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FUNDING PUBLIC EDUCATION: A NEED FOR LEGISLATIVE REFORM*

The children of Demetrio Rodriguez attend the public schools of the Edgewood Independent School District. This district, the "poorest" in San Antonio, Texas, spends an average of only $356 per pupil each school year. Across town, "on the other side of the tracks," children residing in the affluent Alamo Heights Independent School District receive an education costing $594 per pupil, representing a yearly expenditure over 65 percent higher than Edgewood's. Such inequities in educational services are caused by funding imbalances attributable to state educational financing schemes. Under the Texas system, the state is divided into autonomous school districts funded by a combination of state aid or, "subvention," and district real property taxation. The state aid portion is distributed under the Minimum Foundation Program. This program seeks to insure that each school district has sufficient funds to guarantee each of its children an adequate education. Additional funds, raised through real property taxation, permit the partic-

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* This article is a student work prepared by Felix L. D'Arienzo, a member of the St. John's Law Review and the St. Thomas More Institute for Legal Research.

1 The wealth of each district is measured by the average property value per pupil and the median family income of district residents. The figures for the Edgewood district for the 1967-68 school year are $5,960 and $4,686 respectively. These figures are the lowest in the San Antonio metropolitan area. San Antonio Ind. School Dist. v. Rodriguez, 411 U.S. 1, 12 (1973). For a discussion of how the per pupil expenditures are determined see note 4 infra.

2 For the 1967-68 school year, the assessed property value per pupil in the Alamo Heights district exceeded $49,000; the median family income within the district is $8,001. Id. at 13.

3 Id. at 7-17. For a discussion of subvention see Note, Equal Educational Opportunity: A Case for the Children, 18 Cath. Law. 113, 125 (1972).

4 The state contributes 80 percent of the funds out of general revenues; the school districts as a unit contribute 20 percent. Each district's input and return appropriation is determined by a complex economic formula. The formula is designed to take into account each district's ability to pay. 411 U.S. at 8-10.

Under the program, the Edgewood district, levying a property tax of $1.05 per $100 of assessed value, raised $26 per pupil above its allotted portion of the state fund in the 1967-68 school year. The district's appropriation under the Minimum Foundation Program was $222 per pupil. With federal aid of $108 per pupil, Edgewood had a total of $356 per pupil.

The more affluent Alamo Heights district, levying a tax of only $.85 per $100 assessed value, was able to raise $333 per pupil above its portion of the state fund. Coupled with a state appropriation of $225 per pupil and federal aid of $36 per pupil, the district had a total of $594 per pupil to spend. Id.

5 Money appropriated are earmarked for teachers' salaries, text books, and transportation costs. Id. at 9.

6 Under the Texas system this means funds over and above the district's contribution to the Minimum Foundation Program. See note 4 supra.
ular district, at its discretion, to improve the nature and quality of basic educational services otherwise provided.\textsuperscript{7}

With slight variations, this approach is adopted for school financing in 49 states.\textsuperscript{8} The legislative intent of such plans is to establish state supported education systems with a maximum degree of local control.\textsuperscript{9} However, their necessary consequence is to make the financial resources available for each district’s educational needs directly proportionate to its property wealth.\textsuperscript{10}

In \textit{San Antonio Independent School District v. Rodriguez},\textsuperscript{11} the residents of the Edgewood school district brought a class action against Texas education authorities challenging the validity of a school finance system which permitted the perpetuation of such funding disparities. The Supreme Court was asked to rectify the inequities of this system by applying federal equal protection standards to state fiscal and educational policies. Although the Court recognized the seriousness of the issue, it ultimately discovered no violation of the equal protection clause and identified the problem as one better suited for the attention of state legislators.\textsuperscript{12} In the

\begin{tabular}{|c|c|c|}
\hline
Market Value of Taxable Property Per Pupil & Median Family Income For 1960 & Total Per Pupil Expenditure \\
\hline
Above $100,000 (10 districts) & $5,900 & $815 \\
\hline
$100,000—$50,000 (26 districts) & $4,425 & $544 \\
\hline
$50,000—$30,000 (30 districts) & $4,900 & $483 \\
\hline
$30,000—$10,000 (40 districts) & $5,050 & $462 \\
\hline
Below $10,000 (4 districts) & $3,325 & $305 \\
\hline
\end{tabular}

\textit{Id.} at 15, n.38.

\textit{Mr. Justice Powell, speaking for the Court, said:}

The consideration and initiation of fundamental reforms with respect to state taxation and education are matters reserved for the legislative processes of the various States, and we do no violence to the values of federalism and separation of powers staying our hand. We hardly need add that this Court’s action today is not to be viewed as placing its judicial imprimatur on the status quo . . . . These matters merit the continued attention of the scholars who already have contributed much by their challenges. \textit{But the ultimate solutions must come from the lawmakers and from the democratic pressures of those who elect them.}

\textit{Id.} at 58-59 (emphasis added).
aftermath of this decision and in light of possible avenues of reform through state courts, it becomes essential to determine which governmental branch, legislative or judicial, is best equipped to initiate and implement the needed changes.

**FORECLOSURE OF FEDERAL CONSTITUTIONAL RELIEF**

*San Antonio* was the first lawsuit to reach the Supreme Court challenging the validity of school district property taxes. This litigation sought to establish as a doctrine of constitutional law that "the quality of public education may not be a function of wealth other than the wealth of the state as a whole." Plaintiffs contended that the Texas system of school financing denied the children of poor school districts equal protection of the laws.

Mr. Justice Powell, speaking for the majority, described the judicial processes involved in determining whether an equal protection violation existed. He stated:

> We must decide, first, whether the Texas system of financing public education operates to the disadvantage of some suspect class or impinges upon a fundamental right explicitly or implicitly protected by the Constitution, thereby requiring strict judicial scrutiny . . . If not, the Texas scheme must still be examined to determine whether it rationally furthers some legitimate, articulated state purpose and therefore does not constitute an invidious discrimination in violation of the Equal Protection Clause of the Fourteenth Amendment.

This two-tiered process of judicial determination may be exemplified by visualizing a scale. On one side rests the presumption that the state has acted within its constitutional powers, and the less stringent "reasonable classification" standards will be applicable. On the other side, one may envision the class of people affected and the interest or right denied.

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16 *Id.* at 17.
18 McGowan v. Maryland, 366 U.S. 420 (1961). The Supreme Court ruled that "[t]he constitutional safeguard is offended only if the classification rests on grounds wholly irrelevant to the achievement of the State's objective. State legislatures are presumed to have acted within their constitutional power despite the fact that, in practice, their laws result in some inequality. A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it." *Id.* at 425-26.
If the class involved is considered "suspect" or the right "fundamental," the scale will tip and the "strict scrutiny" test will be invoked. Consequently, the state will be forced to display a compelling state interest to avoid an ultimate resolution that its legislation is violative of the equal protection clause.

In *San Antonio*, the issue of invidiousness of wealth discrimination generally presented little difficulty for the Court. In all cases theretofore considered, the wealth classification had been reviewed in conjunction with important interests. Accordingly, it was deemed impermissible for a state to deny an important right solely based upon a citizen's indigency. "Indigency in itself is neither a source of the right nor a basis for denying them. The mere state of being without funds is a neutral fact—constitutionally an irrelevance . . . ." Justice Powell recognized, however, that prior determinations of wealth discrimination were premised on a finding that members of the disfavored class were, "because of their impecunity, . . . completely unable to pay for some desired benefit, and as a consequence, they sustained an absolute deprivation of a meaningful opportunity to enjoy that benefit." Thus, the inequality generated served to label the deprived individuals a suspect class.

The *San Antonio* Court, in considering the presence of a suspect class, was initially confronted with difficulty in determining the nature of the persons discriminated against. Justice Powell noted:

> The case comes to us with no definitive description of the classifying facts . . . . The Texas system of school finance might be regarded as discriminating (1) against "poor" persons whose incomes fall below some identifiable level of poverty or who might be characterized as functionally "indigent," or

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19 For example, if the classification is based on race the law is considered "constitutionally suspect" and will be subjected to the "most rigid scrutiny." Loving v. Virginia, 388 U.S. 1 (1967); *McLaughlin* v. Florida, 379 U.S. 184 (1964); *Korematsu* v. United States, 323 U.S. 214 (1944). The *McLaughlin* Court pointed out that racial classifications must be viewed "in light of the historical fact that the central purpose of the Fourteenth Amendment was to eliminate racial discrimination emanating from official sources . . . ." 379 U.S. at 192.

20 See note 31 and accompanying text infra.


22 411 U.S. at 18: see note 24 infra.

23 See Note, *Discrimination Against the Poor and the Fourteenth Amendment*, 81 Harv. L. Rev. 435 (1967).

24 Edwards v. California, 314 U.S. 160, 184-85 (1941) (Jackson, J., concurring). For instance, in *Griffin* v. Illinois, 351 U.S. 12 (1956), the petitioner alleged that errors in his trial would entitle him to a reversal of the judgment of conviction. He was precluded from obtaining appellate review because of a lack of funds to purchase a trial transcript. The Court held that a central theme of our criminal justice system is that all defendants "stand on an equality before the bar of justice." *Id.* at 17. If a state could discriminate on the basis of wealth, the guarantee of a trial would be a sham.

Similarly, in *Harper* v. Virginia State Bd. of Elections, 383 U.S. 663 (1966), indigent residents of Virginia were barred from voting in state elections because of their inability to pay a poll tax. Here the Court stated that "wealth, like race, creed, or color, is not germane to one's ability to participate intelligently in the electoral process." *Id.* at 668.

25 411 U.S. at 20.
against those who are relatively poorer than others, or (3) against all those who, irrespective of their personal incomes, happen to reside in relatively poorer school districts.

The Court concluded that the record could not support the first two possibilities. The third classification was acceptable to the Court but was deemed too "large, diverse and amorphous" to be considered suspect. Moreover, the class did not suffer an absolute deprivation of any benefit since the Minimum Foundation Program provided some financing for the education of Edgewood children. Finally, since the record failed to conclusively establish a correlation between the deprivations of "poor" school districts and "poor" people, the Court was unwilling to extend the "traditional indicia" of suspectness as established in previous cases to the plaintiffs.

Having rejected plaintiffs' assertions of a suspect class, the Court next confronted the difficult task of determining whether education should be numbered among the constitutionally protected fundamental rights. The crux of the problem lay in the word "fundamental." Its meaning and role in the Court's review of legislative action has been a troublesome question and one which has been the subject of longstanding debate within the Supreme Court.

Two extreme views have been articulated with respect to the range encompassed by the term "fundamental rights" and hence by the strict scrutiny test. Mr. Justice Harlan felt the concept had no place in equal

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26 Id. at 19-20.
27 Id. at 20-27. See chart, note 10 supra. While the chart displays a correlation between district property wealth and per pupil expenditures, it shows only a partial correlation between district median family wealth and per pupil expenditures. For example, districts having per pupil, taxable property with market values of from $10,000-30,000 have a median family income of $5,050. On the other hand, in districts having per pupil, property values of from $50,000-100,000, the median family income is only $4,425.

28 411 U.S. at 28.
29 Id.
31 If a law impinges on a "fundamental" right it will be subjected to "strict judicial scrutiny." For example, the Supreme Court has characterized the right to vote as fundamental. See McDonald v. Board of Election, 394 U.S. 802, 807 (1969); Harper v. Virginia State Bd. of Election, 383 U.S. 663, 670 (1966); Reynolds v. Sims, 377 U.S. 533, 561-62 (1964). A similar determination was made with respect to the right of privacy. See Griswold v. Connecticut, 381 U.S. 479 (1965).
32 The origins of the debate can be traced back to the eighteenth century case of Calder v. Bull, 3 U.S. (3 Dall.) 386 (1798). While reviewing the validity of an act of the Connecticut Legislature, Justice Chase referred to "fundamental law." Id. at 386-87. He stated that he could not
He reasoned that the exception "threatens to swallow" the standard equal protection rule and argued: "[W]hen the right affected is one assured by the federal Constitution any infringement can be dealt with under the Due Process Clause." It was the Justice's feeling that any important rights are within the regulation of the state legislatures, and to extend judicial powers in this direction "would go far toward making this Court a 'super-legislature.'" In contrast, Justice Marshall has approached the entire equal protection question as one not of strict or lenient judicial review, but rather as one requiring a "sliding scale" or "spectrum of standards." Rather than identify a right as fundamental per se, he would scrutinize particular classifications depending on the Constitutional and societal importance of the interest adversely affected and the recognized

subscribe to the omnipotence of a state Legislature, or that it is absolute and without control .... There are certain vital principles in our free Republican government, which will determine and overrule an apparent and flagrant abuse of legislative power ....

Id. at 387-88 (emphasis added). In dicta the Justice went on to say that permitting legislatures to violate these principles would amount to "political heresy, altogether inadmissible in our free republican governments." Id. at 388-89. (emphasis added).

In rebuttal, Justice Iredell took the position that the judicial power of the Court is limited to reviewing the constitutional validity of legislative action. Id. at 398-99. If the legislature shall pass a law, within the general scope of their constitutional power, the court cannot pronounce it to be void, merely because it is, in their judgment, contrary to the principles of natural justice. Id. at 399.

In his dissenting opinion in Shapiro v. Thompson, 394 U.S. 618, 659 (1969), Mr. Justice Harlan commented:

I think that this branch of the "compelling interest" doctrine is sound when applied to racial classifications, for historically the Equal Protection Clause was largely a product of the desire to eradicate legal distinctions founded upon race. However, I believe that the more recent extensions have been unwise. .... [W]hen a classification is based upon the exercise of rights guaranteed against state infringement by the Federal Constitution, then there is no need for any resort to the Equal Protection Clause; in such instances, this Court may properly and straightforwardly invalidate any undue burden upon those rights under the Fourteenth Amendment's Due Process Clause.


Mr. Justice Harlan further observed:

Virtually every state statute affects important rights. This Court has repeatedly held, for example, that the traditional equal protection standard is applicable to statutory classifications affecting such fundamental matters as the right to pursue a particular occupation, the right to receive greater or smaller wages or to work more or less hours, and the right to inherit property. .... [T]o extend the "compelling interest" rule to all cases in which such rights are affected would go far toward making this Court a "super-legislature".

Id.

invidiousness of the basis upon which the particular classification is drawn . . . . 37

Thus, the scope of the Court's review in this area would be substantially increased. 38

Yet a third, somewhat more moderate approach was articulated by Justice Stewart, concurring in Shapiro v. Thompson: 39

The Court does not "pick out particular human activities, characterize them as 'fundamental', and give them added protection . . . ." To the contrary, the Court simply recognizes . . . an established constitutional right, and gives to that right no less protection than the Constitution itself demands. 40

This approach was adopted by Justice Powell as the basis for determining which rights and interests should be afforded the extra-ordinary protection of the strict scrutiny test. 41 The equal protection clause was to be used as a vehicle for guarding existing rights, since "it is not the province of the Court to create substantive Constitutional rights in the name of guaranteeing equal protection of the laws." 42 Under this view, the proper test for ascertaining a fundamental right involves a determination of whether the Constitution either explicitly or implicitly guarantees it. 43

It was thus determined by the San Antonio Court that education was not a right guaranteed by the Constitution. 44 Rejecting plaintiffs' argument that the right can be implied because of a nexus between education and


38 In San Antonio, Justice Powell stated that if a fundamental interest were to be determined by its importance "[w]e would, indeed, then be assuming a legislative role and one for which the Court lacks both authority and competence." 411 U.S. at 31. See note 35 supra. See generally Gunther, The Supreme Court, 1971 Term: Forward, In Search of Evolving Doctrines in a Changing Court: A Model for a Newer Equal Protection, 86 HARV. L. REV. 1 (1972).


40 Id. Interestingly, this concurring opinion was written in response to Mr. Justice Harlan's dissent. See notes 33-35 and accompanying text supra.

41 411 U.S. at 33.

42 Id. The Court relied on Lindsey v. Normat, 405 U.S. 56 (1972) and Dandridge v. Williams, 397 U.S. 471 (1970). Mr. Justice Powell felt these cases provided the Court with a clear "lesson" as to the proper test for determination of fundamental rights. 411 U.S. at 33.

In Lindsey, the Court refused to treat housing as a fundamental right. Justice White, speaking for the Court, stated that "the Constitution does not provide judicial remedies for every social and economic ill . . . . Absent constitutional mandate, the assurance of adequate housing . . . is a legislative, not judicial, function." 405 U.S. at 74.

In Dandridge, the Court, while recognizing the importance of welfare assistance, applied the reasonable basis test. The lesson to be learned is that societal importance alone does not serve as an adequate basis for departing from the lenient equal protection test.

43 411 U.S. at 33, 34.

44 Id. at 35-40. Despite this conclusion, the Court recognized the tremendous importance of
freedom of speech and the right to vote, Justice Powell commented that the Constitution does not guarantee "the most effective speech or the most informed electoral choice." Moreover, it would be difficult to determine the amount of education necessary to preserve these rights were education to be recognized as fundamental. Nothing in the record indicated that the Texas Minimum Foundation Program would be unable to pass such constitutional muster.

Failing to find either a suspect classification or a fundamental right, the Court in San Antonio abandoned strict scrutiny for the "reasonable basis" test. According the Texas legislation the presumption of constitutionality, the Court concluded that that state's school financing "is not education in our society and reaffirmed its commitment to public education:

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

Id. at 29-30, quoting Brown v. Board of Education, 347 U.S. 483, 493 (1954). This emphatic statement, despite the Court's rejection of education as a fundamental right protected by the Constitution, indicates how firmly rooted in the Constitution an interest must be before the "strict scrutiny" test will be applied.

Id. The argument for an implied right to education is inherently vulnerable. In Griswold v. Connecticut, 381 U.S. 479 (1965), the Court found an implied right to privacy. The Court's rationale was that specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance. Various guarantees create zones of privacy.

Id. at 484 (citations omitted). Couched in these terms, the right of privacy can be said to "flow" from explicit constitutional guarantees. Education would not "flow" as a continuum from the right of free speech and the right to vote, but rather forms a foundation to support these rights. Education is, therefore, one step removed from the right itself.

411 U.S. at 36.

Id. at 36-37. The Court pointed out that one of the most controversial aspects of the case was the lack of any demonstrable correlation between per pupil expenditures and the quality of education. Id. at 42-43. See Carrington, Financing the American Dream: Equality and School Taxes, 73 COLUM. L. REV. 1227, 1239 (1973).

411 U.S. at 36-37.

See note 18 supra.

411 U.S. at 36-37. The Court has defined its role in judicial review of legislative action in McCullough v. Maryland, 17 U.S. (4 Wheat.) 316 (1819):

Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consistent with the letter and spirit of the constitution, are constitutional.

Should Congress, in the execution of its powers, adopt measures which are prohibited by the constitution; or should Congress, under the pretext of executing its powers, pass laws for the accomplishment of objects not entrusted to the government, it would
the result of hurried, ill-conceived legislation,” but rather “the product of responsible studies by qualified people.” The majority was unwilling to place its judgment above that of the scholars and legislators who had developed and enacted the system. Consequently, Texas’ school financing plan was not found to violate the equal protection clause.

San Antonio is indicative of the complexities inherent in seeking solutions to racial and state fiscal problems on constitutional grounds. The advisability of judicial restraint may well be warranted and can be illustrated by applying both the two-tiered approach and the sliding scale standard to a hypothetical problem. The facts of Hawkins v. Town of Shaw will serve as a model. This case presents a relatively straightforward fact pattern involving a denial of equal protection in a municipality’s rendering of services. By setting aside the issue of educational finance, with its attendant emotional aspects, the “correctness” of Justice Powell’s approach can be established in a purely objective manner.

In Hawkins, plaintiffs adduced exhaustive statistical evidence which showed that Shaw was divided into two well-defined neighborhoods, one populated by poor blacks, the other by relatively affluent whites. The figures showed that out of a total population of 2500, 1500 were black. These blacks occupied 451 dwelling units, 97 percent of which were located in areas in which no whites resided. These statistics further displayed a gross disparity in the quantity and quality of municipal services provided the two neighborhoods. For example, 98 percent of all homes that fronted on unpaved streets were occupied by blacks, and 97 percent of the homes not served by sanitary sewers were in black neighborhoods. On these facts plaintiffs contend that invidious discrimination by the Town of Shaw, violative of the equal protection clause, was clearly demonstrated. Moreover, they argued that the racial and wealth classification required the court to apply the strict scrutiny test.
For purposes of this hypothetical we will assume that the disfavored neighborhood is not predominantly populated by a racial minority, a suspect class in itself. Consequently, the alleged suspect classification would be wealth; the interests affected would encompass the availability of typical municipal services, such as sewers, street lighting, and other public improvements. Under Justice Powell's approach the threshold question to be resolved is which of the two equal protection tests is applicable. Strict judicial scrutiny will not be invoked unless the indigency of the disfavored class can be shown to result in an absolute deprivation of the affected interest. Furthermore, the affected interest would have to involve a right explicitly or implicitly guaranteed by the Constitution. Absent these conditions, the "reasonableness" approach must be invoked.

Assuming the disfavored class can be clearly identified as "poor" people, Justice Powell would concede that such a class might arguably satisfy the "indicia of suspectness" recognized by the Court in wealth discrimination cases. However, the requirement of an absolute deprivation of a benefit precludes wealth in and of itself as a suspect classification. Furthermore, the conservative tone pervading the San Antonio opinion would seem to indicate that the Court would be unwilling to invoke the strict scrutiny test unless the indigency interfered with a fundamental right. In the hypothetical situation, the adversely affected interests are merely municipal services. Therefore, the Court would ultimately use the more lenient standard rather than the strict scrutiny test. Indeed, Justice Powell's test would accord the hypothetical town a presumption of constitutionality and only invalidate the town's actions if no reasonable basis could be shown to justify the disparities. The Court would not be assuming any legislative role, but would be merely ascertaining the reasonableness of the classification.

Alternatively, under Justice Marshall's approach the Court would engage in a delicate balancing process. The question of the invidiousness of the class would not be limited to a "reflection of historic prejudices."
Rather, special care would be taken to protect the interests of “particularly disadvantaged and powerless” classes. Thus, an economically disadvantaged neighborhood, especially one in a condition of abject poverty, could be considered suspect even without the taint of racial discrimination. Furthermore, the interests affected need not be rights guaranteed by the Constitution, for the test is “to determine the extent to which constitutionally guaranteed rights are dependent on interests not mentioned in the Constitution.” Justice Marshall would not be bound by an a priori definition of the right. Instead, “concentration must be placed upon . . . the relative importance to the individual in the class discriminated against of the governmental benefit that they do not receive.” Municipal services sustain what has been described as the “immediate environment.” Though not essential to subsistence, they do contribute substantially to the quality of life and thus might require stricter scrutiny than is applied under the Powell rationale.

The operation of the “varying” scrutiny test in the hypothetical case illustrates its major weakness. It transforms the Court into a “super-legislature.” A consideration of the powerlessness of the class and relative importance of the benefit could greatly deviate from constitutional considerations. Concentration would tend toward the social impact of the statutory scheme rather than its legality. Using this test, societal, as well as constitutional, importance would defeat the presumption of validity and subject the state legislature’s actions to a more rigid scrutiny.

These considerations, though important, are extra-constitutional. The

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65 411 U.S. at 109.
70 In Hawkins, the Fifth Circuit was mindful of the fact that judicial intervention of this nature tends to contravene separation of powers doctrines. 437 F.2d at 1292. It commented that:

[t]he need for judicially discoverable and manageable standards as well as an awareness of the distinctions between the roles played by the coordinate branches of government must, of course, be foremost in our mind.

Id. Ordinarily, the nature and extent of services expended within a community is considered an exercise of the municipality’s discretionary powers and beyond judicial review. 13 E. McQuillen, The Law of Municipal Corporations ¶ 37.25 (3d ed. 1971). A court should intervene only if it is “clearly satisfied that the action is oppressive and without reasonable grounds.” Id.

The Hawkins court viewed its role in Madisonian “checks and balances” terms:

Indeed unless these departments be so far connected and blended, as to give each a constitutional control over the others, the degree of separation which the maxim requires as essential to a free government can never in practice be duly maintained”. 437 F.2d at 1292, quoting Madison, The Federalist No. 48. Thus the court limited its power to constitutional control. The statistical evidence indicated a racial discrimination clearly violative of the fourteenth amendment. See note 19 supra. Therefore, the court’s holding was in purely constitutional terms.
facts germane to the inquiry would be the same general facts that are used for making law or policy or for guiding the exercise of discretion. The Court may well refer to the same data used by the town council in enacting the statutory scheme under review. Such a process clearly would be judicial legislation, at odds with checks and balances principles.\textsuperscript{71}

The question of what should be the Court's proper role is indeed a difficult one. In Justice Marshall's view, the equal protection clause embodies a broad legal command to protect \textit{all} those rights deemed fundamental to mankind. While in the abstract this seems a sound doctrine of social justice, in practice it results in the erosion of traditional principles of the separation of powers and federalism. Greater scrutiny will increase the accountability of the state legislature, a body elected by the people to carry out their collective will, to the will of a comparatively small number of judges.

Justice Powell's approach, on the other hand, is mindful of the status of the various branches of the government. As he has noted:

\begin{quote}
[W]e stand on familiar ground when we continue to acknowledge that the Justices of this Court lack both the expertise and the familiarity with local problems so necessary to the making of wise decisions with respect to the raising and disposition of public revenues.\textsuperscript{72}
\end{quote}

Consequently, his minimal scrutiny test is sensitive to the separation of powers doctrine by according broad discretion in these matters to the legislative branch. This discretionary power enables the legislature to apply its expertise to formulate sound solutions to complex problems. Conversely, Justice Marshall's sliding scale test would place a significant portion of this discretionary power in the judiciary, thus transforming the court into a "super-legislature." The legislative nature of the issue of school financing appears to dictate that the legislature retain uninhibited power to formulate an effective solution and, thus, Justice Powell's view appears superior.

\textbf{STATE JUDICIAL RESPONSES}

Although \textit{San Antonio} precluded the finding of a solution within the provisions of the federal Constitution, school district property tax systems in both California and New Jersey have been invalidated by the highest courts of those states on \textit{state} constitutional grounds.\textsuperscript{73} Since most state constitutions deal with education explicitly,\textsuperscript{74} an approach through their provisions is readily available. As a result, the judiciary would not appear

\textsuperscript{71} See note 69 \textit{supra}.

\textsuperscript{72} 411 U.S. at 41.


\textsuperscript{74} See, \textit{e.g.}, \textit{CAL. CONST.} art. IX, § 1 (1954); \textit{FLA. CONST.} art. IX, § 1 (1968); \textit{ILL. CONST.} art. X, § 1 (1970); \textit{N.Y. CONST.} art. XI, § 1 (1938).
to be overstepping its bounds in breach of the separation of powers doctrine.

California

Article IX, section 1 of the California state constitution provides:

A general diffusion of knowledge and intelligence being essential to the preservation of the rights and liberties of the people, the Legislature shall encourage by all suitable means the promotion of intellectual, scientific, moral and agricultural improvement.\(^{75}\)

Such language dictated the conclusion reached by the California Supreme Court in *Serrano v. Priest*.\(^{76}\) There, education was deemed a fundamental right under the state constitution. Accordingly, the California Legislature was bound to implement high standards of equal protection in promulgating a school financing program. Indeed, the court in remanding the case to the trial court took the position that it is a “cherished idea of American education that in a democratic society free public schools shall make equally available to all children the abundant gifts of learning.”\(^{77}\) The court concluded its opinion by quoting Horace Mann:

> [N]atural law . . . proves the *absolute right* to an education of every human being that comes into the world, and which, of course, proves the correlative duty of every government to see that the means of that education are provided for all . . . .\(^{78}\)

On remand the defendants in *Serrano* asserted that judicial interference in the controversy would be violative of the separation of powers doctrine. Additionally, they maintained that judicial involvement would serve to inhibit the California Legislature’s enactment of innovative, experimental educational programs.\(^{79}\) In responding to these allegations, the

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\(^{75}\) CAL. CONST. art. IX, § 1 (1954).

\(^{76}\) 5 Cal. 3d 584, 487 P.2d 1241, 96 Cal. Rptr. 601 (1971). The *Serrano* court was asked to invalidate the California public school finance system. As in Texas, the system was substantially dependent on local property taxes with resultant disparities in school revenues. 487 P.2d at 1244.

The California Supreme Court based its argument primarily on the equal protection clause of the fourteenth amendment. However, the complainant also alleged a violation of the equal protection provisions of the California Constitution. In a footnote to its opinion, the *Serrano* court stated that these provisions are treated as “substantially the equivalent” of the equal protection clause of the United States Constitution. The court added that “consequently, our analysis of plaintiffs’ federal equal protection contention is also applicable to their claim under these state constitutional provisions.” 487 P.2d at 1249 n.11. On remand, the trial court read this footnote to mean that the holding in *Serrano* was unaffected by *San Antonio* since the California court’s reasoning could be based either on the United States or California Constitutions. *Serrano v. Priest*, No. 938,254 (L.A. Super. Ct., April 10, 1974).

\(^{77}\) 5 Cal. 3d at 619, 487 P.2d at 1266, 96 Cal. Rptr. at 626.

\(^{78}\) Id.

\(^{79}\) *Serrano v. Priest*, No. 938,254 at 37 (L.A. Super. Ct., April 10, 1974). The California Supreme Court had remanded the case for trial. The trial court ruled on matters of law in light of *San Antonio*. 
trial court asserted that the power to determine whether the school finance system breached the equal protection clause of the state constitution rested with the judiciary. Consequently, plaintiffs were entitled to judicial relief upon a showing that the alleged discriminatory treatment in fact existed.

The defendants further contended that if the court invalidated the educational finance system on equal protection grounds, it could likewise invalidate the local financing of other highly important governmental services, such as police and fire protection. These functions had also been delegated by the California constitution to the legislative and executive branches, and it was argued that an expansion of judicial power along these lines would be illogical and impractical. The court used article IX, section 1 to invalidate this argument. Since education is a special governmental service singled out by the drafters of the state constitution, conclusions reached with respect to it do not necessarily apply to other governmental services.

The presence of a state constitutional provision relating to education markedly differentiates the issues presented to the courts of California from the federal question reviewed by Justice Powell in *San Antonio*. Though the argument may be raised that the problem is essentially a legislative matter, the specific emphasis placed on education in the state constitution greatly militates against the removal of such a fundamental right from the purview of the state judiciary. The absence of a like provision in the federal Constitution seemingly justifies the resolution of the issue enunciated in *San Antonio*. The fact that resolution by judicial processes can be defended on legal grounds does not guarantee that the court’s assumption of an essentially legislative role will prove viable in achieving the desired result. The problem of educational finances has complex economic and political dimensions which may place serious obstacles in the path of ultimate judicial remediation. Defendants’ assertion that the cause of action does not present a judicially manageable controversy may ultimately be correct. A legislature free to innovate and experiment may prove the only effective means for formulating an equitable solution.

Events in California indicate that the court may be encountering difficulty in enforcing its judgment. The *Serrano* court remanded the matter to the trial court to ascertain the truth of the factual allegations of the plaintiffs’ complaint. In the interim, to alleviate the immediate problem,

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81 Id.
82 Id. at 38. Defendants’ position on remand was that such “vitally important” governmental functions may also be considered “fundamental rights” under the California Supreme Court’s rationale in *Serrano*. This would require the state to demonstrate a “compelling state interest” to avoid invalidation of the funding systems for such services. The result would be a judicial assumption of legislative and executive functions.
the California Legislature passed the "Property Tax Relief Act of 1972." On remand, the trial judge ruled the Act did not meet the mandate of Serrano and entered a judgment which required

[that] the trial court [retain] jurisdiction of this action so that any of the parties may apply for appropriate relief in the event that relevant circumstances develop such as a failure by the legislative and executive branches of the state government to take the necessary steps to establish, within a reasonable time, a public school financing system that complies with the equal-protection-of-the-laws provisions of the California Constitution. This judgment implies that California's legislative and executive branches were given a time limit in which to enact legislation acceptable to the trial court or else be compelled to follow explicit court instructions. Thus, the court assumed the role of a super-legislature. The inevitable tension between the co-equal branches of the state government which this decision may engender hardly creates an atmosphere conducive to thorough and imaginative educational reform.

New Jersey

Similarly, in Robinson v. Cahill, the New Jersey Supreme Court invalidated that state's system of school district property taxation. However, rather than rely on federal equal protection standards, the Robinson court focused on the education clause of the New Jersey constitution, which states:

The Legislature shall provide for the maintenance and support of a thorough and efficient system of free public schools for the instruction of all the children in the state . . .

The court concluded that the current system, with its resultant inequities, could not be considered a "thorough and efficient" system. Consequently, it ordered the Governor and legislators to restructure the state's educational finance system prior to December 1974.

The special treatment accorded education by the New Jersey constitution again may justify judicial intervention in this area. However, as in

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85 Id. at 3. The annual state aid appropriation was to be increased in proportion to inflationary increases in real property values. Moreover, a freeze was imposed on the maximum expenditures allowed by individual school districts. Id. at 12, 14.
86 Id. at 106.
87 62 N.J. 473, 303 A.2d 273 (1973). Under the New Jersey school finance system, 67 percent of the funds for education were derived from local property taxes. Disparities in per pupil expenditures existed and state aid did not equalize school district funding. Id. at —, 303 A.2d at 276-77.
89 62 N.J. at —, 303 A.2d at 295.
90 Id. at —, 303 A.2d 298; N.Y. Times, July 16, 1974, at 1, col. 1.
California, subsequent events indicate that the controversy may not be judicially manageable. Though the Robinson court did not invalidate the local property tax as a means of raising school funds, it indicated that a local property tax would be unacceptable as a main source for school finance. Consequently, the executive and legislative branches were constrained to seek alternative methods of financing.

In response to the court, the Governor proposed a state income tax to shift a portion of the local tax burden to the state. In the past, the imposition of a state income tax had been one of the most controversial and emotional matters considered by the New Jersey Legislature. It had been conceded by New Jersey governors for the last forty years that the state’s residents were burdened with the most regressive and inequitable tax systems in the nation. Yet no recent governor has been able to muster sufficient support to pass a reformed income tax bill. Though liberals among the state legislators felt a state income tax was necessary to eliminate the unfair tax burdens on certain New Jersey residents, conservatives viewed it as a threat to local control.

With the court-imposed deadline, pressure to resolve the issue was intensified thereby accelerating the passage of an income tax bill in the state assembly. Certain leaders of the state senate, however, indicated their opposition to the bill by presenting the Governor with an ultimatum to either withdraw the bill or suffer a “humiliating” defeat. As a result, the Governor yielded to political pressures and withdrew the bill, pledging not to re-introduce an income tax measure for at least two years. This defeat raised the distinct possibility of a constitutional confrontation between the New Jersey Legislature and the State Supreme Court. The Legislature’s steadfast refusal to enact the most viable option to the property tax makes it unlikely that an acceptable alternative will be forthcoming prior to the court deadline of December 1974.

Although Robinson and Serrano offer an alternative to consideration of school financing as a federal equal protection issue, they are demonstrative of the grave difficulties involved in enforcing such decisions. The distinctions between the judiciary and other branches become blurred and tensions between them are heightened. As one author stated: “The no-wealth principle poses a problem of ultimate remediation of a far greater order because nothing short of the court’s assumption of the taxing powers would assure compliance.”

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62 N.J. at ____, 303 A.2d at 288.
77 N.Y. Times, July 16, 1974, at 1, col. 1.
85 Id. at 39, col. 7.
95 N.Y. Times, July 25, 1974, at 1, col. 6.
93 N.Y. Times, July 16, 1974, at 1, col. 1. The bill was passed in the state assembly by the narrow margin of 41-38. The proposal generated several hours of intense debate and its passage was unexpected. Id.
96 N.Y. Times, July 5, 1974, at 1, col. 6.
97 Id.
THE LEGISLATIVE ALTERNATIVE

New York provides an example of a state in which the problem of evenhanded school financing has been handled in the political forum rather than the judicial one. Indeed, New York’s attempts to eradicate disparities in the quality of education pre-date judicial admonitions against the property tax system. During October 1969, former Governor Rockefeller created the New York State Commission on the Quality, Cost and Financing of Elementary and Secondary Education, informally known as the Fleischmann Commission.9 The Commission’s 18 members, who included educators, lawyers, legislators, and businessmen,100 were given the awesome task of developing means “to get a lot better education for a lot less money.”101 With complete independence and the aid of a 26 member staff and 60 consultants, the Commission began a massive research effort to analyze problems and formulate recommendations for the legislature.102

The Commission found that, as in the Texas school district, great disparities in per pupil expenditures existed in New York.103 It concluded that the “quality of a child’s education was being ‘determined by accidents of birth, wealth and geography’” and further found it unconscionable that a poor man in a poor district must often pay at higher rates for the inferior education of his child than the man of means in a rich district pays for the superior education of his child.104

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9 N.Y. Times, Jan. 30, 1972, at 48, col. 1. The Commission was named for Manly Fleischmann, a Buffalo attorney who served as its head.
101 N.Y. Times, Jan. 30, 1972, at 48, col. 3-5.
102 To illustrate the problem two Long Island school districts can be compared:

<table>
<thead>
<tr>
<th></th>
<th>Great Neck, L. I.</th>
<th>Levittown, L. I.</th>
</tr>
</thead>
<tbody>
<tr>
<td>Revenues From Local</td>
<td>$1,684.07</td>
<td>$410.31</td>
</tr>
<tr>
<td>Property Tax</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Revenues From Other</td>
<td>29.29</td>
<td>13.87</td>
</tr>
<tr>
<td>Local Sources</td>
<td></td>
<td></td>
</tr>
<tr>
<td>State Aid</td>
<td>364.16</td>
<td>764.48</td>
</tr>
<tr>
<td>Federal Aid</td>
<td>---</td>
<td>.71</td>
</tr>
<tr>
<td>Total Per Pupil</td>
<td>$2,077.52</td>
<td>$1,189.37</td>
</tr>
<tr>
<td>Expenditures</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Assessed Property</td>
<td>$64,000</td>
<td>$16,200</td>
</tr>
<tr>
<td>Per Pupil</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Tax Rate</td>
<td>$2.72 per $100</td>
<td>$2.72 per $100</td>
</tr>
</tbody>
</table>

103 N.Y. Times, Jan. 29, 1972, at 34, col. 5.
104 N.Y. Times, Jan. 30, 1972, at 1, col. 8.
The Commission recommended a radical departure from the present system, suggesting that the state assume full responsibility for the financing of public education.\textsuperscript{106} The proposed plan called for the implementation of a uniform, state-wide property tax.\textsuperscript{106}

The Commission report only initiated the state's movement toward reform,\textsuperscript{107} and provided, at best, a basis for later legislation.\textsuperscript{108} Indeed, the controversial nature of the Commission's proposal caused the legislators to greet the plan as "food for thought, not action."\textsuperscript{109} They predicted and promised "extensive debate" and careful study of the proposals.\textsuperscript{110}

The major flaw of the Fleischmann Commission's plan was its concentration on educational reform, to the exclusion of political and economic realities. The state's mixture of urban, suburban, and rural districts naturally provides an atmosphere in which radical changes in financing will meet with active opposition from some quarters. Moreover, since the Commission estimated the cost of the plan as an additional annual state expenditure of $715 million,\textsuperscript{111} the availability of funds would be determinative of the question whether legislative action would be forthcoming.\textsuperscript{112}

Concurrent with the Fleischmann proposal, Governor Rockefeller, a Republican, was supporting a compromise state tax bill to overcome a $1.5 billion deficit. Democratic leaders in the Legislature offered support for the tax bill in return for a "letter of intent" from Republicans assuring certain minimal appropriations, including $2.5 billion for education. The Republi-

\textsuperscript{106} Id.
\textsuperscript{107} Id. The Commission estimated that a state-wide property tax rate set at $2.04 per $100 of assessed value would be able to increase the amounts now raised locally.

Under the proposed plan the wealthier districts would be "held harmless" that is, they would not be forced to reduce their current expenditures. Rather, the 474 districts which make up the poorest two-thirds of all districts would have their per pupil expenditures increased to the levels of the wealthier districts over a three-year period. Id.

\textsuperscript{108} Manly Fleischmann commented:

Whatever we've written isn't gospel until its agreed upon by the Legislature and the Governor. I've never yet seen a plan survive intact, and I don't think this is going to be the first.

\textsuperscript{109} Id. State Senator Thomas LaVerne, a member of the Commission and Chairman of the Senate Education Committee, admitted that consideration of the proposals by the State Legislature "might take several years." Id.

\textsuperscript{110} Id.

\textsuperscript{111} N.Y. Times, Jan. 30, 1972, at 1, col. 1. Assemblywoman Constance E. Cook, Chairwoman of the Assembly Education Committee and member of the Fleischmann Commission, commented: "I don't think there's any real plan or intention to adopt this in-toto this year." Id.

\textsuperscript{112} Id. Senate Majority Leader Earl W. Brydges reportedly stated that the state's current fiscal crisis made the adoption of the Commission's proposals unrealistic. Id. See notes 114-15 and accompanying text infra. Other state legislatures voiced an objection to any continued reliance on a property tax and suggested a more equitable means to finance education such as an income tax. Id.
cans' refusal heightened the fiscal crisis and foreshadowed the doom of the Fleischmann plan. Though the extensive factual findings of the Commission may have demonstrated a need for concrete reforms, they merely produced a spirited debate. Two legislative sessions passed without even a token movement toward change. However, in the summer of 1973, a joint effort by the Governor, Legislature and Board of Regents resulted in the creation of a special Task Force on State Aid for Elementary and Secondary Schools. Two years after the Fleischmann report the Task Force submitted its own proposals for reform. Rather than suggesting a major overhaul of the local property tax system, the proposal called for a revision of the state aid formula. The limited recommendation was a reflection of the Task Force's sensitivity to political realities. To further reduce political opposition, the Task Force emphasized a re-working of the school financing formula, leaving the ultimate cost an open-ended issue.

The limited reform proposal, fortuitously presented in an election year, gave rise to sufficient political pressure to assure some legislative action. By April 1974, the Governor and legislative leaders were meeting in an attempt to work out a new state aid formula. The major obstacle was again an economic one.

The bill, which generally followed the Task Force recommendations, was finally introduced on April 4, 1974. A $221 million state aid increase was appropriated, apparently representing a compromise between the Governor and the suburban bloc. The ceiling on per pupil grants was increased from $860 to $1200. Under the bill's provisions, what percentage of the $1200 a particular school district will receive depends upon the property value within that district. In addition, each student within the

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111 N.Y. Times, Jan. 4, 1972, at 1, col. 1. With the failure of the attempted compromise between Republicans and Democrats, the Governor outlined an alternative plan to raise additional revenues. The plan called for increases in a number of state taxes, a $275 million freeze in state aid and postponements of $400 million in state obligations. Id. at 24, col. 3.
113 N.Y. Times, Feb. 3, 1974, at 26, col. 1. The Task Force, apparently sensitive to the controversial nature of the problem, did not suggest any radical change from the local property tax. Rather, the Task Force "talked of providing incentives for local districts to share resources with each other." Id.
114 Several weeks prior to the issuance of the report, Assembly Speaker Perry B. Duryea had predicted that a proposal for an increase in state aid to education would receive a favorable response in the Legislature, although any significant property tax reform would still meet with resistance. Id.
115 Id. However, the Task Force did imply that some additional state money would be necessary.
117 The Governor sought a $204 million budgetary package while a powerful group of legislators from suburban districts wanted a $260 million increase. N.Y. Times, April 5, 1974, at 21, col. 5.
118 Id.
119 N.Y. Times, April 26, 1974, at 73, col. 6. As an example of the increase in state aid which
district who is designated a "pupil with special educational needs" (one who scores below a pre-determined level on state achievement tests) will be counted as 1.25 students.\textsuperscript{123} In unanimous action by the assembly, and a vote of 55 to 2 in the Senate, the Legislature passed the bill as chapter 241 of the 1974 Sessions Laws.\textsuperscript{124}

The success of the legislation, and that of any additional reforms it may engender, remains to be seen. Perhaps a future legislature will implement the Fleischmann Commission report and have the state assume full financial responsibility for elementary and secondary education. In any event, by implementing reform through the majoritarian political process, New York will have avoided the pitfalls of a plan hurriedly conceived to satisfy a court order.

The efforts of the various executive, legislative, and investigatory bodies in New York amply illustrate the myriad political and economic dimensions of a problem which has been presented to the courts in other states. Events in California and New Jersey\textsuperscript{125} indicate the possible tensions that may explode between the executive, legislative and judicial branches when the judiciary attempts to accomplish economic and educational reform by applying broad legal theories. The separation of powers doctrine should be a crucial consideration in determining the scope of judicial review of legislative programs. The legislature must be free to consider, negotiate, reject and reconsider plans for reform without the restraint of a court mandate.

\textbf{CONCLUSION}

The importance of education in today's complex society cannot be overstated. The present school district approach to financing education, with its potential for inequities, presents a problem of first magnitude. However, inherent in the pursuit of reform of this system is the troublesome question of where such reform should originate.

The Supreme Court has rejected the argument that the resolution to the problem is to be found in the equal protection clause of the Constitution. Expressing a sensitivity to the doctrine of separation of powers, the Court took cognizance of the complexities of the situation and the need for

\textsuperscript{123} N.Y. Times, April 4, 1974, at 22, col. 4.

\textsuperscript{124} The Act, calling for a $307 million budgetary increase, was passed just 24 hours after a hard won compromise was granted by the Governor. \textit{Id.} In approving the bill Governor Malcolm Wilson made the following comments:

Primary and secondary education are among the most important concerns of the people of this and every state. Thus it is not surprising that few, if any, subjects before the Legislature have each year including the current year, stimulated more controversy than the issue of the financing of elementary and secondary schools . . . .


\textsuperscript{125} See notes 84-86, 91-97 and accompanying text \textit{supra}.
experimentation to achieve an equitable alternative. These factors, indicating the legislative quality of the problem, weighed heavily in the Court's decision to limit the judiciary's role.

At the state court level, the question has assumed a different posture. The special treatment accorded education in state constitutions allowed the courts of California and New Jersey to strike down their respective state's school finance systems. Though the state courts presented an alternative judicial route, the effectiveness of these decisions in bringing about actual reform remains to be seen. It may prove impossible for a court to resolve problems of this nature without assuming a legislative role or inviting a confrontation with the legislative branch.

The most viable source of reform, perhaps, is the legislature. Recent events in New York demonstrate how opposing political views and economic factors play a crucial role in molding reform. Indeed, the problem presents many elusive elements, such as the correlation of the quality of education with per pupil expenditures, and the details of a state supported system affording a maximum degree of local control. Such considerations require investigation and open debate, functions particularly adapted to the legislative process.

As the public becomes increasingly aware of the responsibilities of government, courts will be asked to entertain actions asserting legislative neglect of educational financing. The educational finance reform issue will thus test the dimensions of judicial power. Whether a judicially "unmanageable" controversy is being asserted should be a primary consideration of the courts when reviewing such demands. It remains to be seen how effectively the courts of California and New Jersey have instituted reform.

In sharp contrast to such judicial action is the new school financing system brought about by the New York Legislature. The success of this program should be carefully observed to evaluate the merits of legislative action free from judicial interference.