of undesirable legislation . . . [may be subjected to] more exacting judicial scrutiny . . . .

... [P]rejudice against discrete and insular minorities may be a special condi-
Wealth, said the Serrano majority, has been repeatedly established by the Supreme Court as a "suspect classification" for equal protection purposes. Plaintiffs' contention that the school financing scheme classified (and thus apportioned educational quality) on the basis of wealth, was found "irrefutable."

Moreover, education was held to be a fundamental interest. In

... which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry.

Id. at 152-53 n.4 (citations omitted).

The possibilities of the doctrine were explored in a classic article on equal protection. Tussman & tenBroek, The Equal Protection of the Laws, 38 Calif. L. Rev. 341, 353-81 (1949).


295 Cal. 3d at 598, 604, 614, 487 P.2d at 1250, 1255, 1263, 96 Cal. Rptr. at 610, 615, 623. Plaintiffs had charged the existence of classification based on two types of wealth: district wealth and the personal wealth of residents of the various districts. See text accompanying notes 18 and 19 supra. For purposes of the hearing on demurrer, the alleged correlations between district wealth (assessed valuation per pupil) and individual wealth were deemed admitted. Id. at 601, 487 P.2d at 1252, 96 Cal. Rptr. at 615. This is one of two evidentiary issues that remain to be settled on remand. See note 85 infra. Even if resolved adverse to the plaintiffs, however, it will apparently not affect the outcome, because the California supreme court majority declared discrimination on the basis of district wealth "equally invalid" as that on the basis of individual wealth. Id. at 601, 487 P.2d at 1252, 96 Cal. Rptr. at 612. Although the correlation might be questionable where commercial and industrial property significantly enhanced a district's tax base,

[t]o 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 commercial and industrial establishments. Surely, this is to rely on the most irrelevant of factors as the basis for educational financing.


The link between district wealth, individual wealth and expenditures per pupil has since been firmly established by an affidavit filed October 1, 1971 in support of a claim similar to Serrano. Rodriguez v. San Antonio Independent School Dist., Civil Action No. 68-175-SA (W.D. Tex., filed July 30, 1968). See note 163 infra.

305 Cal. 3d at 604-10, 487 P.2d at 1255-59, 96 Cal. Rptr. at 615-19. Although the specific issue in Serrano—whether education is a fundamental interest that cannot be conditioned on wealth—was admittedly "not supported by any direct authority" (id. at 604, 487 P.2d at 1255, 96 Cal. Rptr. at 615), the court relied upon an abundance of dicta in its own and United States Supreme Court opinions.


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
reaching this determination, the court was most swayed by the following characteristics of education:

1) it "is essential in maintaining what several commentators have termed 'free enterprise democracy'—that is, preserving an individual's opportunity to compete successfully in the economic marketplace, despite a disadvantaged background;"\(^3\)

2) it "is universally relevant" in contrast to other services such as police and fire protection;\(^2\)

3) it "continues over a lengthy period of life . . . . Few other government services have such sustained, intensive contact with the recipient."\(^3\)

4) it "is unmatched in the extent to which it molds the personality of the youth of society."\(^3\)

5) it "is so important that the state has made it compulsory—not only in the requirement of attendance but also by assignment to a particular district and school. Although a child of wealthy parents has the opportunity to attend a private school, this freedom is seldom available to the indigent."\(^3\)

In combination,\(^3\) the two factors of classification by wealth and 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.

Id. at 493 (emphasis added).

The Brown dictum is phrased so forcefully that it might almost be considered decisive on the educational finance issue except for the fact that the overriding concern of the case was clearly racial discrimination. This has been shown conclusively by the post-Brown segregation cases. Serrano defendants were thus able to argue; "The racial cases do not suggest a constitutional difference [between] motor buses, golf, swimming and education." Respondents' Brief at 53, Serrano v. Priest, 10 Cal. App. 3d 1110, 89 Cal. Rptr. 345 (2d Ct. App. 1970). It would be fairer to say that Brown certainly suggests (very persuasively) a constitutional difference; it simply does not dictate it.

A recent United States Supreme Court opinion, cited by the Serrano majority, supports this latter view. In upholding the right of a municipality to shut down its public swimming pools rather than integrate them, the Supreme Court found it necessary to distinguish a school closing case, Bush v. Orleans Parish School Bd., 187 F. Supp. 42 (E.D. La. 1960), aff'd, 365 U.S. 569 (1961). It did so by stating,

[O]f course that case did not involve swimming pools but rather public schools, an enterprise we have described as "perhaps the most important function of state and local governments."


\(^3\) 5 Cal. 3d at 604, 487 P.2d at 1258-59, 96 Cal. Rptr. at 618-619.

\(^2\) Id., 487 P.2d at 1259, 96 Cal. Rptr. at 619.

\(^3\) Id.

\(^4\) Id. at 609-10, 487 P.2d at 1259, 96 Cal. Rptr. at 619.

\(^5\) Id. at 610, 487 P.2d at 1259, 96 Cal. Rptr. at 619.

\(^6\) It was acknowledged that wealth classifications have never been invalidated independent of a limited set of fundamental interests, i.e., the voting interest and the interest in fair criminal process. 5 Cal. 3d at 604, 487 P.2d at 1255, 96 Cal. Rptr. at 615.
fundamental interest demanded, for justification of the uneven apportionment, a compelling state interest unachievable by another means.\(^{37}\)

Defendants insisted throughout the litigation that the legislative plan should be measured against the “rational relationship” standard.\(^{38}\)

The locally collected and retained property tax, and thus the inter-district spending variations, were, they argued, reasonably related to California’s policy “to strengthen and encourage local responsibility for control of public education.”\(^{39}\)

In the court of appeal, they had declared:

> Despite their protestations to the contrary, the actual achievement of appellants’ goals requires the abandonment of our tradition of local control of public education and the local property tax as the main source of financing our public schools.\(^{40}\)

Justice Sullivan’s opinion countered by pointing out that “local control” was divisible into the area of administrative control and fiscal choice. Even if local administrative control were assumed to be a compelling state interest, the \textit{Serrano} opinion was not intended to affect it.\(^ {41}\)

As to the asserted interest in local fiscal control, the state was said to have relinquished all claim to such a justification, since its policies actually hampered local choice for poorer districts:

> [U]nder the present financing system, such fiscal freewill is a cruel illusion for the poor school districts. . . .

> . . . [S]o long as the assessed valuation within a district’s boundaries is a determinant of how much it can spend for its schools, only a district with a large tax base will be truly able to decide how much it really cares about education. The poor district cannot freely choose to tax itself into an excellence which its tax rolls cannot provide. Far from being necessary to promote local fiscal choice, the present financing system actually deprives the less wealthy districts of that option.\(^ {42}\)

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\(^{37}\) The “less onerous alternative” refinement of the “compelling interest” burden was used in \textit{Carrington v. Rash}, 380 U.S. 89 (1965), involving the fundamental voting interest.


\(^{39}\) 5 Cal. 3d at 610, 487 P.2d at 1260, 96 Cal. Rptr. at 620, \textit{quoting CAL. EDUC. CODE § 17,300} (West 1969).


\(^{41}\) No matter how the state decides to finance its system of public education, it can still leave this decision-making power in the hands of local districts.

\(^{42}\) 5 Cal. 3d at 610, 487 P.2d at 1260, 96 Cal. Rptr. at 620. Local administrative control is deemed desirable by commentators who favor a declaration of unconstitutionality of present financing schemes. Much energy has been devoted to refuting the alleged incompatibility of local control and equalized educational opportunities. \textit{See} notes 106-15 and accompanying text \textit{infra}. 

\(^{5}\) 5 Cal. 3d at 611, 487 P.2d at 1260, 96 Cal. Rptr. at 620. According to the court’s
There was, then, no compelling state interest present to validate the “suspect classification” of wealth as it affected the fundamental interest in education.

Defendants’ additional contentions that a purposeful or intentional discrimination must be alleged, that de facto wealth discrimination was not redressible, as well as the underlying argument that, at most, what was involved was de facto discrimination, were all rejected.43

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 and hardened by zoning ordinances and other governmental land-use controls which promote economic exclusivity. . . . Governmental action drew the school district boundary lines, thus determining how much local wealth each district would contain. . . . Compared with Griffin and Douglas . . . official activity has played a significant role in establishing the economic classifications challenged in this action.44

Finally, Justice Sullivan dismissed the argument that plaintiffs’ claims had already been resolved adversely by the United States Supreme Court’s summary affirmances of the three-judge federal court opinions in McInnis v. Shapiro45 and Burruss v. Wilkerson,46 two prior challenges to school financing schemes.

McInnis had been the main stumbling block to the Serrano claims in the lower courts. The Superior Court of Los Angeles cited McInnis in its order of dismissal,47 and the court of appeals cited it throughout

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43 Citing Douglas v. California, 372 U.S. 353 (1963) and Griffin v. Illinois, 351 U.S. 12 (1956), the court noted that none of the previously invalidated wealth classifications had involved purposeful discrimination. “[T]hese prior decisions have involved ‘unintentional’ classifications whose impact fell more heavily on the poor.” 5 Cal. 3d at 602, 487 P.2d at 1253-54, 96 Cal. Rptr. at 613-14.

44 5 Cal. 3d at 603, 487 P.2d at 1254, 96 Cal. Rptr. at 614.


47 10 Cal. App. 3d at 1114 n.7, 89 Cal. Rptr. n.7.
its affirmance,\textsuperscript{48} except where the claim under article IX, section 5, of the California Constitution was considered.

Conceding that the \textit{McInnis} affirmance was "formally a decision on the merits," the \textit{Serrano} court nevertheless felt that the weight of a summary disposition in the case of a non-discretionary appeal was uncertain, "especially where, as in \textit{McInnis}, the Court cites no cases as authority and guidance."\textsuperscript{49}

In any event, the court agreed with the \textit{Serrano} plaintiffs that their contentions differed significantly from those raised in \textit{McInnis}. The \textit{McInnis} Court was primarily disturbed by the non-justiciability of the plaintiffs' claim that resources must be allocated according to "educational needs."\textsuperscript{50} The Supreme Court's summary affirmance was therefore held not dispositive of the issues in \textit{Serrano}.

In stating its conclusions, the California court made it quite plain that a constitutionally acceptable financing system could not tie the quality of a child's education to the wealth of his parents, neighbors

\textsuperscript{48}Id. at 1114-17, 89 Cal. Rptr. at 348-50. Justice McComb's dissent to the California Supreme Court result was therefore also based on \textit{McInnis} because he simply cited the court of appeal opinion. 5 Cal. 3d at 619, 487 P.2d at 1266, 96 Cal. Rptr. at 626 (McComb, J., dissenting).

\textsuperscript{49}5 Cal. 3d at 616, 487 P.2d at 1264, 96 Cal. Rptr. at 624.

\textsuperscript{50}Id. at 617, 487 P.2d at 1264-65, 96 Cal. Rptr. at 624-25. It is not true that no "needs" standard was asserted in \textit{Serrano} or that

\textsuperscript{48}Id. at 616, 487 P.2d at 1264, 96 Cal. Rptr. at 624.

\textsuperscript{50}Id. at 617, 487 P.2d at 1264-65, 96 Cal. Rptr. at 624-25. It is not true that no "needs" standard was asserted in \textit{Serrano} or that

\textsuperscript{48}Id., 487 P.2d at 1264, 96 Cal. Rptr. at 624 (emphasis added). The fact is that the \textit{Serrano} complaint contained an allegation similar to that offered in \textit{McInnis}:

The financing, scheme . . . fails to meet the minimum requirements of the equal protection clause . . . [in that it] . . . [f]ails to take account of any of the variety of educational needs of the several school districts (and of the children therein) of the State of California . . . .

Complaint at 12, Serrano v. Priest, 5 Cal. 3d 584, 487 P.2d 1241, 96 Cal. Rptr. 601 (1971). Of course, discrimination on the basis of wealth was also charged but, in the complaint, the challenge was phrased purely in terms of the traditional rational relation test. Complaint at 14, \textit{id}.

The explanation of the discrepancies is that the character of the \textit{Serrano} suit changed radically from the trial court to the Court of Appeal. The "needs" standard was never mentioned again and the "suspect classification"—"fundamental interest" rationale, ignored in the complaint, was made central to the cause of action. \textit{See} Appellants' Opening Brief at 15-29, Serrano v. Priest, 10 Cal. App. 3d 1110, 89 Cal. Rptr. 345 (2d Ct. App. 1970); Petition for Hearing in the Supreme Court, at 16-22, Serrano v. Priest, 5 Cal. 3d 584, 487 P.2d 1241, 96 Cal. Rptr. 60 (1971).

The pronounced shift in rationale and the adoption of a manageable "no-wealth standard" (the complaint was more nebulously styled a "suit to secure equality of educational opportunity" and the relief it asked for a restructuring of the finance system to provide "substantially equal educational opportunities") may be attributed to two events. The first was the affirmance of \textit{McInnis} by the Supreme Court subsequent to the trial court's dismissal of \textit{Serrano}. The second was the appearance of what has become the definitive outline of school financing systems and a constitutional route to their restructuring. Coons, Clune & Sugárman, \textit{Educational Opportunity: A Workable Constitu-
or area of residence. It did not clarify whether some additional element might be required to meet the demands of equal protection, and was noticeably wary of giving any indication of what effect the ruling might have on inter-locality disparities in the provision of other services such as police and sanitation. Defendants had argued:

[If the equal protection clause commands that the relative wealth of school districts may not determine the quality of public education, it must be deemed to direct the same command to all government entities in respect to all tax-supported public services; and such a principle would spell the destruction of local government.]

The article was amplified in J. Coons, W. Clune & S. Sugarman, Private Wealth and Public Education (1970) [hereinafter PRIVATE WEALTH AND PUBLIC EDUCATION]. The impact of the work of these three authors on the course of the Serrano litigation and its outcome is readily apparent: their analysis of the relevant case law is essentially what appears in the Serrano opinion.


This reenforces the view that the no-wealth (or, as Van Dusartz labelled it, "fiscal neutrality") principle was the constitutional standard adopted in Serrano, because Van Dusartz cited Serrano as direct authority. Since the standard is that articulated by Coons, Clune and Sugarman, it is appropriate to inquire how they define quality. In Private Wealth and Public Education, they state:

[Quality ... is ... what is available ... whatever goods and services are purchased by school districts to perform their task of education. Quality is the sum of district expenditures per pupil; quality is money.]

This reenforces the view that the no-wealth (or, as Van Dusartz labelled it, "fiscal neutrality") principle was the constitutional standard adopted in Serrano, because Van Dusartz cited Serrano as direct authority. Since the standard is that articulated by Coons, Clune and Sugarman, it is appropriate to inquire how they define quality. In Private Wealth and Public Education, they state:

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The thought that perhaps more is involved than the no-wealth principle is inspired by the following language:

Plaintiff children have alleged facts showing that the public school financing system denies them equal protection of the laws because it produces substantial disparities ... in the amount of revenue available for education.

A requirement of substantial equality in revenues available per student is quite a different thing from a no-wealth standard. The latter would permit quality to be a function of factors other than wealth, e.g., disadvantage, ability (factors personal to the child) or non-personal, non-wealth factors such as district or family revenue-raising effort. See notes 109-15 and accompanying text infra.
Defendants' alarm tactics were "unhesitatingly reject[ed]," but in a manner that clearly left the door open to future resolution of the substantive contention.

To homeowners weary of the ever-increasing demands of school budgets reflected in skyrocketing property taxes, the Serrano opinion is of little direct benefit. It by no means invalidated the property tax as a means of financing education nor did it state that property tax rates must be equal throughout the state.

The resolution of the Serrano parents' cause of action is unclear, probably because it was entirely subordinate to that stated by the children. The Serrano parents attacked the high tax rates in their low-wealth districts only because of the inequities in educational opportunities experienced by their children.

The ecstasy undoubtedly felt by California property owners as a result of the original opinion's careless intimation that taxpayers in low wealth districts might refuse to cooperate with the system, i.e., withhold their taxes, was quickly dampened by the modified opinion.

Of all the questions left unanswered by Serrano, the most intrigu-
ing, because most inscrutable, is the acceptability of the California court's rationale to the United States Supreme Court.58

Concern over the decision's anticipated impact will also be generated in the following interrelated areas: overall quality and continued viability of public school systems, public and legislative response, local choice in educational programming and financing educational opportunities for minorities, housing distribution, and interstate disparities in educational quality. A consideration of the options and probabilities in some of these areas follows.

BACKGROUND AND FUTURE OF EQUAL EDUCATIONAL OPPORTUNITY

Three factors seem most strongly present in the background of the Serrano opinion and of the extensive legal writing that has long advocated such a result:58 a widespread conviction among those who have studied present school financing systems as to their educational undesirability and the need for reform;60 the peculiar injustices of the local

58 It does not appear likely that Serrano itself will reach the Supreme Court since there has been no application for a writ of certiorari and one of the principal defendants, California's State Superintendent of Public Instruction, has announced that he would be positively opposed to a review of the decision. N.Y. Times, Aug. 31, 1971, at 23, col. 3.


A conference for attorneys interested in instituting Serrano-type litigation was held October 16, 1971 in Washington, D.C. under the sponsorship of the Lawyers Committee for Civil Rights Under Law. A detailed model complaint was distributed to those attending. It seems, inevitable, therefore, that the Serrano reasoning will be considered by the Supreme Court.

59 See, e.g., PRIVATE WEALTH AND PUBLIC EDUCATION; WISE, supra note 2; Silard, supra note 55; Coons, supra note 50; Michelman, The Supreme Court 1968 Term Foreword: On Protecting the Poor Through the Fourteenth Amendment, 83 HARV. L. REV. 7 (1969) [hereinafter Michelman]; 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) [hereinafter Horowitz]. Some of the authors have assumed a very active role: Professor Horowitz served as attorney for the Serrano plaintiffs, Professor Coons as counsel to the Van Dusartz complainants.

property tax-based systems as to both parent and child; and an expansionist concept of the fourteenth amendment's equal protection clause.

A. Preliminary Discussion

State support ("subvention") of school district budgets ranges from 10 to 80 percent of total revenues in all states except Hawaii, with the average level of support at 41 percent. Few states are at the extremes. Subvention or "equalization" aids take three basic forms: "flat grant," "foundation plan" and "percentage equalizing" plans.

A flat grant, as the name implies, is a legislatively stipulated amount allocated usually on a per pupil basis without regard to special needs, local revenue raising ability or cost differentials from district to district. Seven states use this model or a refinement of it in which cost differentials are taken into account.

Foundation plans involve the setting of a foundation program (determination of the amount to be spent in elementary, intermediate and high schools). A district taxing its property owners at a specified minimum rate will receive in state aid the difference between the amount to be produced locally by taxation at the minimum rate and

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61 See notes 79-81 and accompanying text infra.

62 The use of the term "expansionist" may be somewhat deceptive. In relation to the Serrano opinion and the views of most commentators mentioned in note 59, supra, it means a confidence in the flexibility of categories or guidelines already established by the United States Supreme Court. For some, however, it may have greater significance, as in the following conclusion about the judicial reasoning behind Reitman v. Mulkey, 387 U.S. 569 (1967):

"History—not the "original understanding," but tomorrow's history—will validate the decision as no satisfying doctrinal discourse could . . . . No one—not even professional writers about the court—would have been impressed by the statement, "This is a bad law, but we are saying only that it is not unconstitutional": Thus judicial activism feeds on itself. The public has come to expect the Court to intervene against gross abuses. And so the Court must intervene. Karst & Horowitz, Reitman v. Mulkey: A Telophase of Substantive Equal Protection, 1967 Sup. Cr. Rev. 59, 79.

From either point of view, the expansionist concept appears to be based on a practical assessment of indicia of what the Supreme Court may be prepared to do in the area of equal protection. In light of some recent developments, the continuing validity of the assumption is questionable. See notes 149-53 and accompanying text infra.

63 Coons at 312 n.20, citing A. Morse, STATE PROGRAMS FOR PUBLIC SCHOOL SUPPORT (U.S. Office of Education 1965).

64 See note 3 supra.


66 New Hampshire's state aid constitutes only 10 per cent of its school budgets; Delaware and North Carolina are at the other end of the scale. Coons at 312 n.20, citing A. Morse, STATE PROGRAMS FOR PUBLIC SCHOOL SUPPORT, supra note 63.

67 See Status and Impact of Educational Finance Programs, 4 NEFP 121 (R. Johns et al. ed. 1971); PRIVATE WEALTH AND PUBLIC EDUCATION 52-61; Coons at 313-14.

68 4 NEFP 121-22. The states are Arizona, Arkansas, Connecticut, Delaware, New Mexico, North Carolina and South Carolina. Id.
the foundation program. A district taxing itself above the minimum rate will not have the added revenue deducted from its state allocation.\textsuperscript{69} By far the greatest number of states—34—employ foundation plans as their basic subvention approach.\textsuperscript{70}

Percentage equalizing plans theoretically allow a district to set its own budget and receive state aid in inverse proportion to its revenue-raising ability (computed by comparison to the average ability level of districts in the state).\textsuperscript{71} Six states purport to use this plan,\textsuperscript{72} but it has been pointed out that "no system in existence resembles the theory."\textsuperscript{73} Some of the shortcomings of one percentage equalizing scheme—New York's—will be considered in detail later.\textsuperscript{74}

The models are employed in combination as well. One combination that has been severely attacked is that of foundation plan and flat grant, in which the flat grant is added to the amount to be raised locally and both are deducted from the foundation program in order to compute the amount of equalization aid to be received. California, Illinois and Minnesota are among the states using such a combination.\textsuperscript{75} The Serrano and Van Dusartz courts both noted the peculiar inequities of the flat grant in such a context: it is of no benefit to poor districts since, without it, they would have to be given the same total amount in equalization aid to bring their revenue up to the foundation level. In fact, it aids only the rich districts, since they would be ineligible for any state aid if only a foundation plan were used.\textsuperscript{76} "[B]asic aid [the California flat grant program], which constitutes about half of the state educationl funds . . . actually widens the gap between rich and poor districts," the Serrano majority declared.\textsuperscript{77}

But, whatever their form, all state equalization programs have been found unable to achieve anything near equalization. It can be mathematically seen, for example, that foundation programs, once the hypothetical tax level is passed, cannot compensate for differences in tax

\textsuperscript{69} See 4 NEFP 122-23; Private Wealth and Public Education 63-95; Coons at 314-15.
\textsuperscript{70} 4 NEFP 122.
\textsuperscript{71} See 4 NEFP 123; Private Wealth and Public Education 163-97; Coons at 316.
\textsuperscript{72} 4 NEFP 122. They are Iowa, Massachusetts, New York, Pennsylvania, Rhode Island and Vermont. Id.
\textsuperscript{73} Coons at 316.
\textsuperscript{74} See notes 177-92 and accompanying text infra.
\textsuperscript{76} Van Dusartz v. Hatfield, memorandum and order at 4, No. 3-71 Civ. 243 (D. Minn., decided Oct. 12, 1971); Serrano v. Priest, 5 Cal. 3d at 594-95, 487 P.2d at 1248, 96 Cal. Rptr. at 608.
\textsuperscript{77} 5 Cal. 3d at 594, 487 P.2d at 1248, 96 Cal. Rptr. at 608 (emphasis added).
base per pupil. The foundation program guaranteed amount is itself a minimum (e.g., $355 per elementary pupil in California),\textsuperscript{78} so districts must tax themselves above the hypothetical level. Yet, beyond that minimum, the increased efforts of poor districts, as measured by tax rates, produce only minor increments in revenue. Rich districts, on the other hand, can maximize revenues with little tax effort.

It has, in fact, been demonstrated that low-wealth districts consistently tax themselves for education at higher rates than do rich districts.\textsuperscript{79} Yet, statistics also prove that gross inter-district disparities in expenditures per pupil are a nationwide phenomenon. In 1959-60, 25 states had expenditure differentials (between high and low spending districts) of over two to one, including four where the ratio was over three to one.\textsuperscript{80} Seventeen states had expenditure disparities of over 4 to one, including seven with ratios in excess of 6 to 1.\textsuperscript{81}

The phenomenon is by no means a city-suburban one: because of special tax bases such as shopping centers, industry, etc., the kind of educational offering in neighboring suburban communities is just as likely to differ.\textsuperscript{83}

It is apparent, then, that, regardless of their labels, nearly all of the present school financing arrangements are susceptible to Serrano-type attack. In light of the data that has been accumulated, the characterization, by United States Commissioner of Education, Sidney P.

\textsuperscript{78} \textit{Id.} at 593, 487 P.2d at 1246, 96 Cal. Rptr. at 606.

\textsuperscript{79} The results of a two-year study of Texas school finances were recently summarized by Joel S. Berke, director of the Educational Finance and Governance Program of the Policy Institute, Syracuse University Research Corporation, an organization that has engaged in extensive educational finance research. The study showed that poorer Texas districts regularly tax themselves at higher equalized rates and realize lower yields. Affidavit of Joel S. Berke at 3, 10 and Table II at 13, Rodriguez v. San Antonio Independent School Dist., Civil No. 68-175-SA (W.D. Tex., affidavit filed Oct. 1, 1971).

\textsuperscript{80} It has also been shown that the ten richest California districts (in terms of assessed valuation per pupil) all spend more per pupil than the poorest ten while, in all but one of the richest, tax rates are lower than in all the poorest ten. Brief for Stephen D. Sugarman, The Urban Coalition, The National Committee for the Support of the Public Schools and John E. Coons as amici curiae at 10-11 ("Exhibit I"), Serrano v. Priest, 5 Cal. 3d 584, 487 P.2d 1241, 96 Cal. Rptr. 601 (1971). See also McLinnis v. Shapiro, 293 F. Supp. 327, 331 (N.D. Ill. 1968), aff'd mem. sub nom. McLinnis v. Ogilvie, 594 U.S. 322 (1969); Silard at 9; Coons at 317.

\textsuperscript{81} \textit{Id.}


\textsuperscript{83} On suburban Long Island, New York, for example, the town of Manhasset spends $1,721 on each of its students; the neighboring town of East Meadow, with a property tax rate that is 33 percent higher, is able to spend only $968. N.Y. Times, Sept. 5, 1971, § 4, at 7, col. 1.
Marland, of existing equalization plans as "antiquated" seems mild indeed.

Although the relationship between dollars and quality remains problematical, a correlation is more than reasonable to assume. The alternative is to believe that millions of tax dollars are being wasted and that the interest in local fiscal control is totally irrational.

B. Search for a Standard

Equalization of educational opportunity is the goal of educational finance theorists and litigants. But, the articulation of that goal in concrete, judicially manageable terms has been a continuing problem.

In his often cited book, Rich Schools Poor Schools: The Promise of Equal Educational Opportunity, Arthur E. Wise listed nine proposed definitions of (and constitutional standards for) equal educational opportunity:

1) The "Negative Definition": "Equality of educational opportunity exists when a child's educational opportunity does not depend upon either his parent's economic circumstances or his location within the state." Wise criticized the definition as of limited utility, since it "does not specify the conditions for equality; it merely states the conditions of inequality . . . ." He felt, however, that it might prove attractive to the Supreme Court since it "closely resembles the reasoning employed by the Court in the recent voting cases."

2) "Full Opportunity": This definition assumes differences in the capacity of students to benefit from education and impractically proposes that resources must be expended on every individual until he reaches the point of satiation.


85 This is one of the evidentiary issues that remains open in Serrano. 5 Cal. 3d at 601 n.16, 487 P.2d at 1253 n.16, 96 Cal. Rptr. at 613 n.16.

One study of high school students found a positive relationship between resources such as expenditures per pupil, class size, library quality, counseling programs and achievement test scores. J. Thomas, Talent Development and the National Income, in H. JAMES, J. THOMAS & H. DYCK, WEALTH, EXPENDITURES AND DECISION-MAKING FOR EDUCATION 101-42 (1963). The leading authority to the contrary is a report done for the United States Office of Education which determined that, except for teacher variables, resource inputs had a negligible effect on educational achievement. The primary determinants of achievement were said to be home environment and the influence of fellow students. J. COLEMAN et al., EQUALITY OF EDUCATIONAL OPPORTUNITY (National Center for Education Statistics 1966) ("The Coleman Report"). A recent report of the Council for Basic Education apparently affirms the existence of a correlation. N.Y. Times, Oct. 29, 1971, at 1, col. 6.

86 Wise 146.

87 Id. 147 See note 51 and accompanying text supra, notes 106-08 and accompanying text infra.

88 Id. 148-49.
3) The "Foundation Definition."\textsuperscript{89}

4) "Minimum Attainment": This proposal would set grade achievement levels and allocate resources to children until they reached the appropriate level. More resources would be directed at those below norm.\textsuperscript{90}

5) The "Levelling Definition": Resources would be allocated in inverse proportion to a student's ability. An instance of this would be compensatory education for "culturally deprived" children.\textsuperscript{91}

6) The "Competition Definition": Like "full opportunity," it is based on the assumption that children differ in capacity to benefit from instruction but it would allocate more resources to those with greater abilities.\textsuperscript{92}

7) The "Equal Dollars per Pupil Definition": This definition proceeds from the judgment that, since a child has no control over his native abilities, to allocate resources on the basis of ability is discriminatory.\textsuperscript{93} Coons, Clune and Sugarman have labelled this concept of equal educational opportunity "'one kid— one buck' levelism"\textsuperscript{94} and it has been almost universally criticized because of its inflexibility and failure to take into account factors such as cost differences from area to area.\textsuperscript{95}

8) The "Maximum Variance-Ratio Definition": This would involve a judicial determination that differences in per pupil expenditures should not exceed a (necessarily rather arbitrary) maximum ratio. Thus, the ratio of per pupil spending from highest to lowest district should not exceed 1.2, 1.5 or some similar figure.\textsuperscript{96}

9) The "Classification Definition": Pupils would be categorized according to abilities, needs or other relevant characteristics. Pupils within a given category would be treated equally in terms of kind and cost of programs. The approach can be rephrased "equality for all within a 'reasonable' classification."\textsuperscript{97}

Until recently, those attempts to articulate a constitutional standard of equal educational opportunity were discouraged by two practical considerations that combined to make questionable the en-

\textsuperscript{89} 149-50. See notes 69 and 70 and accompanying text supra.
\textsuperscript{90} Id. 151.
\textsuperscript{92} Wise 159-55.
\textsuperscript{93} Id. 159-56.
\textsuperscript{94} Coons at 339.
\textsuperscript{96} Wise 156-57.
\textsuperscript{97} Id. 157-58.
forceability of any judicial mandate of equality. These considerations may be called the "levelling downward" and "subsidiarity" problems.

There is a very strong fear that equality in public education would necessarily involve a complete preemption of all budgetary and administrative decision-making power by the state. The interest in a high degree of local control to permit different types of programming and experimentation geared to the needs of differing school populations is one that is common to parents who have long enjoyed it and those newly discovering the ineffectiveness of extremely large administrative units.89

The alleged incompatibility of "subsidiarity" and fiscal equality has become axiomatic. The Serrano defendants, for example, cited section 17,300 of California's Education Code. The declaration of legislative intent states, inter alia:

The system of public school support should be designated to strengthen and encourage local responsibility for control of public education. . . . Local control is best accomplished by the development of strong, vigorous, and properly organized local school administrative units. . . . Effective local control requires that all local administrative units . . . have such flexibility in their taxing programs as will readily permit of progress in the improvement of the educational program. Effective local control requires a local taxing power, and a local tax base which is not unduly restricted or overburdened.100

At the onset of the 1968 litigation, a leading spokesman for this point of view expressed the apprehension that the "inexorable" logic of the case for equality of educational opportunity would lead the United States Supreme Court to endorse it by "propos[ing] simple answers for complex problems."101 Before extending its "egalitarian revolution"102 into this area, the Court was urged to consider the conceivable consequences:

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89 "Subsidiarity" is a term coined by Coons, Clune and Sugarman to describe the "principle that government should ordinarily leave decision-making and administration to the smallest unit of society competent to handle them." PRIVATE WEALTH AND PUBLIC EDUCATION 14.

89 In the latter category are residents of city school districts where bureaucracy, central board of education and unsatisfactory schooling have become interchangeably descriptive. See, e.g., N. LEVINE & R. COHEN, OCEAN-HILL BROWNSVILLE: SCHOOLS IN CRISIS (1969); D. ROGERS, 110 LIVINGSTON STREET (1968); MAYOR'S ADVISORY PANEL ON DECENTRALIZATION OF THE NEW YORK CITY SCHOOLS, RECONNECTION FOR LEARNING: A COMMUNITY CONTROL SYSTEM FOR NEW YORK CITY (1967) ("The Bundy Report").

100 CAL. EDUC. CODE § 17,300 (West 1969) (emphasis added).


Statewide equality is not consistent with local authority; national equality is not consistent with state power.

... It is impossible ... to leave discretion and choice to local government and expect a uniformity of treatment among all units of local government. Either the taxing power or the spending power, and probably both, will have to be transferred from local to state control.\textsuperscript{103}

Professor Kurland also raised the "levelling downward" problem as an argument for judicial restraint. This issue, which should not be minimized even now, is concerned with the equality of education under an equalizing plan: it is felt that, given the enormous costs of education and the tremendous disparities that exist, such a plan would most likely not raise all districts within a state to the quality level of the best and highest-spending district. A far more likely result is that the best districts would be levelled downward to some point to which it was feasible to raise the majority of (poorer) districts.

The combined effect of the two problems could lead to a political explosion among those who now enjoy high quality education and the tax backlash might well make an educational-equality victory meaningless. Professor Kurland suggested that the rich might withdraw their children from the public schools:

[I]t could be argued that by putting everyone in the same boat, we force the influential members of our society to see the improvement of their lot by improving the lot of all. The difficulty with this argument is ... that for the affluent, there is, as yet, no obligation to remain in the same boat. ...\textsuperscript{104}

The two problems were felt quite strongly by the three-judge district court deciding \textit{McInnis v. Shapiro}:

Plaintiffs have assumed that requiring expenditures to be related to the needs of the students will result in better education for deprived students without a corresponding decrease in the quality of education now offered by the affluent districts. The more money the latter districts must supply to the former, however, \textit{the less incentive the well-to-do will have to raise their tax rates}. If the quality of good public schools declines, affluent children have the option to attend private schools, thus completely eliminating the need for the wealthy to raise taxes.\textsuperscript{105}

\textsuperscript{103} Kurland at 590.

\textsuperscript{104} Id. at 591.

\textsuperscript{105} McInnis v. Shapiro, 293 F. Supp. 327, 336 (N.D. Ill. 1968), aff'd mem. sub nom.McInnis v. Ogilvie, 394 U.S. 322 (1969) (emphasis added). The \textit{McInnis} court was apparently influenced by Professor Kurland's apprehensions. \textit{Id.} at 334 n.27, 336 n.35.
Proposition I

The proponents of equality in public education achieved their most significant pre-Serrano breakthrough when Professor Coons and Messrs. Clune and Sugarman set forth their no-wealth constitutional standard and ingeniously demonstrated that, far from being incompatible with "subsidiarity," it could be used to achieve a greater degree of meaningful local control.

Their standard, adopted by the Serrano and Van Dusartz courts, stipulates: "the quality of public education may not be a function of wealth other than the wealth of the state as a whole." Remarkably similar to that referred to by Wise as "the negative definition," it is, as Professor Kurland feared, a "simple answer," yet it is founded on a thoughtful analysis of a whole range of complexities. As its authors have pointed out, it is flexible, recognizing a great deal of legislative discretion in the fashioning of new, acceptable finance systems. It thus eliminates judicial concern with the possibility of preempting a legislative function. It does not, for example, "require flat equality or have anything to say upon the issue of compensatory education;" it would, however, permit either approach.

Proposition I is a simple and enforceable standard; its command is easily comprehended and it does not require a straining of judicial ingenuity to determine when and whether individual educational needs are being met.

Perhaps most important, from the point of view of achieving a consensus for equal educational opportunity, Proposition I would permit quality differences based on local or family choice provided they were not also tied to local or family wealth. Of the finance system models that would accord with Proposition I, Professor Coons and Messrs. Clune and Sugarman favor a concept known as "power equalizing," which may be employed at either the school district or family level. "Power equalizing" is intended to create decentralized systems that eliminate the effects of variations in wealth while promoting local fiscal and administrative control. It would make the quality of education a function of district or family effort (as measured by tax rates) rather than of wealth.

"District power equalizing" would "make all districts equal in their power to raise dollars for education." In its simplest form, the

106 See note 50 and accompanying text supra.
107 See notes 86 and 87 and accompanying text supra.
108 Coons at 312.
109 Id. at 319-20.
state legislature would establish a table of permissible school district tax rates, each rate having a corresponding permissible level of expenditure per child. A poor district electing to tax itself at a given rate would be allowed to spend the corresponding amount per pupil regardless of whether taxation at that rate actually produced the appropriate amount of revenue. On the other hand, richer districts would be permitted to spend only the amounts corresponding to their elected tax rates even though the rates chosen produced excess revenues.110

The Serrano defendants had argued California's interest in local control in the following terms:

[i]f one district raises a lesser amount per pupil than another district, this is a matter of choice and preference of the individual district, and reflects the individual desire for lower taxes rather than an expanded educational program, or may reflect a greater interest within that district in . . . other services that are supported by local property taxes. . . .111

As a less onerous alternative for effecting the state's interest, district power equalizing is clearly unassailable. Expenditures per child are not, under present financing schemes, a true indication of a community's interest in education. Within a district power equalized framework, however, expenditures would be a true indicator, because they correspond with varying degrees of tax effort.

If "subsidiarity" is really an interest in delegating authority to the smallest unit of society capable of handling it,112 then an even more attractive alternative financing scheme is "family power equalizing," the other half of the power equalizing concept developed by Coons, Clune and Sugarman.

Under this variety of voucher plan, a family would select the rate at which it wished to tax itself for education and would receive scrip for the tuition amount selected by the legislature to correspond with that particular level of tax effort. Family income per child is the wealth against which the family effort would be measured. The legislature would also decide whether it wanted to limit use of the plan to public schools, extend it to private schools or opt to fulfill its educational responsibility completely through private schools. If private schools were included, the legislature would have the additional responsibility

110See, Coons at 319-21. Elsewhere the authors discuss the district power equalizing proposal in greater detail, suggesting adjustments of the basic model to accommodate particular legislative concerns. PRIVATE WEALTH AND PUBLIC EDUCATION 201-42.
112See note 98 supra.
of providing safeguards to maintain educational quality and non-discrimination. In order to satisfy the mandate of Proposition I, no power-equalized family would be allowed to supplement its scrip with private resources nor would participating schools be permitted to accept scrip and other payment from the same family.113

Criticism of the failures of public school systems has escalated in recent years.114 A voucher system would undoubtedly be welcomed by many parents and educators who would see it as offering three distinct benefits: diversity; improvement of the quality of education generally through competition; and, in a very vital way, restoring the family's involvement in and responsibility for the educational process.115

The Trouble With Proposition I

It is no small tribute to the authors of Private Wealth and Public Education that their standard and their exposition of the constitutional arguments for equality of educational opportunity have already been adopted by two courts. Their work also promises to be the foundation of future litigation in the area.116

One very fundamental problem is, however, presented by Proposition I and, more particularly, by its suggested implementation through

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113 Private Wealth and Public Education 256-68; Coons at 321-22. "Family power equalizing" thus differs radically from the voucher system proposed by Milton Friedman. The Friedman model would utilize a flat grant voucher which could be supplemented freely by parents and used in any school they desired. M. Friedman, Capitalism and Freedom 87-102 (1962); Friedman, The Role of Government in Education, in Perspectives on the Economics of Education 132-42 (C. Benson ed. 1963).

114 See, e.g., C. Silberman, Crisis in the Classroom (1970).

115 Voucher plans are not without their problems, of course. For an evaluation of the five most developed voucher proposals, see Areen, Education Vouchers, 6 Harv. Civ. Rights-Civ. Lib. L. Rev. 466 (1971). The author discusses three fundamental issues that every voucher plan must consider: ensuring equal educational opportunity id. at 477-91); use of vouchers for support of religious schools (id. at 492-500); and preserving quality in education (id. at 500-02). The major premises of voucher systems are summarized:

All such plans proceed from the assumption that, while education is important enough in our society to justify public financial support ... the traditional view that schools should also be managed by the state does not necessarily follow. All voucher plans also accept the premise that there is no one "best" school for all students . . . . Finally, all voucher plans assume that parents should have the power to choose which of the different "state-approved" schools is best for their child.

Id. at 470.

Two of the creators of "power equalizing" have recently drafted a detailed model voucher act, entitled the "Family Choice in Education Act." Coons & Sugarman, Family Choice in Education: A Model State System for Vouchers, 59 Calif. L. Rev. 321 (1971). A system proposed by the Center for the Study of Public Policy has been tentatively approved by the United States Office of Economic Opportunity. Three cities (Alum Rock (San Jose), Cal.; Gary, Ind.; and Seattle, Wash.) are receiving OEO grants to study the feasibility of instituting a demonstration project of the CSPP plan. Areen, Education Vouchers, 6 Harv. Civ. Rights-Civ. Lib. L. Rev. 466, 470 n.16 (1971).

116 The model complaint mentioned in note 58 supra was drafted by Professor Coons.
power equalizing. Proposition I, because it authorizes power equalizing, permits the quality of a child's education to be a function of district voters' interest in and willingness to support education. As to the child, is this any less a denial of equal protection than a legislative scheme that permits the quality of education to be a function of the wealth of his parents, neighbors and district?

Suppose, for example, that a child lives in a school district having more than an average share of senior citizens, single persons or childless couples. Though the outcome can by no means be certain, it is certainly conceivable that the voters of such a district would choose to make a less than maximum (and likely less than average) tax effort for the support of district schools. Is the child attending public school in such a district being denied equal protection of the laws? In the context of a statewide system of public schools, is the interest of one district's voters any less a constitutional irrelevance than district and parental wealth or geographical location? If so, must we not conclude, as the Serrano court did with respect to the accident of wealth, that the fundamental interest of education cannot be made a function of that irrelevant and fortuitous circumstance?

In a critique of the wealth-as-suspect-classification theory, one writer has already taken notice of this flaw in Proposition I. Professor Michelman notes that it would theoretically permit a district to shut down its schools entirely, thus depriving some children of all educational opportunity. Such a result would not have been achieved, he suggests, if the payment requirements cases had been properly interpreted as hinging on the interest involved rather than on the invidiousness of the wealth classification.

He advocates a "minimum protection" approach to a reading of the equal protection clause. So far as the poor are concerned, the approach visualizes the role of the fourteenth amendment as protecting them from the most hazardous fallout of our free enterprise system. State action would not be a particularly important consideration since, where "just wants" are concerned, there would be a positive duty

117 Michelman, supra note 59. See also Silard at 29.
118 Michelman at 53. Presumably, in authorizing a district power equalizing scheme, a legislature would set a minimum level of taxation. The point here is that Proposition I does not commend that a minimum be set and so does not preclude the possibility of complete educational deprivation for some children.
119 Whether a particular interest is a "just want" is determined by inquiring whether a person would insist on the relevant assurances [of fulfillment] assuming that he was (a) deprived of knowledge about whether he personally will find himself in the relevant predicament, but (b) sufficiently informed about the organizing principles of the society to be able to appraise (i) the frequency of the predicament and (ii) the gravity, in such a society, of the particular unfulfilled want.
to fulfill them.\textsuperscript{120} On the other hand, classifications on the basis of payment (de facto wealth classifications) would never independently render a statute void.

If education be considered a "just want" (and Professor Michelman obviously does so consider it),\textsuperscript{121} a minimum protectionist view of the equal protection clause would not permit it to go unsatisfied.

Professor Michelman's analysis has the virtue of candidly acknowledging the root cause of existing educational inequalities.\textsuperscript{122} But, while he sees family power equalizing as the solution to the school finance dilemma,\textsuperscript{123} he fails to satisfactorily explain why a minimum protectionist approach would be any less content with the foundation plans that now exist.\textsuperscript{124}

Moreover, Professor Michelman does not see that the "family power equalizing" authorized by Proposition I also raises some equal protection questions. While the classification of a child on the basis of his parents' willingness to sacrifice for education may not appear to be "invidious,"\textsuperscript{125} yet, if, as minimum protectionists would have it, we are to look most strongly to the fundamentality of the interest or want involved, then we would be bound to conclude that a child whose parents are willing to sacrifice very little for education is also being denied equal protection.

There is another (and, from its originators' point of view, perhaps even more damning) objection to Proposition I. Is it, in fact, a wealth-free standard? One has to wonder whether the poor should be considered free to decide how much they care about education in the same way the rich are free to make such a decision.

It is true that, in the past, poorer districts have shown themselves willing to make disproportionate sacrifices for education.\textsuperscript{126} Perhaps there would be only a few isolated instances of poverty-enforced lack of choice and perhaps only under a family power equalizing plan, but (a) can we constitutionally afford to make that assumption, and (b) can we

\textsuperscript{120} Michelman at 35. Elsewhere, Professor Michelman has more so simply defined "just wants" as those "which justice requires shall not go involuntarily unfulfilled." \textit{Id.} at 30.

\textsuperscript{121} \textit{Id.} at 11.

\textsuperscript{122} See \textit{id.} at 47-59.

\textsuperscript{123} Professor Michelman feels that, in the equal protection aspects of its work, the Supreme Court should be seen as "a body commendably busy with the critically important task of charting some island of haven from economic disaster in the ocean of . . . free enterprise." \textit{Id.} at 33. Elsewhere he describes the Court's equal protection role as one of symptom-treating. \textit{Id.} at 8-11.

\textsuperscript{124} Id. at 53-57.

\textsuperscript{125} Yet Professor Michelman's whole discussion of the educational finance issue is based on the supposition that the existing systems are unacceptable. See \textit{id.} at 47-59.

\textsuperscript{126} See, e.g., the definition of "invidious" offered by Professor Michelman, \textit{id.} at 19-20.

\textsuperscript{127} See note 79 and accompanying text \textit{supra}. 
be any less alarmed because relatively few children would be deprived?

A Child-Centered Standard

If we are concerned about equality of educational opportunity at all, it is presumably because a great number of children are presently being denied their fourteenth amendment right to equal treatment in the most fundamental area of education. If their parents and school districts are being discriminated against, it is only secondarily, through the children's deprivation, that the discrimination occurs.

The child must therefore be the focal point in any search for a constitutional standard that would ensure equality of educational opportunity. Proposition I is itself constitutionally suspect precisely because it focuses on the secondary discrimination and seeks to relieve the primary denial of equal protection only through relief of the subordinate claim. Proposition I represents a nice compromise, but it is a satisfactory only in a political sense.

Throughout their works, Professor Coons and Messrs. Clune and Sugarman have made a convincing argument that an educator's standard of equal educational opportunity—one based on an individual's abilities and need—goes beyond what a constitutional lawyer would demand.

The most satisfying standard would mandate substantially equal educational quality in terms of resources (teacher quality, class size, teaching materials, school (including library) facilities, and ancillary (including counseling) services) rather than dollars, since costs differ from place to place. The standard should, however, be flexible enough to permit some experimentation and the channeling of additional resources to those with special needs or special abilities. Since the primary objective is equal protection of the child, the standard must not permit the quality of education to be a function of factors wholly extraneous to the child (such as parental wealth or tax effort of a school district).

Such a standard would mandate that: Within the public education system of a state, substantially equal resources must be made available to every child at the same grade level. Deviations from substantial equality must be justified by reference to educationally relevant characteristics of the child.

Like Proposition I, the standard has the advantages of simplicity, flexibility and enforceability. It perhaps lacks some of the readily ap-

127 If, indeed, the matter is still in doubt after the Supreme Court's affirmance of McInnis v. Shapiro, 293 F. Supp. 327 (N.D. Ill. 1968), aff'd mem. sub nom. McInnis v. Ogilvie, 394 U.S. 822 (1969).
parent political appeal of Proposition I. Although it does not dictate a completely centralized finance system, it obviously envisions close state monitoring (so, it should be noted, does Proposition I). The "substantial equality" measure would permit some extra local revenue raising but, unlike Proposition I, the permissible local effort would be strictly limited to a kind and quantity that would not affect substantial equality.

The Serrano court stressed that administrative and fiscal control are not inseparable. Equality of resources does not mean sameness in programming. Local decision-making should, by all means, be fostered. It is not unreasonable to suppose that, once the judiciary has acted to protect the long-neglected fourteenth amendment rights of children, parents and educators who have a strong interests in policy and administrative decentralization will make those interests known to the legislators charged with formulating constitutionally satisfactory school finance plans.

C. A Supreme Court Serrano?

If and when a Serrano-type case comes before the United States Supreme Court, the Court must first determine the effect of its holding in McInnis v. Shapiro on the issues presented. It will also be called upon to decide the validity of the Serrano rationale.

McInnis v. Shapiro

The three-judge court opinion in McInnis v. Shapiro, summarily affirmed by the Supreme Court, should not be held inapplicable for the reasons stated by the Serrano court, i.e., because significantly different contentions were raised by the plaintiffs in the two cases; it should be held inapplicable because it is riddled with inconsistencies and factual misstatements and because the educational finance area was not ripe for judicial intervention at the time McInnis was decided.

The McInnis plaintiffs were elementary and high school students from four Cook County, Illinois, school districts, representing them-
selves and others similarly situated. Like the Serrano plaintiffs, they challenged the entire state financing scheme. From the court's opinion, it is apparent that, although they placed great emphasis on allocation of resources according to needs, they did not present that as the only constitutionally permissible solution.

In fact, they suggested two alternate financing plans:

(1) [a]ll students might receive the same dollar appropriations, or
(2) the state could siphon off all money in excess of $X per pupil which was produced by a given tax rate, in effect eliminating variations in local property values while leaving the districts free to establish their own tax rates.133

The second suggestion is, of course, district power equalizing. The fact that it was proposed in McInnis was pointedly ignored by the Serrano plaintiffs as well as by the developers of Proposition I.

Although the McInnis plaintiffs apparently did not agree that the Illinois financing system was void because it utilized the suspect classification of wealth, they did contend that education is a fundamental interest and statutes affecting it require strict judicial scrutiny:

[Under the equal protection clause, the students contend that the importance of education to the welfare of individuals and the nation requires the courts to invalidate the legislation if potential, alternative statutes incorporating the desirable aspects of the present system can also achieve substantially equal per pupil expenditures.]

In the face of this argument, the McInnis court expressly declined to adopt a strict scrutiny test and utilized the traditional rational relation standard, citing economic regulation cases.135

One commentator has described McInnis as a "thoroughly unsatisfying opinion." A more precise description would be "confused." Although the court had been offered a number of non-needs alternatives, it concluded, for two principal reasons, that no cause of action was stated:

(1) the Fourteenth Amendment does not require that public school expenditures be made only on the basis of pupils' educational needs, and (2) the lack of judicially manageable standards makes this controversy nonjusticiable.137

132 293 F. Supp. at 329.
133 Id. at 331-32.
134 Id. at 331.
135 Id. at 332.
136 Michelman at 48.
137 293 F. Supp. at 329 (footnote omitted).
The *Serrano* court was right in concluding that the nonjusticiability of the “needs” standard was the proclaimed *ratio decidendi* of *McInnis*.\(^{138}\) But one wonders whether, given the availability of alternatives to that standard, the *McInnis* court was simply attempting to avoid a decision altogether.

At one point the court equated the “needs” standard with an equal dollars per pupil rule and thus was able to reject both because “[e]xpenses are not . . . the exclusive yardstick of a child’s educational needs.”\(^{39}\)

The opinion is internally inconsistent throughout. The court initially found:

> Clearly, there are wide variations in the amount of money available for Illinois’ school districts, both on a per pupil basis and in absolute terms.\(^{140}\)

Yet, it was later stated:

> The students also object to having revenues related to property values, apparently without realizing that the *equalization grant effectively tempers variations in assessed value*. . . .\(^{141}\)

In its factual examination of the Illinois financing plan, the three-judge district court found:

> Though districts with lower property valuations usually levy higher tax rates, there is a limit to the amount of money which they can raise, especially since they are limited by maximum indebtedness and tax rates.\(^{142}\)

Later, the court was (incredibly) able to state:

> [T]he 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 which they place upon public schools.\(^{143}\)

These contradictions plus the indications that the court had its eye too firmly fixed on what it conceived to be the probable public reac-

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\(^{138}\) The *McInnis* court found the needs standard “nebulous.” *Id.* at 329 n.4. The *Serrano* plaintiffs also utilized a “needs” standard in their complaint. *See* note 50 *supra*. Among the stranger uses to which *McInnis’s* condemnation of a “needs” standard has been put is the validation of Boston’s administration of the National School Lunch Program according to location of facilities rather than needs. The National School Lunch Act expressly provides for provision of the lunches according to need. Briggs v. Kerrigan, 307 F. Supp. 295 (D. Mass. 1969). *See* 42 U.S.C. §§ 1757-58 (1970).

\(^{39}\) 293 F. Supp. at 335.

\(^{140}\) *Id.* at 331.

\(^{141}\) *Id.* at 333 (emphasis added).

\(^{142}\) *Id.* at 331.

\(^{143}\) *Id.* at 333.
tion,\(^\text{144}\) make the \textit{McInnis} opinion thoroughly unconvincing as the final word on the constitutionality of present finance systems.

If \textit{McInnis} appears confused, then the only appropriate description of the three-judge federal court decision in \textit{Burruss v. Wilkerson}\(^\text{145}\) is "obtuse." The dismissal of the attack on Virginia's financing plan was affirmed summarily by the Supreme Court on the authority of \textit{McInnis}.

The \textit{Burruss} plaintiffs were children, parents and property owners of Bath County, Virginia. They charged that the Virginia statutory scheme denied them equal protection in that it perpetuated substantial disparities in the "educational opportunities" offered children in different areas of the state.\(^\text{146}\)

The \textit{Burruss} court refused to perceive locally raised funds as part of a common statewide educational financing scheme (despite the state constitutional provision).\(^\text{147}\) It held that since the amounts distributed from the state school fund alone were not dispersed so as to arbitrarily favor one district more than another, there was no denial of equal protection.\(^\text{148}\)

Assuming that the Supreme Court concludes that its summary affirmances of \textit{McInnis} and \textit{Burruss} do not foreclose consideration of a \textit{Serrano}-style suit, two questions remain: Will the \textit{Serrano} rationale be found acceptable and, if not, will the \textit{Serrano} result be achieved notwithstanding? At the outset, it should be stated that the addition of two new members to the Court makes an already unpredictable outcome even more so.

The contentions of the California plaintiffs and the California supreme court opinion rested on the twin pillars of wealth as a suspect classification and education as a fundamental interest for equal protection purposes. In light of some recent United States Supreme Court opinions, it is apparent that the majority regards the first pillar as never having been erected.

The five-judge majority opinion in \textit{James v. Valtierra}\(^\text{149}\) rejected the motion that there is something inherently suspect about a wealth classification. The Court upheld article XXXIV of the California Constitution, which provides that an affirmative majority vote at a community election is required before any low-rent public housing project can be undertaken by state officials. Noting that no racial discrimination

\(^{144}\) See note 105 and accompanying text supra.
\(^{146}\) Id. at 573.
\(^{147}\) See note 2 supra.
\(^{148}\) 510 F. Supp. at 574.
\(^{149}\) 402 U.S. 137 (1971).
was alleged. Justice Black's opinion for the Court stated, "[t]he Article requires referendum approval for any low-rent public housing project, not only for projects which will be occupied by a racial minority." There could hardly be a plainer instance of wealth classification but, in the absence of an allegation of racial discrimination, the referendum measure was held valid.

The point was not lost on the three James dissenters. They protested that "explicit classification on the basis of poverty [is] a suspect classification which demands exacting judicial scrutiny. . . ." In another recent case, Boddie v. Connecticut, the Court protected the indigent's access to the divorce courts despite inability to pay filing fees. Although the case appeared to be a direct descendant of the Griffin-Douglas line, the majority deliberately adopted a due process rationale rather than extend its equal protection holdings in the area of wealth classifications. Here, too, the concurring judges felt that the opinion was an aberration from the pattern of previous decisions that utilized equal protection analyses.

It seems reasonable to conclude, then, that the first pillar of the Serrano reasoning is, at best, undependable. As to the second, the Serrano court itself conceded that the theory of education as a fundamental interest for equal protection purposes was not supported by any direct authority. Unlike wealth-as-suspect-classification, however, education as fundamental interest has not been rejected by the Supreme Court.

There is reason to believe that the Court would accept the idea that education is an interest sufficiently fundamental to require a demonstration of compelling interest when the state undertakes to provide it and fails to do so on an equal basis to all. Although the many dicta that appear on the subject in various Supreme Court opinions are not controlling, they are of great persuasive value in that they have appeared over an extended period of years and have enjoyed the whole-hearted support of the Court. It is, after all, absolutely impossible to dispute the central importance of education to both the individual and society. The "egalitarian revolution" seen emerging in the early sixties

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150 Id. at 141 (emphasis added).
151 Id. at 144-45 (Marshall, J., dissenting).
153 401 U.S. at 383-85 (Douglas, J., concurring); 401 U.S. at 388 (Brennan, J., concurring).
was, on the other hand, of relatively recent origin and failed to gain the unanimous support of the Court's members.

One other question should be asked: Can the interest in education be buttressed by any other argument when the issue of equality of educational opportunity is presented to the Supreme Court?

There is another argument that was ignored by the Serrano plaintiffs and court but which presents a most appealing case for close judicial scrutiny of school financing systems—the character of those whose interests are most directly affected, the nation's school children. The matter has been considered by a few authors and was discussed in an amicus brief submitted to the California supreme court.

Children are probably the best example of those "discrete and insular minorities" whose interests require strict protection under the equal protection clause. They are politically helpless and are without defense against abuse of the majoritarian process. For political purposes, they are not even counted a minority.

Furthermore, parents are not always to be relied upon as satisfactory political surrogates for their children:

"The truth is that a very significant number of children do not have voting parents. This failure to vote is a neglect of their interest that children are helpless to alter. Second, even the parent who does vote is subject to many influences that conflict with the educational interests of his children."

The Supreme Court previously has not hesitated to protect those who are effectively unrepresented in a state's political structure, including interstate carriers and foreign corporations in addition to racial and ethnic minorities. Although it is true that, in the school finance cases, children are not being discriminated against as a class, nevertheless, the interests being affected are the interests of children—the great majority of children.

There is reason to believe that the test of validity of legislation under the equal protection clause involves a balancing of interests. The

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155 See, e.g., Michelman at 37-38 n.90; Coons at 389-95.
158 Amici Curiae Brief of Stephen D. Sugarman et al. at 25, Serrano v. Priest, 5 Cal. 3d 584, 487 P.2d 1241, 96 Cal. Rptr. 601 (1971). The last point is graphically illustrated by the fact that the national approval rate of local bond issues for educational purposes dropped from 79.6 per cent in 1959 to 43.6 per cent in 1969. N.Y. Times, Sept. 19, 1971, at 45, col. 1.
159 South Carolina State Highway Dep't v. Barnwell Bros., Inc., 303 U.S. 177 (1938).
categories that have evolved—"rational relationship," "suspect classification," "fundamental interest," "strict scrutiny" and "compelling interest"—can be seen as representing a kind of judicial shorthand that is applied when certain interests have consistently been found to weigh or not to weigh very heavily in the balance.¹⁶¹

There is no reason why the Supreme Court should not frankly acknowledge an equal protection balancing test since it is compatible with the case law and would eliminate existing confusion over "special" categories and different types of standards applied at different times. If such a view were adopted, the interests of children would almost certainly be accorded great weight, both in the balance of individual interests and the balance of societal interests.

**City School Financing and Equal Educational Opportunity**

[T]he public schools' most acute financial crisis is in the cities.¹⁶²

Among the more obvious predictable effects of the *Serrano* decision are a re-evaluation of existing school finance systems, with an emphasis on finding new means of support;¹⁶³ a probable increase in the quality of education for poor and minority group students;¹⁶⁴ and

¹⁶¹ See Michelman at 30 n.70, 34, 36.


¹⁶³ It has been reported that Connecticut, Maryland and Michigan are already considering financing alterations in light of *Serrano*. N.Y. Times, Oct. 18, 1971, at 43, col. 1; *id.*, Sept. 2, 1971, at 55, col. 1. New York State's system has been under evaluation since 1969 by its Commission on the Quality, Cost and Financing of Education. The panel, which is due to make its legislative recommendations this month, was apparently spurred to new activity by the *Serrano* opinion N.Y. Times, Oct. 18, 1971, at 1, col. 8.

¹⁶⁴ New sources of support will have to be found in order to avoid the "levelling downward" problem (see notes 98-105 and accompanying text supra) and to maintain present program levels. In this respect the property tax has proven itself inadequate. The income from real estate taxes increases only one percent a year unless raised legislatively, while school operating budgets throughout the country generally increase at a rate of 15 to 18 percent a year. Discontent over rising property taxes may lead to greater public acceptance of the *Serrano* rationale where it would be presumed to be lacking. *See* complaint, *Spano v. Lakeland School Dist. No. 1*, No. 10510 (Sup. Ct., Westchester County, N.Y., filed Sept. 15, 1971) (where a suburban taxpayer claimed a denial of equal protection in comparing his tax rate and return—in terms of expenditures per child—with those of neighboring suburban communities). Legislatures can be expected to look to statewide property taxes, income, sales and corporate taxes for additional school revenues. *See* note 196 infra. It has been estimated that approximately 20 states could finance education entirely from income and sales taxes if they made as great a use of those taxes as the "heavy user states" now do. Silard at 30, n.85.

¹⁶⁵ The result in *Serrano* was not based on any racial factors. However, the unfortunate tendency of money to flow inversely to the proportion of minority students in a school was documented in the case of *Hobson v. Hansen*, 269 F. Supp. 401 (D.D.C. 1967). While that case dealt with intra-district disparities, it has been found that there is a definite correlation between property values per pupil, expenditures per pupil and percentage of minority pupils. *Affidavit of Joel S. Berke at 4, 6*, *Rodriguez v. San Antonio Independent School Dist.*, Civil Action No. 68-175-SA (W.D. Tex., affidavit filed Oct. 1, 1971).
a new call for federal aid to bolster state education budgets and eradicate the great disparities in spending that exist from state to state.165

Because the effects are less obvious and their exploration useful in locating factors that a finance system should consider, the remainder of this Note will be devoted to examining the impact of Serrano on city schools.

Preliminarily, it is not at all clear that a Serrano-type mandate of educational equality would have a salutary effect on the financial problems that now beset boards of education in the large cities.

As the Serrano opinion itself demonstrated and as commentators have long advocated, the constitutional standard, if and when promulgated by the United States Supreme Court and, in the meantime, as promulgated by state and lower federal courts, will be a simple and flexible one, allowing the greatest possible legislative discretion in the fashioning of new financial schemes.166 In all probability the standard will be a negative one,167 implying no obligation to proceed in any particular direction except away from the zone of proscribed systems.

The financing problems of the large cities require precisely the kind of fine tuning that courts will want to (and, indeed, find it necessary to) avoid in setting the initial broad standards for educational equality. For this reason, the effect of Serrano on city school systems is unpredictable.

The constitutional standards that have been suggested, including mandates of equal educational resources per pupil, fiscal neutrality, non-discrimination against the poor and even allocation of resources or dollars according to need,168 would still permit legislatures to make

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165 The Governor of Pennsylvania has proposed that a national education trust fund, similar to the present highway trust fund, be established. N.Y. Times, Oct. 30, 1971, at 31, col. 2. Calls for increased federal funding, particularly in the general rather than categorical aid area, have also issued from the National Education Finance Project (id., Nov. 3, 1971, at 53, col. 1); the Presidential Commission on School Finance (id., Sept. 19, 1971, at 45, col. 1); and the U.S. Commissioner of Education (id., Sept. 1, 1971, at 17, col. 1). Some of the interstate disparities were discussed in Levi, The University, The Professions and the Law, 56 Calif. L. Rev. 251 (1968).

166 Van Dusartz v. Hatfield, memorandum and opinion at 10, No. 3-71 Civ. 243 (D. Minn., decided Oct. 12, 1971); Amici Curiae Brief of Stephen D. Sugarman et al. at 35-36, Serrano v. Priest, 5 Cal. 3d 584, 487 P.2d 1241, 96 Cal. Rptr. 601 (1971); Amici Curiae Brief of Center for Educational Policy Research at 2, 19, id.; Coons at 524-25, 340-41. It was precisely because Professor Kurland foresaw the adoption of a simple standard (Kurland at 588) that he feared a judicial declaration of equality in public education "will probably only be the creation of a greater problem . . . ." Id. at 589.


168 See notes 169-97 and accompanying text infra.
incorrect assumptions as to the abilities of localities, particularly cities, to raise revenues for school support.

New York State's educational allocations system provides a good example of the failure, as to its cities, of an effort to correct the inequities of the flat grant and foundation plans of subvention. For our purposes, that failure is illustrative of the kind of fine tuning mechanisms that a realistic appraisal of urban needs and revenue-raising abilities would require.

Enacted in 1962, the New York scheme[^66] is classified as "percentage equalizing."[^170] The basic general aid program operates essentially as follows: a district's "actual valuation"[^171] of real property per unit of weighted average daily attendance (WADA)[^172] is calculated. The district's "aid ratio" (the percentage of operating expenses per pupil to a ceiling of $860 that the state will absorb)[^173] is computed in inverse proportion to the ratio of the district wealth figure and the state's average actual valuation per unit of WADA.[^174]

On the surface, the comparison of district wealth to average state wealth seems a vast improvement on traditional foundation plans.[^175] The state's "big six"[^176] cities have not found it so, however. Under the formula, New York City's "aid ratio" for 1971-1972 is .253. The statewide average ratio is .490, the average ratio for districts outside the "big six" being .603.[^177] The "big six" receive less aid per pupil than all other types of districts while paying more tax dollars per pupil.[^178] The end result is a lower average total expenditure per child in the cities.[^179]

The explanation is, quite simply, that under the formula New York's large cities appear to have greater revenue-raising abilities than do other districts, that is, they have higher valuations per unit of

[^170]: See notes 71-73 and accompanying text supra. New York's plan, as will become evident in the text, seems actually to be a foundation plan with the twist of a fairer method of calculating ability.
[^172]: The "weighing" of average daily attendance involves a cost correction for different grade levels. Thus, half-day kindergarteners "count" for half the WADA of the base unit; full-day kindergarteners and first through sixth grades count for 1.00 of the base. High school students "count" for 1.25 the base WADA. Id. § 3602.2.a. The statutory scheme actually involves a further refinement of this figure to determine "resident weighted average daily attendance" (Id. § 3602.2.e), a factor which does not affect the analysis here.
[^173]: Id. § 3602.5.b.
[^174]: Id. § 3602.5.
[^175]: See notes 69-70 and accompanying text supra.
[^176]: Albany, Buffalo, New York, Rochester, Syracuse, and Yonkers.
[^178]: Id. 6, 7.
The boards of education of the "big six" contend, however, that appearance does not correspond to reality because the local ability index fails to take account of the following factors that drain city resources disproportionately: non-school services, special education needs, higher costs and tax exempt properties. Additionally, they argue that the operating expense ceiling is unrealistic and the WADA measure operates to reduce city allocations without commensurate cost reductions.

The problem of "municipal overburden" is factually corroborated in New York by a breakdown of the 1970-1971 local property tax dollar. Nearly 76 cents of every "big six" dollar (78 cents of every New York City dollar) went to non-school purposes (police, fire sanitation, etc.); the average non-school cost for other local governments was 49.1 cents of the tax dollar. The state's failure to measure "municipal overburden" is particularly troubling when one considers that the non-school services of the municipal centers are provided for large numbers of non-residents. This commuter population reaps the double benefit of city services without cost and increased state school revenues in their home districts.

Two formulae adjustments that would correct the ability index according to the degree of "municipal overburden" have been proposed. One would calculate wealth as "full property value per capita" rather than "full property value per pupil." The other suggestion would adjust the wealth index by a "value reduction ratio." The ratio would be computed on the basis of a comparison of the percent of municipal taxes per WADA required for non-school purposes and the statewide non-municipal average.

City boards of education also support a disproportionate share of high cost special education programs. Thus, while New York's "big six"
educate 38 percent of the state's total pupil population, that percentage includes 63 percent of the state's handicapped, 86 percent of children receiving Aid to Dependent Children and 65 percent of full-time vocational students. Yet, average daily attendance is not weighted to account for these extra costs.

The WADA measure, used in virtually all cost calculations, has other difficulties. Large cities tend to have high dropout and absentee rates, a factor which does not reduce costs because programs must be drawn up on the basis of enrollment. New York's large city boards have proposed that the measure be changed to weighted average enrollment and be further adjusted to include summer and continuing education enrollments presently unaccounted for.

The above discussions give some idea of the multiplicity of considerations essential to a fair assessment of urban ability to support educational programs. Because (1) the primary target of Serrano was discrimination against districts having low per-pupil valuations and (2) the equal protection theories advanced by school finance theorists deal only with "the grosser objective aberrations of existing systems," it is clear that Serrano per se will not be of great benefit to large city districts having characteristics similar to New York's "big six."

Serrano will, however, have the effect of forcing reappraisals and major overhauls of school financing systems throughout the country. It also marks the entrance, in a major role, of the judiciary into the school finance arena. These two aspects of the California decision do have great significance for city schools.

Whether the impact will be beneficial remains to be seen but an initial, perhaps cynical, reaction is that the latter aspect is more promising. The cities have not fared well legislatively in the past. If similar

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187 Program 1971 5, 6.
189 Program 1971 15.
190 Id. 2, 9.
192 The list is far from complete. Some other factors that should be evaluated are percentages of tax exempt properties, constitutional or statutory limitations on local tax effort, and differentials affecting capital improvement costs (e.g., site costs). Nearly 40 percent of valuations are exempt from taxation in New York's large cities (47.7 percent in Albany) while the non-"big six" average is 20.6 percent. Program 1971 23 (source: New York State Division of Municipal Affairs, Dep't of Audit and Control). Despite their greater costs, New York's cities are hampered in their fund-raising efforts by constitutional proscriptions. New York City's real property tax ceiling is two and a half percent (N.Y. Const. art. VIII, § 10(f); the other large cities are limited to a two percent effort (Id. § 10(b)); the rest of the state's localities may tax at four percent (Id. §§ 10(b) & (c)).
193 Coons at 344.
194 See note 163 supra.
195 See, e.g., New York's statutory scheme described in text accompanying notes 170-92
insensitivity is displayed in revising present finance schemes, the fiscal plight of city taxpayers, if not the school budgets, could actually be worsened.\textsuperscript{168}

A new judicial willingness to scrutinize school finance schemes, particularly under the equal protection clause, may well benefit the cities and their schools; \textit{Serrano}'s more immediate effect will not, however. With regard to this, two matters should be briefly discussed.

The cities' unequal share of the "special education" burden has already been noted.\textsuperscript{197} Yet, \textit{McInnis}\textsuperscript{198} and \textit{Burruss}\textsuperscript{199} would seem to preclude an "individual needs" equal protection attack on inequitable financing of this burden.\textsuperscript{200}

There is, however, another type of needs standard, not condemned by \textit{McInnis} and \textit{Burruss}, which might serve the cities well. This is an "area needs" approach. That is to say, an attack might be made on a state financing scheme that failed to take account of the categorical and more objectively obvious needs of an entire district. \textit{Burruss} is puzzling on this issue: The three-judge court quoted from a section of the complaint that expressly referred to just this type of standard:

\begin{quote}
The Act . . . utterly fails in any manner or to any extent whatsoever . . . to relate to any of the variety of educational needs of the several counties and cities of the State of Virginia—much less
\end{quote}

\textsuperscript{supra}. As a further example, former subdivision 8(c) of New York Education Law section 3602 providing a 17.5 percent size-related cost correction for New York's large city districts was repealed. N.Y. Sess. Laws 1969, c. 183, § 14, eff. July 1, 1970.

\textsuperscript{168} If, for example, a statewide uniform rate property tax for education were levied without taking account of municipal overburden and other factors cited above, it is quite conceivable that total city property taxes would rise, for the education component almost certainly would. See note 183 and accompanying text \textsuperscript{supra}. A proposal for such a tax will reportedly be advanced this month by the majority of New York's Commission on the Quality, Cost and Financing of Education ("The Fleischmann Commission"). N.Y. Times, Oct. 18, 1971, at 1, col. 8. The statewide uniform rate education property tax is apparently only an interim proposal, however, and the Commission's majority favors an eventual shift of the total education finance burden to income or other taxes viewed as more clearly indicative of individual wealth. \textit{Id.} In the event of such a shift, city residents might still fare poorly if the individual share of "municipal overburden" (reflected in city income taxes and non-school city property taxes) is not considered.

\textsuperscript{197} See text accompanying note 187 \textsuperscript{supra}.


\textsuperscript{200} Considering the attacks that have been made on \textit{McInnis} and \textit{Burruss}, this may not be an unassailable proposition, however. \textit{See}, e.g., Coons at 308-09, 351-52 n.134. One area that might be ideal for distinction is precisely that posed by the special education burden of the cities in regard to the mentally and physically handicapped, vocational education and non-English speaking students. Those needs are readily identifiable and quantifiable and so do not present the judicial unmanageability problems of an across-the-board individual needs standard cited by the \textit{McInnis} and \textit{Burruss} courts.
weigh the relative acuteness of these needs or provide any sort of balanced response to them . . . .201

In its opinion, however, the court ignored the "area needs" allegation, interpreting it as a request for an "individual needs" standard and asserting non-justiciability on the basis of that understanding:

[T]he courts have neither the knowledge, nor the means, nor the power to tailor the public moneys to fit the varying needs of these students throughout the State.202

If this analysis is correct, it cannot be said that the Burruss opinion ruled out an "area needs" standard even though that claim was made in the complaint.

A final point should be made in relation to the impact of Serrano on city schools: In addition to its forced reappraisal of statutory financing systems, the decision promises to inspire entirely new approaches to the subject of school funding. It has, for example, been proposed that the federal government assume the administration and financing of the country's 25 largest urban school systems.203 Without commenting on the merits and ramifications of that particular proposal, hopefully it indicates that a whole range of original suggestions will be brought to bear on the problem of city schools—and, indeed, all schools—in the wake of Serrano.

CONCLUSION

The public school has been described as "the most powerful agency for promoting cohesion among a heterogeneous democratic people"204 and "the symbol of our democracy and the most persuasive means for promoting our common destiny."205

So long as present financing schemes perpetuate the inequities of the past, that statement can be no more than the expression of an admirable but unrealized ideal. Each of the states now has, in effect, a series of school systems differing radically in the quality of education offered.

It is not difficult to conclude that educational finance is one of the few genuine equal protection frontiers remaining. From that perspective,

201 310 F. Supp. at 573 (emphasis added).
202 Id. at 574 (emphasis added).
203 The proposal was made by Dr. Mark R. Shedd, Philadelphia's Superintendent of Schools, in testimony before the Senate Select Committee on Equal Educational Opportunity, N.Y. Times, Sept. 22, 1971, at 26, col. 4.
205 Id. at 231.
Serrano v. Priest represents a tremendous exploratory step forward. The standard adopted by Serrano should not, however, be regarded as the final word on the parameters of constitutionally acceptable finance schemes. It is submitted that the standard and two-pronged litigation approach suggested in this Note would, in fact, be more satisfactory both in terms of meeting the fourteenth amendment mandate and in achieving the desired result.

The practical problems that will accompany a decision for educational equality should not be minimized. In particular, the greatest legislative attention and ingenuity will be required to maintain quality and decentralized decision-making and to ensure that revenue-raising ability is fairly calculated. The fact that the advocates of education finance reform have been exceedingly careful to accommodate these concerns should, however, be encouraging as to the probability that a judicial resolution of the matter will ultimately achieve the objective envisioned by Mr. Justice Frankfurter.

206 See text accompanying notes 127-29 supra.
207 See notes 154-61 and accompanying text supra.