The Journal of Law and Education

Volume 5 | Issue 1 Article 3

1-1976

Developments in Education Litigation: Equal Protection

Robert E. Lindquist

Arthur E. Wise

Developments in Education Litigation: Equal Protection

ROBERT E. LINDQUIST AND ARTHUR E. WISE*

The U.S. Supreme Court's decision in *Rodriguez v. San Antonio*[1] is popularly viewed as a turning point in litigation efforts to achieve equal educational opportunity. Since the Court's decision, which upheld the constitutionality of the Texas school finance system, many believe that the federal courts are closed to these reform efforts and that state judicial challenges are the only remaining avenues for school finance reform. This position may be an over-reaction to the opinion of the majority of the Court, however. While the *Rodriguez* decision represents something of a setback to the recent large scale litigation efforts in school finance, the goal of these efforts can still be achieved through the federal courts. Litigation to achieve equal educational opportunities for all children can still be successful, although future approaches may be slower and less sweeping.

Equal Educational Opportunity Litigation

School Finance: The Genesis

The attempt to formulate a cognizable legal theory or standard for equality of educational opportunity faces a myriad of difficulties. No social concensus exists as to the proper function of education. Societal goals for education are ill-defined and often conflicting. Local control over schooling is believed to be an operational reality, indeed, a desirable feature of American education.

---

* Robert E. Lindquist is a legal/social science research analyst with the National Institute of Education, Department of Health, Education, and Welfare.

Arthur E. Wise, formerly Associate Director for Basic Skills, National Institute of Education, Department of Health, Education, and Welfare, is currently Visiting Scholar, E.T.S. Policy Research Institute.

The opinions expressed herein are those of the authors and do not necessarily reflect the position or the policy of the National Institute of Education, Department of Health, Education, and Welfare.

The authors gratefully acknowledge the advice and criticism of R. Steven Browning, Donald G. Bushell, Jr., David L. Kirp, David C. Long, F. Raymond Marks, Daniel C. McSchember, Michael S. Sorgen, Tommy M. Tomlinson and Meyer Weinberg in the preparation and development of this article.

[1] San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1 (1973), *rev'g*, 377 F. 280 (W.D. Tex. 1972) [hereinafter cited as Rodriguez].

Social science research often confounds delineation of the effects of the educational process rather than elucidating them. Valid measures of educational quality remain elusive. Traditional conceptions of the judicial role militate against involvement in education. Education disputes are viewed as essentially political questions, devoid of any judicially manageable standards. Even the number[2] and precision[3] of possible standards pose difficulties. Nonetheless, much of recent education litigation is founded on the assumption that a justiciable definition of equal educational opportunity can be formulated.

Initially, the classification or "educational needs" definition was chosen to test the constitutionality of the wide disparities in per-pupil expenditures. In *McInnis v. Shapiro*[4] the plaintiffs asserted that the equal protection provision of the fourteenth amendment required public school expenditures to be made only on the basis of students' educational needs[5]. The standard proved notably unsuccessful.[6] The three judge federal district court in Illinois ruled that

---

[2] Although no single, universally agreed upon standard for equal education opportunity has been developed, a range of possible standards can be suggested. These standards may be defined in nine basic ways: (1) the negative definition: which delineates what equality is not, rather than what it is; (2) the full-opportunity definition, primarily an input standard, provides that each student must be afforded the opportunity to reach his full potential; (3) the foundation or minimum-adequacy definition, another input standard, stipulates that a satisfactory minimum offering be guaranteed to each pupil; (4) the minimum-attainment definition, an output standard, asserts that students be guaranteed a specified level of achievement; (5) the leveling definition; provides that resources be allocated in inverse proportion to student ability; (6) the competition definition, assumes that differing student capacities require that resources should be allocated in direct proportion to ability; (7) the equal dollars-per-pupil definition, assumes that parity of resources, as measured in dollars, is required; (8) the maximum-variance-ratio definition, assumes that mathematical precision in equalization is not possible, only that approximate parity as defined by some arbitrary ratio of variation, is necessary to achieve equal opportunity; (9) the classification definition, requires that students be classified on the basis of their educational needs or abilities and interests. *See generally* WISE, RICH SCHOOLS, POOR SCHOOLS: THE PROMISE OF EQUAL EDUCATIONAL OPPORTUNITY. (1968) [hereinafter cited as RICH SCHOOLS, POOR SCHOOLS]. McDermott and Klein propound similar definitons (1) equal dollars per-pupil; (2) dollars adjusted according to pupil needs; (3) maximum variable ratio; (4) negative standard; (5) inputs; (6) outputs; (7) minimum adequacy. *See* MeDermot & Klein, *The Cost-Quality Debate in School Finance Litigation, etc.*, 38 LAW & CONTEMP. PROB. 415, at 415–23 (1974) [hereinafter cited as *The Cost-Quality Debate*].

These standards, like all definitions, are somewhat arbitrary. They can be and have been, modified or combined to reach an acceptable, justiciable standard.

[3] Early critics of the application of these standards to school finance litigation asserted that they were too vague to be judicially cognizable. *See e.g.* Kurland, *Equal Educational Opportunity: The Limits of Constitutional Jurisprudence Undefined*, 35 U. CHI. L. REV. 583, 597 (1968), in THE QUALITY OF INEQUALITY: URBAN AND SUBURBAN PUBLIC SCHOOLS 63 (C. Daly ed. 1968) (by implication) [hereinafter cited as *The Limits of Constitutional Jurisprudence*]; Kirp, Book Review, 78 YALE L. J. 908, at 916 (1969).

[4] 293 F. Supp. 327 (N.D. Ill. 1968), *aff'd mem. sub. nom.*, McInnis v. Ogilvie, 394 U.S. 322 (1969) [hereinafter cited as McInnis].

[5] *Id.*, at 329, 331.

[6] *Id.*, at 336, *Accord.* Burruss v. Wilkerson, 310 F. Supp. 572 (W.D. Va. 1969), *aff'd*, 397 U.S. 322 (1969). Other school finance suits failed even to reach culmination. These suits were dismissed on the merits, *see e.g.*, Board of Educ. v. Oklahoma, 286 F. Supp. 845 (W.D. Okla. 1968), *aff'd* 409 F. 2d 665 (10th Cir. 1969); dismissed for lack of prosecution, *see e.g.*, Board of Educ. of Detroit v. Michigan, Civ. No. 103342 (Cir. Ct. Wayne Cty. Mich. 1969); or were

equalization on the basis of pupils' educational needs was beyond the judicial ken. The court found "educational needs" to be a "nebulous concept" and that the " . . . lack of any judicially manageable standards made this controversy nonjusticiable."[7] Ruling that the plaintiffs' complaint presented a political question in the traditional sense of the term, the court found ". . . the allocation of revenue is a basic policy decision more appropriately handled by a legislature than a court."[8] The court also emphasized that the legislature was " . . . constantly upgrading the quality of education"[9] and that the financing system was designed to allow localities to determine the importance to be placed upon public schools.[10] The fourteenth amendment was not found to require that public school expenditures be made solely on the basis of the educational needs of the student.

In retrospect, a more significant legal challenge to state systems of public school financing was the California Supreme Court's decision in *Serrano v. Priest.*[11] The *Serrano* suit challenged the constitutionality of California's

---

voluntarily abated by the plantiffs, *see e.g.*, Bellow v. Wisconsin, Civ. No. 127-060 (Cir. Ct. Dane Cty. Wisc. 1969).

[7] McInnis, 293 F. Supp. at 329 & n. 4 respectively.

[8] *Id.*, at 332.

[9] *Id.*, at 334.

[10] *Id.*, at 333.

[11] 5 Cal. 3d 584, 487 P. 2d 1211, 96 Cal. Rptr. 601 (Cal. 1971), *on review of demurrer* [hereinafter cited as Serrano]. See notes 134–161 and accompanying text *infra*. The *Serrano* ruling was the first decision requiring equalization of education expenditures. It was quickly relied upon for precedent. At the peak period, in August of 1972, more than 50 actions challenging the constitutionality of state school financing system had been brought in 31 states. *See* U.S. OFFICE OF EDUCATION, TASK FORCE ON SCHOOL FINANCE, ANALYSIS OF INTRA-STATE SCHOOL FINANCE COURT CASES, compiled by Lawyers' Committee for Civil Rights Under Law (August, 1972); S. Browning & M. Lehtman, *Law Suits Challenging State School Finance Systems*, App. "F," to INEQUALITY IN SCHOOL FINANCING: THE ROLE OF THE LAW (U.S. Commission on Civil Rights, Clearinghouse Publication No. 39, 1972) [hereinafter cited as THE ROLE OF LAW].

The success of this new wave of litigation was immediate; school finance laws were rapidly over-turned in Texas, Rodriguez v. San Antonio Indep. Sch. Dist., 337 F. Supp. 280 (W.D. Tex. 1972), *rev'd* 411 U.S. 1 (1973); Minnesota, Van Dusartz v. Hatfield, 334 F. Supp. 870 (D. Minn. 1971); Arizona, Hollins v. Shoftstall, No. C-253652 (Super. Ct. Ariz., 6 June, 10 July 1972) *summarized at* 2 Cch Pov. L. REP. para. 16,271, *rev'd* 110 Ariz. 88, 515 P. 2d 590 (Sup. Ct. Ariz. 1973); Kansas, Caldwell v. Kansas, Civ. No. 50616 (Dist. Ct. Kan., 30 Aug. 1972), *summarized at* 2 Cch Pov. L. REP. para. 16,079, *mem. opinion* (Dist. Ct. Kansas, 5 July 1973) (new state financing system conforms with constitutional requirements), *summarized at* 2 Cch Pov. L. REP. para. 17,853; Michigan, Governor (Milliken) v. State Treasurer (Green), 389 Mich. 1, 203 N.W. 2d 457 (Mich. 1973), *vacated,* 390 Mich. 389, 212 N.W. 2d 711 (Mich. 1973); New Jersey, Robinson v. Cahill, 118 N.J. Supp. 223, 287 A. 2d 187 (Law Div. N.J. 1972), *suppl. op.*, 119 N.J. Supp. 40, 289 A 2d 569 (Law Div. N.J.1972), *aff'd on state constitutional grounds,* 62 N.J. 473, 303 A. 2d 273 (N.J. 1973), *cert. denied sub nom.*, Dickey v. Robinson, 414 U.S. 976 (1973). *Also see* Sweetwater Cty Planning Comm. v. Hinkle, 491 P. 2d 1234 (Wyo. 1971), *juris. relinquished,* 493 P. 2d 1050 (Wyo. 1972); State *ex rel.* Woodahl v. Straub, 520 P. 2d 776 (Mont. 1974) (district power equalizing scheme constitutional); Blase v. State of Illinois, 55 Ill. 2d 94, 302 N.E. 2d 46 (Ill. 1971) (state must assume at least 51% of educational financing). *Contra,* Jenson v. State Bd. of Tax Comm'rs No. 24,474 (Cir. Ct. Ind., 15 Jan. 1973), *summarized at* 2 Cch Pov. L. REP. para. 16,875; Spano v. Board of Educ., 68 Misc. 2d 804, 328 N.Y.S. 2d 229 (N.Y. 1972); *cf.* Parker v. Mandel, 344 F. Supp. 1068 (D. Md. 1972) (rational relationship test proper standard of review); Dade Cty Classroom Teachers' Ass'n v. State Bd. of Educ., 269 So. 2d 657 (Fla. 1972)

system of public school financing, a system which also relied heavily on local property taxation and which also produced substantial disparities in the amount of revenue available to the state's school districts. The plaintiffs in *Serrano* alleged that this financing scheme created and perpetuated " . . . substantial disparities in [the] quality and extent of availability of educational opportunity"[12] in the state. In upholding the plaintiffs' allegation, the California Supreme Court ruled that the principle of equal protection would be offended if the state maintained a system of public school financing that conditioned the quality of a child's education on the wealth of his residence.[13] The court held that if the plaintiffs' factual allegations were correct, the California public school finance scheme probably violated both the fourteenth amendment to the U.S. Constitution and the equal protection guarantees inherent in the California State Constitution.[14] The California Supreme Court then remanded the case to the superior court to be tried on its merits. As a result of this trial, the plaintiffs' allegations were held true.[15] In its ruling on the facts of the case, the trial court concluded that a significant relation between education expenditures and educational outcomes does exist.[16] On the basis of this inequality, the court held that the state's school finance system violated equal protection guarantees.[17]

(remanded for clarification of basis for dismissal). Since *Rodriguez* began the third phase of school finance litigation, state constitutional violations have been found only in Connecticut, Horton v. Meskill, 31 Conn. Supp. 377, 332 A. 2d 113 (Super. Ct. Conn. 1974). The constitutionality of similar financing systems has been upheld in Idaho, Thompson v. Engelking, 537 P. 2d 635 (Idaho, 1975); Oregon, Olsen v. Oregon, No. 72-0569 (Cir. Ct. Ore., 25 Feb. 1975) (summary conclusions of law) (slip opinion), *appeal docketed,* No. 24035, Sup. Ct. Ore., 15 April 1975; Washington, Northshore v. Kinnear, 84 Wash. 2d 685, 530 P. 2d 178 (Wash. 1974). Similar actions are pending in Georgia, Thomas v. Stewart, No. 8275 (Super. Ct. Polk Cty, Ga., filed 20 Dec. 1974); Massachusetts, Timilty v. Sargent, Civ. No. 47055 (Super. Ct. Suffolk Cty, Mass., filed 9 Apr. 1973); New York, Board of Educ. v. Nyquist, No. 8208-1974 (Super. Ct. Nassau Cty, N.Y., filed 18 June 1974); West Virginia, Pauley v. Kelly, No. CA-75-1268 (Cir. Ct. Kanawha Cty, W.Va., filed 14 Apr. 1975). *See generally* LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW, A SUMMARY OF STATE-WIDE SCHOOL FINANCE CASES (May 1974).

[12] *As cited in* Serrano, 487 P. 2d 1241, at 1244.

[13] This standard is one of several possible formulations under the negative definition. *See* WISE, RICH SCHOOLS, POOR SCHOOLS at 146. This particular formulation has become known as the "fiscal neutrality" doctrine. *See* COONS, CLUNE & SUGERMAN, PRIVATE WEALTH AND PUBLIC EDUCATION (1970) [hereinafter cited as PRIVATE WEALTH].

[14] Serrano, 487 P. 2d at 1249 & n. 11 respectively, *citing* U.S. CONST., amends. V., XIV, sec. 1 *and* CAL. CONST., art 1, secs. 11, 21.

[15] Serrano, No. 938,254 (Super. Ct. Cal. 10 April 1974), Memorandum Opinion Re Intended Decision (slip opinion) *summarized at* 2 Cch POV. L. REP. para. 18,835 [hereinafter cited as Memorandum Opinion]. See text accompanying notes 135–37, 160 *infra*.

[16] Serrano, at 89, 94. The California Supreme Court's opinion on review of demurrer failed to reach this key question. *Id.*, 487 P. 2d 1241, at 1251, 1253 nn. 13, 14, 16. Determination of the truthfulness of the factual allegations was remanded to the trial court. It was this court's responsibility to ascertain whether the plaintiffs could marshall sufficient evidence to establish a relation between education cost and quality. It is likely that the trial court's final decision turned upon this relation and the injuries which might result from disparities in school expenditures.

[17] Serrano Memorandum Opinion, at 101, 106.

Rodriguez v. San Antonio

The Majority Opinion

The leading federal court decision on the issue of unequal education expenditures is *San Antonio Independent School District v. Rodriguez*[18]—a case that had the reverse outcome. In this case, the U.S. Supreme Court reviewed a federal district court decision which found the Texas State system of school financing unconstitutional. The lower court relied heavily on the *Serrano* precedent and constructed its deliberation on the familiar "two-tier" approach to equal protection analysis,[19] concluding that "strict judicial scrutiny" was the proper standard for review. This conclusion was grounded on the court's finding that the Texas public school financing system infringed upon education as a fundamental interest and invidiously discriminated against poor people as a suspect class.[20]

Based on this determination the court ruled that equal protection of the laws was thereby offended. In reviewing the federal district court's ruling in *Rodriguez,* the U.S. Supreme Court examined this rationale in detail. The Court particularly scrutinized the operation of the Texas system of school finance and its effect upon poor people. The Court also closely examined the role of education in our democratic system of government.

The question of invidious discrimination against children living in "low-wealth" school districts was the Supreme Court's initial focus. The Court attempted to determine whether the Texas system operated to the disadvantage of these children as a suspect class. Curiously, it was not sufficient for the majority that the system discriminates because " . . . some poorer people receive less expensive educations than other more affluent people,"[21] the definition employed by the federal district court and courts in other school finance cases.[22] Mr. Justice Powell, writing for the majority, found that such

---

[18] 411 U.S. 1 (1973), *rev'g*, 337 F. Supp. 280 (W.D. Tex. 1972).

[19] *See e.g.*, United States v. Carolene Products, 304 U.S. 144, at 152 n. 4 (1938) (dictum); Shapiro v. Thompson, 394 U.S. 618 (1969). *See generally* Tussman & tenBroek, *The Equal Protection of the Laws*, 37 CALIF. L. REV. 341 (1949); *Developments in the Law: Equal Protection*, 82 HARV. L. REV. 1065 (1969) [hereafter cited as *Developments*]. *See also* WISE, RICH SCHOOLS, POOR SCHOOLS at 163-95; COONS, CLUNE & SUGARMAN, PRIVATE WEALTH at 200-434 which discuss specifically the application of equal protection analysis to public school financing.

[20] Rodriguez, 337 F. Supp. at 282-83.

[21] *Id.*, 411 U.S. 1, at 19. Some confusion does exist over whether the class should be defined as poor people or as poor people living in "poor" districts or as "poor" districts regardless of the wealth of its individual residents. The effect of the differences in these definitions is significant. *See* Goldstein, *Interdistrict Inequalities in School Financing: A Critical Analysis of Serrano v. Priest and its Progeny*, 12 U. PA. L. REV. 504, at 519-34 (1972) [hereinafter cited as *Interdistrict Inequalities*].

[22] *See e.g.*, Rodriguez, 337 F. Supp. at 285; Van Dusartz v. Hatfield, 334 F. Supp. at 872; Serrano v. Priest, 487 P. 2d at 1244; Robinson v. Cahill, 287 A. 2d at 213-14, 217 for the previous acceptance of a substantially equivalent definition of the injured class.

Wealth has been regarded as a suspect classification in other areas. *See* McDonald v. Board of Election Comm'rs. 394 U.S. 802, 807 (1969) (by implication) (strict scrutiny not invoked because race or wealth, ". . . two factors which would independently render a classification

people were not absolutely deprived of education, nor could they be characterized as functionally indigent.[23] Nor, Justice Powell ruled, could it find "that the poorest people—defined by reference to any level of absolute impecunity—are concentrated in the poorest districts."[24] Finally, Justice Powell held that wealth discrimination could not be defined as discrimination " . . . against all those who, irrespective of their personal incomes, happen to reside in relatively poorer school districts."[25] The Court ruled that this view suggests that the disadvantaged class includes every child in every district except the wealthiest. While this was precisely the complaint made by the plaintiffs, Justice Powell concluded without explanation:

> [t]he system of alleged discrimination and the class it defines have none of the traditional indicia of suspectness: The class is not saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extra-ordinary protection from the majoritarian political process.[26]

---

suspect," were not at issue); Harper v. Virginia Bd. of Elections, 383 U.S. 663, 668 (1966) (". . . lines drawn on the basis of wealth or property, like those of race . . . are traditionally disfavored"); Griffin v. Illinios, 351 U.S. 12 (1956) (appellate review cannot be conditioned on the basis of wealth). *See generally* WISE, RICH SCHOOLS, POOR SCHOOLS at 49-92.

[23] Rodriguez, 411 U.S. at 22-23, 25.

[24] *Id.*, at 23. *See also Id.*, at 20, 25, 27.

[25] *Id.*, at 20. *See also Id.*, at 25, 27.

[26] *Id.*, at 28. *Contra, Id.*, at 91, 97 (Marshall J., dissenting opinion).

The Court's formulation of and ultimate decision on the issue of wealth discrimination was apparently dependent upon its acceptance or rejection of certain social science research findings.

The majority seriously faulted an affidavit, prepared by Professor Joel Berke, on which the plaintiffs (appellees) had relied to demonstrate a relation between low educational expenditures and poor people. Justice Powell noted Goldstein's severe criticisms of the affidavit's methodology (*Interdistrict Inequalities*, U. PA. L. REV., at 523-24, 523 n. 67), and echoed his "grave doubts" about the validity of the affidavit's conclusions. Rodriguez, 411 U.S. 1, at 15 n. 38. Justice Powell's own criticisms were sharp. He challenged the affidavit's use of only a 10% survey of the state's school districts, suggesting that the sample size and the selection of districts at the spending extremes was misleading. He stated that 90% of the districts represented in the survey actually showed an inverse correlation between expenditures and individual wealth. He emphasized that ". . . the appellees' proof fails to support their allegations . . . " and that ". . . no factual basis exists upon which to found a claim of comparative wealth discrimination." *Id.*, at 26, 27 (footnotes omitted).

Justice Powell's own conclusions on the issue are grounded, in large part, on a student note in the YALE LAW REVIEW. He refered to the note as an exhaustive study of school districts in Connecticut, and cited with strong approbation, the note's assertion that "'[i]t is clearly incorrect . . . to contend that the poor live in "poor" districts. . . . Thus a major factual assumption . . . that the educational financing system discriminates against the poor is simply false. . . .'" *Id.*, at 23, *citing* Note. *A Statistical Analysis of the School Finance Decisions: On Winning Battles and Losing Wars*, 81 YALE L. J. 1303, at 1328–29 at 1329 (1972) [hereinafter cited as *A Statistical Analysis*]. Justice Powell's "authority," like the plaintiffs' before it, has been vigorously criticized for its theoretical and methodological errors. Grubb and Michelson charge that the YALE note was ". . . incorrect in its statistical inferences and most of its theoretical analysis." Grubb & Michelson, *Public School Finance in a Post-Serrano World*, 8 HARV. CIV. RIGHTS-CIV. LIB. L. REV. 550, at 552 (1973). After re-analysis of Connecticut school financing data and comparative analysis in Maryland, Massachusetts, and South Carolina, Grubb and Michelson concluded the opposite of the YALE note: ". . . the poor now tend to be in

However, the evidence for these "conclusions" is not to be found in the majority's opinion. Indeed, it may be argued, these "conclusions" are the very premises which the action was brought to test.

The Court's consideration of the second domain of the strict scrutiny rationale—the question of whether education was a fundamental interest—was equally unfavorable. In this context the majority closely scrutinized the role of education in our system of government. Justice Powell concluded:

> [e]ducation, of course, is not among the rights afforded explicit protection under our Federal Constitution. Nor do we find any basis for saying it is implicitly so protected.[27]

The majority thereby rejected the contention that education is an implicit fundamental interest " . . . because it bears a particularly close relationship to other rights and liberties accorded protection under the Constitution."[28]

---

districts with relatively lower revenues and with relatively lower property valuation." *Id.*, at 559. Another study funded by the National Institute of Education, confirmed this conclusion. Utilizing data on *all* school districts in Texas and *all unified* school districts in California, the study found statistically significant correlations (.40 and .34 respectively) between local expenditure levels and individual wealth. Inverse correlations between expenditures and the presence of Mexican-American students were also observed. BRISCHETTO & ARCINIEGA, INEQUALITIES IN EDUCATIONAL RESOURCES: THEIR IMPACT ON MINORITIES AND THE POOR IN TEXAS AND CALIFORNIA (NIE Grant No. NE-G-3-0062). *Also see* Clune, *Wealth Discrimination in School Finance,* 68 NW. U. L. REV. 651 (1973); Harrison, *What Now After San Antonio Independent School District v. Rodriguez?: Electoral Inequality and the Public School Finance Systems in California and Texas,* 5 RUTGERS CAMDEN L. J. 191 (1974).

Although these studies raise serious doubts about the validity of the Court's principal authority and the Court's own findings on the relation between expenditures and wealth, they fail to answer several threshold questions,

> . . . including whether a bare positive correlation or some higher degree of correlation is necessary to provide a basis for concluding that the financing system is designed to operate to the particular disadvantage of the comparative poor, and whether a class of this size and diversity could even claim the special protection accorded 'suspect' classes. Rodriguez, 411 U.S. at 26 (majority opinion) (footnotes omitted).

See Baldus & Cole, *Quantitiative Proof of Intentional Discrimination in Judicial and Administrative Proccedings* 31–59 (unpublished paper presented at the Annual Meeting of the Mid-west Political Science Association, Chicago, Ill., May 1975); Winch & Campbell, *Proof? No. Evidence? Yes. The Significance of Tests of Significance,* 4 AM. SOCIOLOGIST 140 (1969) on the appropriateness of statistical significance in the judicial context. *Also see* Brest, *Palmer* v. *Thompson: An Approach to the Problem of Unconstitutional Legislative Motive,* 1971 SUP. CT. REV. 95; Ely, *Legislative and Administrative Motivation in Constitutional Law,* 79 YALE L. J. 1205 (1970). *See* note 47 *infra.*

[27] *Id.*, at 35. Education guarantees are, of course, explicitly delineated in most state constitutions. *But see* IOWA CONST., art. 9, 1st, sec. 15, art. 9, 2d, secs. 1, 3, 7; MASS. CONST., ch. V, sec. II, sec. 91; MISS. CONST., art. 8, secs. 201 (1960), 205 (1960), 213-B; N.H. CONST., pt. II, art. 83, *construed in* Fogg v. Board of Education, 76 N.H. 296, 82 A. 173 (1912); S. C. CONST., art. 11, secs. 5, 6, *construed* in Mosley v. Welch, 209 S.C. 19, 39 S.E. 2d 133 (1964). See notes 90–93 and accompanying text *infra.*

[28] Rodriguez, at 35. *Contra, Id.*, at 102–03 (Marshall, J. dissenting opinion). See text accompanying notes 60–64 *infra.* However, some lower courts had found education to be a fundamental interest. *See e.g.*, Orway v. Hargraves, 323 F. Supp. 1155 (D. Mass. 1971); Hosier v. Evans, 314 F. Supp. 316 (VI. 1970); *cf.* Hobson v. Hansen, 269 F. Supp. 401, 508 (D. D.C. 1967). *See* note, 112 *infra.*

The Court's holding that neither a suspect class nor a fundamental right was involved, ended its examination of the Texas school finance system under the strict scrutiny doctrine.

The constitutionality of the Texas system of school finance under the less stringent "rational relationship" test was also at issue. Constitutionality in light of this standard of review " . . . requires only that the system bear some rational relationship to legitimate state purposes."[29] Under this test the Court must only find that the system advances the state's purpose. The majority found that the Texas system was predicated on two goals: the state's first purpose is to assure " . . . a basic education for every child in the State, . . . " Its second purpose is to encourage " . . . a large measure of participation in and control of each district's schools at the local level."[30]

The Court began its examination by analyzing the effect of the operation of the school financing system on the state's first purpose or goal—to provide a basic education for every child. The majority concluded that the system did meet the minimal standard of rationality by advancing this goal. It found that the finance system allowed the maintenance of an "adequate" level of education for the students of the state.[31] The majority based this conclusion

---

[29] Rodriguez, 411 U.S. at 40. *See generally Developments,* 82 HARV. L. REV. 1065, at 1077–87.

[30] Rodriguez, 441 U.S. at 49.

[31] *Id.,* at 24, 36–37, 49. The Majority's reliance upon its determination that the State of Texas maintains an "adequate" system of public education exemplifies a general retrenchment on Constitutional issues which has marked Burger Court jurisprudence. *See* note 74 and accompanying text *infra*. A useful doctrinal framework for analysis of the majority's holding on the issue of school financing is found in Professor Michelman's: *The Supreme Court, 1968 Term, Foreward: On Protecting the Poor through the Fourteenth Amendment,* 83 HARV. L. REV. 7 (1969) [hereinafter cited as *On Protecting the Poor*].

This framework employs a "minimum protection-equal protection" dichotomy in analyzing adjudication on cases alleging invidious economic discrimination. The bifurcation suggested in such cases is grounded on the assumption that a ". . . duty to extend protection against certain hazards [injuries, see note 48 *infra*] need not entail . . . 'equalization' of treatment of circumstances beyond the necessity to obviate the hazard." *Id.,* at 11. Michelman posits that in certain cases ". . . justice may be satisfied as long as the prevailing social and economic institutions afford every one a fair opportunity to derive . . . whatever needs are considered 'basic,'" *Id.,* at 14. Further, he asserts that one of these "basics" is ". . . that each child must be guaranteed the means of developing his competence." *Id.,* at 16. Education, of course, is or should be a principal social instrument for the development and acquisition of the individual's competencies.

When Michelman applied this analysis to education financing he foreshadowed the spirit of the majority's holding.

> In abstract discourse it is not uninteresting to observe that, in one important respect, minimum protection emerges as the *more conservative formulation* of the state's duty. For the demands of minimum protection can, *in principle,* be satisfied by a state-aid system of 'flat' or 'foundation' grants which assure to each district an acceptable minimum-resource per pupil at a tolerable sacrifice level, but leave each district free to repair to its own unequalized tax base for some additional level of funding as long as the competitive-inequality gap does not grow too large. But this can *never satisfy* an equal protection doctrine . . . *Id.,* at 57 (emphasis added).

Michelman continues that in a market oriented, technological society, ". . . justice demands minimum educational assurances, and the minimum is significantly a function of the maximum and to that extent calls for equalization." *Id.,* at 58. In other words, the minimum

on citation to several sections of the Texas Educational Code which prescribed student/teacher ratios, accreditation and teacher-qualification criteria, provided for free textbooks and pupil transportation and mandated a minimum school expenditure level.[32] In so doing, Justice Powell glossed over the relevance of substantial financial and educational inequalities inherent in the Texas system. While Justice Powell purports that the statutory provisions cited regulate the quality of education in Texas, he failed to delineate any standard by which the quality of education could actually be judged. Moreover, he failed to define the level of proof required to demonstrate inadequacy in the educational system.[33]

---

educational assurances necessary to gaurantee justice in our competitive society require resources to be very nearly equalized.

> It thus appears that manifestations of minimum protection thinking in school finance litigation—in the definition of a grievance and fabrication of a remedy—will tend towards results similar to those contended for by a more familiar style of equal protection argument, . . . *Id.*, at 58–59.

The doctrine of "adequacy" or "minimal protection" is suggestive of the long discredited doctrine of substantive due process. One commentator, in fact, states that there are advantages in applying a revitalized version of substantive due process to the problem of inequity in education financing. Kurland, *The Limits of Constitutional Jurisprudence*, 35 U. CHI. L. REV. 583, at 591 (1968). *See also* McInnis, 293 F. Supp. 327, at 331 n. 11 (dictum) for a similar suggestion from the bench. Judicial intervention under the aegis of substantive due process is echoed by other commentators as well. *See e.g.*, Goldstein, *Interdistrict Inequalities*, 12 U. PA. L. REV. 504, at 518; Gunther, *The Supreme Court, 1971 Term, Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, at 8, 21, 23 *passim* (1972) [hereinafter cited as *A Model for a Newer Equal Protection*]: McClung, *Do Handicapped Children Have a Legal Right to Minimal Adequate Education*. 3 J. L. & EDUC. 153, at 161 n. 37 (1974): Michelman, *On Protecting the Poor*, 83 HARV. L. REV. 7, at 17, 33–34, *passim;* Tribe, *The Supreme Court, 1972 Term, Foreword: Toward a Model of Roles in the Due Process of Life and Law*, 87 HARV. L. REV. 1 (1973) ; *Developments*, 82 HARV. L. REV. 1065, 1131. *Contra*, McCloskey, *Economic Due Process and the Supreme Court: An Exhumation and Reburial*, 1962 SUP. CT. REV. 34 (1962), in THE SUPREME COURT AND THE CONSTITUTION (P. Kurland ed. 1965).

[32] Rodriguez, 411 U.S. at 45 & nn. 89–97, *citing* TEX. EDUC. CODE ANN. secs. 11. 26 (5), 12.01–12.04, 16.13–19, 16.45, 16.51–16.63, 16.301 et seq. However, the majority failed to cite any evidence of the actual enforcement of these provisions or of the effect of their operation in Texas school districts.

[33] The commentator is left with the problem of assaying the Court's new standard of "minimum protection"—adequacy of educational opportunity. *See* note 31 *supra*. Professor Kurland propounds a test of ". . . any fundamental decison based on the equal protection clause . . ." which would appear apropos. Kurland, *The Limits of Constitutional Jurisprudence Undefined*, 35 U. CHI. L. REV. 583, 592.

Professor Kurland states "[t]he first requirement is that the constitutional standard be a simple one." *Id.* Under this requirement the simplicity of a standard requiring equality must be weighed against a standard requiring adequacy. Equality is a relatively straight-forward concept; it has the virtues of being measurable (at least roughly) and of being constant. Conversely, "adequacy" is a normative concept. An adequacy standard would require general agreement on complex and contraversial educational factors, factors which vary in place and time and with personal values. An adequacy standard would demand enough of something, but enough of what—enough pupil expenditures, enough books, enough days of schooling? Even after it has been established what factors are required for an adequate education, their amounts or their qualities must still be determined. Moreover, what may be adequate for one student may not be adequate for another. Educational needs vary considerably. On its face the

Apparently, the principle utility of employing the foundation or minimum-adequacy standard was to allow the Court to escape from making any determination on the quality of education received by poor children in Texas. The majority's discussion of the relation between educational costs and educational quality illustrates this fact:

> On even the most basic questions in this area the scholars and educational experts are divided. Indeed, one of the major sources of controversy concerns the extent to which there is a demonstrable correlation between educational expenditures and the quality of education.

---

adequacy standard would appear to require a sophisticated determination about a myriad of complex and often contravertable educational questions. This could hardly be considered as a "simple constitutional standard."

Professor Kurland continues, "[t]he second requirement is that the judiciary have *adequate* control over the means of effectuating enforcement." *Id.*, at 592 (emphasis added). The application of Professor Kurland's test here, would force us to define "adequacy" by using adequacy. As a general rule, the more complex a standard the more difficult it will be to enforce. Although the judiciary lacks any independent power of compelling compliance with decisions, this element of the test does assume the judiciary has some means to enforce them. Ultimately this means must be the power of moral suasion, the courts' so-called "legitimating mystique."

Professor Kurland posits that the final requirement ". . . is that the public acquiesce—there is no need for agreement, simply the absence of opposition—in the principle and its application." *Id.*, at 592. Predicting how the public will react to anything requires greater prophetic abilities than can be marshalled here. Albeit, the mere existence of the force that Professor Kurland himself has referred to as the "egalitarian revolution" would appear to be prima facie evidence of opposition to anything less than parity. Kurland, *The Supreme Court, 1963 Term, Foreword: 'Equal in Origin and Equal in Title to the Legislative and Executive Branches of Government'*, 78 Harv. L. Rev. 143, at 144 (1964). Although empirical evidence of the impact of widespread public opposition to judicial policies is scarce, research on Wisconsin state supreme court elections indicates that the court remained untouched by public intervention even after several highly controversial decisions. *See* Lansky & Silver, *Popular Democracy and Judicial Independence: Electorate and Elite Reactions to Two Wisconsin Supreme Court Elections*, 1967 Wis. L. Rev. 128 (1967).

If any conclusions can be drawn from this cursory comparision of principles of equal protection and minimum adequacy—the Court's new constitutional standard—they are that the Court will not avoid its education problems. To the extent that the adequacy or foundation standard of equal opportunity is not merely another example of "Holmesian deference" to state legislation, this standard will draw the Court into the same quandries it so assiduously attempted to avoid. This new standard has the same ". . . potential impact on our federal system . . . " as equal protection. Rodriguez, 411 U.S. at 44 (majority opinion). The standard the Court proposes is ". . . only recently conceived and nowhere yet tested," at least as a Constitutional doctrine. *Id.*, at 55 (majority opinion). Moreover, the adequacy standard places the Court at the vortex of issues where ". . . the scholars and educators are divided . . . on even the most basic questions." *Id.*, at 42 (majority opinion). The Court "offers little guidance as to . . ." how this standard will resolve these basic questions, how this standard is to be defined and judged, or what level of proof will be required to demonstrate the inadequacy of a state educational system. *Id.*, at 41 n. 85 (majority opinion). The new standard will embroil the Court in "[c]omplex problems which do not lend themselves to ready solution by judicial fiat." Kurland, *The Limits of Constitutional Jurisprudence*, 35 U. Chi. L. Rev. 583, at 598. It will require far more judicial involvement in the controversies and complexities of education than equalization ever would. Indeed, it can be argued that judicial determinations of educational adequacy will require the Court to assume ". . . a level of wisdom superior to that of legislators, scholars, and educational authorities in 50 States." Rodriguez, 411 U.S. at 55 (majority opinion).

. . . .

In such circumstances, the judiciary is well advised to refrain from imposing on the States inflexible constitutional restraints . . . [34]

Turning to the state's second goal, the Court addressed the issue of legitimacy of local control. Justice Powell described its importance in the following terms:

In part, local control means . . . the freedom to devote more money to the education of one's children. Equally important, however, is the opportunity it offers for participation in the decision-making process that determines how those local tax dollars will be spent. Each locality is free to tailor local programs to local needs. Pluralism also affords some opportunity for experimentation, innovation, and a healthy competition for educational excellence.[35]

In its construct, the majority believed that it was being " . . . asked to condemn the State's judgment in conferring on political subdivisions the power to tax local property to supply revenue for *local interest.*"[36] In so construing the case, the majority apears to have ignored the mandate of the Texas State Constitution which provides that "[t]he legislature shall as early as practicable establish free schools throughout the State, and shall furnish means for their support, by taxation on property."[37] This article, supported by a large body of both federal and state adjudication on this issue,[38] appears to define education, ultimately, as a state responsibility. The majority continued to misconstrue the situation by asserting that it was being " . . . urged to direct the states either to alter drastically the present system or *to throw out the property tax* altogether. . . ."[39] Moreover, it was deemed irrelevant that less restrictive alternatives were available to Texas to achieve the goal of local control.[40] The Court did stipulate, however, that a constitutional question might arise, if local districts were prevented by state statute from raising as much money as they wished.

[34] Rodriguez 411 U.S. at 43 (footnotes omitted).

[35] *Id.*, at 49–50.

[36] *Id.*, at 40 (emphasis added).

[37] TEX. CONST., art. 10, pts. 1, 2.

[38] Hall v. St. Helena Parish Sch. Bd., 197 F. Supp. 649 (E.D. La. 1961), *aff'd mem.*, 368 U.S. 515 (1962), *cert. denied*, 396 U.S. 904 (1969); Enger v. Texas City Indep. Sch. Dist., 338 F. Supp. 931 (S.D. Tex. 1972); Munne v. Marrs, 120 Tex. 383, 40 S.W. 2d 31 Sup. Ct. Tex. 1931); Webb County v. School Trustees, 95 Tex. 131, 65 S.W. 878 (Sup. Ct. Tex. 1901); *Contra,* Bradley v. Milliken, 418 U.S. 717 (1974); Griffen v. Prince Edward Cty, 133 S.E. 2d 565 (Sup. Ct. Va. 1963), 124 S.E. 2d 277 (Sup. Ct. Va. 1962) (state constitution does not establish mandatory duty to establish and maintain the public schools, this responsibility ultimately left to the localities). *See also* Wise, RICH SCHOOLS, POOR SCHOOLS 89–104, 165–67.

[39] Rodriguez, 411 U.S. at 41 (empasis added).

[40] In several instances, legislation has been struck down because a legitimate state purpose could have been achieved through an alternative which avoided the injury alleged. Only recently applied in civil rights litigation, this principle had retained its antitrust nomenclature of the doctrine of "the least onerous" or "less-restrictive alternative." *See* Shapiro v. Thompson, 394 U.S. 618 (1969); Rinaldi v. Yeager, 384 U.S. 305 (1966); Carrington v. Rash, 380 U.S. 89 (1965); Sheldon v. Tucker, 346 U.S. 479 (1960), *noted in* Horowitz, *Separate But Unequal—The Emerging Fourteenth Amendment Issue in Public School Education,* 13 U.C.L.A. L. REV. 1147, at 1161 (1966); Struve, *The Less Restrictive-Alternative Principle and Economic Due Process.* 80 HARV. L. REV. 1463 (1967).

Having defined the state's purposes in this manner, the Court then concluded that the rational basis test was met by the state's maintenance of an adequate education and by its desire to preserve local control over public education.[41] While recognizing that advancing these goals resulted in unequal education expenditures, the majority could not find " . . . that such disparities are the product of a system that is so irrational as to be invidiously discriminatory."[42]

Unfortunately, this holding masks an internal inconsistency of some magnitude. Mr. Justice Powell imputes that local control is an operational reality with meaningful content.[43] If this concept means all that he asserts, then there must be a direct relation between educational expenditures and educational quality. If such a relationship does not exist, then local control has no meaning; disparities in educational expenditures which use local control for their justification could then have no rational basis. In effect, the majority refused to decide the so called "cost-quality issue." It then predicated its justification of the financing system's expenditure disparities (local control) on the existence of a direct relation between educational cost and quality. This inconsistency easily leads to the conclusion that the majority has employed a double standard of review.

The effect of the Supreme Court's ruling in *Rodriguez* is that a state may constitutionally vary the amount of money available for a child's education from school district to school district. This holding is based squarely on the majority's inability to find direct evidence that any significant harm results from disparities in education expenditures. In conjunction with the Court's related belief that the Texas system of public school financing provides for an "adequate" educational opportunity and that the system rationally advances the state's desire to preserve local control, this finding made it possible for the Texas system to meet the minimal standards of the rational relationship test. The decisive element of this finding is the majority's inability to find direct evidence of significant harm. Clearly, Mr. Justice Stewart's concurring opinion evidences this element when he declares:

> The method of financing public schools in Texas, as in almost every other State, has resulted in a system of public education that can fairly be described as chaotic and unjust. It does not follow, however, and I cannot find, that this system violates the Constitution of the United States.[44]

Mr. Justice Powell also intimates this when he states that there is a need for reform and innovative thinking to assure both a higher level of quality and greater uniformity of opportunity in education. He further elaborates

---

[41] Rodriguez, 411 U.S. at 49, 50, 52.

[42] *Id.*, at 55.

[43] This assumption is not unchallenged, however. Critics assert that local control, even to the extent that it is a legal reality, is a chimera in property-poor school districts. They assert that current financing systems based on *unequalized ad valorum* property taxation, actually deprives these districts of local fiscal control. *See id.*, at 126–129 (Marshall, J. dissenting opinion); Van Dusartz v. Hatfield, 334 F. Supp. 870, 873; Serrano v. Priest, 487 P. 2d 1241, 1260, *noted in* U.S. COMM. ON CIVIL RIGHTS, ROLE OF THE LAW, 16–17.

[44] Rodriguez, 411 U.S. at 59.

this theme by concluding the majority opinion with the statement that this decision does not place the Court's ". . . judicial imprimatur on the status quo."[45] To find a constitutional violation the majority needed direct and incontrovertible evidence that disparities in educational expenditures harmed poor children or harmed children living in property-poor school districts. They needed evidence that disparities in educational expenditures resulted in damage to the " . . . hearts and minds of children in a way unlikely ever to be undone."[46] The demand for evidence of this type can be seen in the majority's general discussion of the cost-quality issue. This demand is particularly apparent in the Court's discussion of the reliability of the plaintiff's affidavit, introduced to demonstrate a correlation between low levels of expenditure and low taxable capacity in the State of Texas.[47] Only concrete evidence that inadequacy in the Texas system of education caused some palpable injury would have brought the majority to declare the system unconstitutional;[48] only this evidence would have brought the majority to

[45] Rodriguez, 411 U.S. at 58.

[46] Brown v. Board of Education, 347 U.S. 438, 494 (1954).

[47] Rodriguez, 411 U.S. at 25–27. See notes 21–26 and accompanying text *supra* and text accompanying notes 52–57 *infra*. Mr. Justice Powell is not the only sharp critic of the adequacy, reliability, and persuasiveness of social science research introduced into evidence. *See e.g.*, Sobeloff, J. concurring in Brunson v. Board of Trustees of Sch. Dist. 1, 429 F. 2d 820, 826–27 (4th Cir. 1970) (en banc). Professor Yudof suggests that the answer to the difficulties inherent in validating injury empirically is predominate reliance on nomothetical/ethical principles. He argues the advantage of these principles on the grounds of stability, consistency and managability. *See* Yudof, *Equal Educational Opportunity and the Courts*, 51 TEX. L. REV. 411, at 446–64 (1973).

Recognizing the necessarily imprecise, inferential, complex, and evolving nature of contemporary social science, Kalven proposes a middle ground between predominate reliance on nomothetical/ethical principles and dependency on the social sciences for reaching judgements. The proper utilization of social science research, he asserts, lies in the "middle range" below the formulation of high level value judgements and above fact finding so mundane as not to require systematic validation. Kalven, *The Quest for the Middle Range: Empirical Inquiry and Legal Policy*, in LAW IN A CHANGING AMERICA (G. Hazard ed. 1968).

Although the topic has been a focus for scholarly commentators for some time, writings in the area have been limited to theoretical treatises, doctrinaire statements and occasional polemic outbursts. Little empirical research has been conducted on the receptiveness of the judiciary to Brandeis briefs, on the skill with which the judiciary treats social science evidence or on the fundamental assumptions in which such evidence is grounded, that is until recently. The National Science Foundation's program in Law and Social Science is funding a series of studies which attempt to fill this void. *See e. g.*, Baldus & Cole, Proof of Differential Impact in Discrimination Litigation (NSF Grant No. SOC74-21932); Askin, Judicial Uses of Social Science Data (NSF Grant No. GS-43056); Rosenblum, The Uses of Social Science in Judicial Decision making (NSF Grant No. GS-42708).

[48] To be injurious and hence, invidiously discriminatory, the state's action must (1) be arbitrary in nature or generally ill-suited to the legislative purpose or objective, (2) be oppressive, unfair, or otherwise denegrative to the legitimate interests of certain persons, or (3) have the potency to injure through stigmatization, by implying a popular or official belief of inherent inferiority or undeservedness. (Adapted from: *Developments*, 82 HARV. L. REV. 1065, at 1124–27, 1173–76; Michelman, *On Protecting the Poor*, 83 HARV. L. REV. 7, 20). Under this framework disparities in educational resources, their resultant inferiority and concomitant stigma, could be proven invidiously discriminatory. Evidence here would center on discrimination in the educational opportunity required to equip a child for his role as a citizen in

precipitate the radical alteration of the school finance systems of the rest of the nation.

Dissenting Opinions

Rodriguez was a close (five to four) and sharply divided decision. Five separate opinions were rendered. However, to most clearly elucidate the Court's polarization, only the dissenting opinion of Mr. Justice Marshall will be contrasted with that of the majority. The difference in value orientation between Justice Marshall and the majority is immediately apparent from the former's opening statement.

> The Court today decides, in effect, that a State may constitutionally vary the *quality* of education which it offers its children in accordance with the amount of taxable wealth located in the school district within which they reside. The majority's decision represents an abrupt departure from the mainstream of recent state and federal court decisions concerning the unconstitutionality of state educational financing schemes dependent upon taxable local wealth. More unfortunately, though, the majority's holding can only be seen as a retreat from our historic commitment to equality of educational opportunity and as unsupportable acquiescence in a system which deprives children in their earliest years of the chance to reach their full potential as citizens.[49]

Mr. Justice Marshall continued his opinion in this same tone. He criticized the majority for emphasizing the amount of state aid which has been given to property-poor districts while failing to emphasize ". . . the cruel irony of how much more state aid is being given to property-rich Texas school districts on top of their already substantial local property tax revenues."[50] He cited the example of Alamo Heights, a "high-wealth" school district, and Edgewood, a "low-wealth" school district. He found that in the 1967–68 school year, Alamo Heights received $3.00 per pupil more than Edgewood in State Equalization Aid. By 1970–71, Alamo Heights was receiving $491.00 per pupil in *state*

---

contemporary society. This discrimination leads a child to unequal job opportunities, disparities in income, handicaps his ability to participate in social, cultural, and political activities, and perhaps most invidious, damages his self concept. Plaintiffs could evidence this claim in three general, if somewhat arbitrary, spheres of injury: economic, social, and political.

In the context of school financing, economic injury can be sustained by the failure to provide a child with an opportunity to become a viable competitor in the labor market or to become an efficacious consumer. This type of injury would directly affect a child's status attainment potential (occupational potential, income and ability to accumulate and retain wealth) and could be persuasive evidence of invidious discrimination.

Disparities in pupil expenditures can also result in social denegration. Injury to a child's individual potential through damage to his self concept or to his self-actualizing ability could also be evidence of discrimination. Similar damage to an individual's present or future social standing might also be employed to that end.

Political discrimination is a sphere of special interest and perhaps a sphere of special competency to the Court. Evidence of political powerlessness is the injury here. Evidence would focus on how education effects the exercise of a child's Constitutional rights or how education affects informed utilization of the franchise. *See* notes 63, 82 and accompanying text *infra*. Of all spheres, evidence of injury in this ares would probably be the most persuasive.

[49] Rodriguez, 411 U.S. at 70–71 (Marshall, J. dissenting) (emphasis added).

[50] *Id.*, at 82.

equalization aid while Edgewood received only $356.00, a difference of $135.00 favoring the property-rich school district![51] Concerning the conflicting expert testimony on the question of the relationship between these expenditure variations and educational quality, Justice Marshall notes that "the question of discrimination in educational quality must be deemed to be an objective one that looks to what the State provides its children, not to what the children are able to do with what they receive."[52]

In contrast to the majority's inability to define the disadvantaged class, Justice Marshall appears to have had little difficulty.

> In light of the data introduced before the district court, the conclusion that the school children of property-poor districts constitute a sufficient class for our purposes seem[sic] indisputable to me.[53]

He stated that, "Texas has chosen to provide free public education for all its citizens, and has embodied that decision in its constitution."[54] Yet, " . . . the State, as a direct consequence of the variations in local wealth endemic to Texas' financing scheme, has provided some Texas school children with substantially less resources for their education than others."[55] He concluded that the impact of this discrimination is to make the quality of educational opportunity contingent upon the arbitrary location of a child's school district.[56]

Justice Marshall charged that the unresponsiveness of the legislative process and the State's action in creating and regulating the school finance system have played a dominant role in this wealth discrimination and attributed the lack of any legislative response in this area to the strong vested interest which advantaged districts have in *preserving the status quo*.[57] He ironically cited the *amici curiae* briefs submitted by a number of the nation's wealthiest school districts and querried rhetorically,

> . . . if financing variations are so insignificant to educational quality, . . . why [have] districts, which have no legal obligation to . . . support the Texas legislation, . . . nonetheless zealously pursued its cause before this Court.[58]

Justice Marshall summarized his analysis of the disadvantaged class by emphasizing that this case was unusual in the extent to which *de jure* wealth discrimination was caused by government action. He concluded that the invidious characteristics of wealth classification presented in the case compounded the need for careful judicial scrutiny of the State's justifications for

---

[51] *Id.*, at 79–81.

[52] *Id.*, at 84.

[53] *Id.*, at 91. *See also Id.*, at 97: ". . . I do not believe that a clearer definition of either the disadvantaged class of Texas school children or the allegedly unconstitutional discrimination suffered by the members of that class under the present Texas financing scheme could be asked for, much less needed."

[54] *Id.*, at 92, *citing* TEX. CONST., art. 8 sec. 1.

[55] *Id.*

[56] *Id.*

[57] *Id.*, at 123–24.

[58] *Id.*, at 85.

the discrimination in educational opportunity offered in Texas schools.[59] Apparently, Justice Marshall did not share in the plight of his brothers, the majority. Not only did he recognize the "chaotic and unjust" operation of the Texas system of school finance, but he also identified the palpable injury which the plaintiffs suffered at its hands.

Mr. Justice Marshall's opinion on the fundamentality of education also contrasts markedly with that of the majority. Although he acknowledged that provision of free public education has never been found to be required by the federal constitution, he asserted "the fundamental importance of education is amply indicated by the prior decisions of this Court, by the unique status accorded education by our society, and by the close relationship between education and some of our most basic constitutional values."[60] Justice Marshall particularly emphasized that education has a direct effect upon the ability of a child to exercise his first amendment rights[61] and that there is a close relationship between education and an understanding of the principles and operation of our governmental process.[62] Justice Marshall then suggests the constitutional test which should be employed in instances like the one now before the Court.

> Although not all fundamental interests are constitutionally guaranteed, the determination of which interests are fundamental should be firmly rooted in the text of the Constitution. The task in every case should be to determine the extent to which constitutionally guaranteed rights are dependent on interests not mentioned in the Constitution. As the nexus between the specific constitutional guarantee and the nonconstitutional interest draws closer, the nonconstitutional interest becomes more fundamental and the degree of judicial strutiny applied when the interest is infringed on a discriminatory basis must be adjusted accordingly.[63]

He capsulized his opinion on the fundamentality of education by concluding,

> [t]he factors just considered, including the relationship between education and the social and political interests enshrined within the Constitution, compel us to recognize the fundamentality of education and to scrutinize with appropriate care the bases for state discrimination affecting equality of educational opportunity in Texas' school districts.[64]

After noting that the only justification offered to sustain this discrimination is the desire to preserve local control,[65] Justice Marshall sharply observed, " . . . it is apparent that the State's purported concern with local control is offered primarily as an excuse rather than a justification for interdistrict inequality."[66] Justice Marshall concluded his opinion with a sharp rebuke of the majority's decision. He reiterated his previous finding

[59] *Id.*, at 123–24.
[60] *Id.*, at 111. *See also Id.*, at 116.
[61] *Id.*, at 112–113. *See* note 48 and accompanying text *supra* and note 82 *infra.*
[62] *Id.*, at 113–114.
[63] *Id.*, at 103–3.
[64] *Id.*, at 116.
[65] *Id.*, at 126.
[66] *Id.*

that the Court was presented with a particularly invidious form of discrimination and that strict judicial scrutiny was called for in the case. He then closed his dissent by expressing the belief that the wide disparities in taxable district property wealth inherent in the Texas public school financing system rendered the scheme violative of the equal protection clause of the federal constitution.[67]

The Limits of Rodriguez

The juxtaposition of the opinions of Justices Powell and Marshall highlights the fragility of constitutional interpretation. One is left to question how two justices presented with the same set of facts and the same legal precedents can reach such disparate conclusions. The value orientations which a justice brings to a new case must clearly influence his perception of its facts and precedents. What is obvious to some is obscure to others.

The contradiction presented by these inconsistencies may seem the product of uncontrolled, even wayward, juridic predilection.[68] A cynic could even find authoritative support for this position in Justice Hughes' somewhat simplistic conclusion that "[t]he Constitution is what the judges say it is."[69] Although, the American Realist conclusion that the law is merely a general prediction of what judges will decide may appear to cast constitutional construction as an arbitrary process, dependent more upon whimsy and personal conviction than upon stable and sustained nomothetical principle, such a conception is a superficial interpretation of both the Realist outlook and of the process of constitutional construction. The Court's differences in the form of constitutional construction and its disparate conclusions on constitutional validity can be more accurately rationalized through the assertion that

> [b]ehind the logical form lies a judgement as to the relative worth and importance of competing legislative grounds, often an inarticulate and unconscious judgement, it is true, and yet the very root and nerve of the whole proceeding. You can give any conclusion a logical form.[70]

The implication of Holmes' assertion is that the Court's polarization in *Rodriguez* is due to divergent policy determinations cloaked under the guise of differing constructions of the Constitution.

Another explanation for these apparent inconsistencies of interpretation, one offered by Chief Justice Stone, centers on the nature of the judicial process. Constitutional construction has been traditionally postulated upon evolution not radical change. Chief Justice Stone captured the spirit of this process when he stated that radical change should be approached "gradually

---

[67] *Id.*, at 132–33.

[68] *See*, LLEWELLYN, THE COMMON LAW TRADITION: DECIDING APPEALS 4–7 (1960) which lucidly details the dangers inherent in a perceived loss of "reconability" in courts of review.

[69] C. E. HUGHES, ADDRESSES AND PAPERS OF CHARLES EVAN HUGHES at 185 (2nd ed. 1961). *Accord*, O. W. Holmes. *The Path of the Law* in COLLECTED LEGAL PAPERS 161, at 173 (1952 reprint of 1920 ed.): "The prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by the law."

[70] Holmes, *supra* at 181.

and by intimation."[71] He compared the judicial process in constitutional challeges to the method employed by the common law. Although there are variations in the subject matter of these inquiries, he concluded that there are no necessary variations in their problem-solving techniques. He continued his comparison, stating that the " . . . method of marking out, as cases arise, step by step, the line between the permitted and the forbidden . . . is as applicable . . ." to constitutional law as it is to the common law. "Courts called upon to rule on constitutional power have thus found ready at hand a common-law technique suitable for the occasion."[72] This traditional statement of constitutional method suggests that the narrow, incremental approach to change, the quintessence of the common law, should determine the pace of reform.

This incremental approach to change can be readily observed throughout the history of American constitutional adjudication. It can be observed throughout the *Rodriguez* decision as well. The range of disagreement among the members of the Court is due, in large part, to this process in operation. Perhaps another of Chief Justice Stone's assertions might clarify this point. He stated,

> [J]ust where the line is to be drawn which marks the boundary between the appropriate field of individual liberty and right and that of government action . . . is the perpetual question of constitutional law. It is necessarily a question of degree. . . .[73]

The majority's opinion firmly "marks out the line between the permitted and the forbidden."[74] It rejects the radical change which *Rodriguez* would have brought in almost all public school finance systems. The dissenting Justices in *Rodriguez* mark out a more "forward" boundary than the majority. Their opinions, to varying degrees, are more limited in what they permit and more extensive in what they forbid. The Court's tolerance to change varies in degree; hence, the discord between those in the majority and those in dissent in *Rodriguez*.

The majority's decision is a setback to school finance reform; the Court's decision, however, does not foreclose federal equal educational opportunity

---

[71] A. MASON, HARLAN FISKE STONE: PILLAR OF THE LAW 469 (1956). Of course, this formulation is not unique to Stone. Holmes graphically illustrates the process in his phrase "legislating interstitially." Southern Pacific Co. v. Jenson, 244 U.S. 205, 221 (1917).

[72] H. Stone, *The Common Law in the United States*, 50 HARV. L. REV. 4, 23 (1936).

[73] *Id.*, at 22–23.

[74] *Id.*, at 23.

The retrenchment on Constitutional issues which has typified the decisions of the Burger Court represents an attempt to return to a more "conservative" formulation of constitutional jurisprudence. This trend is not, apparently, a monolithic "rush to the right" nor is it an absolute turnabout from the constitutional "activism" of the Warren Court. It is more typically, a refusal to extend the principles and directions which have marked the Warren Court, a proclivity toward a narrow reading of Warren Court precedents, and a more strict adherence to stare decisis. Where this passive reaction has broken down, where an identifiably Burger Court position has emerged, the trend has been to restrike the balance between federal and state governments in favor of the latter. This trend has been accompanied by a tendency to diminish the role of the federal judiciary and to reduce the primacy of equal protection as a basis for reform.

litigation. The *Rodriguez* decision suggests several alternatives for future reform of school financing systems. Some of these avenues are directly suggested in the majority opinion; others arise from the conflict between the majority and the dissenting opinions. These avenues include areas in which more research is needed, either to substantiate or to disprove assumptions made by the Court. They also include federal constitutional challenges to narrower aspects of school financing, and state challenges limited to state questions.

The first of these avenues is explicitly suggested by Mr. Justice Powell, and centers on tax rate limitation statutes. These statutes prevent school districts from taxing themselves as much as they wish. Mr. Justice Powell indicates that such limitations might be questioned on federal constitutional grounds[75] and cites the Florida case of *Hargrave v. Kirk*[76] as an example. Unfortunately, successful litigation on this issue would mean only that a property poor district would be free to tax itself at excessive levels.

Although closely related to *Rodriguez,* a more efficacious avenue is suggested in *Hobson v Hansen,*[77] *Natonabah v. Board of Education of Gallup-McKinley,*[78] and *Brown v. Board of Education of Chicago.*[79] Plaintiffs in these actions, like those in *Rodriguez,* alleged that they were victims of invidious discrimination in the allocation of educational resources. Unlike the plaintiffs in *Rodriguez,* however, the injury alleged in these cases was a product of intra-district[80], as opposed to intra-state, discrimination. Injury, here, was

---

[75] Rodriguez, 411 U.S. at 50 n. 107.

[76] 313 F. Supp. 944 (M.D. Fla. 1970), *vacated sub nom.,* Askew v. Hargrave, 401 U.S. 476 (1971). This action challenged the constitutionality of the Florida Millage Rollback Act, sec. 23, chap. 68-18 FLORIDA LAWS, FLA. STAT. ANN. sec. 236.251. The Millage Rollback Act provided that counties exceeding the statutory limit of ten mills on *ad valorem* property taxation would become ineligible to receive State funds under the Minimum Foundation Program. The District Court's holding turned upon its determination that the ". . . act prevents local boards from adequately financing their children's education," and thus impinged upon the principle of local control. 313 F. Supp. at 949. The U.S. Supreme Court remanded the case to the District Court for consideration under the doctrine of abstention. 401 U.S. at 477–478. The Court further added that the factual record presented was inadequate. The Court indicated that the plaintiffs must be prepared to show that the comprehensive legislative program for reorganizing public school financing (of which the Millage Rollblack Act was only a part) resulted in injury to local school districts. *Id.,* at 479.

[77] 269 F. Supp. 401 (D.D.C. 1967), *aff'd sub nom.,* Smuck v. Hobson, 132 U.S. App. D.C. 372, 408 F. 2d 175 (1969), 327 F. Supp. 488 (D.D.C. 1971) (Wright, J., sitting as District Court Judge).

[78] 355 F. Supp. 716 (D.N.M. 1973).

[79] 386 F. Supp. 110 (N.D. Ill. 1974).

[80] Similar actions are also pending, *see* Rosaria v. Weinberger, No. 74-922 (D. P. R., filed 7 Aug. 1974); Cardenas v. Los Angeles Unified School District, No. CA 0094 (Super. Ct. L.A. County, filled 13 Dec. 1973). Empirical research evincing intradistrict inequalities is as sparse as judicial precedent on the issue. *See* Goettel, THE EXTENT OF INTRA-DISTRICT INEQUALITIES: ISSUES AND PROBLEMS (ERIC ED No. 095 657, 1974); Summers & Wolfe, INTRADISTRICT DISTRIBUTION OF SCHOOL RESOURCES TO THE DISADVANTAGED: EVIDENCE FOR THE COURTS (Department of Research, Federal Reserve Bank of Philadelphia, March 1974); UNITED BRONX PARENTS, DISTRIBUTION OF EDUCATIONAL RESOURCES AMONG BRONX PUBLIC SCHOOLS (United Bronx Parents 1968); Walberg & Bargen, *School Equality,* in EVALUATING EDUCATIONAL PERFORMANCE (H. Walberg ed. 1974): STARK, PATTERNS OF RESOURCE ALLOCATION IN EDUCATION: THE DETROIT

evinced in a number of areas, including disparities in capital or operational expenditures, building conditions, the availability and quality of equipment, operational or instructional services, class size (overcrowding), and measures of pupil achievement or competencies.

In each of these cases, the defendants were found to have systematically perpetuated disparities in the resources allocated to schools serving predominantly poor and minority children. In each case, these disparities were found to violate equal protection guarantees. This approach has the advantage of narrowing the scope of the challenge to a more manageable level. It allows for easier definition of the injured class and more detailed documentation of the injury suffered.

The question of injury raised in these cases (and in the *Rodriguez* majority's decision) also presents an avenue for further action. This is the so-called "cost-quality" question.[81] What is needed here is empirical evidence that injuries result from disparities in a child's educational resources. If it can be shown that expenditures have a direct effect upon the quality of education provided, if wealth based differences in educational quality—as opposed to educational expenditures—can be demonstrated, then there will clearly be a new case for charging that disparities constitute invidious discrimination. This evidence would directly challenge the majority's assumption that Texas provides an adequate education for its children.

The majority's assertion of adequacy also suggests an additional course, a more extensive examination of the relationship between education and other factors. This examination should center on the effects of education on the ability to compete in the labor market and to acquire the skills necessary for effective citizenship. In particular, research on the effects of a child's education on his ability to exercise his first amendment rights could spearhead an effort to prove that education is a constitutionally protected interest. This research would concentrate upon how education contributes to a child's conception of his constitutional rights, how education contributes to effective utilization of those rights, and how education serves the function of instilling an understanding of the principles and operation of the governmental process.[82] Mr. Justice Marshall's opinion strongly suggests that there is a signifi-

---

PUBLIC SCHOOLS 1940 TO 1960 (Doctoral Dissertation, Univ. Mich. 1969) (Univ. Microfilm No. 70-4202); Berk & Hartmann, *Race and Public School Funds in Chicago, 1971,* 10 (1) INTEGRATED EDUC. 52 (Jan.-Feb. 1972); Coordinating Council of Community Organizations, *The Chicago Title VI Complaint to H.E.W.,* 3 (6) INTEGRATED EDUC. 10 (Dec. 1965-Jan. 1966); Greenburg & McCall, *Teacher Mobility and Allocation,* 9 J. HUMAN RESOURCES 408 (1974); Landers, *Profiles of Inequality in New York City,* 11 (1) INTEGRATED EDUC. 3 (Jan.-Feb. 1973); Summers & Wolfe, *Philadelphia's School Resources and the Disadvantaged,* BUSINESS REV. 3 (Mar. 1974) (Fed. Reserve Bank Philadelphia); Summers & Wolfe, *Which School Resources Help Learning? Efficiency and Equity in Philadelphia Public Schools,* BUSINESS REV. 4 (Feb. 1975) (Fed. Reserve Bank, Philadelphia). The research findings *supra* were generously compiled by Dr. Meyer Weinberg.

[81] *See* Rodriguez, 411 U.S. 1, at 42-43. *Contra, Id.,* at 85-86.

[82] In large part, the research on political socialization has been conducted by political scientists. These studies have mainly provided information on age and socio-economic related changes in attitude espousement, and have catalogued the socializing agents effecting political

cant relation between education and these first amendment rights, and that the closeness of that relation calls for strict judicial scrutiny.[83] The potential efficacy of this approach is also confirmed by Justice Powell's suggestion that ". . . some Quantum of Education . . ." may be ". . . a constitutionally protected prerequisite for a meaningful exercise of either right."[84] In other words, it may be possible to refute the majority's assertion that the Texas system provides ". . . each child with an opportunity to acquire the basic skills necessary for the enjoyment of the rights of speech and full participation in the political process."[85] Until evidence of this type is introduced, it will prove difficult to convince the majority that differences in educational expenditures produce an injury so grievous as to require a radical alteration of the education financing systems of the nation.[86]

A fourth general area, in which a gradual approach to constitutional change is evidenced, is found in the majority's statement: "[w]e are unwilling to assume for ourselves a level of wisdom superior to that of legislators, scholars, and educational authorities in 49 states, especially where the alternatives proposed are only recently conceived and nowhere yet tested."[87] Two directions are suggested by this statement. Both of these directions center on

consciousness and participation. Mr. Justice Marshall cited some of this research to support his opinion on the fundamentality of education. *See Id.*, at 113 n. 72 (dissenting opinion).

Unfortunately, political science research has contributed little to our understanding of the socialization process itself, particularly as it is related to the formation of attitudes and values about the law and constitutional rights. The research needed here centers on how these attitudes are formulated and on how they change and develop. A number of questions remain to be answered on the actual process of legal attitude formulation. What is the nature of the "cognitive structure" underlying attitude formation? How does a child's understanding of legal or political principles mature? Is this maturation identifiable as an invariant sequence of developmental stages? Is age, not stage, the overriding factor in differentiating attitude response? Can the maturation process be accelerated or retarded? Do children at different ages reflect quantitative *and* qualitative distinctions in thought processes?

Research on the process of "legal socialization" has already been undertaken. Although the U.S. Supreme Court was apparently unaware of much of this work, developmental psychologists have already provided initial answers to many of these questions. Based on developmental theories, these research conclusions have begun to support Justice Marshall's contention that there is a strong nexus between education and an understanding and exercise of legal and political rights. The most comprehensive study of legal socialization to date is Tapp & Levine, *Legal Socialization: Strategies for an Ethical Legality*, 27 STAN. L. REV. 1 (1974). *Also see* TAPP & LEVINE, LEGAL SOCIALIZATION: ISSUES FOR PSYCHOLOGY AND LAW (forthcoming 1975).

[83] *See* Rodriguez, 411 U.S. at 111, 112–16 (Marshall, J. dissenting).

[84] *Id.*, at 36.

[85] *Id.*, at 37. *See* note 33 *supra*.

[86] *Compare* Rodriguez, 411 U.S. at 42–43 where Justice Powell stated: "on even the most basic questions in this area the scholars and educational experts are divided." "In such circumstances, the judiciary is well advised to refrain from imposing on the States inflexible constitutional restraints. . . ." *with* Rouse v. Cameron, 373 F. 2d 451, 457 (D.C. Cir. 1966) where Judge Bazelon concluded that ". . . lack of finality [in scientific judgement] cannot relieve the court of its duty to render an informed decision." The ultimate goal of the judiciary is to render just, impartial, and informed decisions. Uncertainty in the social sciences even in combination with aspirations to this goal cannot relieve the judiciary of its immediate and overriding function—the resolution of disputes.

[87] Rodriguez, 411 U.S. at 55.

state action and both will provide federal courts with additional precedent on which to base future action.

The first direction is the examination of a state which adopts an alternative financing scheme, either as the response to a state court mandate or as the result of legislative initiative. Since the Court's decision in *Rodriguez,* nineteen states have passed major legislative reforms to their systems for financing public education.[88] Eleven of these states revised their systems for distributing state aid by enacting a form of district power-equalizing formulas.[89] The remaining eight expanded their state foundation programs to assume a greater percentage of the state's educational expenditures.[90] The successful operation of either a power-equalization plan or a full state funding plan would provide evidence that an alternative, more equitable plan is feasible.[91]

The second direction is state litigation. Mr. Justice Marshall explicitly suggests this course of action in his final note. He stated, "[o]f course, nothing in the Court's decision today should inhibit further review of State educational funding schemes under state constitutional provisions."[92] State constitutions provide a wealth of possible grounds for action. The constitutions of all but four states contain language which guarantee equal protection of the

[88] *See* Grubb, *The First Round of Legislative Reforms in the Post-Serrano World,* 38 LAW & COMTEMP. PROB. 459 (1974) [hereinafter cited as *The First Round of Reform*]; GRUBB & COSTELL, NEW PROGRAMS OF STATE SCHOOL AID (1974).

[89] Colorado, COLO. REV. STAT. ANN. secs. 123-44-1—123-44-17 (Cum. Supp. 1973); Connecticut, P.A. 75-341 (1975); Florida, FLA. STAT. ANN. secs. 236.012—236.68 (Supp. 1974), but during the 1974 legislative sessions its DPE provisions were repealed and Florida moved toward full state funding, FLA. STAT. ANN. secs. 236.012—236.73 (Supp. 1975); Georgia, GA. CODE ANN. secs 32-637a—32-648a (Supp. 1974); Illinois, ILL. STAT. ANN. ch. 122, secs. 18-1—18-12 (Smith-Hurd Supp. 1974); Kansas, KAN. STAT. ANN. secs. 72-7030—72-7090 (Supp. 1973); Maine, ME. REV. STAT. ANN. tit. 20, secs. 3711—13, 3731-34 (Supp. 1973); Michigan, MICH. COMP. LAWS ANN. secs. 388.1101—388.1279 (Supp. 1974); Montana, MONT. REV. CODE ANN. secs. 75-6902—75-6297 (Supp. 1973); Utah, UTAH CODE ANN. secs. 53-7-16-53-7-24 (Supp. 1973); Wisconsin, WIS. STAT. ANN. secs. 121.02—121.21 (Supp. 1974); *summarized in* Grubb, *The First Round of Reform,* 38 LAW & CONTEMP. PROB. 459, at 473-92. *See also* Minnesota, MINN. STAT. ANN. sec. 124.17 (Cum. Sup. 1971, 1974); Ohio, Substitute S.B. 170 (Awaiting Governor's signature).

[90] Arizona, ARIZ. REV. STAT. ANN. secs. 15-1601—15-1621 (Supp. 1974); California, CAL. EDUC. CODE secs. 17301-18480 (West Supp. 1974) New Mexico, N.M. STAT. ANN. secs. 77-61—77-638 (Supp. 1974); North Dakota, N.D. CENT. CODE secs. 15-40.1-05—15.40.1-16 (Supp. 1974). Other states have increased the state share of school financing and enacted significant categorical aid or weighting programs, *see* Indiana, PL 75-341 (1975); Iowa, ch. 44 [1975] IOWA ACTS (H.F. 558) (1975); Kentucky, KY. REV. STAT. ANN. sec. 157a (Baldwin 1974); Texas, TEX. EDUC. CODE ch. 334, secs. 11.32 (J), 11.33(c), 19.246—19.247, 21.008, 21.031, 21.913 (1975); *see* Grubb, *The First Round,* 39 LAW & CONTEMP. PROB. 459, at 466.

[91] As of the 1975 legislative year, eighteen states allocate revenues through a modified form of district power-equalizing (Colorado, Connecticut, Georgia, Illinois, Iowa, Kansas, Maine, Massachusetts, Michigan, Montana, New York, New Jersey, Oklahoma, Pennsylvania, Rhode Island, Utah, Vermont, Wisconsin). *See* T. JOHNS, PUBLIC SCHOOL FINANCE PROGRAMS, 1971-72 (1972). Unfortunately, in most cases these enactments bear only a scant relation to the DPE conceived by Mssrs. COONS, CLUNE and SUGARMAN in PRIVATE WEALTH at 200-44. For a discussion of the precepts underlying recent reform efforts and possible alternative formulation of school revenue allocations, *see* Michelson, *Reform Through State Legislation: What is a "just" System for Financing Schools? An Evaluation of Alternative Reforms,* 38 LAW & COMTEMP. PROB. 436 (1974).

[92] Rodriguez, 411 U.S. at 133 n. 100.

laws.[93] Only ten state constitutions fail to provide for due process or its substantial equivalent.[94] Nor is there a paucity of state constitutional provisions delineating educational guarantees. These provisions establish a system of "thorough, efficient, uniform or general" education in a state. Twenty-nine states have such guarantees in their constitutions;[95] four other state constitutions contain language which could be interpreted as a guarantee of educational opportunity.[96] It must be recognized, however, that even by proceeding on state ground, the litigant does not necessarily avoid the pother of the cost-quality question.

State Litigation

Robinson v. Cahill

On April 3, 1973, thirteen days after the U.S. Supreme Court handed down the *Rodriguez* decision, the Supreme Court of New Jersey ruled on the case of *Robinson v. Cahill*.[97] In a unanimous decision the court held the New Jersey system of public school finance unconstitutional.

The New Jersey court dealt explicitly with the cost-quality issue from the beginning of its opinion. Chief Justice Weintraub, who delivered the court's opinion, recognized that dollar inputs do not ensure equality in educational outcomes. He noted that other factors, both natural and environmental, had an impact upon educational results.[98] The court decided the issue, however, by ruling that " . . . there was a significant connection between the sums expended and the quality of the educational opportunity."[99] Chief Justice Weintraub continued, "[w]e accept the proposition that the quality of educational opportunity does depend in substantial measure upon the number of dollars invested, . . . "[100] Having found the injury which the U.S. Supreme Court in *Rodriguez* was unwilling or unable to find, the New Jersey Supreme Court was forced to consider the legal grounds for redressing the invidious discrimination in the state school financing system.

---

[93] *See* PERLE, STATE CONSTITUTIONAL PROVISIONS: ETC. at 4, *passim* (1973) [hereinafter cited as STATE CONSTITUTIONAL PROVISIONS]. The four states are Colorado, Delaware, Mississippi, and Montana.

[94] *See Id.*, at 5, *passim*. Only California, Connecticut, Indiana, Kentucky, and Vermont have no provision for due process in their constitutions. In Alaska, Massachusetts, New Hampshire, New Jersey and Wisconsin state courts have interpreted general constitutional languages as providing a due process guarantee.

[95] *See Id.*, at 9, *passim*. Only eight state constitutions fail to provide for guarantees of tax uniformity, another possible ground for action. *See Id.*, at 10, *passim*.

[96] RUVOLDT, THE HORIZON JUST MOVED (presented to National Tax Association 66th Annual Conference, Toronto, Ontario, Canada, September 1973), Appendix "A." The four states are California, Massachusetts, New Hampshire and Rhode Island.

[97] Robinson v. Cahill, 118 N.J. Supp. 223, 278 A. 2d 187 (Law Div. N.J. 1972), *supp. op.*, 119 N.J. Supp. 40, 289 A. 2d 569 (Law Div. N.J. 1972), *aff'd on state constitutional grounds*, 62 N.J. 473, 303 A. 2d 273 (N.J. 1973), *cert. denied sub nom.*, Dickey v. Robinson, 414 U.S. 976 (1973), *juris, retained for relief*, 63 H.J. 196, 306 A. 2d 65 (N.J. 1973), *modified*, 67 N.J. 35, 335 A. 2d 6 (N.J. 1975), *provisional remedy*, 67 N.J. 333, 339 A. 2d 196 (N.J. 1975). [hereinafter cited as Robinson].

[98] *Id.*, 303 A. 2d at 277.

[99] *Id.*

[100] *Id.*

The first possible ground for redressing the inequity in educational opportunity created in New Jersey public school finance system was equal protection. The equal protection argument had formed the basis of the trial court's judgment that the system was unconstitutional. This thesis drew heavy support from the precedent of the *Serrano* decision and, like *Serrano,* the trial court's decision was based on both the fourteenth amendment equal protection clause and the equal protection provisions implicit in the New Jersey Constitution.[101]

Chief Justice Weintraub began his discussion of the equal protection issue by reviewing the *Rodriguez* decision, the controlling federal case. He found that, in spite of the differences between the school financing practices in Texas and those in New Jersey, the U.S. Supreme Court would probably have reached a similar decision on the New Jersey financing system.[102] The *Rodriguez* decision was accepted as controlling in *Robinson* v. *Cahill.* As a result, Chief Justice Weintraub ruled, no federal constitutional violation could be found.[103]

Chief Justice Weintraub reiterated, however, that New Jersey equal protection guarantees could be interpreted more strictly than fourteenth amendment protections.[104] He then noted that, as a state action, the issue of federalism was absent in this case.[105] The majority in *Rodriguez* had relied upon this issue to employ judicial restraint. If, at this point, the plaintiffs gleaned some hope for the persuasiveness of the equal protection argument, it was short lived. Mr. Chief Justice Weintraub continued his analysis of the state's equal protection guarantees by introducing yet another issue which had constrained the majority in *Rodriguez.* He stated,

> [t]he majority [in *Rodriguez*] recognized, as we have in this opinion, that the equal protection argument goes beyond the educational scheme and implicates the entire concept of local government. . . .[106]

The ubiquity inherent in equal protection was the factor on which Chief Justice Weintraub turned his decision on the applicability of New Jersey's equal protection guarantees. He refused to extend equal protection to the field

---

[101] Robinson, 278 A. 2d at 214–17, *citing* U.S.C.A. CONST. amend. 14: N. J. CONST. art. 1, para. 1. Trial court Judge Botter failed to find the public school finance system invalid under the education clause of the New Jersey Constitution (art. 8, sec 4, para. 1). Judge Botter concluded that, fully funded, the system would probably reach its goal of a ". . . thorough and efficient system of free public schools for . . . all children . . . ." He did allow, however, that the support aid and save harmless provisions, conspicuous contributors to disparities in educational resources, could not be reconciled with the constitutional mandate. *Id.,* at 211. *See* notes 106, 107, 110 and accompanying text *infra.*

[102] Robinson, 303 A. 2d at 280–81.

[103] *Id.*

[104] *Id.,* at 282.

[105] *Id.* The federalism issue has "buttressed" the majority's conclusion in *Rodriguez* that state financing systems must be afforded the traditional presumption of constitutionality. Justice Weintraub found that this necessary deference, to a state attempting to solve its own problems in light of its own circumstances, was absent in this case.

[106] *Id.,* at 281. *Contra,* Serrano Memorandum Opinion, at 38-29; COONS, CLUNE & SUGERMAN, PRIVATE WEALTH at 415-19.

of school finance because he believed that all local governmental services would soon be affected.[107] Justice Weintraub concluded that, in spite of the special status afforded education in the New Jersey Constitution, education could not be distinguished from any other local governmental service.[108] This conclusion closed the court's consideration of the case on equal protection grounds.

The last remaining question before the court was whether the school finance scheme violated the New Jersey Constitutional provision prescribing education. This provision mandated that,

> [t]he 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 this State between the ages of five and eighteen years.[109]

Chief Justice Weintraub found that this mandate could have only one meaning—to ensure equal educational opportunity.[110] He concluded that whether the State acted directly or through local government the end product must be in accord with the constitutional demands.[111] The trial court had ruled that these demands had not been met. The New Jersey Supreme Court agreed that the State of New Jersey was not offering its children a "thorough and efficient education." [112] Both courts based this conclusion on disparities in per pupil

---

[107] Robinson, 303 A. 2d at 285-87.

[108] *Id.*, at 283-86, *citing* N.J. CONST art. 1, sec. 4, para. 1. The court's holding on this issue was significantly influenced by its belief that the concepts of "fundamental rights" and "compelling state interests" were not juridicially meaningful. The court, therefore, refused to employ what it termed the "mechanical strict" scrutiny approach to judicial review. *See* note 112 *infra*.

[109] N.J. CONST., art. 8, sec. 4, para. 1.

[110] Robinson, 303 A. 2d at 294.

[111] *Id.*

[112] *Id.*, 278 A. 2d at 211, 303 A. 2d at 295. *See* note 101 *supra*. The court's construction of the consitutional status of the education clause clearly establishes that the New Jersey Constitution created a "preeminate or fundamental duty" to provide all children with a thorough and efficient education; albeit, the fundamentality of this duty was not prescribed *in haec verba* by the language of the constitution. Concomitantly, a "preeminate or fundamental right," its jural correlate in the Hohfeld sense, was also created. *See* Hohfeld, *Some Fundamental Legal Conceptions as Applied to Judicial Reasoning* [1], 23 YALE L. J. 16, at 30-36, 58-59 (1913), *Fundamental Legal Conceptions* [II], 26 YALE L.J. 710, at 710-11 (1917), in FUNDAMENTAL LEGAL CONCEPTIONS (1964).

The court's overt use of the concept of a fundamental right in establishing the constitutional mandate of the education clause should be contrasted with the court's use of the concept in judging the dictates of the equal protection clause. *Compare* Robinson, 303 A. 2d at 295-96 *with* 303 A. 2d at 282; *see* note 108 *supra*. Although the court challenged the utility of the concept of a "fundamental right" in the context of strict scrutiny equal protection review, it immediately based its construction of the education clause on the concept. How can the concept of a fundamental right be useless in construing one part of a constitution and decisive in construing another? If education is a fundamental right in New Jersey, any infringement should be as suspect under the equal protection clause as under the education clause.

One can only conclude that if the New Jersey Supreme Court had chosen to apply the strict scrutiny rationale for school financing outlined by Mr. Justice Powell, it would have reached a decision under the equal protection clause indentical to its holding under the education clause. *See* Rodriguez, 411 U.S. at 17, 35 (strict scrutiny should be invoked if a fundamental right, explicitly or implicitly protected by the Constitution, is infringed).

expenditures.[113] Justice Weintraub stated,

> [w]e deal with the problem in those terms because dollar input is plainly relevant and because we have been shown no other viable criterion for measuring compliance with the constitutional mandate. The constitutional mandate could not be satisfied unless we were to suppose the unlikely proposition that the lowest level of dollar performance happens to coincide with the constitutional mandate and that all efforts beyond the lowest level are attributable to local decisions to do more than the State was obliged to do.[114]

The court analyzed the current state aid plan and concluded it was not designed to guarantee that local effort plus state aid would yield to all pupils the level of educational opportunity which the State Constitution demanded.[115] Mr. Chief Justice Weintraub included the caveat that

> [a]lthough we have dealt with the constitutional problem in terms of dollar input per pupil, we should not be understood to mean that the State may not recognize differences in area costs, or in a need for additional input to equip classes of disadvantaged children for the education opportunity [mandated by the New Jersey Constitution].[116]

With that statement the court closed its consideration of the issues, ruled that the New Jersey system of school financing was unconstitutional, and remanded the case to the lower court for remedy.

The court made no attempt explicitly to define equal educational opportunity or to delineate, exactly, the constitutional demands placed on the State's school systems by the "thorough and efficient" clause. The court did, however, present its view of the role of public education. Chief Justice Weintraub found that "[t]he Constitution's guarantee must be understood to embrace that educational opportunity which is needed in a contemporary setting to equip a child for his role as a citizen and a competitor in the labor market." [117] He continued, stating that although ". . . the State has never spelled out the content of the educational opportunity the Constitution requires," [118] it must now ". . . define in some discernable way the educational obligation and must *compel* the local school districts to raise the money necessary to provide the opportunity." [119]

Just how the State's educational obligation is to be defined has been a major source of political and educational controversy in New Jersey since the court's decision. The New Jersey Supreme Court initially concluded that the current statutory scheme should not be "disturbed" by judicial action unless the Legislature failed to enact legislation defining the content of the constitution's educational mandate by December 31, 1974.[120] This date passed without

[113] Robinson, 278 A. 2d at 200-202, 205, *passim*, 303 A. 2d at 277, 295-97. *See* notes 98-100 *supra* 117 *infra* and accompanying text.

[114] *Id.*, 303 A. 2d at 295.

[115] *Id.*, at 297.

[116] *Id.*, at 297-298.

[117] *Id.*, at 295.

[118] *Id.*

[119] *Id.*, at 297 (emphasis in original).

[120] *Id.*, 306 A. 2d 65 (N.J. 1973). The court then requested argument on relief *Id.*, 67 N.J. 35, 335 A. 2d 6 (N.J. 1973). The court's provisional remedy was promulgated on 23 May 1975,

legislative action. The court, itself, is non compelled to be the source of substantive definition of the New Jersey education clause. On January 23 the court ordered argument on the subject of relief. Specifically, the court requested argument on methods for ". . . determination of the definition of 'a thorough and efficient system of free public schools,' [and] of the translation of that definition into financial terms." [121]

The responses of the plaintiffs, defendant and *amici curiae* to this order illustrate the multiplicity of possible definitions of equal educational opportunity. One definition, suggested by the State's Attorney General, urges the adoption of the so-called "process standards" formulated by the State Department of Education. Under these standards each school district would develop educational goals based upon the district's "needs." Assessments would also be conducted to determine the needs of individual children. In this context the standards provide for ". . . attainment of reasonable levels of proficiency with particular reference to basic communications and computational skills as identified in the school's objectives and as determined for each individual pupil by local professional staff in accordance with the range of pupil abilities." [122] This definition has been challenged because it provides no state-wide standards of educational quality and because it fails to delineate how the state's mandate of equal educational opportunity can be achieved if each district establishes its own educational goals. Moreover, local professional staff expectations, it is asserted, may be based upon irrelevant considerations, considerations which may well be inconsistent with the Court's decision and with the concept of equal educational opportunity.[123]

The Governor's response to the legislature's inaction has been to endorse the process standards formulated by the State Department of Education and to suggest that these standards be implemented, on an interim basis, by enjoining distribution of minimum support and save-harmless aid, school building aid, transportation aid, atypical pupil aid and pension fund contributions for school employees. These funds would then be distributed through the

---

subsequent to the completion of this article. *Id.*, 67 N.J. 333, 339 A. 2d 193 (N.J. 1975). The New Jersey Legislature responded to the court's order with Senate Bill 1516 (3rd OCR). On September 29, 1975 (after this article was written) this bill was signed into law as the Public School Education Act of 1975 H. J. STAT. A. sec. 18A: 7A-1, *et al.*, c. 212 [1975] H. J. STAT.

[121] 306 A. 2d 65.

[122] Brief for the N.J. Attorney General on the Subject of Relief for the School Year Commencing July 1, 1976, app. Exhibit "A," Thorough and Efficient System of Education as Defined in New Jersey Administrative Code. Recommended Revisions Feb. 1975 [Marked "Draft for 'T&E' Discussion Only"] at 2.2(a) (3) (vii), Robinson v. Cahill, 62 N.J. 473, 303 A. 2d 273 (Sup. Ct. N.J. 1973) [hereinafter all briefs will be cited as Robinson]. The proposed regulations appended have since been formally announced: Proposed N.J.A.C. REG. ch. 8, 6:8-2.1 (a) (3) (vii), 7 N.J.R. 133 (1975) (withdrawn as a result of the enactment of the Public School Education Act of 1975 N. J. STAT. A. sec. 18A: 7A-1 *et al.*).

[123] Brief for NAACP & ACLU as Amici Curiae; Reply to Briefs of Parties and Amici Curiae at 15–16, app. "A," Robinson v. Cahill, 62 N.J. 473, 303 A. 2d 273 (N.J. 1973); Brief for the New Jersey Education Reform Project of the Greater Urban Coalition as Amicus Curiae, Letter Memorandum 3 March 1975, at 2–4, Robinson v. Cahill, 62 N.J. 473, 303 A. 2d 273 (N.J. 1973). Both *amici* suggest that the proposed regulations fail to rectify practices found wanting by the court.

Bateman Incentive Equalization Formula.[124] Although parties generally agree that this course is within the court's broad remedial powers, the Governor's motion has raised questions regarding the consistency of this action with the court's decision. Specifically cited was the undesirable possibility that some districts with low levels of taxable property would receive windfalls in equalized assistance, while other districts might lose much of their state aid.[125] The suggested solution to this problem was to merge school districts (possibly into a single state-wide district) in order to equalize their fiscal capacity; to bar high wealth school districts from spending more than low-wealth districts; or to set a state-wide tax rate and "recapture" excess funds in high-wealth districts for equalization in low-wealth districts.[126]

The plaintiffs' response has centered more upon the substantive educational requirements of a "thorough and efficient" system than on their fiscal counterpart. The plaintiffs urged the adoption of a series of generalized "outcome" and "process" goals resulting from the New Jersey State Board of Education's *Our Schools* project.[127] They assert the constitution's mandate of "thorough and efficient," like other legal concepts, must be viewed as "fluid" and ". . . only definable in the context of a given controversy at a given time." [128] The plaintiffs assert that the fluid goals delineated by the *Our Schools* project should be translated into financial terms through "controlled experimentation" undertaken by the New Jersey Commissioner of Education.[129]

The theme of educational outcomes has also been the focus of other responses to the court's order. In their joint brief the NAACP and the ACLU emphasize that the court's order in *Robinson*, other New Jersey Supreme Court decisions on "thorough and efficient" and the language of the Education Clause itself, all suggest that output criteria are the proper standards for defining equal educational opportunity in the State.[130] The NAACP and the ACLU assert, moreover, that the utilization of state-wide assessment programs in some 30 states and the trend toward competency-based graduation requirements adequately support the feasibility of the concept of output standards.[131]

The *amicus* brief of the New Jersey Education Reform Project also echoes the theme of educational outputs. This brief is based upon the premise that the acquisition of basic skills is a necessary foundation for all other elements of a thorough and efficient education. The New Jersey Education Reform

---

[124] Brief for Defendant-Appellant Brendon Byrne, Governor of the State of New Jersey, at 23–25, Robinson.

[125] Brief for NAACP & ACLU as Amici Curiae in Response to Motions of the Plaintiff-Respondents for Relief and of the Governor for Order in Aid of Judgement at n. 19, Robinson.

[126] *Id.*, at 34–43.

[127] Brief for the Plaintiffs-Respondents on Remedies at 7–9, Robinson.

[128] *Id.*, at 5.

[129] *Id.*, at 13, *citing* Georgia v. Tennessee Copper Co., 237 U.S. 474 (1915).

[130] Brief for NAACP & ACLU as Amici Curiae in Reply to Briefs for Parties and Amici Curiae at 17–21, app. "B," Robinson, *citing* Landis v. Ashworth Sch. Dist. No. 44, 57 N.J.L. 509, at 512; Robinson, 118 N.J. Super. 233, at 281, 62 N.J. 473, at 515; N.J.S.A. 18A:4-24, 18A: 33-1,33-2.

[131] *Id.*, 18–20.

Project asserts that at a minimum the State's educational obligation must be defined in a manner which allows for determination of whether a child has mastered the basic skills of reading, writing and mathematics. The State must also take appropriate action to remedy any deficiencies in the acquisition of these skills.[132] While asserting that a thorough and efficient education requires the acquisition of basic skills, the New Jersey Education Reform Project emphasized that the State's educational obligation ". . . must be sufficiently comprehensive to prepare a child for citizenship and successful competition in the labor market." [133]

Whatever standard or combination of standards is finally employed by the New Jersey Supreme Court to define the educational opportunity required by the State's Constitution, one thing is certain: the standard will have been based on a comprehensive and systematic reevaluation of the instructional practices utilized in New Jersey and a thorough assessment of their educational outcomes.

Serrano v. Priest

The definition of equal educational opportunity was a critical factor in California deliberations as well. The issue was central to the California superior court's decision on the merits in *Serrano v. Priest*.[134] Previously the California Supreme Court had ruled on the sufficiency of the legal questions presented by the plaintiffs in *Serrano*. The court found that if the plaintiff's allegations proved true, the State's public school financing system probably violated equal protection guarantees. The case was then remanded to the superior court with directions to try the case on its merits.[135] The purpose of this proceeding was to determine whether the evidence presented bore out the plaintiffs' allegations. The superior court was necessarily forced to resolve (for the purpose of testing the validity of California's school finance scheme, at least) the cost-quality controversy, and to give a substantive definition to the California Supreme Court's ruling on equal educational opportunity. The superior court was thus charged with determining whether the evidence proved that disparities in educational expenditures existed, and if these expenditures resulted in injury or differences in educational outcomes, as the plaintiffs alleged. If the superior court found such proof, it would then be required to determine if the resulting injury violated equal protection guarantees as the California Supreme Court had indicated.

Superior Court Judge Jefferson began the task of defining the California Supreme Court's requirement of equal educational opportunity, by undertaking an extensive analysis of the operation of the state's system of school

[132] Brief for the New Jersey Education Reform Project of the Greater Newark Urban Coalition as Amicus Curiae, Robinson.

[133] *Id.*, at 3.

[134] 10 Cal. App. 3d 1110, 89 Cal. Rptr. 345 (1970) *rev'd on review of demurrer, remanded for trial on merits*, 5 Cal. 3d 584, 487 P. 2d 1211, 96 Cal. Rptr. 601 (Sup. Ct. 1971), No. 938,254 (Super. Ct. Cal. 10 April 1974), Memorandum Opinion Re Intended Decision (slip opinion), *summarized at* 2 CCH Pov. L. Rep. para. 18,835, *appeal docketed*, No. 30398 (Sup. Ct. Cal., 3 Jan. 1975).

[135] Serrano, 489 P. 2d at 1266.

financing and of the legal constraints imposed upon it. This examination was complicated by the U.S. Supreme Court's decision in *Rodriguez*[136] and by recent state legislation[137] altering the school finance scheme. Both of these actions postdated the California Supreme Court's ruling on the sufficiency of the legal questions in the case; either of these actions could be decisive in determining whether the questions raised by the plaintiffs were still valid grounds for legal action. For example, if Judge Jefferson found the California Supreme Court had relied solely on the fourteenth amendment in its decision on the sufficiency of the issues raised by the plaintiffs, then the U.S. Supreme Court's decision in *Rodriguez* would be controlling law. If this proved to be the case, Judge Jefferson could not find a constitutional violation. Similarly, the court's deliberations could also be brought to a close if Judge Jefferson found that recent legislative changes of the school finance system had eliminated any unconstitutional inequities.

To establish whether the *Rodriguez* decision was controlling in the *Serrano* case, Judge Jefferson was required to determine if the California Supreme Court had relied exclusively on the protections afforded by the fourteenth amendment or if it had based its opinion on both federal and California State equal protection guarantees. If the California Supreme Court had based its opinion solely on fourteenth amendment grounds, in other words if it had acted under what it conceived to be the compulsion of the federal constitution, then *Rodriguez* would take precedence over the California Supreme Court's decision. Judge Jefferson would then be required to find that the California system of school finance was valid and constitutional. If, however, the California Supreme Court's decision in *Serrano* was also grounded in the California Constitution, the State equal protection provisions alone would be sufficient to support the case and the *Rodriguez* decision would have no controlling effect.

Judge Jefferson's analysis of this issue recognized the strong reliance which the California Supreme Court had placed upon the equal protection guarantees of the fourteenth amendment.[138] Yet, he found that the Court had not relied on these protections alone,[139] but had treated the State's equal protection provisions as "substantially the equivalent" of the equal protection clause of the U.S. Constitution.[140] Judge Jefferson found that this interpretation was

---

[136] *See* text accompanying notes 18–67 *supra*.

[137] CAL EDUC. CODE secs. 17301–18480 (West Supp. 1974), S.B. 90, ch. 1406, [1972] CAL. STATS. 2931, as amended, A.B. 1267, ch. 208, [1973] Cal. Stats. 424. *See also* CAL. EDUC. CODE 20902–20909.1 (voter override provision) *as cited in* the Superior Court's Memorandum Opinion by bill numbers: S.B. 90, A.B. 1267 *noted in* Karst, *Serrano v. Priest's Inputs and Outputs,* 38 LAW & CONTEMP. PROB. 333, at 335–37 (1974) [hereinafter cited as *Inputs and Outputs*].

[138] The California Supreme Court's opinion was couched in the terms of the familiar "two-tier" approach to equal protection review. "There is little doubt that the California Supreme Court devoted most of it's attention to the plaintiff's contentions that the financing system was in violation of the Fourteenth Amendment to the United States Constitution." Serrano, Memorandum Opinion, at 22.

[139] *Id.*, at 17.

[140] *Id., citing* Dept. of Mental Hygiene v. Kirchner, 62 Cal. 2d 586, 588 (1965), *as cited in* Serrano, 487 P. 2d 1241, 1249 n. 11.

also supported by a large body of precedent on the same issue.[141] This case law held that other California court decisions had been based on dual equal protection grounds and that the State equal protection provisions could be interpreted more strictly than the equal protection clause of the fourteenth amendment. This precedent also held that the State grounds alone were sufficient to sustain an equal protection claim. Judge Jefferson reasoned that *Serrano* had likewise been based on such dual grounds.[142] He concluded that the U.S. and California equal protection provisions ". . . provide generally equivalent but independent protections in their respective jurisdictions." [143] Evidently the *Rodriguez* decision would not be controlling in the *Serrano* case.

Judge Jefferson's next step was to formulate the equal protection standard by which the California school finance system would be tested. He reiterated the California Supreme Court's finding that education was a fundamental interest.[144] This finding was due to the importance of education, both to the individual and society.[145] This importance, he emphasized, was reflected in the special treatment explicitly afforded education in the California Constitution.[146] Judge Jefferson then ruled that because a fundamental interest was involved, the California equivalent of the strict scrutiny test should be employed.[147] Under this rubric he held that the equal protection provisions inherent in the California Constitution mandated that the State ". . . provide for uniformity and equality of treatment to all pupils of the State." [148] Judge Jefferson concluded

> . . . That uniformity and equality of treatment mean that, if there is a correlation or meaningful relationship between the amount of money expended by a school district . . . and the quality of education provided pupils by such expenditures, the State may not . . . permit . . . significant disparities in expenditures, between school districts. . . .[149]

---

[141] Serrano, Memorandum Opinion, at 19, *citing* Dept. of Mental Hygiene v. Kirchner, 62 Cal. 2d 586; People (California) v. Krivda, 8 Cal. 3d 623 (1973); Rios v. Cozens, 9 Cal. 3d 454 (1973).

[142] Serrano, Memorandum Opinion, at 17, 21.

[143] *Id.*, at 18, *citing* Dept. of Mental Hygiene v. Kirchner, 62 Cal. 2d 586, 588.

[144] Serrano, Memorandum Opinion, at 23, 25, 29. *See* Serrano, 487 P. 2d at 1255–59.

[145] *Id.*, Memorandum Opinion, at 29, *citing* Renolds v. Sims, 377 U.S. 533, 562, (1964) *as quoted in*, Serrano, 487 P. 2d at 1257. *See also Id.*, at 1255–56.

[146] Serrano, Memorandum Opinion, at 30, *citing* CAL. CONST. art. 9, secs. 1.

> 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 improvements.

The California Supreme Court had previously rejected plaintiffs' contention that equal educational opportunity was required by article 9, section 5 of the CALIFORNIA CONSTITUTION:

> "The Legislature shall provide for a system of common schools by which a free school shall be kept up and supported in each school district at least six months in every year. . . ."

Serrano, 487 P. 2d at 1248. *See* note 109 *supra*.

[147] Serrano, Memorandum Opinion, at 36.

[148] *Id.*, at 51.

[149] *Id.*

Judge Jefferson then ruled that the standard of an "adequate education" used by the U.S. Supreme Court in *Rodriguez* failed to satisfy the State's requirement of uniformity and equality of treatment.[150] He also summarily dismissed defendants' contentions ranging from the argument that education was not a judicially manageable issue, to prophecies that the court's intervention might paralyze legislative initiative in the field of education and that by applying equal protection guarantees to school finance other local governmental functions might be jeopardized.[151]

Judge Jefferson dealt with the defendants' final defense in more detail however; here the defendants alleged that recent State legislation had eliminated the unconstitutional aspects of the school financing scheme. They contended that there was no significant correlation between the amount of money expended on education and the education outcomes which resulted.[152] The defendants argued that standardized mental test results should be employed to test this contention.[153] Claiming that expenditure did affect education quality, the plaintiffs opposed this contention. They advanced the view that the effect of expenditures on education should be tested by examining the ability of a school district to offer an opportunity for learning.[154]

The Court was unwilling to accept the defendants' definition of the quality of education, a definition based solely on standardized pupil achievement scores.[155] Judge Jefferson concluded that this definition of the cost-quality relation was inadequate. He ruled that the appropriate measure of the quality of education in California was the school-district-offerings standard advanced by the plaintiffs.[156] Proponents of this definition argued that resources provided by a school district govern the quality of education a child receives.[157] The plaintiffs contended that a meaningful relation exists be-

---

[150] *Id.*, at 59. It is the child's educational entitlement as a whole, interactive entity (gestalt) that is fundamental. Individual inputs may be necessary, but they are not sufficient. The Court avoided the temptation to try to ". . . pick out fragmentary inputs into the educational process and label them 'fundamental.'. . ." Karst, *Inputs and Outputs,* 38 LAW & CONTEMP. PROB. 333, 344. Such an approach might assure the provision of each student's essential needs for education. *But see* notes 31, 33 *supra*. Such an approach would not satisfy the outcome requirement that education must prepare a child for a competitive role in society. For this reason relative deprivation is the central and decisive factor, not some level of minimal educational "adequacy." *See* Serrano, 487 P. 2d at 1255–56 (". . . . education is a major determinant of an individual's chances for economic and social success in our *competitive* society. . . ") (emphasis added); Robinson 303 A. 2d at 295 (education is needed ". . . to equip a child for his role as a citizen and a *competitor* in the labor market. . . .") (emphasis added).

[151] Serrano, Memorandum Opinion, at 36–48.

[152] *Id.*, at 74. The court accepted the defendants' contention that the plaintiffs must assume the burden of demonstrating the correlation betweeen educational expenditures and educational quality.

[153] *Id.*, at 52, 57.

[154] *Id.*, at 52–53.

[155] *Id.*, at 77, 89, 94.

[156] *Id.*, at 99–100.

[157] *Id.*, at 95. Plaintiffs contended that the following school characteristics affected the quality of educational programs: (1) class size; (2) teacher quality; (3) curriculum offerings; (4) length of school day; (5) adequacy of materials and equipment; (6) support services such as

tween the quality and amount of these resources and the amount of money which a school district has to spend. The court agreed. Using the school-district-offerings definition Judge Jefferson found that pupils in low-wealth school districts were not receiving an educational opportunity equal to that of high-wealth districts.[158] Judge Jefferson's ruling on the cost-quality relation, did not end there, however. He found that, even as measured by standardized pupil-achievement tests, differences in expenditures had a significant effect on the quality of an educational program.[159]

Judge Jefferson concluded his opinion with the judgement that the plaintiffs had established the truth of their allegations. Even as modified by the recent legislative reforms, the public school financing system violated the equal protection provisions of the California State Constitution. He held that the injury which resulted from disparities in educational expenditures produced invidious and constitutionally impermissible discrimination against children from low-wealth school districts.[160] The court's remedy for this condition was to apply the maximum-variance-ratio standard for equal educational opportunity. Inequalities in educational expenditures were ordered reduced to ". . . amounts considerably less than $100 per pupil, within a period of six years." [161]

The *ratio decidendi* of the *Rodriguez, Robinson,* and *Serrano* decisions varies widely. In a classic example of Holmesian deference, the U.S. Supreme Court yielded to a state legislature's judgement on the adequacy of the educational offering in the state. In New Jersey, the State's highest court found that a similar system failed to provide the "thorough and efficient" education guaranteed by the State's constitution and needed to equip a child for his role in adult society. Although the New Jersey Supreme Court based its holding on disparities in expenditures, the court's decision has resulted in a heated reappraisal of the substance and practice of public education in the State. Courts in California also found disparities in public educational expenditures constitutionally offensive. Yet, the equal protection grounds relied upon there resulted only in the equalization of expenditures. The California judiciary, unlike its New Jersey counterpart, did not explicitly call the substance and quality of the State's entire educational offering into question.

---

number of counselors, and their training, number of teacher aids and the type and maintenance of buildings and equipment, and (7) instructional expenditures per pupil. For a concise analysis of the various schooling "inputs" and their effects *see* Spady, *The Impact of School Resources on Students*, in REVIEW OF RESEARCH IN EDUCATION (vol. I, F. Kerlinger ed. 1973).

[158] Serrano, Memorandum Opinion, at 101.

[159] *Id.*, at 89, 90, 94.

[160] *Id.*, at 101.

[161] *Id.*, at 102. The simplicity of the maximum-variance-ratio standard applied in this case may be deceptive. Although the court equalized per pupil expenditures among those students similarly situated, it specifically held that "categorical aids special-needs programs" were to be treated apart from basic expenditures. *Id.* This holding requires that pupil needs be identified and that students be classified on the basis of their needs before special needs programs can be allocated additional expenditures. Any other course would be an arbitrary departure from the court's order. Thus, the effect of the court's decision may well be to apply the maximum-variance-ratio standard within the classification or educational needs standard.

The judicial positions of these courts also vary, as do the political, social and economic contexts which influenced their decisions. It is probably too early to make any positive determinations about the relative authority which any of these decisions might hold. To date, only four similar cases have been decided. Yet these decisions may provide some insight into future attempts to achieve equal educational opportunity through litigation.

Northshore v. Kinnear

The Washington Supreme Court's decision in *Northshore* is typical of the three recent cases in which disparities in educational expenditures have been found constitutionally valid.[162] These three cases are not only conceptually similar, but in several instances close parallels in the actual language of the opinions can be observed.[163] The *Northshore* decision is also exemplary of the only other appellate ruling on these issues; in these cases the courts' opinions were as closely as they were bitterly divided.

On December 15, 1974 the Washington Supreme Court, under its original jurisdiction, ruled that the State's financing system was a valid exercise of legislative power.[164] Chief Justice Hale, writing for the majority, concluded

---

[162] Thompson v. Engelking, 537 P. 2d 635 (Idaho, 1975) (*rehearing denied,* 24 July 1975), *rev'g,* No. 47055 (D. Ct., 4th Jud. Dist., Ada County, Idaho, 16 Nov. 1973) (slip opinion); Olsen v. Oregon, No. 72-0569 (Cir. Ct. Ore., 25 Feb. 1975) (summary conclusions of law) (slip opinion), *appeal docketed,* No. 24035 Sup. Ct. Ore., 15 Apr. 1975; Northshore v. Kinnear, 84 Wash. 2d 685, 530 P. 2d 178 (Sup. Ct. Wash. 1974) (*en banc,* 4 to 3) (*rehearing denied,* 20 March 1975) [hereinafter cited as Thompson; Olsen; and Northshore respectively].

[163] The authors have analyzed the Olsen and Thompson decisions and have contrasted those decisions with Northshore in the footnotes accompanying the discussion of Northshore

[164] Northshore, 530 P. 2d at 194–97, Thompson, 537 P. 2d at 644, 650–53. The Northshore decision was made under the Washington Supreme Court's original jurisdiction (original application for *prohibition* and *mandamus*). Initially the parties had hoped to speed the proceedings by stipulating the facts of the case. Agreement, however, on the proper interpretation of the facts proved impossible. The Washington Supreme Court was then forced to refer the case to a reference judge drawn from the superior court bench (Order of Referral, per Hamilton, C.J. [7 Aug. 1972]). The superior court heard the evidence on both the actual facts of the case and interpretations of the significance of these facts; he then entered a finding of facts. (Finding of Fact Pursuant to Reference Hearings, Northshore Sch. Dist. No. 417 v. Kinnear, No. 46166 [Super. Ct. Wash., 23 Mar. 1973]) [hereinafter cited as Findings of Facts]. These findings, however, were also to prove controversial. The majority of the court was to disregard them, contending that the high court was in equally as good a position to examine the whole record and make a determination on those evidential facts ultimately affecting the financing system's constitutionality. Northshore, 530 P. 2d at 182. The dissent objected strenuously to this departure from established precedent. *Id.* at 204–206. See note 92 and accompanying text *infra.*

In the Thompson case both findings of fact and conclusions of law were entered by the trial court. Findings of fact provided a source of controversy in the Idaho Supreme Court as well. In an attempt to expedite the case, the trial judge had prepared his findings in the form of documentary rather than testamentary evidence. As such the majority ruled that it was not constrained by the trial court's findings. Thompson, 537 P. 2d at 642. The dissent disagreed. They found the presentation of fact in exhibit form acceptable and binding. *Id.* at 659 n. 1 (Donaldson, J., dissenting).

The trial court judge in Olsen merely filed brief summary conclusions of law. No attempt was made to formulate any statement of the facts, their implications, or the basis for the court's conclusions of law.

that the public financing system, a system based on assessed property valuations and resulting in wide disparities in expenditures, did not violate the guarantees of either the federal or state equal protection provisions. Moreover, the court ruled that the financing system fulfilled the mandate of the Washington Constitution's education clause.[165]

The weight given to the *Rodriguez* decision in these deliberations is apparent from the beginning of the majority's opinion. In language quite reminiscent of Justice Powell's opinion, Chief Justice Hale proclaimed that

> [p]etitioner's challenge is thus sweeping, comprehensive and all-encompassing. It is not directed at any particular section or sections of the educational code of this state but to the entire code embodied in RCW 28A.[166]

The majority concluded that this challenge was so radical, so sweeping that, if upheld, ". . . the schools would have to be closed unless the legislature redesigned and restructured the statutes for the funding and operation of the public school system. . . ." [167]

The impact of the U.S. Supreme Court's decision was not limited only to the tone of the majority's opinion. *Rodriguez* was also deemed mandatory authority on the federal equal protection question and highly persuasive on the construction of the State's privileges and immunities clause. This clause, the majority ruled, is synonomous with the fourteenth amendment in the court's jurisdiction. As such the majority was of the opinion that

> . . . [t]he two provisions have the same significance and are to be construed alike. If the state's statutes controlling the funding and operation of the common schools are repugnant to the equal protection clause of the Fourteenth Amendment, they are similarly repugnant to the equal protection clause [*Wash. Const.*, art. I, sec. 12, the privileges and immunities clause], and vice versa.[168]

---

[165] Northshore, 530 P. 2d at 195–96, *citing* WASH. REV. CODE sec. 28A.02.200, 28A.04.120—130; Olsen, at 1. See notes 32–33 and accompanying text *supra*. The Idaho Supreme Court in Thompson made no effort to establish whether the State's legislative or executive branch had ever attempted to implement the Idaho Constitution's education clause. After concluding that the legislature had been delegated the ". . . primary and fundamental *duty* to establish and maintain a system of public education" by the Idaho Constitution, the majority ended its consideration of the question. Thompson, 537 P. 2d at 649 (emphasis in original). *But see Id.*, at 638–40 where the majority details the operation of the State's financing system. *See* note 112 *supra*.

[166] Northshore, 530 P. 2d at 181.

[167] *Id.* Regretably, the Idaho Supreme Court in *Thompson* also echoes these histrionic excesses: "[w]e reject the arguments advanced by the plaintiffs-respondents and the conclusions made by the trial court. To do otherwise would be an unwise and unwarranted entry into the controversial area of public school financing, whereby this Court would convene as 'super-legislature,' legislating in a turbulent field of social, economic and political policy. We are especially cognizant that the facts and socio-economic conclusions which the respondents presented to the trial court are controversial, sketchy and incomplete." Thompson, 537 P. 2d at 640.

[168] Northshore, 530 P. 2d at 198; Olsen, at 2 (by implication); Thompson, 537 P. 2d at 645 (*semble*). The majority of the Idaho Supreme Court in *Thompson* cities the trial court's similar conclusion on this issue with approval. *Id.*, at 641. At 645, however, that court also notes that a differing interpretation of the Idaho equal protection clause could be reached. *See* Thompson, No. 47055 (D. Ct., 4th Jud. Dist., Ada Cty, Idaho, 16 Nov. 1973), *citing* Rodriguez, 411 U.S. 1 (1973); Robinson, 303 A. 2d 273 (1973).

The majority, of course, concluded that "vice versa" was the appropriate holding. It ruled that *Rodriquez* was a direct and controlling authority on the issue before the court. This ruling, in combination with the majority's interpretation of the Washington privileges and immunities clause, led to the court's finding that neither federal nor state equal protection guarantees were violated by the State's system of public school financing.[169]

In so construing the demands of Washington's equal protection guarantees, the majority violated two salient principles of constitutional construction. First, every provision of a state constitution should be construed in light of the instrument as a whole. No provision should be sequestered from it. No provision should be considered alone.[170] Second, as a general rule, fundamental provisions are of equal dignity. One provision must not be enforced so as to nullify or substantially impair another. Constitutional provisions should be construed in a manner which harmonizes apparent conflicts and preserves the vitality of every provision.[171]

The majority's construction of the State's equal protection clause offends both of these principles. The federal constitution contains no explicit education guarantees; this fact was decisive in the U.S. Supreme Court's deliberations in *Rodriguez*. Conversely, the Washington Constitution emphatically provides for a fundamental educational entitlement. In fact article 9, section 1 delineates a particularly stringent educational guarantee:

> [i]t is the *paramount duty* of the state to *make ample* provision for the education of all children residing within its borders, *without distinction or preference* on account of race, color, *caste,* or sex.[172]

This provision is a clear statement of the fundamental nature of education in the state of Washington and a clear statement of the egalitarian basis on which education is to be provided. Section 2 of article 9 specified the ultimate responsibility for the implementation of section 1, mandating that, "[t]he legislature shall provide a general and uniform system of public schools." [173] In combination, both sections of article 9 make education a fundamental

---

[169] Northshore, 530 P. 2d at 200; Thompson, 537 P. 2d at 641; Olsen, at 2.

[170] Downes v. Bidwell, 182 U.S. 244 (1901); Boise-Payette Lumber Co. v. Challis Indep. Sch. Dist., 46 Idaho 405, 268 P. 26 (1928); Kusydar v. Collins, 201 Ore. 271, 270 P. 2d 132 (1954); Jory v. Martin, 153 Ore. 278, 56 P. 2d 1093 (1936); De Flipis v. Russell, 52 Wash. 2d 745, 328 P. 2d 904 (1958); State *ex rel.* State Capitol Comm'n v. Lister, 91 Wash. 9., 156 P. 858 (1916). *See generally,* T. COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS 57–58 (1972 reprint of 1st ed. [1868]) [hereinafter cited as CONSTITUTIONAL LIMITATIONS] *citing* SIR EDWARD COKE, Co[MMENTARY UPON] LI[TTLETON] at 381.

[171] Ullmann v. United States, 350 U.S. 422 (1956); Dick v. United States, 208 U.S. 340 (1908); State v. Evans, 46 Wash. 219, 89 P. 565 (1907). *See generally,* COOLEY, CONSTITUTIONAL LIMITATIONS at 57.

[172] WASH. CONST. art. 9, sec. 1 (emphasis added). This article establishes the fundamental nature and the importance of education in the state. Similar delineations of the role and import of education can be observed in IDAHO CONST. art. 9, sec. 1: *"The stability of a republic form of government depending mainly upon the intelligence of the people,* it shall be the duty of the legislature of Idaho, to establish and maintain a general, uniform and thorough system of public, free common schools." (emphasis added).

[173] WASH. CONST. art. 9, sec. 2. This section amplifies the State's ultimate responsibility for and prescribes the general and uniform nature of the state's duty. *See* IDAHO CONST. art. 9, sec. 1 note 172 *supra;* ORE. CONST. art. 8, secs. 1 & 3.

interest in the State of Washington. Precedent demands that if a fundamental interest is infringed, the proper standard for construing the demands of equal protection is strict judicial scrutiny.[174] Therefore, to equate the guarantees of equal protection in the U.S. and the Washington constitutions has the effect of sequestering the Washington privileges and immunities clause from its constitutional context and the effects of the education clause. Mr. Chief Justice Hale's nugatory construction impairs both clauses in a situation where equalizing expenditures would harmonize both the demands of equal protection and the egalitarian guarantees of the education clause.

Even absent the protections of the privileges and immunities clause, the education clause would still provide an independent ground for action. The contention was made by the petitioners that expenditure disparities created a situation where some children failed to receive an ample education.[175] It can also be argued that the financing system, by conditioning expenditures on local property valuation, allocates educational resources on a wealth-based caste system. This final contention is, of course, the plaintiffs' complaint that the public school financing scheme invidiously discrimates against the poor, a suspect class.[176]

The majority's treatment of these issues is also reminiscent of the *Rodriguez* decision. Chief Justice Hale began the majority's analysis of whether the State had provided all children with an ample education by granting the great importance of education to the public welfare of Washington. He continued, however, that the constitution

> . . . makes the legislature primarily and the Superintendent of Public Instruction . . . and not the judiciary the determinants of whether and in what manner this paramount duty is to be discharged.[177]

Then in a directly contradictory judgment, he proceeded to make such a determination, finding that the legislature had acted adequately in its provision of education in the state.[178] Chief Justice Hale, like the majority of the U.S. Supreme Court in *Rodriguez*, based this ruling on citations to Washington statutory provisions, on school accreditation, the approval and evaluation of curricula and other programs, school discipline, and other provisions which

---

[174] *See* note 19 *supra*. *But see* Thompson, 537 P. 2d at 644–46 *citing* State v. Cantrell, 94 Idaho 653, 496 P. 2d 276 (1972) (strict scrutiny mentioned in dicta), Thompson v. Hagen, 96 Idaho 19, 523 P. 2d 1365 (1974) (strict scrutiny mentioned in dicta). *Contra*. Thompson 537 P. 2d Id. at 661–63 (Donaldson, J. dissenting), *citing* State v. O'Bryan, 96 Idaho 548, 531 P. 2d 1193 (1975) (strict scrutiny approach considered in holding). *See generally Developments*, 82 HARV. L. REV. 1065, at 1087–1132.

[175] Northshore, Brief for the Plaintiffs Petitioners at 7, 10–15; Findings of Fact, No. 33, 63; Thompson, No. 47055, at 9 (D. Ct. Idaho, 16 Nov. 1973).

[176] Northshore, Brief of the Plaintiffs-Petitioners at 5–6, 8, 15–22; Findings of Fact, No. 22, 23, 51; Thompson, Brief for the Respondents at 14–24; Thompson, No. 47055, at 16 (D. Ct. Idaho, 16 Nov. 1973).

[177] Northshore, 530 P. 2d at 196, 194–98.

[178] Northshore, 530 P. 2d at 184, 196–97; Olsen, at 1; the majority of the Idaho Supreme Court flatly refused to decide the issue. The court found that it could not determine " . . . what is necessary for a basic education, and what are so-called 'equal educational opportunities' . . ." Thompson, 537 P. 2d at 641. Moreover, the majority concluded that "[t]he courts are ill-suited to [this] task which is the province of the legislature." *Id.*, at 642.

". . . promote the true interests of the common schools." [179] Implicitly, the majority's reference to these provisions constitutes a standard by which education in Washington could be evaluated and judged. Yet, like the majority in *Rodriguez*, Chief Justice Hale failed to document the efficacy of these provisions in achieving their stated objectives; he apparently failed even to ascertain whether the Superintendent of Public Instruction had implemented them at all. Moreover, he failed to delineate the criteria he used in singling out these particular provisions over other educational regulations. He failed to announce any discernable indices that would allow other independent verification of the "ampleness" of Washington's educational system. Like the majority in *Rodriguez*, he failed to define the level of proof needed to establish that children were not receiving an ample education. In practice, if not in concept, an ample education must be the same as an adequate education. The evaluation and approval criteria seem to be identical. The substantive guarantees of both provisions seem to be fulfilled by what the legislature, in its wisdom, has chosen to provide.

The majority treated the issue of invidious discrimination against the class of poor children or children living in poor districts in a similar manner. Based on testimony and other evidence submitted by the Office of the Superintendent of Public Instruction, the majority found that ". . . there was no evidence that people from wealthy families tend to live in school districts with high assessed valuation per pupil, or that poor families tend to live in school districts with low assessed valuation per pupil. . . ." [180] Chief Justice Hale found that while "[t]he petitioners' whole case was based on the unconstitutional effect upon education stemming from differences in assessed valuation," [181] that the exact opposite was true. In Washington's 10 largest school districts, the majority found, people from poor families tended to live in areas with high assessed valuation.[182] The majority ruled that whatever differences existed in educational expenditures stemmed, not from variations in property wealth but from numerical difference in school population. The majority found that the origin of expenditure disparities lay in economies or diseconomies of scale.[183] Chief Justice Hale asserted that district property wealth per-pupil had little to do with the quality of education and that all districts meet the *minimum standards* necessary to fulfill the State's paramount duty.[184] The majority concluded that "[t]he significance of assessed valuation per pupil is thus inconsistent, superficial and coincidental only." [185]

This finding, like the U.S. Supreme Court's finding in *Rodriguez*, is based

---

[179] Northshore, 530 P. 2d at 175, *citing* Wash. Rev. Code sec. 28A.02.200, 28A.04.120.130. See note 164 *supra*.

[180] Northshore, 530 P. 2d at 189; *cf.* Thompson, 537 P. 2d at 645–46 summarily *citing* Rodriguez, 411 U.S. at 25 (the poor not a suspect class).

[181] Northshore, 530 P. 2d at 189.

[182] *Id.*

[183] *Id.*, at 190–91. *Contra,* Billings & Legler, *Empirical Evidence of Economies of Scale in Education as a Justification of Differentials in Expenditures Per Student,* 2 J. L. & EDUC. 667 (1973).

[184] Northshore, 530 P. 2d at 184, 185, 186, 189, 190, 191.

[185] *Id.*, at 191.

on the court's inability to find any palpable injury resulting from low assessed valuation and the concomitant low educational expenditures. The majority explicitly noted that "[t]here was no evidence that any child had been deprived of accreditation [sic], promotion or admission to other schools because his district failed to meet state standards. . . ." [186]

Chief Justice Hale stated that the record was notably silent as to what constitutes an ample educational opportunity. He asserted that petitioners had made

> . . . virtually no showing whatever as to the standards or curriculum which is or ought to be necessary to meet the state's duty to provide a common school education for all children, and suppl[ied] no comparative basis for a ruling . . . that the state is not discharging its paramount duty. . . .[187]

He continued:

> [t]here is no evidence whatever that one district or another provides unconstitutionally superior or unconstitutionally inferior opportunities; nor is there evidence which are the better or inferior of offering districts, if any, one way or another; . . . conclusions of fact rest largely as they do upon opinion and conjecture drawn from the *statistical data* of the record.[188]

Mr. Chief Justice Hale emphasized the irrelevance of these statistical disparities to the court's deliberations on the constitutionality of the state's financing system by stating that, "[t]he entire case is thus based not upon curriculum deficiencies and lack of educational opportunities but rather upon financial and property valuations derived almost exclusively from statistical data, . . ." [189] The court thus concluded that the record did not bear out the plaintiffs' complaint of inequalities in educational opportunity in Washington. As such, the court ruled, the plaintiffs' challenge of the statutory structure of the public school financing system could not be sustained.[190]

---

[186] *Id.*, at 184.

[187] *Id.*, at 184–85.

[188] Northshore, 530 P. 2d at 185 (emphasis added). Although concurring with the result, Mr. Justice Rosellini emphasized that he could not concur with those portions of the majority's opinion which suggest that the State is now providing all children with an ample education. "It is my opinion," he asserted,

> based upon what I have read and observed, that the State's contribution to the cost of educating children within its borders is inadequate. The question of adequacy is one of opinion, affected by many considerations. But since the record does not clearly disclose this inadequacy, I believe that my proper function as a member of the judiciary is not to convert my personal opinion to a constitutional mandate.
>
> "For these reasons I would deny the relief sought in this action."
>
> *Id.* at 203.

If the plaintiffs had marshalled evidence which documented the educational impact of low property wealth and low expenditures, it seems likely that Justice Rosellini would not have concurred with the majority. In which case, the outcome of the decision would have been reversed.

[189] *Id. Accord,* Jefferson v. Hackney, 406 U.S. 535 (1972) where the plaintiffs' statistical evidence of discrimination in funds allocation was characterized as a "naked statistical argument" establishing no injury.

[190] Northshore, 530 P. 2d at 185 and 203 respectively; Thompson, 537 P. 2d at 653; Olsen, at 1–3.

The dissent to the majority's opinion was bitter. Justice Stafford began his opinion by emphasizing that the case presented the most important combination of constitutional, educational, and taxation issues faced by the court in recent history. He reacted to the majority's judgment by calling this opinion ". . . a legal pygmy of doubtful origin." [191] He asserted that the majority's judgment might provide temporary solace to some, but that it could never ". . . withstand a critical analysis either factually or legally." He continued that the opinion rested on such a shaky foundation that the majority's "comfortable solution" may be short lived.[192]

Justice Stafford's analysis of the case began with a compilation of the adjudicative errors in the majority's opinion. He challenged the majority's disregard of the trial court's findings of fact. He evinced that this cavalier usurpation was directly contrary to current case law on the question and noted that the majority had failed to cite any legal support for its action. Justice Stafford continued his opinion by asserting that not all of the majority's findings of fact could be supported from the record.[193] In concluding his criticism of the court's judicial procedure, Justice Stafford strongly faulted the majority for its use of "strawman" rhetorical fallacies and its ". . . lengthy use of the 'parade of horribles' or 'pandora's box' argument. . . ." [194]

Turning to the substantive questions at issue, Justice Stafford again differed markedly with his colleagues in the majority. He, unlike the majority, had little difficulty in identifying the class of disadvantaged children and the injury they suffered. Mr. Justice Stafford found that there was not only a close relationship between per-pupil assessed property valuation and per-pupil expenditures but that there was also a strong correlation between poverty (measured both in terms of median income and in the percentage of families below the poverty line) and per-pupil assessed valuation.[195] In other words, Justice Stafford found that educational expenditures were greater in those areas where the school population was drawn from the children of wealthy families. Justice Stafford concluded that this wealth discrimination had a significant effect on the quality and substance of the state's educational offering. He noted that possibly it was true that there was no exact standard for measuring the quality of education children receive. "Nonetheless," he stated,

> it is crystal clear that there are vast discrepancies in the dollar input per-pupil, a fact that in the final analysis is very relevant in light of the further fact that financing is a key ingredient in the provision of education services for children.[196]

---

[191] Northshore, at 204 (Stafford, J., dissenting).

[192] *Id.*

[193] *Id.*, at 204–205, 206 respectively (Stafford, J., dissenting); Thompson, 537 P. 2d at 659 n.1. (Donaldson, J., dissenting) criticizing the "off-handed" rejection of the lower court's findings of fact. See note 163 *supra.*

[194] Northshore, 530 P. 2d at 206 (Stafford, J., dissenting opinion).

[195] Northshore, 530 P. 2d at 211 (Stafford, J., dissenting); *cf.* Thompson, 537 P. 2d at 669–70 (Donaldson, J., dissenting), (employing district wealth rather than the individual wealth definition of poverty).

[196] Northshore, 530 P. 2d at 220 (Stafford, J., dissenting); Thompson, 537 P. 2d at 664–69 (Donaldson, J., dissenting).

Justice Stafford found that wealth discrimination in Washington's system of educational financing was not limited solely to disparities in local fiscal capacity; he also found discriminatory effects in the State equalization formula. This formula, *inter alia,* increases the "State's per-pupil guarantee" allocation to reflect staff training and experience and thus provides monetary benefits to districts which can recruit better trained, more experienced staff. "Once again," Justice Stafford noted, "districts which are better able to compete for experienced staff (i.e., those with higher per-pupil assessed valuation) receive a double benefit: better staff and additional state money . . . ."[197] He found that this same double benefit is afforded wealthy districts in State reimbursements for transportation and other expenses as well.[198]

Perhaps the dissent's single most important finding of injury was on the question of educational adequacy raised by the majority and by the U.S. Supreme Court in *Rodriguez.* The U.S. Supreme Court had found that no proof was offered to discredit or refute the assertion, by the State of Texas, that all children were guaranteed at least an adequate education. "In the instant case," Justice Stafford ruled, "it is the uncontroverted finding of the trial court that the state's per pupil guarantee *does not* even *provide sufficient* funds with which to operate and maintain the public schools."[199]

Together these findings led the dissent to conclude that the state system of public school financing violated the Washington Constitution. In supporting this conclusion Mr. Justice Stafford found that

> . . . while neither the Equal Protection nor Privileges and Immunities Clause [Wash. Const. art. 1, sec. 12] requires absolute equality, our state constitution, art. 9, secs. 1 and 2 [the education clause], specifically requires the *state* to make "ample provision for the education of all children."[200]

Justice Stafford reasoned that the education clause thus created a class of citizens to which the state owes the "paramount duty" of providing an "ample" education. He found that the use of the word "paramount" made this duty particularly compelling. He noted that the stringent nature of this duty is unique among state constitutions generally, and that it finds only a single instance of use in the Washington Constitution, in the education clause.[201]

---

[197] Northshore, 530 P. 2d at 212 (Stafford, J., dissenting); Thompson, 537 P. 2d at 665 n.9 (Donaldson, J., dissenting), *citing* Serrano, Memorandum Opinion, at 100.

[198] Northshore, 530 P. 2d at 212 (Stafford, J., dissenting).

[199] *Id.,* at 215 (Stafford, J., dissenting) (emphasis in original).

[200] Northshore, 530 P. 2d at 215–16. Justice Stafford found that the "ampleness" of the State's educational offering must be judged on the basis of " . . . contemporary demands and the new complexities of life . . ." *Id.,* at 220, *citing* Robinson v. Cahill, 62 N.J. 473, 303 A. 2d 273 (1973); Keyishan v. Board of Regents, 385 U.S. 589 (1967); Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 222 (1824); McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 415 (1819). *Accord,* Thompson, 537 P. 2d at 648 (majority opinion). Although construing the constitution as a whole, Justice Stafford in *Northshore* has given the principal weight to the education clause in his judgement in this case. Justice Donaldson, dissenting in *Thompson,* proceeded similarly using the rationale outlined by Justice Powell in *Rodriguez,* but turned the case on equal protection grounds. Thompson, 537 P. 2d at 658, 669–70. (Donaldson, J., dissenting). *See* note 112 *supra.*

[201] Northshore, 530 P. 2d at 216–18 (Stafford, J., dissenting).

Justice Stafford then noted that the Constitution clearly defined the manner by which the duty was to be executed. "Article 9, sec. 1" he found,

> declares that such provision for education shall be *"without distinction or preference* on account of race, color, caste, or sex." Section 2 of article 9 provides further that the above-mentioned (paramount) duty shall be carried out by means of a *"general and uniform* system of public schools."[202]

Justice Stafford found that the egalitarian protections delineated in section 1 not only prohibited traditionally suspect racial classifications, but that the constitution's bar against caste distinctions explicitly prohibited classifications based on wealth. Justice Stafford noted further that in this context the "uniform and general" provisions of section 2 prescribe that the state shall provide educational services equally. Any system which failed to provide education on this basis, he reasoned, would violate the Washington Constitution.

The dissent found, moreover, that the Washington privileges and immunities clause acted to support this construction. Justice Stafford rejected the majority's suggestion that the demands of the privileges and immunities clause and the education clause should be reviewed with a singularly exclusive construction. He asserted that the equal protection guarantees of both clauses could only be viewed as mutually supportive. He found that any other interpretation would relegate the education clause's "paramount" guarantee to a secondary position in the constitution.[203] Any other interpretation, it need not be added, would relegate the educational opportunities of some children to a secondary position as well.

Horton v. Meskill

The *Rodriguez* decision also had a significant effect upon deliberations over the constitutionality of Connecticut's system of public school financing. In his decision in the case of *Horton* v. *Meskill,*[204] Superior Court Judge Rubinow ruled that the U.S. Supreme Court's decision in *Rodriguez* was controlling authority on the question of a possible fourteenth amendment violation and that *Rodriguez* was persuasive authority as to the proper construction of Connecticut's own equal protection guarantees.[205] Moreover, Judge Rubinow explicitly excluded recent state decisions, like *Robinson* and *Serrano*, from consideration. He held that the range of variation in state public school financing systems and in the provisions of state constitutions made such decisions ". . . of little value as precedent." [206]

Judge Rubinow began his opinion by examining the basis and operation of the State's system of school financing. At the outset, he ruled that "[i]n

[202] *Id.*, at 218 (emphasis in original).

[203] *Id.*, at 217–18. Thompson, 537 P. 2d at 660 (Donaldson, J., dissenting).

[204] Horton v. Meskill, 31 Conn. Supp. 377, 332 A. 2d. 113 (Super. Ct. Conn. 1974), *modified,* Supplement to Memorandum of Decision, No. 185283 (Super. Ct. Conn. 30 Jan. 1975); Second Supplement to Memorandum of Decision (Super. Ct. Conn. 8 Aug. 1975), *reviewing,* Conn. Pub. A. 75-341 (12 June 1975); *appeal docketed,* No. 185283 (Sup. Ct. Conn. Jan. 1975) [hereinafter *cited* as Horton].

[205] *Id.*, at 115.

[206] *Id.*

Connecticut, the duty of educating children is a duty of the state." [207] He found that this duty was formally recognized in the eighth article of the 1965 Constitution and that the State's duty had long been established by the common law of Connecticut.[208] Judge Rubinow noted that areas of the state's authority, including the power to raise revenues from the local property tax, had been delegated legislatively to the municipalities. "Nevertheless," he continued, "the duty to educate is that of the state; delegating the authority does not discharge it." [209]

Judge Rubinow next turned to the fiscal operation of the State's public schools. He found that despite a variety of federal and state grants to school districts, the principal revenue source for public education in the state was local property taxation. He continued that there could be no doubt that the amount of money spent on a child's education was determined by the taxable wealth of his community, and that there were manifest disparities in the tax bases of the State's municipalities. He noted that " '[t]his dual inequality—a family can pay more and get less for its children—is the fundamental issue of school finance.' " [210]

For Judge Rubinow, these inequalities were not merely statistical calculations on a chart showing local fiscal capacity. On the contrary, he found that these inequalities had a palpable effect upon the education a child might receive. Children living in low-wealth districts might receive both narrower curriculum and extracurricular programs. Additionally, low-wealth districts might not have the resources to ". . . perceive and provide for [needed] special instruction, for both handicapped and gifted children; or to furnish counseling to children in need of it; or to have well-rounded vocational training programs." [211] Finally he observed that district wealth also affected the ability to attract more competent and better educated personnel. Judge Rubinow did note that there was no conclusive evidence of a correlation between educational inputs and educational outcomes. "On the other hand," he continued

> the evidence in this case is highly persuasive that, . . . there is a high correlation between education input and education opportunity (the range and quality of educational services offered to pupils). In other words, disparities in expenditures per pupil tend to result in disparities in education opportunity.[212]

---

[207] *Id.*

[208] *Id.*, at 115–16, *citing* State *ex. rel.* Board of Educ., v. D'Aulisa, 133 Conn. 414, 52 A. 2d 636; Bissell v. Davidson, 65 Conn. 183, 52 A. 636; Murphy v. Berlin Bd. of Educ., ___A. 2d___ (1974).

[209] Horton, at 116. Judge Rubinow found that the Connecticut Supreme Court's decision in State *ex rel.* Walsh v. Hine, 59 Conn. 50, at 60, 21 A. 1024 clearly documented this relation:

> " 'In so far as these subdivisions of the territory of the state were used for the performance of this duty of providing education they were the *mere agent and instruments of the state,* liable to be changed at its pleasure, and used by it from time to time solely because the object in view could in its opinion be more *effectually and economically* accomplished through such agencies than in any other way.' " (Emphasis added).

[210] Horton, at 115–16, *citing* 2 GOVERNOR'S TAX REFORM COMMISSION REPORT at 53; INTERIM REPORT OF THE COMMISSION TO STUDY SCHOOL FINANCE AND EQUAL EDUCATION OPPORTUNITY at 4, 10 (Feb. 1974); *A Statistical Analysis,* 81 YALE L.J. 1303, at 1328.

[211] Horton, at 117.

[212] *Id.*, at 118.

He summarized the court's opinion on the issue by ruling that

> [t]o the extent that the lack of local property tax money imposes some or all of these deficiencies upon the pupils in one town to a substantially greater degree than upon the pupils in another town, the former pupils are being denied these educational advantages, not because they do not need them or want them, but because the present method of raising funds to provide for their education *is not related to either their educational needs or their wants*.[213]

In the *Horton* complaints, the plaintiffs had emphasized the "'. . . sheer irrationality of a system that allocates education (to pupils) on the basis of property values. . . .'" Judge Rubinow concurred with their assessment of the arbitrary and capricious nature of the system. Noting that their "'. . . argument would be similar and no less tenable should the state make educational expenditures dependent upon some other irrelevant factor, such as the number of telephone poles in the district,'" he ruled that the wealth of a district was a criteria ". . . totally unrelated to the needs or wants of those pupils" living in the district.[214]

There is no difference between the constitutional duty of the State to the children in one district or another, Judge Rubinow ruled. Yet by delegating its authority without regard for the differing fiscal capacities of the State's municipalities, pupils in some municipalities ". . . receive an education that is in a substantial degree lower in both breadth and quality than that received by pupils in municipalities with greater financial capability. . . ." [215] For this reason, Judge Rubinow ruled,

> [t] he disparities in educational opportunity that are inherent in the present duty-delegating legislation make that legislation not "appropriate" legislation for discharging the state's constitutional duty, and that legislation therefore violates article eight, section 1 of the Connecticut Constitution.[216]

Moreover, Judge Rubinow found that there was an additional reason why the State's system of public school financing violated the Connecticut Constitution. It is at this point in the Judge's opinion that the impact of *Rodriguez* can be observed. Judge Rubinow began his discussion of this second violation by noting that the fourteenth amendment and the Connecticut equal protection clause, article 1, section 20, "have the same meaning and imposed similar constitutional limitations.' " [217] He then ruled that the *Rodriguez* decision treated the same issues as presented in the instant case; as such *Rodriguez* constituted persuasive authority on the construction of Connecticut's equal protection provisions.[218] Specifically, Judge Rubinow cites the Court's conclusion that if a financing system ". . . impinges upon some fundamental right explicitly or implicitly protected by the Constitution . . ." strict judicial scrutiny is thereby required.[219] Judge Rubinow concluded that the

---

[213] *Id.*, at 117 (emphasis added).

[214] *Id.*, at 117, *quoting A. Statistical Analysis*, 81 YALE L.J. 1303, at 1307.

[215] Horton, at 118.

[216] *Id.*, *citing* CONN GEN. STAT. REV. secs. 10-220, 10-240, 10-241.

[217] Horton, at 118, *citing* Karp v. Zoning Board, 156 Conn. 287, at 295, 240 A. 2d 845, at 849.

[218] Horton, at 118, 119.

[219] *Id.*, at 118, *quoting* Rodriguez, 411 U.S. 1, at 17.

majority's opinion in *Rodriguez* clearly suggested that if the U.S. Constitution had contained a provision declaring education a fundamental right, the Court would have found the Texas system of public school finance in violation of the equal protection clause. He also noted the majority's assertion that the Texas financing system "... and its counterpart in virtually every other State will not pass [the] muster" of "strict judicial scrutiny."[220] Finally, Judge Rubinow applied the U.S. Supreme Court's reasoning in the context of the Connecticut Constitution, to the present fact situation. He found that the mandatory language of the education clause made it the duty of the State to provide free public education and thus created a correlative right to that education. He also found that the recurrent expressions of the importance of educating the State's children "... make inevitable the conclusion that the right thus created by article eight, section 1 of the Connecticut Constitution is a fundamental right."[221] The court found that because the State's financing system infringed upon this fundamental right that strict judicial scrutiny is the proper form of review. Judge Rubinow noted that under this test, the State's actions are not entitled to the usual presumption of validity. The State "... must carry a 'heavy burden of justification,'" he ruled, and must demonstrate that the educational system has been structured with 'precision' and is 'tailored' narrowly to serve legitimate objectives" with "'the least drastic means'" available.[222] Judge Rubinow ruled that the defense of preserving local control was not a compelling justification for the inequities in the State's financing system because the State's objectives could be achieved without the discrimination inherent in the current system.[223] He finally concluded his opinion with the ruling that "... under the reasoning and authority of *Rodriguez*" the Connecticut system of public school financing also violates the equal protection clause of the Connecticut Constitution.[224]

It is tempting to assert that the decisive factor in these four cases was whether their respective courts were more impressed by the result or the reasoning in *Rodriguez*. In Connecticut, the court closely applied the strict scrutiny rationale outlined by Mr. Justice Powell and concluded, on this basis, that the Connecticut system violated the State's constitution. In Idaho, Oregon, and Washington the courts evidently looked beyond the letter of *Rodriguez* to Justice Powell's decision itself. As a result, these courts found no constitutional violations. On closer examination, however, this thesis fails to account for the reason why one course was chosen over the other. Only injury can account for the outcomes of these decisions. If a court could find some palpable educational injury resulting from disparities in educational expenditures, then the financing system was held unconstitutional. If, conversely, the court could only find statistical inequalities the constitutionality of the system was upheld. Educational injury is the decisive element.

A focus of this article has been the criticism or commendation of certain

---

[220] Horton, at 119, *quoting* Rodriguez, 411 U.S. at 17.

[221] Horton, at 119, *citing* State *ex rel.* Walsh v. Hine, 59 Conn. 50, at 60, 21 A. 1024. *See* note 112 *supra*.

[222] Horton, at 119, *quoting* Rodriguez, 411 U.S. at 16–17.

[223] Horton, at 119.

[224] *Id.*

judicial determinations in recent school finance challenges. It should be noted that in neither instance was the "fact research" introduced sufficient to compel a particular decision. Although the analysis presented in this article generally challenges inequities in educational expenditures, this analysis finds no firmer empirical support in the record than the decisions which it opposes. In the end, this analysis and the decisions discussed are grounded in personal biases and policy judgements. Moreover, even if supporting fact research on injury were available, little is known about how the persuasiveness of social science research findings is affected by their presentation in litigation, by the necessary nomothetical elements of a judgement, or by the preconceived value and policy notions of the presiding justices. However, one fact is certain. The very absence of compelling scientific proof of injury dictates that the pivotal decision factor in the rule making process will be the values, biases, and policy considerations of the court.

Other Avenues for Action

As courts grapple with the concepts of injury, adequacy, equal protection, thoroughness and efficiency, we may move closer to equal educational opportunity for all children. School finance litigation is not the only path to this end, however. Other avenues of legal action also advance in this direction. Moreover, challenges in these areas avoid the problems of the cost quality assumption. Demonstrations of injury in these cases are more simple and direct. These cases are based on the salient principle that once a state provides public education it may not exclude or invidiously discriminate against any group of children.

Traditionally local school agencies have had wide discretion in the admission of children to schools, in the assignment of students to classes, and in the formulation and execution of promotion and graduation standards for those classes. The judiciary has been particularly reticent about intruding upon this process and thereby challenging the educators' professional decisions. Only recently and only in the case of significant abuses has the judiciary overcome its trepidation.

Exclusions from Education

A step toward equal educational opportunity can be observed in cases involving handicapped children. These cases establish education as "a right which must be made available to all on equal terms." [225] These cases also reverse the traditional judicial position that the substance and quality of

---

[225] Brown v. Board of Educ., 347 U.S. 483, at 493 (1954). It should be noted that education is not only "a right which must be made available to all on equal terms," it is also a right, that once provided cannot be denied to all on equal terms. *See* Griffin v. Prince Edward Cty., 377 U.S. 218 (1964). The National Institute of Education is funding a study of compulsory education and the possible consequences of its repeal, *see* Aikman, Legal Implication of Compulsory Education (NIE Grant No. NEG-00-3-0161). Preliminary conclusions indicate that the legislative repeal of publicly supported education is neither a legal nor a political reality.

education are not justiciable issues. Further, they begin to define the legal obligations a state undertakes by providing education. The conflict which precipitated these broad and fundamental precepts is fairly narrow and mundane, however, arising from a state exclusion of handicapped children from education on the grounds that they are uneducable, untrainable and unable to benefit from education.

In one of these cases, *Pennsylvania Association for Retarded Children* v. *Pennsylvania*,[226] the plaintiffs contended that the State's claim that handicapped children are "uneducable and untrainable" lacks a basis in fact.[227] Their assertion was substantiated by extensive research findings and expert testimony.[228] Plaintiffs then contended that the state had invidiously discriminated against handicapped children by denying them their fourteenth amendment equal protection and due process rights.[229] The injury to these children, due to educational deprivation and stigma, was as compelling as it was obvious. Neither the Commonwealth of Pennsylvania nor any of the school districts which were parties to the action challenged the plaintiffs' constitutional claims. As a result, a three judge federal district court ruled that it was satisfied that the evidence which was introduced raised serious doubts that Pennsylvania had a rational basis for such exclusions. The parties then entered into a consent agreement which required the Commonwealth of Pennsylvania to provide "every retarded person . . . access to a free public

---

[226] 334 F. Supp. 1257 (E.D. Pa. 1971) (consent decree), 343 F. Supp. 279 (E.D. Pa. 1972) (consent decree) [hereinafter cited as P.A.R.C.], *noted in* Kirp, Buss & Kuriloff, *Legal Reform in Special Education: Empirical Studies and Procedural Proposals*, 62 CAL. L. REV. 40, at 58–81 (1974) [hereinafter cited as *Legal Reform in Special Education*]; Kuriloff, True, Kirp, & Buss, *Legal Reform and Education Change: A Preliminary Assessment of the Pennsylvania Case*, 41 EXCEPTIONAL CHILD. 35 (1974). The National Institute of Education is funding an in-depth study of the implementation and operation of the P.A.R.C. decree, *see* Kuriloff, Kirp, & Buss, Student Classification and the Law (NIE Grant Neg-00-3-0192). *Also see* HOBBS (ed.), HANDBOOK ON CLASSIFICATION OF EXCEPTIONAL CHILDREN (1975). One of the best treatments of the issue of exclusion as well as that of misclassification and inappropriate instruction is still Kirp, *The Schools as Sorters: The Constitutional and Policy Implications of Student Classification*, 121 U. PA. L. REV. 705 (1973) [hereinafter cited as *The Schools As Sorters*].

[227] P.A.R.C., 343 F. Supp. at 283.

[228] *Id.*, at 285 & n. 14a; *Id.*, 334 F. Supp. at 1259. The use of expert testimony in this case is a clear example of Kalven's middle range. Through the use of social science empiricism, the court was able to establish that ". . . all mentally retarded persons are capable of benefitting from a program of education." *Id.*, at 1259. The court then applied nomothetical principles to reach a value judgement on the significance of that empirical fact on the validity of the state's action. The court concluded:

> The Commonwealth of Pennsylvania has undertaken to provide a free public education to all its children . . . and even more specifically, has undertaken to provide education and training for all its exceptional children.
>
> Having undertaken to provide a free public education to all of its children, the Commonwealth of Pennsylvania may not deny any mentally retarded child access to a free public program of education and training. *Id.*

[229] *Id.*, 343 F. Supp. at 283. Plaintiffs also advanced the claim that the constitution and laws of Pennsylvania guarantee an education to all children including the mentally retarded. *Id.*, 283–84 & n. 9, *citing* PA. CONST. (PURD. STAT.) art. 8, sec. 14; PA. STAT. tit. 24, secs. 13-1301, 13-1326 (PURD. STAT.).

program of education and training appropriate to his learning capacities." [230]

In a similar case, *Mills v. Board of Education,*[231] the Board of Education of the District of Columbia was also required to end the exclusion of handicapped children from publicly supported education. Since the District of Columbia is not a state, the fourteenth amendment equal protection clause cannot be applied. The plaintiffs in *Mills* proceeded on the inherent due process guarantees of the fifth amendment, guarantees which have been judged to be substantially equivalent to the equal protection provision of the fourteenth amendment. Plaintiffs also based their claim on provisions in the District of Columbia Code and in the D.C. School Board Rules which require attendance of all children and which require placement in a special education program if a child cannot benefit from a normal instructional program. These requirements, of course, established a correlative right to an education that is suited to the child's educational needs.[232] Like the court in Pennsylvania, Federal District Court Judge Waddy found that the plaintiffs had been denied an equal educational opportunity.[233] The holding of the Court in *Mills* was broader in scope than the holding in *P.A.R.C.*, however. In *Mills*, the court not only included handicapped children but also extended the remedy to children who had been suspended or expelled from school.[234] The *Mills* decision differs from the *P.A.R.C.* decree on one other important point. In *Mills*, a defense of the Board of Education had been that the school district lacked sufficient funds for the education of the handicapped.[235] In its ruling on this issue the court held that the exclusion of these children ". . . cannot be

---

[230] P.A.R.C., 343 F. Supp. at 302–16. On June 14, 1974, the Pennsylvania State Board of Education widely extended the protections of the P.A.R.C. decree. Henceforth, every child in Pennsylvania, including "normal" and "gifted" children, will have a right to an appropriate education and can avail themselves of the P.A.R.C. style due process hearing to challenge any placement unsuited to their educational needs. *See* 22 PA. CODE sec. 13.31 et seq. (3 June 1975).

[231] 348 F. Supp. 866 (D. D.C. 1972), No. 1931-11 (D. D.C. 27 Mar. 1975) (District of Columbia found in contempt for its failure to implement the court's decision). *Accord,* LeBanks v. Spears, 60 F.R.D. 135 (E.D. La. 1973) (consent agreement); Harrison v. Michigan, 350 F. Supp. 846 (E.D. Mich. 1972); W. Va. *ex rel.* Doe v. Kingery, 203 S.E. 2d 358 (Sup. Ct. W. Va. 1974); *In the Interest of* G.H., 218 N.W. 2d 44 (1974); Reid v. Board of Educ., 453 F. 2d 238 (2nd Cir. 1971) (Doctrine of Abstention), *In re* Reid, No. 8742 (decision of the N.Y. Comm'r of Educ., 26 Nov. 1973). *Contra,* Panitch v. Wisconsin, 371 F. Supp. 955 (E.D. Wis. 1974); Tidewater Society for Autistic Children v. Tidewater Bd. of Educ., Civ. No. 426-72-N (E.D. Va. 26 Dec. 1972). For compilations of rendered and pending decision on this issue, *see* ABESON & BOLICK, A. CONTINUING SUMMARY OF PENDING AND COMPLETED LITIGATION REGARDING THE EDUCATION OF HANDICAPPED CHILDREN (Nov. 1974); HEW, MENTAL RETARDATION AND THE LAW: A REPORT OF CURRENT COURT CASES (Nov. 1974). *See also* Title V, section 504 of the Rehabilitation Act of 1973, P.L. 93–112, 87 STAT. 355. This section prohibits invidious discrimination against the handicapped by agencies receiving federal funds. It can be viewed as a necessary extention of the protections of the Civil Rights Act of 1964.

[232] Mills, 348 F. Supp. 866, at 873–874 *citing* D.C. CODE 31-201, 31-203, 31-207, D.C. BD. OF EDUC. RULES, chap. 13.

[233] Mills, 348 F. Supp. 866, at 873–75.

[234] *Id.*, at 870 (definition of class), 878 (judgement and decree).

[235] *Id.*, at 878. *See* Goldberg v. Kelly, 397 U.S. 254 (1969); Shapiro v. Thompson 394 U.S. 618 (1969) ("The saving of costs cannot justify an otherwise invidious classification.") *Contra,* Burham v. Dept. of Public Health, 349 F. Supp. 1335 (N.D. Ga. 1972).

excused by the claim that there are insufficient funds," nor can ". . . insufficient funding or administrative inefficiency be permitted to bear more heavily on the 'exceptional' or handicapped child than on the normal child." [236]

Neither the *P.A.R.C.* nor the *Mills* cases contain the extensive equal protection analysis found in cases like *Serrano, Rodriguez* and *Robinson.* Neither case centered upon whether the traditional rational basis test or the far stricter compelling state interest test should properly be applied to public education.[237] Yet, in both cases, the litigation was highly successful. This success may be attributed to two factors. First, that the courts were presented with a clearly palpable injury to a clearly definable class. While these cases were based on equal protection and due process grounds, they also introduced statutory or regulatory standards that served to substantiate their claims. Second, while these cases challenged inequalities in educational opportunity, their challenges were limited and quite specific. They did not challenge the entire fiscal basis of the educational system nor the assumptions upon which it was based, as had *Serrano, Rodriguez* and *Robinson.*

Misclassification in the Provision of Education

Classification or "tracking" of students according to the schools' best estimate of their educational ability is a generally accepted and widely practiced phenomena in American schooling. This process of selection, evaluation and placement of students lies at the heart of the educators' special claim to competency. Yet the increasing frequency of grievous instances of student "misclassification" has begun to change the judiciary's traditional deference to such professional decisions.

The leading case on this issue is *Hobson* v. *Hansen.*[238] Judge Skelly Wright's opinion has become the doctrinal foundation for challenges to erroneous student classification. Judge Wright was presented with a situation in which the District of Columbia established and maintained a rigid tracking system for classifying students, ostensibly on the basis of their educational

---

[236] *Id.*, at 876.

[237] *In* P.A.R.C., 343 F. Supp. at 283 n. 8, the Court ruled that the plaintiffs had

> . . . established a colorable claim even under the less stringent rational basis test, and consequently we need not decide whether the Commonwealth must demonstrate a compelling state interest [strict scrutiny] in order to dispose of the narrow issues presently before us."

See also note 252 *infra* for references on judicial avoidance generally.

[238] Hobson v. Hanson, 269 F. Supp. 401, (D. D.C. 1967), *aff'd sub nom.*, Smuck v. Hobson, 132 U.S. App. D.C. 372, 408 F. 2d 175 (1969), 327 F. Supp. 488 (D. D.C. 1971) (Wright, J., sitting as District Court Judge); *noted in* BARATZ, A. QUEST FOR EDUCATIONAL OPPORTUNITY IN A MAJOR URBAN SCHOOL DISTRICT: THE CASE OF WASHINGTON, D.C. (NIE Grant No. NEG-00-3-0201). *See generally* Sorgen, *Testing and Tracking in Public Schools,* 24 HAST. L. REV. 1129 (1973); TRACHTENBERG & JACOBY, PUPIL TESTING: A LEGAL VIEW (NIE, ERIC, ED No. 1022110); Note, *The Legal Implications of Cultural Bias in the Intelligence Testing of Disadvantaged Children,* 61 GEO. L. J. 1027 (1973); Note, *Legal Implications of the Use of Standardized Ability Tests in Employment and Education,* 68 COLUM. L. REV. 691 (1968); Ruch and Ash, *Comments on Psychological Testing,* 69 COLUM. L. REV. 608 (1969) (reactions to 68 COLUM. L. REV. 691); and the authorities cited therein.

progress and potential. Judge Wright found, however, that the lower tracks of this system received an education "decidedly inferior" to that provided children in the upper tracks.[239] On the basis of exhaustive statistical evidence, the court also found that ". . . those being consigned to the lower tracks are the poor and the Negroes, whereas the upper tracks are the provinces of the more affluent and the whites." [240] With these two considerations in mind, Judge Wright reasoned that

> [s]ince by definition the basis of the track system is to classify students according to their ability to learn, the only explanation defendants can legitimately give for the pattern of classification found in the District schools is that it does reflect students' abilities. If the discriminations being made are founded on anything other than that, then the whole premise of tracking collapses and with it any justification for relegating certain students to curricula designed for those of limited abilities. While government may classify persons and thereby effect disparities in treatment, those included within or excluded from the respective classes should be those for whom the inclusion or exclusion is appropriate; otherwise the classification risks becoming wholly irrational and thus unconstitutionally discriminatory. It is in this regard that the track system is fatally defective, because for many students placement is based on traits other than those on which the classification purports to be based.[241]

These traits, the court ruled, were directly linked to the use of standardized aptitude tests as the principle classification tool. These assessment instruments produced ". . . inaccurate and misleading test scores when given to lower class and Negro students." [242] In effect these students were actually being classified ". . . according to their socio-economic or racial status, or—more precisely—according to environmental and psychological factors which have nothing to do with innate ability." [243]

The evidence was clear. The tracking system placed a disproportionate number of black children in the lower, educationally inferior tracts. Moreover, the fundamental rationale for the system could not be sustained; the District could not demonstrate that the innate abilities of children could reliably be determined. Hence the system was arbitary and irrational. Based on these dual grounds Judge Wright found the tracking system unconstitutional and ordered it abolished.[244]

Two California cases also challenge the misclassification of minority children based on discriminatory practices. In *Diana* v. *California State Board of Education,*[245] the plaintiffs asserted that Mexican-American students had been placed in special education classes in disproportionate numbers. This placement was also based upon standardized aptitude scores. The students

---

[239] *Id.*, 269 F. Supp. 401, at 513.

[240] *Id.*, at 511, *also see Id.*, at 456–68.

[241] *Id.*, at 513.

[242] *Id.*, at 514, *also see Id.*, at 476–80.

[243] *Id.*, at 512, *also see Id.*, at 480–82.

[244] *Id.*, at 517. *Modified* 408 F. 2d 175, at 189 (limited to the District's *current* tracking system).

[245] Diana v. State Bd. of Educ., Civ. No. C-70 37 RFP (N.D. Cal., 5 Feb. 1970) (consent decree), *summarized* at 2 CCH Pov. L. Rep. para 19,746.

were retested by a bilingual psychologist and permitted to respond in either English or Spanish with the result of significant improvement in their scores.

The defendants refused to allow the case to go to trial. In a stipulated agreement the parties established that further placement testing would not be limited solely to English; the child would henceforth be allowed to respond in both his primary language and English. The parties further stipulated that other types of cultural bias would be removed from the test instrument.

In *Larry P.* v. *Riles*,[246] the State of California was again a defendant in a misclassification suit. In a case almost identical to *Diana*, black children alleged that they were being assigned to special education classes for the educably mentally retarded (EMR) in disproportionate numbers. Again alleged test bias was the cause. This time, however, the state asserted that I.Q. test scores were only one of a number of assessment techniques used to classify children for placement in special education classes.[247] Despite this defense, the court found that test scores remained ". . . a most important consideration in making assignments to EMR classes." [248] As a result an injunction was issued prohibiting the placement of black children ". . . on the basis of criteria which place primary reliance upon the results of I.Q. test scores as they are currently administered." [249]

Unsuitable Instruction in the Provision of Education

A closely allied area of educational practice is the selection and implementation of instructional techniques and programs. After the student has been classified, the educator determines the "proper" educational program for the child or more precisely for the group of children. Courts have recently called such decisions into question as well.

The landmark decision in this area may well be *Lau* v. *Nichols*.[250] In an unanimous decision the U.S. Supreme Court ruled that the San Francisco Unified School District discriminated against Chinese-speaking children by failing to provide them with instruction suitable to their educational needs.

---

[246] Larry P. v. Riles, 343 F. Supp. 1306 (N.D. Cal. 1972) *aff'd*, 502 F. 2d 963 (9th Cir. 1974). *Accord*, Mosses v. Wahington Parish Sch. Bd., 330 F. Supp. 1340 (E.D. La. 1971), *aff'd*, 456 F. 2d 1285 (5th Cir. 1972) (*per curium*), *cert. denied*, 409 U.S. 1013 (1972); Singleton v. Jackson Separate Sch. Dist., 419 F. 2d 1211 (5th Cir. 1969), *cert. denied*, 396 U.S. 1032 (1970); Lemon v. Bossier Parish Sch. Dist., 444 F. 2d 1400 (5th Cir. 1971) (*per curium*); Guadalupe Organization v. Tempe Elementry Sch. Dist., No. 71-435 (D. Ariz. 1972), *summarized* at 2 CCH Pov. L. Rep. para. 15,965; Corvarrubias v. San Diego Unified Sch. Dist., No. 70-394-S (S.D. Cal. 1972); Singleton v. Anson Cty Bd. of Educ., No. 3259 (W. D. N.C. 1971); Walton v. Board of Educ. of Glen Cove, 68 Misc. 2d 935, 328 N.Y.S. 2d 932 (1972).

[247] Larry P. v. Riles, 343 F. Supp. 1306, at 1311.

[248] *Id.*, at 1308.

[249] *Id.*, at 1313.

[250] Lau v. Nichols, 414 U.S. 563 (1974), *rev'g on statutory grounds*, 472 F. 2d 909 (1973) (withdrawn), 483 F. 2d 791 (1973) (*en banc*), *noted in* Sugarman & Widess, *Equal Protection for Non-English Speaking School Children*, 62 Cal. L. Rev. 157 (1974). *Accord*, Serna v. Portales Municipal Schools, 351 F. Supp. 1279 (D. N.M. 1972) (on equal protection grounds), *aff'd on statutory grounds*, 499 F. 2d 1147 (10th Cir. 1974); Aspira v. Board of Educ., 58 F.R.D. 62 (S.D. N.Y. 1973); Denetclarence v. Board of Educ., Civ. No. 8872 (D. N.M. 1974) (settled by pretrial agreement). *Contra*, Morales v. Shannon, 366 F. Supp. 813 (W.D. Tex. 1973).

The Court concluded that these children, although allowed to attend school, received little or no benefit from education due to their limited ability to understand English, the language of instruction.[251] The Court had been presented with a fourteenth amendment equal protection argument in this case. It chose, however, not to reach the Constitutional question; instead it based its decision that Chinese-speaking students were functionally excluded from meaningful educational opportunity on federal regulations promulgated under the Civil Rights Act of 1964.[252] These regulations were designed to prevent discrimination in school districts that receive federal financial assistance.

The implication of this case is significant; the U.S. Supreme Court, for the first time, found that education was a judicially manageable issue. Here, the Court dealt directly with the substance of education by requiring that a school rectify the language deficiencies of students in order to open to them

[251] Lau v. Nichols, 414 U.S. 563, at 566. *Compare* the U.S. Supreme Court's holding on the educational needs issue *with* McInnis v. Shapiro, 293 F. Supp. 327, at 335 (N.D. Ill. 1968), *aff'd mem. sub nom.*, McInnis, v. Ogilvie, 394 U.S. 322 (1969), where Federal District Court Judge Decker stated that educational needs provide " . . . no discoverable and manageable standards by which the court can determine when the Constitution is satisfied and when it is violated." In 1966, Judge Bazelon formulated a clear standard for areas like this, which have traditionally been avoided as non-judicially cognizable.

> The hospital [school] need not show that the treatment [instruction] will cure or improve [educate] him only that there is a bona fide effort to do so. This requires the hospital [school] to show that initial and periodic inquiries are made into the needs and conditions of the patient [student] with a view to providing suitable treatment [instruction] for him, and that the program provided is suitable to his particular needs. Treatment [instruction] that has therapeutic [educative] value for some may not have such value for others. Rouse v. Cameron, 373 F. 2d 451, at 456 (D.C. Cir. 1966) (citations omitted). Its relevance has not been diminished.

[252] *Id., relying upon* sec. 601 of the Civil Rights Act of 1964, 78 STAT. 252, 42 U. S.C. sec. 2000D. Implicit in the Court's decision was that a similar result could be reached on State grounds, *citing* CAL. EDUC. CODE, sec. 8573.

The Court's decision to turn its ruling on the Civil Rights Act of 1964 is another example of gradual change by intimation. Techniques of constitutional avoidance are, however, old and time honored tools of the Court. *See,* Bickel, *The Supreme Court, 1960 term, Foreword: The Passive Virtues,* 75 HARV. L. REV. 40 (1961); Findelstein, *Judicial Self-limitation,* 47 HARV. L. REV. 338 (1947); HAND, THE BILL OF RIGHTS (1958), at 15; Tussman and tenBroek, *The Equal Protection of the Laws,* 37 CAL. L. REV. 341 at 348–49, 365–66. Not all commentators hold the "passive virtues" in such high esteem, however. *See* Gunther, *The Subtle Vices of the "Passive Virtues"—A Comment on Principle and Expediency in Judicial Review,* 64 COLUMN. L. REV. 1 (1964); ROCHE, *Judicial Self-Restraint,* 49 AM. POL. SCI. REV. 762 (1955); Wechler, *Toward Neutral Principles of Constitutional Law,* 73 HARV. L. REV. 1, at 2–10.

Recognizing the deferential trend toward state standards, in recent U.S. Supreme Court decisions (*see* note 74 *supra*), the National Institute of Education has funded two studies of state legal provisions. The first, Perle & Long, A National Study of State Constitutionally Mandate Education Standards, etc. (NIE Grant No. NE-G-00-3-0044) compiled and categorize all state legislative and administrative standards in the 50 states. *See* LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW, A STUDY OF STATE LEGAL STANDARDS FOR THE PROVISION OF PUBLIC EDUCATION (1975); GEFFERT, HARPER, SCHEMBER & SARMIENTO, THE CURRENT STATUS OF U.S. BILINGUAL EDUCATION LEGISLATION (1975). The second project, Schember & Harper, Model Legislative and Administrative Standards for Insuring High Quality Education (NIE Grant No. NIE-G-74-0031), is currently developing a range of model legislative options in selected areas of education.

regular instructional programs. The Court took a significant step toward a legally cognizable definition of the obligations a state undertakes by providing public education.

While the inequities these three groups of cases challenged were limited in scope, their impact is quite significant. In conjunction, the precedent of these cases establishes that once a state undertakes the provision of public education, it may not exclude any child from the benefits of education. Moreover, this precedent establishes, that this education must be suitable to the individual child's educational needs. Perhaps as important, the combined precedent of these three cases rejects the only possible defenses that a state can offer to justify educational inadequacy or exclusion: the legal fiction that education is a non-justiciable area; the factual assertion that some children are not educable or that a "standard" education is equally suited to all children; and the fiscal pretext of insufficient resources. The addition of the precedent from pending litigation on these issues will only serve to substantiate the trend set by these decisions. It can also be expected that advocates of equal educational opportunity will advance the claims of other groups either, absolutely or functionally denied a suitable education.[253] The precedent from these test cases will further broaden the substantive rights of children to suitable educational opportunity.

Conclusion

In toto, these recent developments in equal protection litigation form a pattern. The precedent emerging from this body of case law establishes an evolving right to an equal educational opportunity. This evolving right is based on the precept that once a state undertakes the provision of education, a child's educational needs must be accurately assessed and met. In other words, the classification or educational-needs definition of equal educational opportunity is emerging as the dominant legal principle.[254] This principle is

---

[253] *See, e.g.,* Berkelman v. San Francisco Unified Sch. Dist., 501 F. 2d 1264 (9th Cir. 1974); Brenden v. Independent Sch. Dist., 342 F. Supp. 1224 (D. Minn. 1972); Holt v. Sheldon, 341 F. Supp. 821 (M.D. Tenn. 1972); Bray v. Lee, 337 F. Supp. 943 (D Mass. 1972), which challenge the conditioning of educational opportunities on the basis of sex. *Also see* Peter W. Doe v. San Francisco Unified Sch. Dist., No. 653-312 (Super. Ct. San Francisco City & Cty, Cal., filed 20 Nov. 1972), *noted in* Abel, *Can a Student Sue the Schools for Educational Malpractice?,* 44 HARV. EDUC. REV. 416 (1974); Ratner, *Remedying Failure to Teach Basic Skills: Preliminary Thoughts,* 17 INEQUAL. EDUC. 15 (June 1974); Sugarman, *Accountability Through the Courts,* 82 SCH. REV. 233 (1974). The Doe case challenges the failure of the San Francisco public schools to teach the plaintiff, an otherwise "normal" child, to read. This action is a significant extention of current litigation trends; it attempts to establish the professional responsibility for the outcomes of the educational process. The National Institute of Education is funding an extensive study to identify and evaluate mandatory minimum professional standards of performance, *see* Elson & Wilson, Legal Accountability of the Public Schools for Providing a Minimum Standard of Professional Services (NIE-Grant NE-C-00-3-0145.

[254] *Contra,* WISE, THE FOUNDATION PROGRAM AND EDUCATIONAL NEEDS: A CONCEPTUAL ANALYSIS (1971). It is doubtful, at this late date, whether it is still necessary to go through the contortions of "distinguishing" *McInnis.* Should the exercise prove necessary, the raw materials can be found in Brown, *The Supreme Court, 1957 Term, Foreword: Process of Law,* 72 HARV. L. REV. 77, at 94–95 (1958); Currie, *The Three Judge District Court in Constitutional Litigation,* 32 U. CHI. L. REV. 1, at 74 n. 365 (1964); Coons, Clune & Sugarman, *Educational*

evolutionary; in many cases it will prove evasive. Yet, in the long run it is the only viable solution to the inequities inherent in current education practices.

School finance litigation has set this evolutionary trend. The breadth of these challenges will continue their dominant role. However, the academically oriented fiscal neutrality standard announced in *Serrano* will have limited future usefulness. Although the standard was instrumental in reviving school finance reform litigation after *McInnis,* and although it has been used almost exclusively since that time, it is unlikely that the doctrine can sustain further progress in school finance reform (except, perhaps in the most extreme cases of expenditure disparities). The subtleties and complexities of the education process simply overpower the doctrine.[225]

Bound to the notion of a significant relationship between education costs and educational quality, the *Serrano* fiscal neutrality standard has become a passive straw in the judicial wind. It is dependent upon the willingness of a judge to assume a relationship between cost and quality, and to assume that statistical disparities in expenditures relate to significant differences in the outcomes of the educational process. Such a relation was accepted by courts in California, New Jersey, and Connecticut; it was rejected by the U.S. Supreme Court and courts in Idaho, Oregon, and Washington. Actually, however, this relationship can be treated only as an assumption. Social science research has yielded no conclusive empirical validation of the effect of expenditures on educational outcomes. The thesis of unconstitutional inequalities in dollar inputs will be successful only to the degree that they are accepted as evidence of injury or as resulting in marked differences in educational outcomes.

It is possible, however, to evidence injury in more direct and more persuasive ways. The opportunities from which some children are excluded and the inadequacies to which some children are subjected can be detailed. The impact of these exclusions and inadequacies can be documented. Remedies to these problems can be translated into fiscal terms. This course does require considerably more work, both on the part of counsel and on the part of educational experts and researchers. However, *Rodriguez, Northshore,* and *Thompson* demonstrate that only direct evidence of educational injury can sustain a challenge to state public school finance systems. Certainly statistical evidence of disparities in expenditures is needed, but such evidence cannot and does not prove actual injury.

Even in those cases where the *Serrano* doctrine has prevailed, its success has not eliminated the burden of defining the educational correlates of

---

Opportunity: A Workable Constitutional Test for State Financial Structures, 57 CAL. L. REV. 305, 308–309 n. 5, (1969).

[255] In all fairness, the fiscal neutrality standard was not designed to account for the intricacies of the educational process. Quite the contrary, it was specifically intended to avoid them. Fiscal neutrality was intended to provide a simple, judicially manageable standard which could be distinguished from the *McInnis* holding. In this regard it was enormously successful. The authors are, therefore, quite reticent about retrospective criticism. The fact remains, however, that complexities of the educational system can not be avoided. A simple standard which fails to account for the specifics of schooling and the injuries which result will probably not prove successful in future litigation.

inequalities in education expenditures. The requirements of equal educational opportunity must still be defined in terms of educational substance and quality. It is still necessary to detail the required educational inputs and to account for the outcomes these inputs produce. These inputs and outcomes must then be translated into financial terms. Children's needs must be determined; an educational program must be selected or formulated to address those needs. The program's success in addressing the child's needs must still be evaluated and the program must be altered if it has been proved unsuccessful. The *Serrano* doctrine does not avoid these issues, nor, it might be added does the U.S. Supreme Court's doctrine of educational adequacy. The New Jersey experience is a clear demonstration of this fact; probably, California and Connecticut will be forced to address these issues as well.

Future school finance litigation should probably bypass the fiscal neutrality standard altogether. Future challenges to the arbitrariness of state school finance practices should center directly on the concept of injury and the educational needs of the client. The evidence required to prove injury under the needs standard is more direct and powerful. Moreover, the educational needs of the child must ultimately be the focus of any remedy.

Individually, decisions on exclusion, misclassification, and unsuitable education emerge as somewhat less influential. The impact of these cases is less, not because their fundamental conception is any less compelling, but because their scope is narrower. In combination, however, these cases may be even more significant in the evolution of a right to equal educational opportunity. The injuries present in these cases can be successfully challenged. These cases overcome the argument that the substance and quality of education is non-justiciable. They demonstrate that limited resources cannot condition a child's right to education. Their holdings overtly center on an educational needs standard. In effect, these cases may be the incremental precursors of future school finance challenges.