The Journal of Law and Education

Volume 1 | Issue 1 Article 7

1-1972

Educational Financing and Equal Protection: Will the California Supreme Court's Breakthrough become the Law of the Land

Hershel Shanks

Educational Financing and Equal Protection: Will the California Supreme Court's Breakthrough Become the Law of the Land?

HERSHEL SHANKS*

The California Supreme Court handed down a decision last Fall which, if made applicable to other states of the Union, will require a thorough revamping of education financing laws in all states except Hawaii.[1]

The California Court held for the first time that a state educational financing system which requires local school districts of varying wealth to raise even a part of their own education funds from local property taxes violates the equal protection clause of the Fourteenth Amendment. This result followed, said the Court, because such a system discriminates on the basis of wealth in the distribution of educational resources. To the extent the local school district is required to assume the burden of supporting its public schools from its own taxes, the poorer districts are unable to provide the same level of financial support as their richer neighbors, even though the poorer districts often impose on themselves higher tax rates than wealthier districts. Thus the educational opportunity—at least in economic terms—available to any child within the state depends on the wealth of the district in which he lives. "[S]uch a system cannot withstand constitutional challenge and must fall before the equal protection clause." [2]

California's School Finance Formula

The California system for financing public education is typical of that which prevails throughout the United States. About one-third of the sup-

*Partner with Glassie, Pewett, Beebe and Shanks, Washington, D. C.

[1] Hawaii already has a single unified school district.

[2] *Serrano* v. *Priest*, L.A. No. 29820, California Supreme Court, August 30, 1971, slip op. 2. On October 12, 1971, a federal district judge in Minnesotta, relying on the *Serrano* decision, came to the same conclusion. *Van Dusartz* v. *Hatfield*, No. 3-71 Civ. 243 (D. Minn.). This ruling came in a denial of a motion to dismiss. The Court will retain jurisdiction but defer further action in the case pending action by the Minnesota legislature, so the ruling is not presently appealable. Since the *Serrano* decision, approximately 30 other states have filed or are considering filing *Serrano*-type suits.

port for the public school system comes from the State. Over one-half is provided by local property taxes imposed by local school districts. Six percent comes from federal funds, and the remainder from miscellaneous sources.

State aid consists of two types of grants from the State to the local school district. The first type is known as the flat grant and consists of a payment to the local school district of $125 per pupil. It is distributed on a uniform per pupil basis to all districts, irrespective of their wealth. The flat grant constitutes about half of the funds distributed by California to its local school districts.

The second type is an equalization grant intended at least partially to ameliorate the disparities arising out of the differing abilities of districts of varying wealth to support local schools from local taxes. The equalization grant assures that every school district regardless of its poverty will have available to it a certain minimum amount per pupil—$355 for each elementary school pupil and $488 for each high school student. This minimum amount would supposedly fund a so-called minimum "foundation program".[3]

To compute the size of the equalization grant, two items are subtracted from the minimum foundation program amount: (1) the State's flat grant and (2) the sum the local school district is expected to raise from its own taxes. The remainder is the equalization grant per pupil. In other words, the equalization grant consists of $355 for each elementary school pupil and $488 for each high school student less the $125 flat grant and less a hypothetical amount which would be raised by minimal local tax rates—1 percent in elementary school districts and .8 percent in high school districts).[4] In practice, however, only the poorer districts receive equalization grants under this formula. For the wealthier districts, the flat grant of $125 plus minimal local taxes raises more than the minimum foundation program amount.

While equalization grants are to some extent equalizing in their effects, the flat grant is anti-equalizing. For the poor district, the flat grant is essentially meaningless because anything taken away from the flat grant would be made up by an increased equalization grant of the same amount. The flat grant could be repealed without having any effect on the poor district. This is of course not true of wealthier districts who do not get an equalization grant. If the flat grant were repealed, the wealthier districts would lose $125 per pupil. Accordingly, the flat grant actually widens the gap between rich and poor districts.

[3] In fact, far more is needed per pupil to fund an adequate program.

[4] California also has an additional State program of "supplemental aid" which is available to subsidize particularly poor school districts which are willing to make an extra local tax effort by setting their tax rates above a certain statutory level.

The result of the California system of educational financing—partially because the equalization grant does not go nearly far enough and partially because of the anti-equalizing effects of the flat grant—is a wide variation in per pupil expenditures from the poorer to the wealthier California school districts. Thus, the Baldwin Park Unified School District in Los Angeles spends only $577 to educate each of its students. By contrast, the Beverly Hills Unified School District, also in Los Angeles, spends $1,231 per student.

The fundamental injustice underlying this system is highlighted by the fact that the tax rate in Beverly Hills is just over 2 percent, while the tax rate in Baldwin Park is more than 5 percent. Thus, Beverly Hills can raise far more per pupil with far less effort than Baldwin Park.

The source of the disparity in per pupil funds available to the two districts is clear: The assessed valuation per pupil in Beverly Hills is thirteen times more than the assessed valuation per pupil in Baldwin Park. The assessed valuation per pupil is $50,885 in Beverly Hills and $3,706 in Baldwin Park.

The Court found "irrefutable" the contention that the foregoing system classifies students on the basis of the wealth of the district in which they happen to live. Indeed, "[t]he wealth of a school district, as measured by its assessed valuation, is the major determinant of educational expenditures." [5]

Requirements Under *Serrano*

Assuming that this decision becomes the law of the land, what are its implications for educational financing and public education administration?

It is of course clear that such a decision would require the revamping of educational financing systems throughout the country. But beyond this lie a number of questions. Will compliance with this decision require, or lead to, state control, if not actual operation of, local schools? In other words, does this decision spell the end of the local school district, locally controlled? Does the decision mean the end of local property taxes as a source of revenue to support public education? Does the decision require 100 percent state financing of public education? Does the decision require equal dollar expenditures per pupil for each student within a state?

Many educators and even some lawyers have assumed that the answer to all of these questions is "yes". In fact, however, the answer to all of these questions is "no". It is therefore important, at the outset, to understand what compliance with the decision will, and will not, require.

The contention that the decision will result in state control and perhaps

[5] Slip Op. 240.

even state operation of local schools—and thereby doom the local public school—is based on the assumption that the decision will require 100 percent state financing of public education. The argument is that whoever pays the piper will call the tune. Yet the assumption is incorrect. To be sure, a state *may*, but need not, comply with the decision by a system in which the state provides all of the funds for the public schools on a per pupil basis. But even if a state were to adopt a 100 percent state financing as its method of compliance, this would not necessarily mean state operation or control of local schools. Even now, local school districts are creatures of the state, created by state legislatures, and subject to all valid rules and regulations which the state legislature may decide to adopt. A state has the right under the present system of school financing to control or operate the local public schools. But in fact states have not done this, despite the fact that they provide a very substantial part of the local school districts' educational budget.

It could, of course, be argued that if states were to supply 100 percent of the local school budget, they would be more inclined to control the operations of the local school districts. This seems doubtful. Given the long history of doggedly independent local school control and operation, it is unlikely that the states would undertake to exert substantially more control over local school systems simply because the extent of their financial support of these systems increases from, say, 40 percent to 100 percent. But, in any event, the signal point to keep in mind for this purpose is that 100 percent state financing of public education is not required by the decision.

Whether state educational financing systems may still rely on local property taxes, and, if so, whether at varying tax rates, locally determined, requires a somewhat fuller discussion of the Court's reasoning.

The evil which the Court found in the present system is that to some extent the number of dollars available per pupil in any given school district depends on the wealth—as measured by the assessed valuation per pupil—within that district. The Court condemned the *relation* between *educational offering* (at least as measured in economic terms)[6] and *wealth*

[6] Whether per pupil expenditures are in fact closely related to educational offering or educational achievement has been hotly debated since the Coleman Report's finding that "differences in school facilities and curriculum, which are the major variables by which attempts are made to improve schools, are so little related to differences in achievement levels of students that, with few exceptions, their effects fail to appear even in a survey of this magnitude." (James S. Coleman, et al., *Equality of Educational Opportunity* [Washington: U. S. Government Printing Office, 1966]). Other distinguished critics question this finding. See Guthrie, Kleindorfer, Levin & Stout, *Schools and Inequality* (1971) and Bowles, "Towards Equality of Educational Opportunity?", 38 Harv. Ed. Rev. (1968), reprinted in *Equal Educational Opportunity* (Cambridge: Harvard University Press, 1969). Although a definitive answer may not be available, it is difficult to disagree with Henry S. Dyer, who writes:

> We strongly suspect that the amount of money spent on instruction can make a considerable difference in the quality of pupil performance, but how the funds are deployed

(as measured in assessed valuation per pupil). That is all the Court condemned. Compliance with the Court's decision requires only that there be a divorce in this relationship of wealth with educational offering. The Court did not say *how* the divorce shall take place, or what systems of educational financing will meet this test of "non-relatedness of wealth and educational offering".

There are many ways of breaking this relationship which do not require abandonment of local taxes—even property taxes—as a source of support for local school systems. For example, a state could provide that $1,000 per student will be available in each district within a state and that the local district must raise as much of this amount as would be produced by a 2 percent property tax. If that would produce in any particular district less than $1,000 per pupil, the state would make up the difference. If such a tax would produce more than $1,000 per pupil, the excess would be required to be paid to the state. This is a true 100 percent equalization formula.[7]

The system just described breaks the relationship between wealth and educational offering, but it retains a significant reliance on local property taxes to support local schools. It may be argued, however, that this system, like the system in which the state provides all of the funds for local education, produces an educational straight-jacket in which every school district is limited to $1,000 per pupil regardless of the importance which a particular local school district places on education and regardless of the effort which the residents of a particular district are willing to make to support their public schools. This is true, but the system may be varied so as to

---

and used probably makes even more of a difference. It seems reasonably clear that the effectiveness of schools is very largely a function of the characteristics of the people in them—the pupils and their teachers—but we are still a long way from knowing in useful detail what specific changes in the people or in the educational mix will produce what specific benefits for what specific kinds of children [Dyer, "School Factors and Equal Educational Opportunity", 38 Harv. Ed. Rev. 38 (1968), reprinted in *Equal Educational Opportunity* (Cambridge: Harvard University Press, 1969)].

Nevertheless, it is difficult to imagine a court denying equal funds to the poor because differences in per pupil expenditures have not been shown to make a difference. On the contrary, courts appear to have assumed that dollars will make a difference see *McInnis* v. *Shapiro,* 293 F. Supp. 327, 331 (N.D. Ill. 1968), *affirming mem. sub nom. McInnis* v. *Ogilvie,* 394 U.S. 332 (1969); *Hargrave* v. *Kirk,* 313 F. Supp. 944 (M.D. Fla. 1970), vacated on other grounds, *sub nom. Askew* v. *Kirk,* 401 U.S. 476 (1971)), although successful, plaintiffs may find themselves put to the proof, see *Serrano* v. *Priest,* slip op. 26–27; *Hobson* v. *Hansen,* 269 F. Supp. 401, 437 (D.D.C. 1967), *affirmed sub nom. Smuck* v. *Hobson,* 408 F.2d 175 (D.C. Cir. 1969), and especially *Hobson* v. *Hansen,* 327 F. Supp. 844 (D. D.C. 1971).

[7] In the example, the state *requires* the local district to impose the 2% tax on real estate. However, the state need not make this requirement: The local district may be permitted to raise the money any way it wishes—by a real property tax or by any other form of taxation. Or it may be permitted to raise less than the amount that would be produced by a 2% property tax, in which event the 2% property tax would be used only as a measure of the state's equalization obligation.

provide for different amounts depending on the effort (as expressed in its tax rate) the local district is willing to make to support public education. In other words, under the holding in the *Serrano* case, it is constitutionally permissible to allow a variation in educational offering to depend on the effort the local district is willing to make. Remember that only disparities emanating from variations in wealth are forbidden by the *Serrano* decision.

Suppose the formula is varied somewhat, to provide a differential in per pupil expenditures available to any district based on variations in local effort (i.e., local tax rates). Consider a system which provides that for each mill of local tax imposed by the local district, the local district would receive $50 per pupil. If one mill of tax produces less than $50 per pupil, the state will make up the difference. If it produces more than $50 per pupil, the excess must be paid to the state. Under this system, the local district decides how many dollars per pupil it wishes to provide for public education. The greater effort it makes, as expressed in its tax rate, the greater per pupil expenditures it will have for its public education system. But the amount available to the local district does not depend on its wealth. A 30 mill tax will produce the same revenue per pupil ($1,500) in the poorest as in the wealthiest district. This system has been described as "district power-equalizing" [8] because under it each district has the same *power* to produce educational funds for its own local school system, regardless of its wealth.

However, there are likely to be vociferous political objections to a district power-equalizing system because of the effect of such a system on the wealthier districts.[9]

To understand where the political outcry will come from in any district power-equalizing scheme, consider the following scenario, which is summarized in Table I. Assume, as is now the case, that each district raises its own school funds through local taxation but, for simplicity, without any state contribution. Assume further that District B, the wealthiest district in the state, is five times as wealthy in assessed valuation per pupil as District A, the poorest district in the state. District A imposes a 6 percent tax which produces $600 per pupil (1 percent tax = $100 per pupil). District B, however, imposes only a 3 percent tax, but this produces $1,500 per pupil (1 per cent tax = $500 per pupil). Now suppose (see Hypothetical 1 in Table I) that this hypothetical state decides to comply with the *Serrano* decision by a district power-equalizing formula. One way to do this would be to provide that any district which taxes itself at the rate which District

[8] See Coons, Clune & Sugarman, *Private Wealth and Public Education.* Cambridge: Harvard University Press (1971).

[9] However, such an effect necessarily results from any system which withdraws from the wealthier districts the advantages they previously had as a result of their wealth.

TABLE I

Present System

(Each District Retains What Is Produced By Its Own Taxes)

District A (Poor)			District B (Wealthy)		
Tax Rate		Expenditures Per Pupil	Tax Rate		Expenditures
6%	=	$600	3%	=	$1,500

Hypothetical 1, Using A District Power-Equalizing System
(All Districts Raised to Level of Best System)
(1% Tax Rate = $500 Per Pupil)

District A (Poor)			District B (Wealthy)		
Tax Rate		Expenditures Per Pupil (Including State Grant)	Tax Rate		Expenditures Per Pupil
3%	=	$1,500 (i.e., $300 in local taxes and $1,200 state grant)	3%	=	$1,500

Hypothetical 2, Using A District Power-Equalizing System
(1% Tax Rate = $250 Per Pupil)

District A (Poor)			District B (Wealthy)		
Tax Rate		Expenditures Per Pupil (Including State Grant)	Tax Rate		Expenditures Per Pupil
6%	=	$1,500 (i.e., $600 in local taxes and $900 state grant)	3%	=	$750
				or	
			6%	=	$1,500

B presently taxes itself will receive just as much money as District B. In other words, for each percent of tax imposed by the local district, the state will insure that the district will receive $500 per pupil. The effect of this district power-equalizing formula is to raise the entire state to the level of the wealthiest district, provided only that the other districts make the same effort (by imposing the same tax rate) as the wealthiest district. In the case of District A, it could reduce its tax rate from 6 percent to 3 percent and increase its per pupil expenditure 2½ times, from $600 to $1,500. District B would retain its present tax rate of 3 percent and present per pupil expenditure of $1,500.

The problem with this district power-equalizing formula is that it is enormously expensive and is likely to be regarded politically as prohibitively expensive. The total cost, the politicians will say, is too high.

The state will then consider a district power-equalizing system that is pegged at a lower level (see Hypothetical 2 in Table I). The state will insure that the local district will receive, not $500 for each percent of tax it imposes, but $250. (Anything raised in excess of $250 for each percent

would of course be paid to the state.) This is all right with District A, the poorest district in the state. District A retains its 6 percent tax rate and, instead of having $600 per pupil, it will have $1,500 per pupil. However, District B now has a serious problem which its politically powerful residents are not likely to welcome. If District B retains its present 3 percent tax rate, it will find that it now will receive only $750 per pupil instead of the $1,500 per pupil which was previously produced by a 3 percent tax rate. If District B feels strongly that it does not want to lower the per pupil funds available to it for public education, as it is likely to feel, it will be faced with the prospect of doubling its tax rate from 3 percent to 6 percent in order to retain the same per pupil expenditure. In short, District B will either have to increase its tax rates substantially or decrease the quality of education it provides for its children. This is the fly in the political ointment of district power-equalizing. However, from a constitutional point of view, this result follows only because District B no longer has an advantage because of its wealth.

Some argue that the result of the *Serrano* decision will be the destruction of the public school system. Whether the state adopts a district power-equalizing system or 100 percent state financing, it is unlikely to raise the level of all systems to that of the best. The result will mean a lowering of the quality of our best schools. No longer will they serve as the beacon light for the future. All those who have been accustomed to a higher level of educational quality are likely to abandon the public schools if they can afford it.

Others argue, with at least equal persuasiveness, that a judicial command to remove the disparities attributable to wealth will vastly improve the overall quality of the schools, without eliminating either diversity or freedom to experiment. These people argue that as a practical or political matter those citizens who control both the public schools and the legislatures, supported by the broad middle class who are entirely dependent on those schools, will make a new effort to aspire to the best for all, once they realize that even the wealthy can have the best only if it is also available, assuming equal effort, to the poor.

In exploring the latitude in devising school financing systems which is still available under the *Serrano* decision, it is clear that variations in per pupil expenditures are permitted if they result from variations in effort or tax rate exerted by the local district. However, differences in per pupil expenditures may be made to depend on a number of factors in addition to variation in effort. This, of course, follows from the fact that the *Serrano* decision forbids only variations which stem from differences in wealth. Accordingly, state financing systems may, consistent with the *Serrano* decision, permit differences in per pupil expenditures resulting from a host of variations in educational needs. High school students, for example, may

be given more than elementary students. Adjustments may be made for districts whose school population is geographically dispersed so as to give them special transportation problems. Other reasonable, and therefore allowable, adjustments might be made for the differential purchasing power of the dollar in different parts of the state, or the state formula may provide additional funds for any district willing to adopt and support special instruction or guidance programs.

In short, the latitude which remains after the *Serrano* decision is very wide indeed; the only thing that the decision condemns is wealth-related discrimination.

Will *Serrano* Become the Nation's Law?

The foregoing discussion was based on the assumption that the *Serrano* case would become the law of the land. We now turn to the question of how likely it is that this will occur. This question will involve a consideration of the history of the effort to obtain a judicial decree requiring the equalization of school resources, including the story of some litigation efforts that failed; a consideration of the constitutional theory on which the *Serrano* case rests, including its strengths and weaknesses; a consideration of whether the Supreme Court as now constituted is likely to be receptive to the position of the plaintiffs in the *Serrano* case, with special attention to straws in the wind provided by cases during the Court's last term; and finally to questions of judicial and litigative strategy which might affect the result in the United States Supreme Court.

In February 1965 a short notice by Arthur E. Wise entitled "Is Denial of Equal Educational Opportunity Constitutional?" appeared in *Administrator's Notebook*.[10] Although the subject generally was in the air,[11] this appears to be the first published suggestion that the present system of financing public education is unconstitutional. There followed a rash of articles, dissertations, books and book reviews—criticizing, developing, and sharpening the analysis, and providing new materials and ideas.[12]

[10] Volume XIII, p. 1.

[11] See, e.g., C. Benson, *The Cheerful Prospect: A Statement of the Future of Public Education* (1965).

[12] Horowitz, "Unseparate but Unequal—The Emerging Fourteenth Amendment Issue in Public School Education," 13 U.C.L.A. L. Rev. 1147 (1966); Wise, "The Constitution and Equality: Wealth, Geography and Educational Opportunity" (Univ. of Chicago, doctoral dissertation, 1967); Kurland, "Equal Educational Opportunity: The Limits of Constitutional Jurisprudence Undefined," 35 U. Chi. L. Rev. 583 (1968), reprinted in C. Daly The Quality of Inequality: Suburban and Urban Public Schools, Chicago: Univ. of Chicago Press (1968); Kirp, "The Constitutional Dimensions of Equal Educational Opportunity," 38 Harv. Educ. Rev. 635 (1968), reprinted in Equal Educational Opportunity (1969); 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); A. Wise, Rich Schools, Poor Schools: The Promise of Equal Educational Opportunity, Chicago: University

Much of this scholarly output pointed to the conclusion that the present system of financing public education unconstitutionally discriminated against the poor.

Simultaneously with these publications, a number of lawsuits were instituted to test the validity of the proposition that the present system of educational financing was unconstitutional—in Michigan, Illinois, Virginia, California, Texas, and elsewhere.[13]

The first case to reach judgment was the Illinois case, *McInnis* v. *Shapiro*,[14] in which a three-judge federal district court granted the defendants' motion to dismiss, thereby rejecting the equal protection argument advanced by the plaintiffs. Although the court found that "the inequalities of the existing arrangement are readily apparent," [15] it concluded that the system was not entirely irrational. The Illinois statutes allowed local communities to control local schools, to experiment in educational financing and to determine their own tax burden in terms of the importance they placed on education. This gave the system sufficient legislative justification to sustain its constitutionality. Moreover, the court found that the judiciary was ill-equipped to order funds allocated on the basis of so nebulous a concept as "educational need," as was urged by the plantiffs.

The *McInnis* decision was a serious setback, especially as it was a unanimous decision of a three-judge court. However, the Supreme Court still sat in Washington, and it was there that the plaintiffs promptly repaired.

However, the Supreme Court just as promptly dealt with the case by affirming, in a *per curiam* decision, on the basis of the jurisdictional statement filed by the plaintiffs in support of their appeal.[16] Apparently, the Supreme Court felt it could dispose of the case without benefit of briefs on the merits or oral argument.

Prior to the Supreme Court's decision in *McInnis*, the defendants in the

of Chicago Press (1969); Coons, Clune and Sugarman, "Equal Educational Opportunity: A Workable Constitutional Test for State Financial Structures," 57 Calif. L. Rev. 305 (1969); "Developments in the Law—Equal Protection," 82 Harv. L. Rev. 1065 (1969); Kirp, Book Review, 78 Yale L. J. 908 (1969); Michelman, "Foreword: On Protecting the Poor Through the Fourteenth Amendment," 83 Harv. L. Rev. 7 (1969); Shanks, "Equal Education and the Law," 39 The American Scholar 255 (1970), reprinted in W. R. Hazard, Education and the Law New York: Free Press (1971); Silard and White, "Intrastate Inequalities in Public Education: The Case for Judicial Relief Under the Equal Protection Clause," 1970 Wisc. L. Rev. (1970); Coons, Clune & Sugarman, Private Wealth and Public Education Cambridge: Harvard University Press (1970); Shanks, Book Review, 84 Harv. L. Rev. 256 (1970); Goldstein, Book Review, 59 Calif. L. Rev. 302 (1971); Kaplan, Note, "Constitutional Law: Financing Public Education Under the Equal Protection Clause," 23 Fla. L. Rev. 590 (1971).

[13] Many of the cases are listed in Coons, Clune and Sugarman, *Public Education and Private Wealth*, p. 289 nn. 4–5.

[14] 293 F. Supp. 327 (N.D. Ill. 1968).

[15] 293 F. Supp. at 331. Per pupil expenditures varied between $480 and $1,000.

[16] *Sub nom. McInnis* v. *Ogilvie*, 394 U.S. 322 (1969). Mr. Justice Douglas would have noted probable jurisdiction.

Virginia case, styled *Burruss* v. *Wilkerson*,[17] presented a motion to dismiss to a single district judge who was thus required to rule on the substantiality of plaintiffs' constitutional contention. Without the benefit of the Supreme Court's ruling in *McInnis*, Chief Judge Dalton ruled that the question was substantial and that a three-judge court must therefore be convened:

> Poverty does appear to be a factor contributing to the conditions which give rise to the plaintiffs' complaint. It is clear beyond question that discrimination based on poverty is no more permissible than racial discrimination....[18]

A trial was had in the *Burruss* case and the facts established were even more appealing from the plaintiffs' point of view than those alleged in the *McInnis* complaint. Plaintiffs established that they were from a poor rural Virginia county and that their extreme poverty prevented them from providing an even marginally adequate school system, despite the fact that their school tax rates were unusually high and far in excess of many counties with well-financed school systems.

However, by the time the three-judge court in *Burruss* was ready to hand down its decision on the merits, the Supreme Court had already ruled on the *McInnis* case. Nevertheless the district court took the occasion in its opinion dismissing the complaint to observe:

> The existence of such deficiencies and differences is forcefully put by plaintiffs' counsel. They are not and cannot be gainsaid[19]

However, the Court found that

> The circumstances of [the *McInnis* case] are scarcely distinguished from the facts here[20]

Thus, the Court dismissed the case, but added

> While we must and do deny the plaintiffs' suit, we must notice their beseeming, earnest and justified appeal for help[21]

The *Burruss* court seemed to be inviting the Supreme Court to take another look.

So the *Burruss* plaintiffs also appealed to the Supreme Court. But the result was the same, a *per curiam* affirmance on the basis of jurisdictional

[17] 301 F. Supp. 1237 (W.D. Va. 1968) (denying motion to dismiss), 310 F. Supp. 572 (W.D. 1969) (dismissing the case after trial).

[18] 301 F. Supp. at 1239.

[19] 310 F. Supp. at 574.

[20] *Ibid.*

[21] *Ibid.*

papers without the benefit of briefs on the merits or oral argument.[22] If anything, the Supreme Court appeared to have "dug-in" by its decision in the *Burruss* case.

With two Supreme Court rulings against them, lawyers around the country who had been pressing these suits and exploring legal arguments to support them, paused for some serious stocktaking. A number of suits simply withered away. The Harvard Center for Law and Education, one of whose top priorities at its inception only a short time earlier had been to press equal education lawsuits, now turned its primary focus elsewhere. Interest in the issue lagged.

But for those who continued to press the struggle, a number of developments seemed to augur well. One was the expansion of equal protection doctrine in the Supreme Court itself. Shortly after its *per curiam* decision in *McInnis,* the Supreme Court articulated more explicitly and in greater detail than it had ever done before a new and far broader standard for judging the constitutionality of legislation subjected to attack under the equal protection clause.[23] To appreciate this expansion of equal protection law, a short bit of background is necessary.

Chief Justice Warren has noted that

> The concept of equal protection has been traditionally viewed as requiring the uniform treatment of persons standing in the same relation to the governmental action questioned or challenged.[24]

Or as Mr. Justice Harlan put it:

> The Equal Protection Clause prevents states from arbitrarily treating people differently under their laws. Whether any such differing treatment is to be deemed arbitrary depends on whether or not it reflects an appropriate differentiating classification among those affected.[25]

Thus, though the equal protection clause does not prevent government from treating people differently, it does prevent different treatment which is not adequately justified or which is based on inadequate reasons. Accordingly, in any case where legislation is subjected to attack under the equal protection clause, the court must decide what is adequate state justification for the state's differing treatment.

Historically, adequate justification meant that the statute represented a reasonable means to accomplish a valid purpose. In order to mount a successful attack under the equal protection clause, a suitor had to estab-

[22] 397 U.S. 44 (1970). Mr. Justice Douglas and Mr. Justice White would have noted probable jurisdiction.

[23] *Shapiro* v. *Thompson,* 394 U.S. 618 (1969).

[24] *Reynolds* v. *Sims,* 377 U.S. 533, 565 (1964).

[25] *Harper* v. *Virginia Board of Elections,* 383 U.S. 663, 681 (1966) (dissenting opinion).

lish that the distinctions embodied in the law were arbitrary and unreasonable. As the Supreme Court stated in a 1935 case, "A statutory discrimination will not be set aside as the denial of equal protection of the law if any state of facts reasonably may be conceived to justify it".[26] This has come to be known as the "rational basis" test.

In recent years, however, a stricter standard appears to have been applied in some cases. The emergence of this stricter standard began in cases where the Supreme Court declined to accept "any reasonable" justification for distinctions based on race. As early as 1944, the Court said that classifications based on race were "suspect" and therefore had to bear a greater burden of justification.[27]

Shortly after its decision in the *McInnis* case, the Supreme Court ruled more explicitly than it had ever done before that in certain cases reasonable justification was no longer enough to sustain a statute. In these cases, the standard of review was far stricter; differential treatment would be considered to be adequately justified only when the government convinces the Court that the differential treatment is *necessary to promote a compelling governmental interest.*[28] This has come to be known as the "compelling interest" test. Shortly thereafter, the Supreme Court made it clear that the stricter standard of review was applicable to cases involving discriminations based "on wealth".[29] This post-*McInnis* development seemed to bode well for another *McInnis*-type effort.

Then the first educational financing case was won in the lower court *Hargrave* v. *Kirk.*[30] *Hargrave* presented a much narrower issue than was presented to the court in *McInnis,* but it certainly trenched on *McInnis* ground.

Hargrave involved a Florida statute which provided that any Florida county that imposes on itself more than 10 mills of property tax for educational purposes will not be eligible to receive state funds for the support of its public education system. The plaintiffs there argued that this statute effected a discrimination based on wealth because it distributed taxing authority for educational purposes by a standard related solely to the wealth of the county. The plaintiffs pointed out that the statute permitted Charlotte County to tax itself up to $725 per pupil without losing state support for its public education system, but limited Bradford County

---

[26] *Metropolitan Casualty Insurance Co.* v. *Brownell,* 294 U.S. 580, 584 (1935); see also *McGowan* v. *Maryland,* 363 U.S. 420, 425–426 (1961) and cases there cited.

[27] *Korematsu* v. *United States,* 323 U.S. 214, 216 (1944); see also *Skinner* v. *Oklahoma,* 316 U.S. 535, 541 (1942); *Yick Wo* v. *Hopkins,* 118 U.S. 356, 370 (1886).

[28] *Shapiro* v. *Thompson,* 394 U.S. 618, 634 (1969).

[29] *McDonald* v. *Board of Election Commissioners,* 394 U.S. 802, 807 (1969).

[30] 313 F. Supp. 944 (M.D. Fla. 1970), judgment vacated on other grounds, *sub nom. Askew* v. *Hargrave,* 401 U.S. 476 (1971).

to only $52 per pupil on pain of losing state support for its public education system.

In a unanimous opinion invalidating the Florida statute, Circuit Judge Dyer stated:

> What apparently is arcane to the defendants is lucid to us—that the Act prevents the poor counties from providing *from their own taxes* the same support for public education which the wealthy counties are able to provide.[31]

This holding too seemed to provide hope for a future victory in a broader *McInnis*-type case.

The third encouraging development was the publication of *Private Wealth and Public Education* by John E. Coons, William H. Clune, III, & Stephen D. Sugarman.[32] As this writer stated in a review in the *Harvard Law Review*,[33] this book "is clearly the most sophisticated, careful and thorough analysis of the subject which has yet appeared". While the book does not say anything that has not been said—or, at least, adumbrated—before, it does say it better. It provides a careful analysis of existing school financing systems and explains in considerable detail and with great effectiveness how they operate to the disadvantage of poorer districts. It explores at length district power-equalizing systems. Finally, it stresses the need for a limited judicial attack on the present system—an attack which would seek to have the court outlaw wealth-related discriminations, but would not try to persuade the court to itself reallocate funds on the basis of a nebulous concept of educational need, as the plaintiffs in the *McInnis* case attempted to do.[34]

However, by all odds the most encouraging development in the somewhat somber post-*McInnis* era is the stunning victory in the *Serrano* case itself.

---

[31] 313 F. Supp. at 947.

[32] Cambridge: Harvard University Press (1970).

[33] 84 Harv. L. Rev. 256 (1970).

[34] It is helpful in any equal protection analysis to understand that the equal protection does not demand or command equality. It is framed in negative, not positive, terms: "No State shall... *deny*..." It forbids inequality. While logically, it is true, equality and inequality are mutually exclusive and exhaust the universe, it nevertheless makes a great deal of practical difference whether we ask, on the one hand, whether particular treatment is unequal in a particular respect, or whether, on the other hand, we ask whether particular treatment is equal in all other respects. We may be able to decide what is unequal—an inquiry which can easily be narrowed and pinpointed—without having the haziest notion as to what is equal. To determine what is equal requires omniscience with respect to the infinite aspects of any particular distribution of benefit or burden, plus the ability to measure or weigh each aspect in comparison to the others—an impossible task, certainly for the judiciary.

In short, the equal protection clause is a negative command, and the only relief a successful suitor can legitimately seek is the removal of the inequality *he* attacks.

Further Analysis of Serrano

Let us turn then to an analysis of the California Supreme Court's reasoning: The first question for the Court was whether the "rational basis" test or the "compelling interest" test should be applied. As previously noted, it seems clear from explicit United States Supreme Court statements that the "compelling interest" test applies to cases involving classifications based on wealth.[35] That the California system for financing public education classifies on the basis of wealth, the Court found plain. Therefore, on this ground alone, the Court concluded that the "compelling interest" test should apply. However, the Court also appeared to rule that the "compelling interest" test applied for another independent reason. The United States Supreme Court has indicated that the "compelling interest" test applies whenever a "fundamental right" is involved.[36] In the *Serrano* case the California Supreme Court concluded for the first time that education was a fundamental right or interest,[37] and therefore required the application of the "compelling interest" test. Having concluded on two grounds that the "compelling interest" test was applicable, the Court then turned to whether the California system for financing public education met that test. The Court had no difficulty in concluding that California's system of financing public education was not necessary to promote a compelling state interest. Accordingly, the Court condemned the system as a violation of the equal protection clause.

Both legs of the Court's analysis have their shortcomings, but the result is correct.

Taking the second leg first, it is true that the United States Supreme Court has indicated that the compelling interest test is applicable when a fundamental right is involved, but this is patently erroneous. For that reason it is highly unlikely that the Supreme Court would itself apply such a rule if that were the only basis for granting relief.

Assuming elementary and secondary education to be a fundamental interest,[38] we often discriminate—and properly so—in its distribution.

[35] *McDonald* v. *Board of Election Commissioners,* 394 U.S. 802, 807 (1969), citing *Harper* v. *Virginia Board of Elections,* 383 U.S. 663 (1968).

[36] *McDonald* v. *Board of Election Commissioners, supra,* at 807; citing *Kramer* v. *Union Free School District,* 395 U.S. 621 (1969).

[37] The Court appears to use right and interest almost interchangeably. The Court speaks of the "right to education, which we have determined to be fundamental" (Slip op. 22 n. 13); a "number of fundamental interests [including] rights of [criminal] defendants" (Slip op. 33); the court speaks of comparing "the right to an education with the rights of defendants in criminal cases and the right to vote" (Slip op. 29); the court concludes that "the distinctive and priceless function of education in our society warrants, indeed compels, our treating it as a 'fundamental interest' " (Slip op. 42).

[38] College education may or may not be different from secondary education. Consider the following example. A state university makes available to any qualified student, upon payment of a $1,000 tuition fee each year, a university education which costs the state $3,000 per year.

For example, we discriminate among students by providing more money for high school students than for elementary school students. We provide different courses for students with different interests. We provide special facilities for the culturally deprived. All of these instances of differing treatment may be reasonable, wise and desirable. But they are hardly necessary to promote a compelling state interest—unless we torture those words to encompass ideas which they do not now contain.

The same kind of examples could be cited with respect to any interest whose fundamentality, unlike education, is unquestioned. Surely the right to vote is a fundamental interest. Yet convicted felons are commonly denied the right to vote. No one would suggest, however, that this form of discrimination must be justified by reference to a compelling state interest if it is to be sustained against attack under the equal protection clause. Both the denial and the grant of the franchise to convicted felons are reasonable rules, and neither rule is unconstitutional even though a fundamental interest is involved.

That the "compelling interest" test is not applicable simply because a fundamental right is involved may also be demonstrated by considering the two constituent elements involved in any equal protection analysis. The first element may be denominated as the "basis of classification", such as wealth or race. This element has also been described as "the classifying fact" [39] or "the differentiating classification".[40]

The second element which is involved in any equal protection analysis is the "benefit" or "detriment" which government is distributing differentially on the basis of the classifying fact. The benefit or detriment may be the franchise, a particular educational resource, or a jail term. In every equal protection analysis the question is, or should be, whether the particular classifying fact can appropriately be used as a basis for the differential distribution of the benefit or detriment involved.

To say that the "compelling interest" test is applicable whenever a fundamental interest is involved is to say that we can determine whether an equal protection violation has occurred simply by examining the nature of the benefit or detriment which is differentially distributed, without regard to the nature or character of the classifying fact. It is to say that no distinctions with respect to fundamental interests can be made unless they are necessary to a compelling state interest. This argument falls of its own weight.

This does not indicate, or even imply, that the fundamentality of the

---

The qualified student who cannot afford the $1,000 tuition fee is denied the $2,000 grant which the state in effect makes to the student who can afford the $1,000 tuition fee. Cf. *McMillan* v. *Garlick*, 430 F.2d 1145 (2d Cir. 1970).

[39] Coons, Clune & Sugarman, Private Wealth and Public Education, p. 342.

[40] Mr. Justice Harlan in *Harper* v. *Virginia State Board of Elections*, 383 U.S. 663, 681 (1966) (dissenting opinion).

interest involved is either irrelevant or unimportant. The fundamentality of the interest has a significance to another, perhaps crucial, aspect of a proper analysis of the *Serrano* problem, to which we shall return.

The other leg on which the *Serrano* decision stands is that the "compelling interest" test is applicable to wealth as a differentiating classification, and that wealth is so used in this case. With the statement of principal that government should not be permitted to classify on the basis of wealth unless to do so is necessary to promote a compelling governmental interest, few could disagree.[41] Whether the *Serrano* case involves a discrimination based on wealth is another question. I believe it does not.

The *Serrano* case involves, instead, a discrimination based on ability to pay. The difference is subtle, sometimes difficult to grasp, but nevertheless important. A law prohibiting all people earning less than $3,000 per year from using a public park is a discrimination based on wealth; one forbidding entry to a park unless a three dollar admission fee is paid is a discrimination based on ability to pay. In one sense, it may be argued both come to the same thing: Neither the poor man nor his child can afford the three dollar admission fee, so they are fenced out just as surely as if they had been denied admission to the park because of the father's failure to earn more than $3,000 per year. However, from the viewpoint of equal protection theory, it makes a good deal of difference. It is much more difficult to justify a discrimination based on wealth than on ability to pay. For example, all would agree that the "compelling interest" test should be applicable to a law that forbad poor people from buying tickets to the municipal opera. But what about charging the poor man $15 for a seat? Or how about charging the poor man the same toll as the rich man on a state turnpike?

In short, the "compelling interest" test is always applicable to wealth discriminations.[42] But not all discriminations based on ability to pay are

[41] Even Mr. Justice Harlan (who has dissented from most of the equal protection cases on which plaintiffs rely in wealth discrimination cases) agrees that discrimination based on wealth is unconstitutional:

> It is said that a State cannot discriminate between the "rich" and the "poor" in its system of criminal appeals. That statement of course commands support... *Griffin* v. *Illinois,* 351 U.S. 12, 34 (1956) (dissenting opinion).

> The States, of course, are prohibited by the Equal Protection Clause from discriminating between "rich" and "poor" *as such* in the formulation and *application* of their laws. But it is a far different thing to suggest that this provision prevents the State from adopting a law of general applicability that may affect the poor more harshly than it does the rich. *Douglas* v. *California,* 372 U.S. 353, 361 (1963) (dissenting opinion) emphasis supplied as to the word "application").

However, strangely enough, Justice Harlan does not appear to require the application of the "compelling interest" test to wealth classifications. See *Dandridge* v. *Williams,* 397 U.S. 471, 489 (1970) (concurring opinion); *Shapiro* v. *Thompson,* 394 U.S. 618, 659–61 (1969) (dissenting opinion).

to be judged on the basis of this more stringent test. To argue that all discriminations based on ability to pay are subject to the "compelling interest" test would mean that government could never impose a uniform fee on all citizens.

When is fee paying or discrimination based on ability to pay unconstitutional? We know that in some cases it is not permitted. For example, in *Harper* v. *Virginia Board of Elections*[43] the Court struck down a $1.50 poll tax. The case involved, strictly speaking, not a discrimination based on wealth (although it is widely cited for this proposition), but a discrimination based on ability to pay (or fee-paying). Rich and poor alike were charged the $1.50 poll tax. The statute did not say to the poor man who manages by dint of great sacrifice to come up with the $1.50 poll tax, "You are not permitted to pay the $1.50 poll tax." The indigent citizen was denied the franchise only if he did not have the $1.50. The state would clearly have accepted the fee from an indigent person who was willing to pay the fee. Therefore, the statute discriminated on the basis of ability to pay, rather than wealth, although the effect may be and often is the same; namely, to fence out indigent voters.

The Court stated:

> A State violates the Equal Protection Clause of the Fourteenth Amendment whenever it makes the affluence of the voter *or* payment of any fee an electoral standard.[44]
>
> * * *
>
> To introduce wealth *or* payment of a fee as a measure of a voter's qualification is to introduce a capricious or irrelevant factor.[45]
>
> * * *
>
> [*W*]*ealth or fee paying* has, in our view, no relation to voting qualifications.[46]

An analysis similar to the one just undertaken for *Harper* can be made of *Serrano*. In *Serrano*, the state is not preventing or forbidding Baldwin Park from raising as much money for its educational system as Beverly Hills.[47] Baldwin Park is free to raise as much money for its educational system as it wishes. Baldwin Park's problem arises from the fact that, like the poor man who wants a seat to the municipal opera, it can't afford it.

---

[42] Except for so-called benign wealth discriminations, such as welfare payments (which discriminate in favor of the poor) or graduated income tax (which discriminates against the rich). On benign racial classifications, see "Developments in the Law—Equal Protection," 82 Harv. L. Rev. 1065, 1104–1120 (1969).

[43] 383 U.S. 663 (1966).

[44] 383 U.S. at 666; emphasis supplied.

[45] 383 U.S. at 668; emphasis supplied.

[46] 383 U.S. at 670; emphasis supplied.

[47] If it did, such a case would be condemned by *Hargrave* v. *Kirk*, 313 F. Supp. 944 (M.D. Fla. 1970), judgment vacated on other grounds, *sub nom. Askew* v. *Hargrave*, 401 U.S. 476 (1971).

Baldwin Park doesn't have the ability to itself pay for the kind of educational system it would like.

The *Harper* case and other cases cited in a footnote,[48] in which fee-paying has been condemned as violative of the equal protection clause, provide a guideline as to when discriminations based on ability to pay or fee-paying are unconstitutional; that is, when fundamentally important interests are involved.

It is at this point in the analysis that the fundamentality or importance of education becomes relevant. In short, fee-paying, or discrimination based on ability to pay, violates the equal protection clause only when the benefit or detriment differentially distributed is of fundamental importance. The California Supreme Court's discussion of the importance of education is an excellent one and fully supports the conclusion that the "compelling interest" test is applicable to the facts of that case because it involves a discrimination based on ability to pay in the distribution of a fundamentally important benefit. Needless to say, it is also obvious that California's present system of financing public education is not necessary to promote a compelling state interest, and it must therefore be struck down as unconstitutional.

The foregoing analysis, indicates that the judgment—if not all of the reasoning—of the California Supreme Court should be adopted by the United States Supreme Court. However, there is great doubt that this will occur.

The first major obstacle to an adoption of the *Serrano* judgment by the Supreme Court is, of course, the *McInnis* and *Burruss* cases. However, *McInnis* can be distinguished from *Serrano* on the ground that in *McInnis* the plaintiffs argued, not that the Constitution forbade discrimination based on wealth, but that the Constitution required the distribution of educational resources based on the "educational needs" of the students, whatever that is.[49] *Burruss* simply followed *McInnis*. Moreover, it may well be, as the California Supreme Court has suggested, that the *McInnis* and *Burruss* decisions are nothing more than a refusal by the Supreme Court to deal with the question at that time. These decisions were not, according to this view, a rejection of the constitutional position, but simply the practical equivalent of a denial of certiorari.[50] In any event, the

[48] For other cases in which fee-paying has been declared unconstitutional as it affects the poor, see *Griffin* v. *Illinois*, 351 U.S. 12 (1956); *Douglas* v. *California*, 372 U.S. 353 (1963); *Williams* v. *Oklahoma City*, 392 U.S. 458 (1969); and *Tate* v. *Short*, 401 U.S. 395 (1971).

[49] The *McInnis* plaintiffs went so far as to argue—in the first case dealing with economic equality of educational opportunity—that the equal protection clause required more than equal per pupil state expenditure for "culturally and economically deprived areas" in order to equalize the educational opportunity of children from these areas.

[50] The cases came up by way of an appeal from three judge courts.

Supreme Court knows how to overcome even a series of *per curiam* affirmances when it wants to.[51]

The second, and perhaps more serious, hesitation in predicting that the *Serrano* rule will be adopted by the United States Supreme Court is the tenor of decisions during the last term of court. To summarize, the 1970–71 term of the United States Supreme Court was disastrous from the point of view of civil rights and civil liberties advocates.[52]

More specifically, however, the Court has indicated what can only be described as an insensitivity to the claims of the poor. In *James* v. *Valtierra*,[53] the plaintiffs attacked under the equal protection clause a provision in the California Constitution which provided that no low rent housing project could be constructed by a state public body unless the project was approved by a majority of those voting at a community election. Because the provision required voter approval of housing only for the poor, the plaintiffs contended that the provision effected a wealth discrimination as well as a racial discrimination. The Court was unable to find any unconstitutional discrimination. The opinion deals explicitly only with the question of racial discrimination, which it rejects. The claim of wealth discrimination is obliquely and lightly brushed off: referendums "always disadvantage some groups." [54] The California constitutional provisions, according to the Court, "demonstrate devotion to democracy, not to bias, discrimination, or prejudice." [55] The dissent (Justice Marshall speaking for himself and Justices Brennan and Blackmun) saw the California constitutional provision as "an explicit classification on the basis of poverty".[56] For the dissenters, it was plain that "the

[51] E.g., *Baker* v. *Carr*, 369 U.S. 186, 278 (1962); *McGowan* v. *Maryland*, 366 U.S. 420, 511 (1961). See also *Minersville School District* v. *Gobitis*, 310 U.S. 586 (1940), where the Court gave plenary consideration to an issue which had previously been ruled on in a series of *per curiam* decisions. *Gobitis* was, of course, overruled in *West Virginia State Board of Education* v. *Barnette*, 319 U.S. 624 (1943).

[52] See, for example, the so-called February Sextet, led by *Younger* v. *Harris*, 401 U.S. 37 (1971), which sapped the vitality of *Dombrowski* v. *Pfister*, 380 U.S. 479 (1965); *Askew* v. *Hargrave*, 401 U.S. 476 (1971), which for the first time applied the doctrine of abstention to a Civil Rights Act (42 U.S.C. §1983) case; *Wyman* v. *James*, 400 U.S. 309, 324 (1971), Justice Blackmun's first majority opinion in which he rejected the welfare claimant's plea to privacy and stated, "[The welfare claimant] has the 'right' to refuse the [social worker's] home visit, but a consequence in the form of cessastion of aid ... flows from that refusal. The choice is entirely hers, and nothing of constitutional magnitude is involved", *Palmer* v. *Thompson*, 403 U.S. 217 (1971), holding that a city may close its swimming pools to avoid desegregating them; *McKeiver* v. *Pennsylvania*, 403 U.S. 528 (1971), limiting the extent to which procedural rights are available in juvenile court proceedings; and *Rogers* v. *Bellei*, 401 U.S. 814 (1971), holding that an American citizen by birth who was not born in this country may be involuntarily deprived of his citizenship by residing abroad.

[53] 402 U.S. 137 (1971).

[54] 402 U.S. at 142.

[55] 402 U.S. at 141.

[56] 402 U.S. at 144–5.

article explicitly singles out low income persons to bear its burden".[57] The fact that the majority explicitly treated only the question of alleged racial discrimination prompted this response in the dissenting opinion:

> It is far too late in the day to contend that the Fourteenth Amendment prohibits only racial discrimination; and to me, singling out the poor to bear a burden not placed on any other class of citizens tramples the values that the Fourteenth Amendment was designed to protect.[58]

If the *Valtierra* case says anything close to what the dissenters imply it says, the *Serrano* rule is in deep trouble.

Moreover, the Court last term showed a reluctance to expand further its application of the equal protection clause—and it has refused to do so in a case peculiarly relevant to the *Serrano* case. The case I refer to is *Gordon* v. *Lance*,[59] which involved an attack, on equal protection grounds, on a statute which required a 60 percent majority to pass a school bond issue. The plaintiffs argued that the equal protection clause was violated because in effect "no" voters were given votes of greater weight than "yes" voters and that there was no compelling state interest requiring "no" voters to be treated differently from "yes" voters.

By the time *Gordon* reached the Supreme Court, similar cases had come up in a number of courts, some decided one way and some the other. A case from California had been decided in favor of the plaintiffs—that is, the California decision held that the so-called extraordinary majority provision was unconstitutional as a violation of the equal protection clause.[60] The California Supreme Court opinion in the *Westbrook* case far outshone anything which had been previously written on the subject. The author of the opinion was Justice Sullivan, the same Justice Sullivan who wrote the California Supreme Court's decision in the *Serrano* case. In the *Gordon* case, the United States Supreme Court ruled in a fuzzy opinion by Mr. Chief Justice Burger that extraordinary majority provisions do not violate the equal protection clause. Despite the fact that Justice Sullivan's brilliant analysis in *Westbrook* was available to the Chief Justice when he wrote, the Chief Justice did not so much as give a passing nod to it. When *Westbrook* came to the Supreme Court later in the same term, the Court, in a one-sentence order, simply vacated the judgment entered by Justice Sullivan's Court, citing as authority the United States Supreme Court's decision in *Gordon* v. *Lance*. Whether a similar fate awaits Justice Sullivan's opinion in *Serrano* remain to be seen.

---

[57] 402 U.S. at 144.
[58] 402 U.S. at 145.
[59] 403 U.S. 1 (decided June 7, 1971).
[60] See Stern and Gressman, Supreme Court Practice (4th ed.) §312.

Conclusion

We may conclude with a few observations on procedural matters.

It is unlikely that the United States Supreme Court would have jurisdiction to review the judgment of the California Supreme Court in the *Serrano* case. At the present time the California judgment is not final, because the California Supreme Court has simply reversed the lower court's dismissal of the complaint and remanded the case for trial.[61] But even after trial, assuming the plaintiffs are successful, United States Supreme Court jurisdiction of this case is doubtful. This is because the California Supreme Court's judgment rests on state, as well as federal, grounds. The California Supreme Court interpreted the California Constitution as imposing the same obligations on the defendants as the equal protection clause of the federal Constitution imposes on them.[62] Accordingly, even if the United States Supreme Court ruled that the California Supreme Court had misinterpreted the Federal Constitution, the plaintiffs would still be entitled to the same judgment because of their rights under the California Constitution, on which the California Supreme Court, not the United States Supreme Court, has the last word. In effect, since the United States Supreme Court cannot change the result, it does not have jurisdiction.

As one who favors the result reached by the California Court in *Serrano*, I am not displeased that the United States Supreme Court appears not to have jurisdiction. In my view, the best chance for the adoption of the *Serrano* rule by the United States Supreme Court lies in delaying a decision on this issue for a few years. If the Supreme Court has an opportunity to see how the *Serrano* decision works in California, the high court might then be convinced to adopt it nationally. However, I fear that if it

[61] See Stern and Gressman, *Supreme Court Practice* (4th ed.) §3.12.

[62] The California Supreme Court decision (Slip op. 17 n.11) notes that "The complaint also alleges that the financing system violates [several provisions] of the California Constitution ... We have construed these provisions as 'substantially the equivalent' of the equal protection clause of the Fourteenth Amendment to the federal Constitution ... Consequently, our analysis of plaintiffs' federal equal protection contention is also applicable to their claim under these state constitutional provisions". This, it seems to me, establishes an adequate non-federal ground for the decision, so as to eliminate the United States Supreme Court's jurisdiction to review. See generally, Stern and Gressman, Supreme Court Practice (4th ed.) §3.31–3.32. The California Supreme Court's decision certainly does not "leave the impression that the Court probably felt constrained to rule as it did because of [decisions applying the Fourteenth Amendment]" (*Minnesota* v. *National Tea Co.*, 309 U.S. 551, 554–555 (1940)), nor that the California Supreme Court "felt under compulsion of Federal law [to hold as it did]" (*Missouri ex rel Southern R. Co.* v. *Mayfield*, 340 U.S. 15 (1950)). Indeed, the California Supreme Court was no doubt fully aware of the jurisdictional problem (see *Mental Hygiene Department of California* v. *Kirchner*, 380 U.S. 194 (1965)), and the language which we have quoted from the California Supreme Court decision was very probably inserted specifically for the purpose of providing an independent state ground for the decision which would defeat any attempt at United States Supreme Court review.

makes the decision in the next term or so, the result will be an overruling of *Serrano,* not only for the reasons heretofore set forth, but also because the replacements for Justices Black and Harlan are likely to be reluctant to begin their service with a decision that has only slightly less political implications than *Brown* v. *Board of Education.*

Moreover, the *Serrano* decision, unreviewed by the Supreme Court, is likely to have a healthy *in terrorem* effect on state legislatures—and perhaps Congress as well—encouraging them to eliminate the inequities in their present systems of financing public education. State legislatures must surely realize that their failure to correct the disparities in their own systems, can only encourage the Supreme Court to adopt the *Serrano* rule on a nationwide basis.[63]

[63] It is likely to be several years before the *Serrano* issue can come to the Supreme Court, especially if new cases are instituted in federal, rather than state, court, as has just occurred in Maryland. Federal court may seem at first glance more attractive because of the availability of a three-judge district court and a direct appeal from there to the Supreme Court, as occurred in *McInnis* and *Burruss.* However, since these decisions, the Supreme Court has made it reasonably clear that federal courts should abstain from deciding this issue in deference to state court adjudication. *Askew* v. *Hargrave,* 401 U.S. 476 (1971). Although the *Askew* decision seems questionable (cf. *Wisconsin* v. *Constantineau,* 400 U.S. 433 (1971)), if the Supreme Court adheres to it, plaintiffs in federal cases are likely to find themselves out of court without a decision on the merits.