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Can Localities Lock the Doors and Throw Away the Keys

Stephen Landsman

Can Localities Lock the Doors and Throw Away the Keys?

Fiscally Motivated Suspensions of Public Education Programs: A Proposed Equal Protection Analysis*

STEPHAN LANDSMAN**

In the United States a broad range of public services are administered and, at least in part, financed by local government entities.[1] One of the most important services provided in this way is public education.[2] Localities are responsible for the management of schools in almost every state. They are also required to bear a significant share of the cost of education.[3]

Public education in America has traditionally been handled by local governments. In the early days of the Republic, this pattern was utilized to provide free education in localities willing to pay for it while avoiding the politically difficult decision to impose statewide taxation in support of a complete system of public schools.[4] Local administration and financing were also a reflection of 18th and 19th Century political attitudes which extolled self-reliance and denigrated state intrusion.[5]

Local administration of education programs has been viewed by a number

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** Assistant Professor of Law, Cleveland-Marshall College of Law. A.B. Kenyon College, 1969; J.D., Harvard, 1972.

[1] The "local government entities" upon which this Article focuses are the school districts, municipalities, counties or other political subdivisions established by the states to facilitate provision of public education.

[2] Throughout this Article, "public education" refers to elementary and secondary schooling financed by federal, state or local government.

[3] *See* J. COONS, W. CLUNE AND S. SUGARMAN, PRIVATE WEALTH AND PUBLIC EDUCATION 149 (1970) [hereinafter cited as PRIVATE WEALTH] (Hawaii was found to be the only state with a "fully centralized" system of education); San Antonio Independent School District v. Rodriguez, 411 U.S. 1, 48 & n. 102 (1973) (The Court noted that in 1968 Hawaii changed its law to allow for independent county financial contribution, thus joining all other states in relying on "local resources" as well as state funds to finance public education); Project, *Education and the Law: State Interests and Individual Rights,* 74 MICH. L. REV. 1373, 1380 & n. 33 (1976).

[4] *See* PRIVATE WEALTH, *supra,* note 3, at 46-50.

[5] *See* J. CRAMER, CONTEMPORARY EDUCATION—A COMPARATIVE STUDY OF NATIONAL SYSTEMS 38-40 (2d ed. 1965).

of scholars and judges as the best means to insure their success. The major premise of this argument is that "the smallest unit competent to handle" a school program is the one best suited to do so.[6] There are at least four reasons advanced to support this premise.

First, it is argued, local control leads to innovation. When freed from centralized and doctrinaire bureaucracy, localities can experiment with new and potentially better techniques of administration. This freedom to experiment can also spur healthy competition between districts. Second, local administration can be flexible in adapting general programs to particular local needs and conditions. Reliance on the special knowledge of local administrators can help insure maximum utilization of available resources. Third, local administrators are, at least hypothetically, more responsive to the opinions and desires of the local populace, especially those opinions expressed through the political process. Finally, a system of local control arguably generates a wide range of school programs in any given state. If a resident is dissatisfied with the approach taken in his district he is free to move to another district offering a different program.[7]

Those who champion local administration assert its advantages can only be realized if each locality pays a large share of program costs. If a locality does not pay its way, there will be no incentive for innovation, no efficient use of resources, and no significant local political interest in education issues.[8] Spurred, perhaps, by such considerations, and by a desire to control burgeoning budgets, states have generally required localities to shoulder a significant share of the cost of school programs.[9]

Notwithstanding all these considerations, there has been a pronounced shift toward state supervision and perhaps control of public education in recent years. By constitutional or statutory declaration most states now require a statewide system of public education.[10] State statutes generally make school

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[6] *See* Milliken v. Bradley, 418 U.S. 717, 751-752 (1974); San Antonio Independent School District v. Rodriguez, 411 U.S. 1, 49-50 (1973); Wright v. Council of Emporia, 407 U.S. 451, 469 (1972); PRIVATE WEALTH, *supra,* note 3, at 15; R. Tribe, *Unraveling National League of Cities: The New Federalism and Affirmative Rights to Essential Governmental Services,* 90 HAR. L. REV. 1065, 1068-69, 1068 n. 18 (see cases cited therein) & n. 19 (see cases cited therein) (1977) [hereinafter cited as *The New Federalism*].

[7] *See* materials cited note 6 *supra.;* Comment, *New York City School Decentralization: The Respective Powers of the City Board of Education and the Community School Boards,* 5 FORDHAM URB. L. J. 239, 240 (1977); *see also* Sandalow, *The Limits of Municipal Power Under Home Rule: A Role for the Courts,* 48 MINN. L. REV. 643, 670, 710 (1963); Vanlandingham, *Municipal Home Rule in the United States,* 10 WM. & MARY L. REV. 269, 270-272 (1968). [hereinafter cited as *Municipal Home Rule*].

[8] San Antonio Independent School District v. Rodriguez, 411 U.S. 1, 53n. 109; PRIVATE WEALTH, *supra* note 3 at 21, 150; J. CONANT, THE CHILD, THE PARENT AND THE STATE 27 (1959).

[9] *See* ADVISORY COMMITTEE ON INTERGOVERNMENTAL RELATIONS, STATE AID TO LOCAL GOVERNMENT, 34 (table 8) (1969) [hereinafter cited as STATE AID TO LOCAL GOVERNMENT]; *generally see,* M. ARNOLD, THE PRICE OF EDUCATION, 35 (1972) [hereinafter cited as THE PRICE OF EDUCATION].

[10] *See* Lindquist and Wise, *Developments in Education Litigation: Equal Protection,* 5 J. L. & EDUC. 1, 7 n. 27 (1976).

attendance mandatory for all children.[11] State boards of education have been vested with the authority to determine most questions of importance.[12] Even state legislatures have tried their hands at regulating the details of public education,[13] including teacher qualification,[14] course requirements,[15] textbook selection,[16] curriculum requirements[17] and corporal punishment.[18] Additionally, the legislatures have been entirely responsible for fixing the geographical boundaries and authority of the school districts which administer local education programs.[19] It may not be an overstatement to describe local school districts today as agents of the state, executing state-mandated education programs.[20]

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[11] *See, e.g.,* IDAHO CONST. art. IX, § 6; MICH. COMP. LAWS ANN. 380. 1561 (West Supp. 1977); N.Y. EDUC. LAW § 3205 (McKinney 1970); *Ohio Rev. Code Ann.* § 3321.01 (Page 1972); WIS. STATE ANN. § 118.15 (West 1973).

[12] *See* THE PRICE OF EDUCATION, *supra* note 9 at 91-93.

[13] *See* S. KNEZEVICH, THE ADMINISTRATION OF PUBLIC EDUCATION 155 (1969). The state legislatures have determined

> [t]he basic policies in education: how local boards of education shall be selected, how many people shall serve on local school boards, what rights and responsibilities the local board shall possess, what specific subjects shall or shall not be taught in the public schools, how many years of education shall be available to all or various types of pupils, what standards shall be required for admission of pupils to schools, what promotion and graduation requirements shall be, and even what textbooks shall be used. The state legislature determines the instructional program, the certification of teachers . . . the safety and quality of school facilities, and what financial resources shall be made available for the support of education in the state and in the local school districts.

Id.

[14] *See, e.g.,* CAL. EDUC. CODE. § 1301 et seq. (West 1975); MICH COMP. LAWS ANN. § 380.1531 (West Supp. 1977); N.Y. EDUC. LAW § 3004 (McKinney 1970); OHIO REV. CODE ANN. § 3319.22-3319.31 (Page 1972); WIS. STAT. ANN. § 118.19 (West 1973).

[15] *See, e.g.,* PRESIDENT'S COMMISSION ON SCHOOL FINANCE, PUBLIC SCHOOL FINANCE: PRESENT DISPARITIES AND FISCAL ALTERNATIVES (prepared by the Urban Inst.) 250 (1972) [hereinafter cited as PUBLIC SCHOOL FINANCE]. (The Commission noted that the ten states it analyzed, North Carolina, Delaware, Washington, New York, Michigan, California, Kansas, Colorado, South Dakota and New Hampshire, all had legislation regulating course requirements.)

[16] *See, e.g.,* CAL. EDUC. CODE § 9201 et seq. (West 1975); MICH. COMP. LAWS ANN. § 380.1422 (West Supp. 1977); N.Y. EDUC. LAW § 701 (McKinney 1970); OHIO REV. CODE ANN. § 3329.08 (Page 1972); WIS. STAT. ANN. § 119.18(4) (West 1973).

[17] *See, e.g.,* PUBLIC SCHOOL FINANCE, *supra* note 15 at 250 (The Commission noted that the ten states analyzed placed curriculum-fixing authority in the hands of a single state agency.); *see also,* Maher v. Roe, 432 U.S. 464, 477 (1977); Meyer v. Nebraska, 262 U.S. 390 (1923) (The states have the power "to prescribe a curriculum" that includes English and excludes German in the public schools.).

[18] *See, e.g.,* CAL. EDUC. CODE § 13557 (West 1975); MICH. COMP. LAWS ANN. § 380.1312 (West Supp. 1977); N.Y. PENAL LAW § 35.10(1) (McKinney 1975); OHIO REV. CODE ANN. § 3319.41 (Page 1972); WIS. STAT. ANN. § 119.18 (West 1973); *see also* Ingraham v. Wright, 430 U.S. 651, 662-663 & 662-663 n. 23 (1977) (noting that 23 states have addressed the question of corporal punishment through legislation).

[19] *See, e.g.,* PUBLIC SCHOOL FINANCE, *supra* note 15 at 259. (The Commission noted that nine of the ten states analyzed were responsible for the geographical boundaries of local school districts. The only exception was New Hampshire.)

[20] *See, e.g.,* Lanza v. Wagner, 11 N.Y. 2d 317, 326, 183 N.E. 2d 670, 675, 229 N.S.Y. 2d 380, 386 (1962); Bd. of Ed. v. Town of Ellington, 151 Conn. 1, 193 A. 2d 466 (1963); N. EDWARDS, THE

The state takeover of public education has been accompanied by substantial increases in state and federal expenditures for school programs. In 1969-1970 approximately 49 percent of all education costs were underwritten by state and federal governments.[21]

The glaring anomaly in public education today is the perpetuation of the rhetoric and fiscal methodology of local responsibility in the face of ever increasing state domination. Every day localities are called upon to pay large sums to finance a system they can no longer control or change.

Recently localities have had great difficulty in raising their share of education costs. The traditional methods of generating revenue, property taxation and bond sales, have proven inadequate to the task.[22] The problem of fiscal shortfalls has been exacerbated by inflation,[23] periodic slowdowns in the economy[24] and a variety of local *contretemps*.[25] In addition to these problems, the number of kinds of state mandated education services have been multiplying causing added strain on local resources.[26] All these factors have caused an ever widening gap between what localities can raise and what they are required to spend.[27]

The predictable consequences of these economic and political factors have been local fiscal crises[28] and extreme voter hostility to increased expenditures in any tax supported school program.[29] The latter point is neatly illustrated by a comparison of voter response to school bond issues in 1960 and 1971. In 1960 approximately 23 percent of the bond issues were defeated; in 1971 almost 56 percent were rejected.[30] Voter hostility to school spending has remained strong

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COURTS AND THE PUBLIC SCHOOLS 26-46 (1971); *see also* Michelman, *The Supreme Court, 1968 Term—Forward On Protecting the Poor Through the Fourteenth Amendment,* 83 HARV. L. REV. 7, 50 (1969) [hereinafter cited as *On Protecting the Poor*]; *but see* note 6, *supra;* Mt. Healthy City School District v. Doyle, 429 U.S. 274 (1977).

[21] *See* O. OLDMAN & F. SCHOETTLE, STATE AND LOCAL TAXES AND FINANCE, 946-948 (1974) [hereinafter cited as STATE AND LOCAL TAXES AND FINANCE].

[22] *See The Price of Education, supra* note 9 at 35-65; Note, *The Limits of State Intervention in a Municipal Fiscal Crisis,* 4 FORDHAM URB. L.J. 545 (1974); *See also Municipal Home Rule, supra* note 7, at 272.

[23] *See* THE PRICE OF EDUCATION, *supra* note 9, at 108; Areen & Ross, *The Rodriguez Case: Judicial Oversight of School Finance,* 1973 SUP. CT. REV. 33, 34 [hereinafter cited as *Judicial Oversight*]; N.Y. Times, April 17, 1975, 50, col. 1.

[24] *See* materials cited note 23 *supra.*

[25] *See* STATE AID TO LOCAL GOVERNMENT, *supra* note 9 at 36; Cleve. Plain Dealer April 17, 1977, A25, Col. 5 (energy costs).

[26] *See* Porter, *Rodriguez, the "Poor" and the Burger Court: A Prudent Prognosis* 29 BAYLOR L. REV. 199, 201 (1977) [hereinafter cited as *Prudent Prognosis*]; STATE AID TO LOCAL GOVERNMENT, *supra* note 9 at 33.

[27] San Antonio Independent School District v. Rodriguez, 411 U.S. 1, 56-57 n. 111 (1973); Pechman, *Fiscal Federalism for the 1970's,* 24 NAT'L TAX J. 281, 285 (1971); *Prudent Prognosis, supra* note 26 at 201; Comment, *The Evolution of Equal Protection—Education, Municipal Services and Wealth,* 7 HARV. CIV. RIGHTS-CIV. LIB. L. REV. 103, 111 (1972).

[28] Fiscal difficulties have befallen a large number of school districts. See materials set forth in notes 32-34 *infra.*

[29] *See On Protecting the Poor, supra* note 20 at 54 n. 132; Wilkinson, *The Supreme Court, The Equal Protection Clause, and The Three Faces of Constitutional Equality.,* 61 VA. L. REV. 945, 1007 (1975) [hereinafter cited as *Three Faces of Constitutional Equality*].

[30] *See Judicial Oversight, supra* note 23 at 34 n. 8.

throughout the 1970's. In Ohio, for example, only 53 percent of school levies presented to the electorate in 1977 were approved.[31]

Because of voter rejection of levies or the collapse of local credit a number of public school programs have been suspended or threatened with interruption in the past several years. In 1976 *The New York Times* reported financially motivated school closings in Oregon, Ohio and Connecticut.[32] Previous failures or near failures have taken place in some of America's largest school systems, including those in Detroit, Philadelphia[33] and Toledo.[34] A recent survey undertaken by the Ohio Legislative Budget Office found that at least nine states have faced the possibility of school closings because of fiscal problems. These include Ohio, Michigan, Pennsylvania, New Jersey, Missouri, Rhode Island, New Mexico, North Dakota, and Oregon.[35]

Within the context of state control of public education, students can justifiably claim that they are denied the equal protection of the laws when a state does not intervene to restore a public education program suspended by local officials in response to local fiscal conditions. Before exploring this thesis it is necessary to canvass some historical developments touching upon the interpretation and application of the equal protection clause of the fourteenth amendment.

The Warren Court established an essentially two tier approach to the application of the equal protection clause. In most cases, especially those involving economic regulation, any rational basis would suffice to justify disparate treatment.[36] However, if unequal treatment were premised upon an inherently "suspect classification" or deprived a person of a "fundamental interest," strict scrutiny would be utilized in examining the constitutionality of the action or legislation in question.[37]

The Supreme Court has rejected claims that public education is a "fundamental interest."[38] Accordingly, the Court has indicated that deprivation of this benefit does not in itself require strict judicial scrutiny. Strict scrutiny

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[31] *See* Cleve. Plain Dealer, Jan. 28 1978, A 14, Col. 1.

[32] *See* N.Y. Times Nov. 8, 1976, 18 col. 1 (Eagle Point, Oregon); N.Y. Times Nov. 21, 1976, 26. col. 3 ("at least 10 Ohio school districts"); N.Y. Times Dec. 3, 1976, B1, col. 1 (Putnam, Conn.): see also Cleve. Plain Dealer, Dec. 12, 1976, 4, 1, col. 1 (North Union and Jackson Milton school districts in Ohio); Cleve. Plain Dealer Aug. 22, 1977, D1, col. 1 (In Ohio "a record 31 school districts have asked either to start late or close before the end of the year. This compares with 32 districts that lost class time for financial reasons during the last 10 years. If all requests are granted—and only one has been to date—146, 792 students would be affected, more than 6% of the state's school enrollment."); Cleve. Plain Dealer, Jan. 25, 1978, A6, col. 1-6 (In Ohio 156 public school systems "face either the threat of closing or cutting back educational programs.").

[33] *See* Long, *Litigation Dealing with Urban School Financing Problems: Notes on Future Directions,* 8 CLEARINGHOUSE REV. 334, 354 (1974).

[34] *See* N.Y. Times, Jan. 29, 1978, 37 col. 2. *See also* Cleve. Plain Dealer Jan. 25, 1978. A6, col. 1-6 (In calendar year 1978 five of the eight largest school systems in Ohio face deficits. These include: Cleveland, $30 million; Columbus, $11.7 million; Dayton, $1-2 million; and Canton, $1 million.).

[35] *See* Cleve. Plain Dealer, Feb. 26, 1978, 1-16, col. 1.

[36] *See* Note, *Developments in the Law—Equal Protection,* 82 HARV. L. REV. 1065, 1076-1087 (1969) [hereinafter cited as *Developments in Equal Protection*]; see e.g. McGowan v. Maryland, 366 U.S. 420 (1961); Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61 (1911).

[37] *See Developments in Equal Protection, supra* note 36, at 1087-1131.

[38] *See* San Antonio Independent School District v. Rodriguez, 411 U.S. 1, 33-38 (1973).

might still be warranted under the two-tier approach if the government's action in suspending a public school program were based upon a "suspect classification."

It is difficult to fix with precision the classification relied upon in fiscally motivated suspension cases. The suspension occurs in one or another locality while service is maintained throughout the rest of the state. This type of classification might be described as geographical in nature. Alternatively, it might be argued that the suspension is the product of local poverty or inadequate fiscal resources. When described in this way the classification may arguably be said to be based upon wealth.[39]

Classifications based upon race,[40] national ancestry[41] and alienage[42] have been held automatically suspect. Apart from these, an assessment of the "suspectness" of a classification is tied to the importance of the interest or benefit affected by the classification. The greater the importance ascribed by the Court to an interest or benefit, the more likely "suspectness" will be found.[43]

The Supreme Court has analyzed geographic classifications in light of the interests affected by them.[44] Such classifications have been routinely approved in the vast majority of cases including those involving the administration of the criminal justice system[45] and the regulation of business interests.[46] In both these situations the Court has held that the interest with which the geographical classification is coupled is not so vital that its variable distribution on the basis of geography is suspect. The Court has also indicated that geographic variability may, in these cases, serve strongly felt state interests. On the other hand, geographic distinctions have been rejected when used to deny the franchise[47] or to serve what would appear to be a racially discriminatory purpose.[48] The Supreme Court's rejection of the fundamentality of education

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[39] Several state courts have held, in school finance litigation, that disparity in the ability of localities to finance education amounts to classification on the basis of wealth. *See, e.g.,* Serrano v. Priest, 5 Cal. 3d 584, 589, 487 P. 2d 1241, 1244, 96 Cal. Rptr. 601, 604 (1971); Horton v. Meskill, 31 Conn. Sup. 377, 332 A. 2d 113 (1974); Robinson v. Cahill, 62 N.J. 473, 303 A. 2d 273 (1973); *but see* San Antonio Independent School District v. Rodriguez, 411 U.S. 1 (1973); Note, *A Statistical Analysis of the School Finance Decisions: On Winning Battles and Losing Wars,* 81 YALE L.J. 1303 (1972).

[40] *See, e.g.,* Palmer v. Thompson, 403 U.S. 217 (1971); Loving v. Virginia 388 U.S. 1 (1967); McLaughlin v. Florida, 379 U.S. 184 (1964); Brown v. Board of Education, 347 U.S. 483 (1954).

[41] *See, e.g.,* Hernandez v. Texas, 347 U.S. 475 (1954); Oyama v. California, 332 U.S. 633 (1948); Korematsu v. U.S., 323 U.S. 214 (1944).

[42] *See, e.g.,* Nyquist v. Mauclet, 432 U.S. 1 (1977); Examining Board v. Flores de Otero, 426 U.S. 572 (1976); Sugarman v. Dougall, 413 U.S. 634 (1973); Graham v. Richardson, 403 U.S. 365 (1971).

[43] *See Developments in Equal Protection, supra* note 36, at 1120-1121.

[44] See Horowitz and Neitring, *Equal Protection Aspects of Inequalities in Public Education and Public Assistance Programs From Place to Place Within a State,* 15 UCLA L. REV. 787 [hereinafter cited as *Inequalities From Place to Place*]. The Horowitz and Neitring article has had a significant influence upon the geographical classification argument developed *infra.*

[45] *See, e.g.,* McGowan v. Maryland, 366 U.S. 420 (1961); Salsburg v. Maryland, 346 U.S. 545 (1954).

[46] *See, e.g.,* Fort Smith Light and Traction Co. v. Bd. of Improvement, 274 U.S. 387 (1927).

[47] *See, e.g.,* Reynolds v. Sims, 377 U.S. 533 (1964); Baker v. Carr, 369 U.S. 186 (1962).

[48] *See, e.g.,* Griffin v. County School Board of Prince Edwards Co., 377 U.S. 218 (1964); Gomillion v. Lightfoot, 364 U.S. 339 (1960).

would suggest that the coupling of schooling with a geographic classification would not lead to strict judicial scrutiny.[49]

The "suspectness" of wealth as a classification has been a topic of heated debate in the last twenty years.[50] Cases like *Griffin v. Illinois*,[51] *Douglas v. California*,[52] and *Harper v. Board of Elections*[53] all suggest the willingness of the Supreme Court to carefully scrutinize classifications which discriminate on the basis of wealth. However, the Court has not drawn wealth into the inner circle of clearly suspect categories (*i.e.*, race, national origin and alienage). Wealth classifications appear to provide heightened attention only when they deprive individuals of important interests. Arguably, such deprivation took place in *Griffin* and *Douglas* because the wealth classification relied upon served to totally exclude the poor from the criminal appeals process.[54] In *Harper* the exclusion worked by a wealth classification involved the highly prized right to vote.[55] The Supreme Court has specifically rejected the idea that strict scrutiny is required in cases involving the conjunction of a wealth classification and provision of education. As the Court declared in *San Antonio Independent School District v. Rodriguez*, "at least where wealth is involved, the Equal Protection Clause does not require absolute equality or precisely equal advantages."[56]

According to the standards fixed by the Warren Court, strict scrutiny would be inappropriate in the case of a fiscally motivated local suspension of a public education program. Under the two-tier approach the applicable standard would perforce be the "rational basis" test. The predictable outcome of the application of the rational basis test in such a case would be the rejection of the students' equal protection claim.[57] However, the Supreme Court has recently implied the availability of a third-or middle-tier test for application of the equal protection clause. This third-tier test appears to be less stringent than strict scrutiny but more demanding than the traditional rational basis standard[58] and might provide a means by which the students' constitutional claim could be vindicated.

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[49] In San Antonio Independent School District v. Rodriguez, 411 U.S. 1, 28 n. 66, 54 n. 110 (1973), the Supreme Court refused to recognize any equal protection "per se rule of 'territorial uniformity'" and would not apply strict scrutiny in examining interdistrict education financing disparities in the State of Texas.

[50] *See, e.g.*, Clune, *The Supreme Court's Treatment of Wealth Discrimination Under the Fourteenth Amendment*, 1975 SUP CT. REV. 289; Coons, Clune & Sugarman, *Educational Opportunity: A Workable Constitutional Test for State Financial Structures*, 57 CAL. L. REV. 305 (1969); *On Protecting the Poor, supra* note 20; Sager, *Tight Little Island; Exclusionary Zoning, Equal Protection, and the Indigent*, 21 STANFORD L. REV. 767 (1969); *Three Faces of Constitutional Equality, supra* note 29; *Developments in Equal Protection, supra* note 36.

[51] 351 U.S. 12 (1956).

[52] 372 U.S. 353 (1963).

[53] 383 U.S. 663 (1966).

[54] *But see*, Ross v. Moffitt, 417 U.S. 600 (1974).

[55] *See* cases cited note 47 *supra*.

[56] 411 U.S. 1, 24 (1973).

[57] *See* Gunther, *The Supreme Court 1971 Term—Forward: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972) [hereinafter cited as *Newer Equal Protection*].

[58] *See* Craig v. Boren, 429 U.S. 190, 210-211 (1976) (Powell, J., concurring); Barrett, *Judicial Supervision of Legislative Classifications—A More Modest Role for Equal Protection?*, 1976

The middle-tier equal protection test was perhaps presaged by Mr. Justice Jackson in his concurrence in *Railway Express Agency v. New York.*[59] In that case Justice Jackson stressed the advantage of judicial reliance on the equal protection clause[60] and articulated a test which required

> ... that cities, states and the Federal Government must exercise their powers so as not to discriminate between their inhabitants except upon some reasonable differentiation fairly related to the object of regulation.[61]

Justice Jackson urged a serious judicial examination of the means used by government to carry out ends which would not be closely scrutinized. He endorsed judicial intervention when the means were inadequate or inappropriate to the articulated ends.[62]

In a series of cases decided in 1971 and 1972 the Supreme Court appeared to embrace the technique suggested by Justice Jackson.[63] In these cases the Court carefully examined (though it did not "strictly scrutinize") the relation between the means of government action and the ends sought to be achieved. Where the state's espoused aims were not suitably furthered by differential treatment, violations of the equal protection clause were found.[64] In applying the middle-tier test the Court would not supply or invent justifications for government action. Instead the Court gave credence only to articulated purposes or readily apparent motives for the actions under examination.[65] The effect of the middle-tier test was to intensify judicial scrutiny without creating new fundamental interests or suspect categories and to place the burden upon the state to articulate the rationale for government action.

Since 1972 the Supreme Court has continued to use the middle-tier test.[66] However, it has not made clear the circumstances under which the new test, rather than either of its more traditional counterparts, will be employed.

B.Y.U.L. REV. 89; Dixon, *The Supreme Court on Equality: Legislative Classification, Desegregation and Reverse Discrimination,* 62 CORNELL L. REV. 494 (1977); *Newer Equal Protection, supra* note 57; *Three Faces of Constitutional Equality, supra* note 29; *but see* Craig v. Boren, 429 U.S. 190, 211-212 (1976) (Stevens, J. concurring). ("There is only one Equal Protection Clause. It requires every state to govern impartially. It does not direct the courts to apply one standard of review in some cases and a different standard in other cases.").

[59] 336 U.S. 106, 111 (1949) (Jackson, J. concurring); see *Newer Equal Protection, supra* note 57, at 22-23.

[60] Railway Express Agency v. New York, 336 U.S. 106, 112 (1949) (Jackson, J. concurring).

[61] *Id.*

[62] *See Newer Equal Protection, supra* note 57, at 23.

[63] *See, e.g.,* James v. Strange, 407 U.S. 128 (1972); Jackson v. Indiana 406 U.S. 715 (1972); Weber v. Aetna Casualty and Surety Co., 406 U.S. 164 (1972); Eisenstadt v. Baird, 405 U.S. 438 (1972); Humphrey v. Cady, 405 U.S. 504 (1972); Stanley v. Illinois, 405 U.S. 645 (1972); Reed v. Reed, 404 U.S. 71 (1971); see also *Newer Equal Protection, supra* note 57.

[64] *See* cases cited note 63 *supra.*

[65] *See Newer Equal Protection, supra* note 57, at 21; Craig v. Boren, 429 U.S. 190, 199-200 n. 7 (1976) (The Court intimated that it would not in future rely upon "a convenient, but false, post hoc rationalization" in identifying legislative purposes.).

[66] *See, e.g.,* Trimble v. Gordon, 430 U.S. 762 (1977); Craig v. Boren, 429 U.S. 190 (1976); Weinberger v. Wiesenfeld, 420 U.S. 636 (1975); Schlesinger v. Ballard, 419 U.S. 498 (1975); Jimenez v. Weinberger, 417 U.S. 628 (1974); Johnson v. Robison, 415 U.S. 361 (1974); United States Department of Agriculture v. Moreno, 413 U.S. 528 (1973).

Professor Gerald Gunther has suggested two situations in which the middle-tier test may be expected to come into play.[67] First, the Court will probably rely on the new test as a method of avoiding broad or complex constitutional issues. By using the test in this way the Court is free to vindicate important rights without establishing new and far-reaching suspect categories or fundamental interests. Motives of this sort would appear to have played a part in recent third-tier decisions involving sexual discrimination,[68] illegitimacy[69] and procreation.[70]

The second type of case in which Professor Gunther envisioned possible though limited, adoption of the middle-tier test involved novel constitutional questions. In these "unaccustomed area" cases the Court might use the middle-tier test rather than break new constitutional ground.[71] Such was arguably the situation in the earliest sex discrimination cases,[72] and a more recent decision involving the denial of veterans' benefits to conscientious objectors.[73]

According to the foregoing analysis utilization of the middle-tier approach would be least likely in cases which the traditional rational basis test has been routinely invoked.[74] At first blush, the Supreme Court decision in *San Antonio Independent School District v. Rodriguez*[75] would appear to consign all public education cases to analysis under the rational basic rubric. Writing for a five-member majority, Justice Powell rejected application of the strict scrutiny test and declared

> [a] century of Supreme Court adjudication under the Equal Protection Clause affirmatively supports the application of the traditional standard of review, which required only that the state's system be shown to bear some rational relationship to legitimate state purposes.[76]

However, Justice Powell did not entirely foreclose review on a stricter basis. He stressed that *Rodriguez* was not a case involving absolute deprivation of public education.

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[67] *Newer Equal Protection, supra* note 57, at 26.

[68] *See, e.g.,* Califano v. Goldfarb, 430 U.S. 199 (1977); Craig v. Boren, 429 U.S. 190 (1976); Weinberger v. Wiesenfeld, 420 U.S. 636 (1975); Schlesinger v. Ballard, 419 U.S. 498 (1975); Kahn v. Shevin, 416 U.S. 351 (1974); *see also,* Frontiero v. Richardson, 411 U.S. 677 (1973); (In *Frontiero* only a plurality was willing to apply the strict scrutiny test in cases involving sex discrimination. Since *Frontiero,* the Court has relied upon the middle-tier test in sex discrimination litigation. This use of the middle-tier test well illustrates Professor Gunther's thesis.).

[69] *See, e.g.,* Trimble v. Gordon, 430 U.S. 762 (1977); Jiminez v. Weinberger, 417 U.S. 628 (1974); New Jersey Welfare Rights Organization v. Cahill, 411 U.S. 619 (1973); Gomez v. Perez, 409 U.S. 535 (1973); Weber v. Aetna Casualty and Surety Co., 406 U.S. 164 (1972).

[70] *See, e.g.,* Planned Parenthood of Central Missouri v. Danforth, 428 U.S. 52 (1976); Eisenstadt v. Baird, 405 U.S. 438 (1972).

[71] *Newer Equal Protection, supra* note 57, at 30-33. Professor Gunther was guarded in his assessment of the viability of the middle-tier test in "unaccustomed area" cases. He indicated "doubt whether the Court is prepared to apply an invigorated rational basis review to new spheres of legislative activity." *Id.*

[72] Reed v. Reed, 404 U.S. 71 (1971); *see Newer Equal Protection, supra* note 57, at 32-33.

[73] Johnson v. Robison, 415 U.S. 361, 374-375 (1974).

[74] *See Newer Equal Protection, supra* note 57, at 32.

[75] 411 U.S. 1 (1973).

[76] San Antonio Independent School District v. Rodriguez, 411 U.S. 1, 40 (1973).

> Whatever merit appellees' argument might have if a State's financing system occasioned an absolute denial of educational opportunities to any of its children, that argument provides no basis for finding an interference with fundamental rights where only relative differences in spending levels are involved and where—as is true in the present case—no charge fairly could be made that the system fails to provide each child with an opportunity to acquire the basic minimal skills necessary for the enjoyment of the rights of speech and of full participation in the political process.[77]

In his opinion, Justice Powell distinguished *Rodriguez* from a number of cases in which equal protection violations had been found.[78] This distinction was warranted, said the Court, because, in the prior cases, there had been a complete inability "to pay for some desired benefit" and "an absolute deprivation of a meaningful opportunity to enjoy that benefit."[79] According to the Court, neither of these factors was present in *Rodriguez.* The Court found that Texas had assured "an adequate base education for all children."[80] It also found that the educational scheme challenged by the plaintiffs had the effect of extending the reach and improving the quality of public schooling.[81] For these reasons *Rodriguez* did not merit close judicial scrutiny. However, the Court left open the question of the validity of an absolute deprivation of public education and intimated that intensified judicial scrutiny might be appropriate in such a case.

The Court has not yet considered the absolute deprivation problem in the public education setting. It has, however, faced the issue in the analogous welfare benefits context.[82] Pursuant to *Dandridge v. Williams*[83] the Court in

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[77] *Id* at 37; *see The New Federalism, supra* note 6, at 1073.

[78] San Antonio Independent School District v. Rodriguez, 411 U.S. 1, 20-22 (1973). The cases distinguished were *Griffin v. Illinois*, 351 U.S. 12 (1956) (deprivation of meaningful opportunity to appeal because of denial of trial transcript or adequate substitute); *Douglas v. California*, 372 U.S. 353 (1963) (deprivation of meaningful opportunity to appeal because of denial of counsel on direct appeals); *Williams v. Illinois*, 399 U.S. 235 (1970) (deprivation of meaningful opportunity to obtain freedom because of insistence on the payment of a fine); *Tate v. Short*, 401 U.S. 395 (1971) (same as Williams); *Bullock v. Carter*, 405 U.S. 134 (1972) (deprivation of meaningful opportunity to be a candidate for public office because of insistence on the payment of filing fees).

[79] San Antonio Independent School District v. Rodriguez, 411 U.S. 1, 20 (1973).

[80] *Id.* at 25 n. 60.

[81] *Id.* at 39

[82] The similarities between education and welfare programs are significant. Historically, both were provided by localities. *See* notes 4-5, *supra*; F. PIVEN AND R. CLOWARD, REGULATING THE POOR: THE FUNCTIONS OF PUBLIC WELFARE, 14-22, 45-48 (1971).

In both education and welfare programs localities are usually charged with a degree of administrative and financial responsibility. *See* notes 3 and 6 *supra*; STATE AID TO LOCAL GOVERNMENT. *supra* note 9 at 70-71 (Pursuant to 45 CFR §205.100(a)(1) (Public Welfare) (1976), local government entities in 22 of the 50 states administer Aid to Families With Dependent Children programs (AFDC). The AFDC program is codified in 42 U.S.C. §601 et seq. (1974 and 1977 Supp.)); M. BARTH, G. CARCAGNO AND J. PALMER, TOWARD AN EFFECTIVE INCOME SUPPORT SYSTEM: PROBLEMS, PROSPECTS AND CHOICES 16 (1974). (Only 16 states finance their AFDC programs without local financial contributions.); Note, *Developments in Welfare Law—1973,* 59 CORNELL L. REV. 859, 878 and n. 135 (1974) [hereinafter cited as *Developments 1973*]; City of New York v. Richardson, 473 F. 2d 923, 927 & n.3 (2d Cir. 1973).

Despite local contributions, in both education and welfare programs the states have assumed overall program control. *See* notes 10-21 *supra;* R. Rafuse, Jr., *Income Maintenance Programs and State and Local Finances* in THE PRESIDENT'S COMMISSION ON INCOME MAINTENANCE

1970 held that the "reasonable basis" standard should be applied in equal protection cases involving "economics or social welfare."[84] This decision seemed to consign all welfare cases to analysis under the rational basis test. However, *Dandridge,* like *Rodriguez,* did not involve an absolute deprivation. Rather, it dealt with reduction of "per capita benefits to the children in the largest families" receiving Aid to Dependent Children in Maryland.[85]

In 1973 the Court finally adjudicated a case involving the absolute deprivation of a welfare-type benefit in *United States Department of Agriculture v. Moreno.*[86] In that action Justice Brennan, writing for seven members of the Court, held invalid an amendment to the Food Stamp Act of 1964[87] which denied food stamp assistance to any "household containing unrelated persons."[88] In his opinion, Justice Brennan first identified the congressionally articulated purpose of the Food Stamp Act which was to "alleviate hunger and malnutrition among the more needy segments of our society."[89] He then noted that the unrelated persons rule was "clearly irrelevant" to the articulated purpose of the Act.[90] Justice Brennan then sought to identify any legitimate government motive that might justify the challenged amendment. The government could proffer none.[91] Therefore, Justice Brennan concluded that the unrelated persons rule violated the Fifth Amendment correlative of the equal protection clause.[92]

Both Justice Douglas in his concurrence in Moreno[93] and Justice Rehnquist in his dissent in the companion case, *U.S. Department of Agriculture v. Murry,*[94] noted that the Court had departed from the rational basis standard articulated in *Dandridge.* Justice Douglas was willing to justify this departure because he perceived First Amendment problems to be raised by the 1971 Food Stamp Act amendment under review. Justice Rehnquist, on the other hand, saw no excuse for the departure from *Dandridge* and declared

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PROGRAMS, TECHNICAL STUDIES 217 (1970); Lupu, *Welfare and Federalism: AFDC Eligibility Policies and the Scope of State Discretion,* 57 B.U.L. REV. 1 (1977); *Developments 1973, supra* note 82 at 878-880; City of New York v. Richardson, 473 F2d 923 (2d Cir. 1973).

[83] 397 U.S. 471 (1970).

[84] Dandridge v. Williams, 397 U.S. 471, 485 (1970) citing Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61, 78 (1911); *See also,* Jefferson v. Hackney, 406 U.S. 535 (1972); Richardson v. Belcher, 404 U.S. 78 (1971).

[85] Dandridge v. Williams, 397 U.S. 471, 477 (1970). Jefferson v. Hackney 406 U.S. 535 (1972) and Richardson v. Belcher, 404 U.S. 78 (1971) were also cases in which no absolute deprivation was at issue. .

[86] 413 U.S. 528 (1973).

[87] Section 3 (e) of The Food Stamp Act of 1964, 7 U.S.C. §2012(e) as amended in 1971.

[88] United States Department of Agriculture v. Moreno, 413 U.S. 528, 529 (1973).

[89] *Id.* at 533.

[90] *Id.* at 534.

[91] *Id.* at 535.

[92] The Court's inquiry in *Moreno* was premised upon the "equal protection component" of the due process clause of the Fifth Amendment. *Id.* at 532-33. As the Supreme Court has frequently stated, review in this context is substantially equivalent to review pursuant to the equal protection clause of the Fourteenth Amendment. *See* Schneider v. Rusk, 377 U.S. 163, 168 (1964); Shapiro v. Thomson, 394 U.S. 618, 641-642 (1969) Frontiero v. Richardson, 411 U.S. 677, 680 n. 5 (1973); Hampton v. Mow Sun Wong, 426 U.S. 88 103-104 (1976).

[93] 413 U.S. 528, 540-545 (1973) (Douglas, J. concurring).

[94] 413 U.S. 508, 522-527 (1973) (Renquist, J., dissenting).

> [n]otions that in dispensing public funds to the needy Congress may not impose limitations which "go beyond the goal" of Congress, or may not be "inflexible", have not heretofore been thought to be embodied in the Constitution. In *Dandridge v. Williams,* 397 U.S. 471 (1970), the Court rejected this approach ... [95]

The Court's action in *Moreno* appears to have had the effect of narrowing the reach of the *Dandridge* minimum scrutiny test and to have applied the middle-tier approach in the context of an absolute deprivation of a statutory welfare benefit to those covered by articulated statutory purposes.[96]

Rodriguez and *Moreno* seem expressive of a willingness on the part of the Supreme Court to give thorough scrutiny to actions absolutely denying important benefits to potential recipients whose interests are incorporated in the articulated purposes of the benefit program. Heightened scrutiny in education cases may be challenged as unwarranted intervention in state and local affairs.[97] However, there is significant support for such action not only in the equal protection cases discussed above but in a number of decisions concerning the due process clause. Although adjudications under the due process clause are not authoritative on equal protection issues, the confluence of these two sections of the Fourteenth Amendment has frequently been noted.[98]

One decision providing support for the concept of heightened scrutiny in cases of absolute deprivation of educational benefits is *Goss v. Lopez.*[99] In this action Justice White noted the importance of education[100] and declared that unjustified exclusion from the "educational process" causes serious harm to both the student and the state.[101] He made clear the need for a hearing prior to suspension from public school and stressed the value of as little as ten days of instruction. Justice White emphasized that a clear and valuable entitlement

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[95] *Id.* at 522.

[96] *See* Davidson, *Welfare Cases and the "New Majority": Constitutional Theory and Practice,* 10 HARV. CIV. RIGHTS—CIV. LIB. L. REV. 513, 541-545 (1975) [hereinafter cited as *Welfare Cases and the New Majority*]. Davidson suggests that the Supreme Court is most likely to find a violation of the equal protection clause whenever plaintiffs are "totally excluded" from a benefit program. "Plaintiffs are totally excluded if the legislative pursuit of the secondary, exclusionary purpose deprives the plaintiffs of all benefits that the primary legislative purpose would otherwise grant." *Id.* at 541.

An argument closely related to that advanced both in this article and by Davidson is presented by Professor Tribe in *The New Federalism, supra* note 6. Tribe reads *National League of Cities v. Usery,* 426 U.S. 833 (1976), "to suggest the existence of protected expectations—of rights—to basic government services." *Id.* 1076. Thus, *Usery* can be classified as a reaction by the Supreme Court to acts of Congress which threaten to absolutely deprive citizens of "protected expectations" by compelling competing expenditures.

See also, Developments 1973, supra note 82 at 908-909 n. 257; *The Supreme Court, 1972 Term,* 86 HARV. L. REV. 55, 129-130 (1973). However, the reach of *Moreno* may be circumscribed by the fact that the act of Congress voided in that case was based upon an animus against a "politically unpopular group." *See* Mathews v. Diaz, 426 U.S. 67, 87 (1976); Johnson v. Robison 415 U.S. 361, 383 n. 18 (1974).

[97] *See, e.g.,* Weinberger v. Salfi, 422 U.S. 749 (1975); Epperson v. Arkansas, 393 U.S. 97 (1968).

[98] *See, e.g.,* Moore v. City of East Cleveland, 431 U.S. 494, 503 n. 10 (1977) (plurality opinion); United States Department of Agriculture v. Murry, 413 U.S. 508, 519 (1973) (Marshall, J., concurring); Monaghan, *Of "Liberty" and "Property",* 62 CORNELL L. REV. 405, 406 (1977).

[99] 419 U. S. 565 (1975).

[100] Goss v. Lopez, 419 U.S. 565, 576 (1975).

[101] *Id.* at 579.

was given each student by the education laws under consideration and that this entitlement was worthy of constitutional protection. The concern voiced by the Court with regard to even brief suspensions seems consonant with the use of the middle-tier equal protection test in a case of deprivation of educational entitlement to all school children in a locality.[102]

Assuming the availability of the middle-tier test in school shut-down cases, there remains a significant impediment to its application. The equal protection clause of the fourteenth amendment can only be utilized when "state action" is involved.[103] If it can be demonstrated that a state does no more than authorize localities to independently administer and finance an education program on a local basis it can be urged that there is no state action. The state's authorization, it may be argued, does not contribute to the injury of those who live in a district that independently decides to suspend a program.[104] Carrying this argument one step further, it may be said that even if the equal protection clause does apply, the relevant focus for equal protection analysis is the local administrative unit that has made the de-funding choice. It may also be said that as long as all school children are treated equally within the local unit the equal protection clause is not offended.

The failure to recognize state action in school programs misapprehends the factual context in which such programs operate today. Every state in the union does far more than merely authorize education.[105] State financing is crucial to the continuation of local programs and state constitutional, statutory and regulatory guidelines control virtually everything of importance.[106] The states are, at the very least, active partners in the operation of school programs and in almost all cases the source of final authority. The participation of the states provides both state action and expands the focus of judicial scrutiny to encompass the entire state rather than the isolated locality.[107]

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[102] Additional justification for application of the middle-tier test may be premised upon Michelman's argument in *On Protecting the Poor, supra,* note 20, that certain "just wants" of all citizens should be satisfied regardless of ability to pay. Under this view, when "just wants" are not satisfied the equal protection clause provides a basis for judicial intervention. Education would appear to be incorporated within the ambit of "just wants." *Id.*, 28. Tribe reiterates these propositions in *The New Federalism, supra* note 6. and suggests that they may have been influential in the Supreme Court's decision in *National League of Cities v. Usery*, 426 U.S. 833 (1976). Justice Powell's comments about "absolute deprivation" in *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1 (1973) seem to suggest a similar attitude. Pursuant to this analysis, deprivation of public education would seem, at a minimum, to call for heightened scrutiny under the equal protection clause.

However, the "just wants" theory has not been immune from criticism. It has been described as nothing more than "a kind of half-hearted equal protection." *Judicial Oversight, supra* note 23, at 46.

[103] *See* Civil Rights Cases, 109 U.S. 3, 11 (1883).

[104] *See On Protecting the Poor, supra* note 20, at 55.

[105] *See* materials cited in notes 10-21, *supra.*

[106] *Id.*

[107] The argument that there is no state action in the administration of public education programs can only be supported if local school districts are separate and independent corporate entities. Most states have not made schools independent in this sense. It has been frequently observed that "[t]he public school is a state institution" not an independent corporate entity. *See* N. EDWARDS, THE COURTS AND THE PUBLIC SCHOOLS, 23 & n. 1 (cases cited) (1971).

Burton v. Wilmington Parking Authority[108] illustrates the operation of the state "partnership" concept. In *Burton* a private restaurant rented space in a public parking authority building. The restaurant sought to exclude Blacks. The Court held that this action, though taken by a private corporation, was state action attributable to the parking authority. In the context of the partnership between state and local school administrators a finding of state action focusing upon the state as a whole seems warranted in light of *Burton.*

In reality state education bureaucracies have far more authority than co-equal partners. State agencies actually define and direct education programs.[109] This pervasive control should satisfy the state action requirement and establish the propriety of a statewide equal protection focus.[110] The state choice to allow a modicum of local administration should not serve to insulate the state from its obligations under the equal protection clause.[111] The only foreseeable exception to these propositions would arise in a state which by legislation or its equivalent makes local districts honestly and completely autonomous.[112]

The final step in analyzing the equal protection claims of school children deprived of benefits by local, fiscally motivated shutdowns is to apply the middle-tier test in their case. As previously noted, the test requires that the administrative means employed by the state be consonant with the goals articulated in the underlying statute or justified in light of other readily identifiable legitimate motives. If the means employed do not reasonably promote the articulated ends the statute may be held to violate the equal protection clause.

Identification of the ends served by education programs is not difficult. Constitutional and statutory texts announce the intention of most legislatures to assure that school-age children receive an education.[113] Other apparent motives include the promotion of the fourfold advantages said to arise from local financing and administration (*i.e.,* innovation, flexibility, political responsiveness and choice)[114] and diminution of state expenditures to support locally administered school programs.

The means chosen by the states to carry out these articulated purposes and apparent motives are also rather clear. They are fully set forth in the statutes

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[108] 365 U.S. 715 (1961).

[109] *See* materials cited in notes 10-20, *supra.*

[110] Although the Supreme Court, at one time, utilized the concept of state action to protect states from federal domination, the state action doctrine is no longer relied upon to preserve state prerogatives. Today it serves to shield *private individuals and organizations* from the requirements of the fourteenth amendment. This emphasis on *private* behavior suggests that the state action concept may be inapposite when school district activities are the focus of scrutiny under the equal protection clause. *See generally,* Black, *The Supreme Court, 1966 Term—Forward: "State Action," Equal Protection, and California's Proposition 14,* 81 HARV. L. REV. 69 (1967); Lewis, *The Meaning of State Action,* 60 COLUMBIA L. REV. 1083 (1960); Quinn, *State Action: A Pathology and a Proposed Cure,* 64 CAL. L. REV. 146, 149-155 (1976).

[111] *See* Memorial Hospital v. Maricopa Co., 415 U.S. 250 (1974) ("What would be unconstitutional if done directly by the State can no more readily be accomplished by a county at the State's direction." *Id.* at 256).

[112] *See, e.g.,* Griffin v. County School Bd. of Prince Edward County, 377 U.S. 218 (1964).

[113] *See* materials cited notes 10 & 11 *supra.*

[114] *See* text accompanying notes 6 & 7 *supra.*

and regulations which establish local administrative units for the management and, to some extent, financing of the education programs. Often included within this package of means is either tacit or explicit permission to localities to shut down schools on the basis of local fiscal considerations.[115]

Permitting localities to terminate school programs on the basis of local fiscal conditions is clearly irrelevant to the states' articulated goal of educating school-age children. Moreover, permitting shutdowns does not serve to secure any of the four advantages thought to arise because of local management and financing. Where no program exists there can be neither innovation nor flexible utilization of resources. Where a school program has been terminated the number of choices open to citizens seeking to settle in communities providing desired pedagogical approaches is narrowed and the specter of piecemeal foreclosure of all choice is raised. Piecemeal closings also have the effect of placing inordinate strain on surviving programs in other localities. Finally, although suspension may reflect the conscious choice of a majority of local voters, it has the effect of foreclosing further political debate and can work permanent injury to a politically weak minority.[116]

The remaining justification for local, fiscally motivated shutdowns is the saving of money. On a number of occasions the Supreme Court has rejected the proposition that constitutionally objectionable behavior on the part of a government entity can be justified by the need to conserve fiscal resources.[117] Were this not the case virtually every spending program would be insulated from scrutiny so long as its offensive provisions had the effect of reducing

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[115] *See, e.g.*, OHIO REV. CODE ANN. § 3313.483 (Page 1972).

> A board of education, upon the adoption of a resolution stating that such board may be financially unable to open on the day or to remain open for instruction on all days set forth in its adopted school calendar and maintain minimum standards as may be required by the state board of education, shall request the auditor of the state to determine whether such situation exists. If the auditor of the state finds that the board of education has attempted to avail itself to the fullest extent authorized by law of all lawful revenue sources available to it except those authorized by section 5705.21 of the Revised Code, he shall certify that finding to the superintendent of public instruction and shall certify the date on which the district will have remaining only such moneys as are necessary for maintaining the district while the education program is suspended and the date on which the district, by utilizing all lawful revenue sources for securing such moneys, will have available sufficient moneys to open or reopen the instruction program meeting the required minimum standards.
>
> Upon receipt of such certification, the superintendent of public instruction may authorize such school district to delay the opening of its schools or close schools on or after the certified date on which the district will cease to have sufficient funds and order such district to open or reopen on the certified date on which it will again have sufficient funds available. The order to open or reopen may be extended by the superintendent of public instruction for good cause shown.
>
> No board of education may delay the opening of its schools or close its schools for financial reasons unless so authorized by the superintendent of public instruction.

[116] The school children whose program is suspended face immediate injury. *See* Goss v. Lopez, 419 U.S. 565 (1975) ("total exclusion from the educational process for more than a trivial period, and certainly if the suspension is for 10 days, is a serious event in the life of the suspended child." *Id.*, 576.)

[117] *See*, Memorial Hospital v. Maricopa County, 415 U.S. 250, 263 (1974); Stanley v. Illinois, 405 U.S. 645, 656-657 (1972); Shapiro v. Thompson, 394 U.S. 618 (1969). As Justice Brennan stated in *Shapiro*

expenditures.[118] On the basis of the foregoing analysis it would appear that there is no means/ends correlation to justify local suspension of state public assistance or education programs. Therefore, suspension of this sort should be held to violate the equal protection clause.

Were one to assume the existence of some colorable means/ends correlation justifying the use of shutdowns to achieve programmatic goals, it could still be forcefully argued that most suspensions are nonetheless improper. Suspensions today are the product of the vagaries of local political attitudes and financial practices. In reality they are seldom invoked or justified on grounds germane to the programs which are suspended. Shutdowns take place within local borders which were fixed without education goals in mind.[119] The coupling of disregard for programmatic concerns with geographical randomness arguably renders most shutdowns irrational.

Conclusion

Changes in constitutional doctrine and a number of recent Supreme Court decisions suggest that an equal protection challenge to the fiscally motivated shutdown of a public education program would be well founded. As indicated earlier, the Supreme Court specifically recognized in *Rodriguez* the possibility of placing limits on the ability of a state to work "an absolute denial of educational opportunity."[120] Other rulings suggest that while education is not fundamental its deprivation can bring about heightened constitutional scrutiny.[121]

A decision which illustrates the approach the Court might take in dealing with a local shutdown is *Griffin v. County School Board of Prince Edward County*.[122] There the Supreme Court held that the closing of schools in one Virginia county was a denial of equal protection to the school children of that county. The Court intimated in *Griffin* that had there been no racially discriminatory behavior involved in the case the county could perhaps have lawfully shut its schools. However, the Court was careful to note that a county shutdown was permissible specifically because of the declaration of the Supreme Court of Virginia that state law provided each county with "an option

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> [w]e recognize that a State has a valid interest in preserving the fiscal integrity of its programs. It may legitimately attempt to limit its expenditures, whether for public assistance, public education, or any other program. But a State may not accomplish such a purpose by invidious distinction between classes of its citizens. It could not, for example, reduce expenditures for education by barring indigent children from its schools. Similarly, in the cases before us, appellants must do more than show that denying welfare benefits to new residents saves money.

Id., 633; *Welfare Cases and the New Majority, supra* note 96 at 524 n. 46; *On Protecting the Poor, supra* note 20, at 45-46.

[118] *See Welfare Cases and the New Majority supra* note 96, at 556.

[119] *See Inequalities From Place to Place, supra* note 44, at 808; *On Protecting the Poor, supra* note 20, at 29.

[120] *See* text accompanying notes 77-81 *supra*.

[121] *See, e.g.*, Wood v. Strickland, 420 U.S. 308 (1975); Goss v. Lopez, 419 U.S. 565 (1975); Fleming v. Adams, 377 F.2d 975 (10th Cir. 1967).

[122] 377 U.S. 218 (1964).

to operate or not to operate public schools."[123] Where, as in almost all states today, state constitutions and statutes require statewide public education and where there is significant ongoing state financial and administrative involvement in local public education, the relief granted in *Griffin* would seem appropriate.[124]

In recent years the fiscal problems of local school systems have grown dramatically. Additionally, voters have become reluctant to approve expenditures for education. These trends have resulted in an increase in local fiscally motivated suspensions of school programs. If local schools are viewed in the context of the statewide programs of which they are a part, localized suspensions raise questions of inequitable treatment in derogation of the equal protection clause. The remedy ordered in *Griffin* represents an appropriate judicial response to this equal protection dilemma.

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[123] Griffin v. County School Bd. of Prince Edward County, 377 U.S. 218, 229-230 (1964) citing County School Bd. v. Griffin, 204 Va. 650, 133 S.E. 2d 565 (1963).

[124] The relief approved in *Griffin* included an order to the county supervisors requiring them to levy taxes, raise needed funds, open, operate and maintain the public schools in the county. *See* Griffin v. County School Bd. of Prince Edward County, 377 U.S. 218, 233 (1964). In an appropriate shutdown case similar relief would seem permissible.