South Carolina Law Review

Volume 24 | Issue 3 Article 9

1972

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Michael F. Mullinax

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Recommended Citation

Michael F. Mullinax, Constitutional Law--Statutory Provision Allowing Public Schools to be Financed Primarily by Local Property Taxes is Unconstitutional Denial of Equal Protection of the Law, 24 S. C. L. Rev. 464 (1972).

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CONSTITUTIONAL LAW — STATUTORY PROVISION ALLOWING PUBLIC SCHOOLS TO BE FINANCED PRIMARILY BY LOCAL PROPERTY TAXES IS UNCONSTITUTIONAL DENIAL OF EQUAL PROTECTION OF THE LAWS*

I. INTRODUCTION

The potential success of each individual and of American society as a whole is based to a large extent upon our system of public schools, whose administration is controlled by the individual states. With the abandonment of the "separate but equal" concept of public schools, the area of financing in the public school domain remains for consideration in order to insure "equal educational opportunity for all." The concept of equal educational opportunity is not susceptible of any precise definition, therefore this comment will attempt to explore recent developments in this area and the effect of these developments upon our present educational system.

In *Serrano v. Priest*,[1] reversing and remanding with direction to overrule the demurrers as to each claim, the Supreme Court of California held that the complaint alleged sufficient facts to show that California's system of public school financing, which relied heavily upon local property taxes in determining the expenditure per pupil in local districts, was an unconstitutional denial of "equal protection of the laws"[2] in that the financing system created a classification based on wealth which constituted an invidious discrimination against the poor. In reaching this conclusion the *Serrano* court held that education is a fundamental interest,[3] and that "this system [California's] conditions the full entitlement to such interest on wealth, classifies its recipients on the basis of their collective affluence and makes the quality of a child's education depend upon the resources of his school district and ultimately upon the pocket book of his parents."[4]

*Serrano v. Priest, 5 Cal. 3d 584, 487 P.2d 1241, 96 Cal. Rptr. 601 (1971).

1. 5 Cal. 3d 584, 487 P.2d 1241, 96 Cal. Rptr. 601 (1971).
2. U.S. CONST. amend. XIV, §1.
3. 5 Cal. 3d 584, 599, 487 P.2d 1241, 1256, 96 Cal. Rptr. 601, 623 (1971).
4. *Id.*

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II. LEGISLATIVE CLASSIFICATIONS AND THE EQUAL PROTECTION CLAUSE

In rendering this decision, the *Serrano* court had to determine upon which criteria the classification was to be judged. Traditionally, legislative classifications were subjected to a "reasonable relationship test" whose principles were first enunciated in *Lindsey v. Natural Carbonic Gas Co.*[5] In the more recent case of *McDonald v. Board of Election Comm'rs,*[6] the court stated that "statutory classifications will be set aside only if no grounds can be conceived to justify them."[7]

The *Serrano* court rejected this standard in favor of the stricter criteria defined as the "compelling governmental interest doctrine".[8] In order to establish the availability of this doctrine, the court in *Serrano* drew upon a line of cases establishing wealth as a suspect classification.[9] In *Harper v. Virginia Board of Elections*[10] the Supreme Court of the United States stated, "Lines drawn upon the basis of wealth or property, like those of race are traditionally disfavored."[11] Even though no purposeful or intentional discrimination was found in California's school financing statutes, the court relied upon

5. 220 U.S. 61 (1911). In this case the Supreme Court laid down specific rules to be used in determining whether statutory guidelines were violative of equal protection of the laws. Among them were the principles that the Equal Protection Clause permits legislatures a wide scope of discretion in classifying and adopting police and welfare laws and that the Equal Protection Clause only forbids that which is done without any reasonable basis and therefore that which is purely arbitrary.

6. 394 U.S. 802 (1969). In this case the Supreme Court upheld an Illinois absentee voting statute which, in providing for absentee ballots to persons who for medical reasons could not go to the polls or who would be out of the country, had failed to provide for absentee ballots to inmates in county jails.

7. *Id.* at 806.

8. *See* Shapiro v. Thompson, 394 U.S. 618 (1969); Kramer v. Union Free School District, 395 U.S. 621 (1969).

9. *See* Douglas v. California, 372 U.S. 353 (1963); Griffin v. Illinois, 351 U.S. 12 (1956); Edwards v. California, 314 U.S. 160 (1941).

10. 383 U.S. 663 (1966). In this case the Supreme Court invalidated a Virginia poll tax stating it introduced the irrelevant factor of wealth into determination of the qualifications of the right to vote.

11. *Id.* at 668.

two criminal decisions[12] placing upon the state the duty of relieving an indigent of the burden of his own poverty.[13]

In order to further support their argument, the *Serrano* court asserted that education is a "fundamental interest" stating, "[W]e are convinced that the distinctive and priceless function of education in our society warrants, indeed compels, our treating it as a 'fundamental interest'."[14] Precedent may be found for this viewpoint in *Brown v. Board of Education*[15] which invalidated de jure segregation by race in the public schools. In *Brown* the Supreme Court stated that "Today, education is perhaps the most important function of state and local governments. . . . Such an opportunity, [education]. . . is a right which must be made available to all on equal terms."[16]

In all cases prior to *Serrano,* while wealth had been established as a suspect classification, it had always been in conjunction with other fundamental rights such as the right to vote, the right to a meaningful appeal in a criminal trial and the right to counsel. *Brown* did speak of education as a "right which must be made available to all on equal terms", but it did so in the area of racial discrimination.

Having determined that wealth was a suspect classification and that education was a "fundamental interest", the court next questioned whether the California school financing system was necessary to achieve a compelling state interest. The State of California asserted that local administrative control over education was a compelling state interest,[17] and that "if one district raises a lesser amount per pupil than another district, this is a matter of choice and preference of the individual district and reflects the individual desire for lower taxes rather than an expanded educational program, or may reflect greater interest within that district in such other ser-

12. Douglas v. California, 372 U.S. 353 (1963), Griffin v. Illinois, 351 U.S. 12 (1956).

13. Justice Harlan in a dissenting opinion filed in *Harper v. Virginia Board of Elections,* 383 U.S. 663 (1966) reaffirmed his previous opinion that *Douglas* and *Griffin* should be viewed as based upon fundamental due process rather than equal protection of the laws.

14. Serrano v. Priest, 5 Cal. 3d 584, 601, 487 P.2d 1241, 1258, 96 Cal. Rptr. 601, 618 (1971).

15. 347 U.S. 483 (1954).

16. *Id.* at 493.

17. Serrano v. Priest, 5 Cal. 3d 584, 587, 487 P.2d 1241, 1244, 96 Cal. Rptr. 601, 604 (1971).

vices that are supported by local property taxes, as, for example, police and fire protection or hospital services."[18]

The *Serrano* court dismissed these arguments by stating:

> Assuming arguendo that local administrative control may be a compelling state interest, the present financing system cannot be considered necessary to further this interest. No matter how the state decides to finance its system of education, it can still leave this decision-making power in the hands of local districts.[19]

III. PRESENT STATE OF THE LAW

In the case of *McGowan v. Maryland*,[20] the Supreme Court granted wide discretion to state legislators as to the reasonableness of their classifications:

> The constitutional safeguard is offended only if the classification rests on grounds wholly irrelevant to the achievement of the State's objective. State legislators are presumed to have acted within their constitutional power despite the fact that, in practice, their laws result in some inequality. A statutory discrimination will not be set aside if any state of facts may be conceived to justify it.[21]

Two recent decisions, *Burruss v. Wilkerson*[22] and *McInnis v. Shapiro*,[23] have been considered by the Supreme Court. The holding of these decisions was that the state and local legislative patterns for levying and disbursing taxes in the area of school financing in those two states were not unconstitutional. The financing of public schools in Virginia and Illinois was similar to that of California.

The United States District Court for the Northern Dis-

18. *Id.*

19. *Id.*

20. 366 U.S. 420 (1961). In this case the Supreme Court upheld a Sunday closing law because the state legislature could reasonably find that the Sunday sale of exempted commodities was necessary either for the health of the populace or the enhancement of the recreational atmosphere of the day and was not repugnant to equal protection of the laws by virtue of such exemptions.

21. *Id.* at 425, 426.

22. Burruss v. Wilkerson, 310 F. Supp. 572 (W.D. Va. 1969), *aff'd* 397 U.S. 44 (1970).

23. 293 F. Supp. 327 (N.D. Ill. 1968), *aff'd mem. sub nom.* McInnis v. Ogilvie, 394 U.S. 322 (1969).

trict of Illinois rendered the decision of *McInnis v. Shapiro*[24] which was summarily affirmed by the Supreme Court. In *McInnis,* a three judge court upheld the Illinois state statutory system of financing education through local property taxation even though it resulted in wide variations in per pupil expenditures from district to district. The plaintiffs in *McInnis* based their argument upon the Equal Protection Clause of the fourteenth amendment. The court considered the claim upon that ground but stated that the relief sought resembled substantive due process.[25]

In *McInnis,* the court stated that "Expenses are not . . . the exclusive yardstick of a child's educational needs. . . . The desirability of a certain degree of local experimentation and local autonomy in education also indicates the impracticability of a single simple formula."[26]

The *Serrano* court refused to accept the reasoning in *McInnis,* stating that the primary basis for that ruling was that the plaintiff's claim was based upon "educational needs" as the proper standard to measure school financing schemes against the Equal Protection Clause. In *Serrano,* the court stated:

> [N]onjusticiability of the "educational needs" standard was the basis for the *McInnis* holding and the district court's affirmance of the substantive issues was purely dictum.[27]

McInnis was also cited with approval in *Briggs v. Kerrigan.*[28] In *Briggs,* the District Court of Massachusetts held that the City of Boston did not violate the Equal Protection Clause by failing to provide subsidized lunches in all of its public schools. The lunches were provided only in those schools

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24. *Id.* The Illinois system of finance is substantially similar to California's. The court in *McInnis* based its decision on the facts that the legislative classification was neither arbitrary nor creative of an invidious classification and also that there was a lack of judicially manageable standards for the type of relief that was sought.

25. *Id.* at 331&n.11. The court stated, "[Q]uality education for all is more desirable than uniform, mediocre instruction. Yet if the Constitution only commands that children be treated equally, the latter result would satisfy the fourteenth amendment. . . ."

26. *Id.* at 336.

27. Serrano v. Priest, 5 Cal. 3d 584, 605, 487 P.2d 1241, 1265, 96 Cal. Rptr. 601, 624 (1971).

28. 307 F. Supp. 295 (D. Mass. 1969), *aff'd* 431 F.2d 967 (1st Cir. 1970).

with kitchen facilities and the result was that some of the more affluent children received subsidized lunches while poorer children did completely without. The court in *Briggs* concluded that this inequality was constitutionally permissible. Most notably in *Briggs*, the court stated:

> It does not follow that state and federal programs affecting citizens unequally are all unconstitutional if some hypothetical appropriation of funds would produce equal benefits to all citizens.[29]

In *Burruss v. Wilkerson*,[30] an action was brought attacking the constitutional validity of Virginia's statute relating to the distribution of public education funds. The District Court held that there was no discrimination in the disbursement of funds under Virginia's financing arrangement, and that the cities and counties received state funds under a uniform consistent plan. The court dismissed the action upon finding that the differences in a particular county were the result of the inability of the county to obtain locally the moneys needed to be added to the state contribution. In commenting upon the plaintiff's demand for equal educational opportunity the court stated:

> Actually, the plaintiffs seek to obtain allocations of state funds among the cities and counties so that the pupils in each of them will enjoy the same educational opportunities. This is certainly a worthy aim, commendable beyond measure. However, the courts have neither the knowledge, nor the means, nor the power to tailor the public moneys to fit the varying needs of these students throughout the State. We can only see to it that the outlays on one group are not invidiously greater or less than that of another. No such arbitrariness is manifest here.[31]

IV. RECENT DEVELOPMENTS

The case of *Rodriquez v. San Antonio Independent School District*,[32] decided by a three-judge district court, relied heavily upon *Serrano* in holding that the Texas system of public school financing was a denial of equal protection of the laws under the fourteenth amendment to the United States Consti-

29. *Id.* at 304.

30. 310 F. Supp. 572 (W.D. Va. 1969), *aff'd* 397 U.S. 44 (1970).

31. *Id.* at 574.

32. 40 U.S.L.W. 2398 (U.S. January 4, 1972).

tution, in that the Texas financing scheme like that of California relied heavily upon the local property tax base and had established a classification based on wealth which affected a "fundamental interest". The court reaffirmed the principle of "fiscal neutrality" inferred from the decision of the *Serrano* court.[33] This case is currently upon appeal to the United States Supreme Court and will presumably provide the Court with the first opportunity to evaluate the reasoning first advanced by *Serrano*.

In *Robinson v. Cahill*,[34] the Superior Court of New Jersey held that the New Jersey system of financing public education, which relied heavily on local property taxes, denied the plaintiff's equal protection rights guaranteed by the New Jersey and Federal Constitutions. Drawing primarily from the thesis advanced in *Serrano*, the New Jersey court stated:

> The [financing] system discriminates against pupils in districts with low real property wealth, and it discriminates against taxpayers by imposing unequal burdens for a common state purpose.[35]

Consistent with decisions from other jurisdictions, the court admonished that their opinion should not be construed as to require the legislature to adopt any specific method of financing or taxation. Specifically, the court stated:

> The Legislature may approach the goal required [a system of thorough and efficient education] by any method reasonably calculated to accomplish that purpose consistent with the equal protection requirements of the law.[36]

The *Robinson* court, while declaring the present financing system unconstitutional, gave its ruling prospective application only and allowed the legislature until January 1, 1973, to correct the discriminatory taxation system while retaining jurisdiction for any modification or further order as may be required.[37]

In *Van DuSartz v. Hatfield*,[38] the U.S. District Court in Minnesota adopted the findings of the *Serrano* Court in concluding that a system of public school financing which makes

33. *Id.* at 2399.
34. 118 N.J. 223, 287 A.2d 187 (1972).
35. *Id.* at 253, 287 A.2d at 217.
36. *Id.*
37. *Id.*
38. 334 F. Supp. 870 (D. Minn. 1971).

spending per pupil a function of the school district's wealth violates the equal protection guarantee of the fourteenth amendment. The Court denied the defendant's motion to dismiss for failure to state a cause of action and deferred further action upon the case until the close of Minnesota's then current legislative session. The court in *Van DuSartz* again stressed that absolute uniformity of school expenditures was not required:

> This Court in no way suggests to the Minnesota Legislature that it adopt any one particular financing system. Rather, this memorandum only recognizes a constitutional standard through which the Legislature may direct and measure its efforts. . . .[39]

The only blemish thus far upon the adolescent face of the *Serrano* court's thesis was rendered by the Supreme Court of New York in the case of *Spano v. Board of Education.*[40] Plaintiffs had brought suit alleging that New York's existing provisions for levying and distributing school taxes were unconstitutional based primarily upon the reasoning advanced in *Serrano.* The court acknowledged that the existing financing system may be inadequate and unfair,[41] but that the pronouncements of the United States Supreme Court in two previous cases[42] were controlling authority until otherwise proclaimed by that Court. Commenting specifically upon the discussions of the *Burruss* and *McInnis* decisions by the *Serrano* court, Justice Hawkins stated:

> The majority's [*Serrano*] discussion of *McInnis* and *Burruss,* in my opinion, is largely dicta and their extended comments gratuitous. Involving merely a motion to dismiss a complaint for general insufficiency, the latter portions of that decision, I believe, are speculations and extrapolations as to what prompted the United States Supreme Court twice to affirm in such terse manner.[43]

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39. *Id.* at 877,n.14.

40. 68 Misc. 2d 804, 328 N.Y.S. 2d 229 (Sup. Ct. 1972).

41. *Id.* at 809, 328 N.Y.S. 2d at 234.

42. McInnis v. Shapiro, 293 F. Supp. 327 (N.D. Ill. 1968), *aff'd mem. sub nom.* McInnis v. Ogilvie, 394 U.S. 322 (1969); Burruss v. Wilkerson, 310 F. Supp. 572 (W.D. Va. 1969), *aff'd* 397 U.S. 44 (1970).

43. Spano v. Board of Education, 68 Misc. 804, 808, 328 N.Y.S. 2d 229, 233 (Sup. Ct. 1972).

In conclusion, the *Spano* court admonished that if the "one scholar, one dollar" doctrine (a suggested variant of the "one man, one vote" doctrine) is to become the law of the land, it is the prerogative and within the "territorial imperative" of the legislature or, under certain circumstances, of the United States Supreme Court.[44]

V. CONCLUSION

Although, as stated before, the principles relied upon by the *Serrano* court were discussed in detail in the *McInnis* decision and apparently rejected by the three-judge district court, the summary affirmance of that decision[45] by the Supreme Court cannot conclusively foreclose the arguments presented in *Serrano* and those cases based upon it. A decentralization of powers is the primary consideration in allowing local school districts to determine for themselves the quality of education they desire in their schools. In this writer's opinion a mandate of equal expenditures throughout a state would not solve the problem of equal educational opportunity, and *Serrano* and later cases defer to their respective legislatures in the formulation of school financing plans. The right to attend a public school is a fundamental right as is the right to counsel in a criminal trial. However, every criminal defendant is not entitled to the caliber of legal assistance that usually can be attained only by the very wealthy.

The doctrine of "fiscal neutrality" which has emerged from these decisions simply requires that the quality of education may not be a function of wealth, other than the wealth of the state as a whole.[46] Certainly the educational system of our nation is a fundamental function of local government; according to one commentator, however, "No less can be said about health services, police and fire services, water supply, public housing, parks and recreation facilities, transportation, welfare services, housing regulations and what have you."[47]

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44. *Id.* at 810, 328 N.Y.S. 2d at 235.

45. McInnis v. Ogilvie, 394 U.S. 322 (1969).

46. Assuming the correctness of this doctrine, a question then remains as to why the quality of education should be allowed to vary according to the wealth of the various states throughout the nation.

47. Kurland, *Equal Educational Opportunity: The Limits of Constitutional Jurisprudence Undefined*, 35 U. CHI. L. REV. 583, 589 (1968).

In his dissent in *Harper v. Virginia Board of Elections*,[48] Justice Black stated:

> The mere fact that a law results in treating some groups differently from others does not, of course, automatically amount to a violation of the equal protection clause. To ban a state from drawing any distinctions in the application of its laws would practically paralyze the regulatory power of legislative bodies.[49]

Rather than limiting this issue entirely to equal protection, substantive due process may also be considered by the Supreme Court. Keeping this in mind, the statement made by Justice Black in *Adamson v. California*[50] may be appropriate:

> The "natural law-due process formula" under which the courts make the constitution mean what they think it should at a given time has been used in the past, and can be used in the future, to license this Court, in considering regulatory legislation, to roam at large in the broad expanses of policy and morals, and to trespass, all too freely, on the legislative domain of the states as well as the Federal Government.[51]

The answer to the problem of equal educational opportunity is not one that lends itself to an easy or precise solution. In rendering a decision, the Supreme Court must consider the tremendous impact upon our already faltering public school system and the future implications of an affirmance of *Serrano*-type reasoning. The most important question to be answered by the Supreme Court is whether or not the classification of education as a fundamental interest in this context is justified.

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48. 383 U.S. 663 (1966).
49. *Id.* at 672.
50. 332 U.S. 49 (1947).
51. *Id.* at 90.