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THE AFTERMATH OF SERRANO: THE STRICT SCRUTINY APPROACH AND THE VIABILITY OF PROPERTY TAX FINANCING FOR PUBLIC EDUCATIONAL SYSTEMS

I. INTRODUCTION

The public education systems of most states rely heavily on the property taxes raised by local school districts for the financial support of the schools in each district.1 Thus the quality of education in a district may depend upon and be limited by the wealth of that district.2 A series of recent cases has employed the equal protection clause of the fourteenth amendment of the federal Constitution3 to condemn local property tax financing of public educational systems. The leading case was Serrano v. Priest.4 There, the Supreme Court of California held that students and parents had stated a cause of action by alleging that California's school finance system invidiously discriminated against residents of poor school districts because the poorer districts offered education which was inferior to that of other districts merely because of the disparity of wealth.5 The novelty of such an application of the equal protection clause, and the immediate practical effect of the decision,6 led the court to modify its original opinion.7 The modification emphasized the demurrer nature of the case and provided that if the plaintiffs prevailed, the present system should nevertheless continue to operate until a less discriminatory system could be fashioned by the state legislature.8

Three cases followed which relied heavily on the Serrano analysis in dealing with similar sets of facts. In Van Dusartz v. Hatfield,9 the United States District Court for the District of Minnesota held that the plaintiffs — taxpayers and parents — had stated a cause of action by making allegations similar to those made in Serrano. In Rodriguez v. San Antonio,10 a three-judge court for the Western District of Texas held that a cause of action similar to that in Serrano had been proved. Finally, in Robinson v. Cahill,11 the Superior Court of New Jersey held that the

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2. See notes 196–204 and accompanying text infra (discussion of equalization attempts by the states).
3. U.S. CONST. amend. XIV, § 1, providing in part:
   No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.
4. 5 Cal. 3d 584, 487 P.2d 1241, 96 Cal. Rptr. 601 (1971) (en banc).
5. Id. at 617–18, 487 P.2d at 1255, 96 Cal. Rptr. at 625.
6. See notes 87–88 infra (the immediate political impact of the Serrano decision).
7. The opinion was originally handed down on August 30, 1971, and was modified on denial of rehearing which was filed on October 21, 1971. 77 CASE & COM. 30 (1972).
8. Id.
state's school financing system constituted a denial of equal protection. Notably, each court retained jurisdiction pending legislative modifications of the systems, even though Rodriguez and Robinson were cases which represented final decisions on the merits as to the constitutionality of the systems.

In Sweetwater County Planning Committee v. Hinkle,\(^{12}\) the Supreme Court of Wyoming held that the Serrano result forbade the establishment of a unified school district when the basis for such unification was the wealth of the districts rather than the educational needs of the children. The Sweetwater court went beyond any of the aforementioned cases in that it made specific suggestions as to what would be acceptable legislative rationales for a constitutionally valid districting system.\(^{13}\)

In contrast to Serrano, Van Dusarts, Rodriguez, Robinson, and Sweetwater, but on very similar facts, the New York Supreme Court held, in Spano v. Board of Education,\(^{14}\) that the plaintiff had not stated a cause of action. The Spano court felt that the decisions of the United States Supreme Court in McInnis v. Ogilvie\(^{15}\) and Burruss v. Wilkerson,\(^{16}\) though distinguished by the Serrano court,\(^{17}\) were controlling.

Thus, a clear disagreement among the states makes this rapidly developing issue\(^{18}\) ripe for decision by the United States Supreme Court, which recently docketed the appeal in Rodriguez.\(^{19}\)

The Supreme Court recently used the equal protection approach adopted by the Serrano court in Shapiro v. Thompson.\(^{20}\) In Shapiro, the Court invalidated a one-year residency requirement as a condition to receipt of state welfare benefits. Mr. Justice Harlan, in his dissent, outlined the majority's "compelling interest" doctrine, which the Serrano court called the "strict scrutiny" approach,\(^{21}\) and contrasted it with the traditional "rational basis" test:

The "compelling interest" doctrine, which today is articulated more explicitly than ever before, constitutes an increasingly significant exception to the long-established rule that a statute does not deny equal protection if it is rationally related to a legitimate government objective. The "compelling interest" doctrine has two branches. The branch which requires that classifications based on "suspect"

\(^{12}\) 491 P.2d 1234 (Wyo. 1971).
\(^{13}\) Id. at 1237-38. For a discussion of the Sweetwater court's suggestions, see notes 168 & 210 and accompanying text infra.
\(^{17}\) See notes 83-90 and accompanying text infra.
\(^{18}\) Similar suits have been filed in twenty-five states. Wall Street Journal, Mar. 2, 1972, at 1, col. 6.
\(^{19}\) 337 F. Supp. 280 (W.D. Tex. 1971), appeal granted, 40 U.S.L.W., 3573 (U.S. June 6, 1972) (No. 71-1332). Numerous states are expected to file briefs as amicus curiae.
\(^{21}\) 5 Cal. 3d at 610, 487 P.2d at 1259, 96 Cal. Rptr. at 619. This Comment will employ the term "strict scrutiny."
criteria be supported by a compelling interest apparently had its genesis in cases involving racial classifications.

It has been held [with regard to the second branch] that a statutory classification is subject to the “compelling interest” test if the result of the classification may be to affect a “fundamental right,” regardless of the basis of the classification.

The soundness of the “strict scrutiny” approach, as applied to the problem of educational opportunity, is the subject of this Comment. After a brief discussion of problems related to finding “state action” (a condition to the applicability of the fourteenth amendment), the designation of education as a “fundamental interest,” the designation of wealth as a “suspect classification,” and the interplay between these designations will be scrutinized. The kinds of “state interest” which might justify unequal treatment and the judicial approach to measuring the “compulsion” of such state interest will then be considered. A modified strict scrutiny test will then be proposed which will, it is submitted, more closely reflect the approach apparently taken by the courts in the instant cases. The suitability of the judiciary to lead the attack on educational inequality will then be considered, followed by an analysis of the practical impact of the instant cases on the federal system and the freedom of the states to provide for local government decision-making.

II. State Action

The Serrano court had no difficulty finding the presence of “state action.”23 While the state constitution and statutes were neutral on their face as they evidenced no intent to affect people differently according to their wealth,24 the court took judicial notice of extrinsic factors relating to the distribution of wealth among school districts25 and recognized that the system’s effect was to create an arguably invalid discrimination.26

22. 394 U.S. at 658-60 (Harlan, J., dissenting) (citations omitted).
24. Indeed, the instant cases took note of the numerous equalization programs undertaken by the states, indicating a state purpose not to discriminate by wealth. The Serrano court noted, however, that other cases “dealing with the factor of wealth” rejected imposition of certain “payments which, although neutral on their face, may have a discriminatory effect.” 5 Cal. 3d at 602, 487 P.2d at 1254, 96 Cal. Rptr. at 614. Cf. Developments: Equal Protection, supra note 23, at 1080-83. There the author explained that legislatures must not only write their laws so that they apply equally to all members of the classes described by the legislation (“numerical equality”) but also consider certain other differences. A legislature cannot be blind to practical extrinsic classifications that might be created.
25. In deciding the demurrer, the Serrano court took judicial notice of all materials “contained in publications of state officers or agencies.” 5 Cal. 3d at 591, 487 P.2d at 1245, 96 Cal. Rptr. at 605. The other courts also undertook extensive examination of the facts relating to distribution of wealth and educational benefits. See, e.g., 118 N.J. Super. at 235-46, 287 A.2d at 193-99.
26. In other areas of the law, the lack of any discrimination on the face of legislation has not saved it from judicial scrutiny in the light of extrinsic circum-
The court properly dismissed the defendants' contention that this was purely de facto discrimination and therefore not "state action." It recognized that a de jure/de facto distinction had little meaning\(^{27}\) where, as here, governmental involvement in every facet of the school system, from the drawing of school district lines to the distribution of school funds, was obvious.\(^{28}\) However, the case may lend support for future invalidation of de facto racial segregation in schools.\(^ {29}\)

Two further observations with reference to the threshold finding of "state action" are appropriate at this point. The question of "action" versus "inaction"\(^ {30}\) tends to pervade these cases, though it is not explicitly discussed.\(^ {31}\) When a state has undertaken to remedy a social problem, courts have generally granted relief for unequal treatment only when the classification, on which distribution of the remedial benefits is based, is not rationally related to the problem intended to be remedied.\(^ {32}\) Thus, if the state action does not remedy the entire problem, the courts have nevertheless refrained from requiring the state to do more than it has already undertaken.\(^ {33}\) This question of state "inaction" may serve to distinguish another recent case, *Dandridge v. Williams*,\(^ {34}\) which is

\(^{27}\) 5 Cal. 3d at 603-04, 487 P.2d at 1255, 96 Cal. Rptr. at 615. The *Serrano* court pointed out that wealth classifications do not lend themselves to de facto/de jure categorization and should not be controlled by analogy to permissible de facto racial segregation, especially in light of California's stance against such segregation. *Id.* at 603-04 n.20, 487 P.2d at 1255 n.20, 96 Cal. Rptr. at 615 n.20. Notably, the *Rodriguez, Van Dusartz*, and *Robinson* cases did not distinguish *Serrano* on this point.

\(^{28}\) See 5 Cal. 3d at 602-04 & nn.18-20, 487 P.2d at 1254-55 & nn.18-20, 96 Cal. Rptr. at 614-15 & nn.18-20. The role of the state was best illustrated by the Sweetwater situation. See Michelman, *Foreword: On Protecting the Poor Through the Fourteenth Amendment*, 83 Harv. L. Rev. 7, 48-50 (1969).

\(^{29}\) De facto discrimination was traditionally permissible because the state had no role in perpetuating the discrimination. With the increasing involvement of government in all phases of activity, however, it is difficult to find an instance where the state could not be deemed to condone discrimination if it does not actively prevent discrimination. Cf. *Kurland, Equal Educational Opportunity: The Limits of Constitutional Jurisprudence Undefined*, 35 U. Chi. L. Rev. 583, 592-95 (1968). Professor Kurland noted that the public's acquiescence in removing the vestiges of de jure segregation in schools may explain the reluctance of the Supreme Court to demand de facto segregation. Cf. *Palmer v. Thompson*, 403 U.S. 217 (1971) (5-4 decision); *School Comm. v. Barksdale*, 348 F.2d 261 (1st Cir. 1965). Strong support for an end to de facto segregation, because it rejects the disestablishment argument in favor of outright prohibition of all segregation is offered in *Hobson v. Hansen*, 269 F. Supp. 240, 240-47 (D.D.C. 1967), appeal dismissed, 393 U.S. 801 (1968), *aff'd* sub nom., *Smuck v. Hobson*, 408 F.2d 175 (D.C. Cir. 1969). Its approach suggests that by attacking extra burdens on the poor, the equal protection clause may accomplish what it has not done by attacking racial classifications alone. However, the circuit court there based its affirmance partially on "the trial court's finding that discriminatory intent underlay these [optional attendance] zones." 408 F.2d at 183.

\(^{30}\) *See Developments: Equal Protection*, supra note 23, at 1070-89.

\(^{31}\) Cf. *Serrano*, 5 Cal. 3d at 602-03, 487 P.2d at 1254, 96 Cal. Rptr. at 614.


\(^{33}\) Cf. *Briggs v. Kerrigan*, 307 F. Supp. 295 (D. Mass. 1969), *aff'd*, 431 F.2d 967 (1st Cir. 1970) (the state was allowed to offer school lunch programs in schools according to whether or not there were existing kitchen facilities in the respective schools).

\(^{34}\) 397 U.S. 471 (1970). For other bases for distinguishing *Dandridge* from the instant cases, *see* notes 115 & 190 and accompanying text *infra.*
often cited as an indication of a trend away from "strict scrutiny," and which is considered to be of significance in the instant cases. In Dandridge, the Supreme Court held that a state could distribute welfare benefits for dependent children and at the same time draw a line at the fifth child per family. The decision might have been based on a recognition that the state legitimately undertook to remedy poverty only to the extent of remedying low family income and should not be obliged, in addition, to remedy the needs of every child.

In contrast to Dandridge, the case of Hobson v. Hansen, which was discussed in the instant cases and which may have come closest to demanding that a state undertake more than it intended, required that the state either abandon its "tracking" system, intended to advance superior students, or undertake to make disadvantaged students eligible. As can be seen by comparison of these two cases, the characterization of state involvement as "action" or "inaction" may require detailed analysis by a court and thereby merge with the final and decisive step of the "strict scrutiny" analysis — the examination of the state's interest. The mere presence of the initial requirement of "action," not "inaction," has helped, however, to create a balance between judicial standards for equal treatment and legislative discretion to attack problems gradually, as it becomes economically or politically feasible to do. The instant cases found

35. See Riverside v. Whitlock, ___ Cal. 3d ___, ___ P.2d ___, 99 Cal. Rptr. 710 (1972), where the court stated that, while Serrano stood for the proposition that the opportunity for equal education was on the list of "fundamental interests," Dandridge suggested that the list was limited. The Whitlock court held that the equal protection principle of one man-one vote need not be applied to a vote on gas distribution by those owning a majority of the affected lands.

36. The Van Dusartz court thought it necessary to distinguish Dandridge. See note 115 infra.


39. See, e.g., 5 Cal. 3d at 609 n.27, 487 P.2d at 1259 n.27, 96 Cal. Rptr. at 619 n.27.

40. Cf. Hobson v. Hansen: Judicial Supervision of the Color-Blind School Board, 81 HARV. L. REV. 1511 (1968). See Selma Improvement Ass'n v. County Comm'n, ___ F. Supp. ___ (N.D. Ala. 1972). The federal district court held that Alabama County, with a history of failure to pave streets in black neighborhoods, was obliged to equalize paving, even though the county had already adopted a program to gradually lessen the differences. Id. at ___.

41. 408 F.2d at 186-89.

42. See text accompanying notes 161-71 infra.

43. Cf. Shapiro v. Thompson, 394 U.S. 618, 655 (1969) (Harlan, J., dissenting). See Note, supra note 37, in which the author stated:

To say this is not to import into the Constitution — as Mr. Harlan has feared — a "philosophy of levelling." Elimination of state-created barriers to advancement does not require states to undertake affirmative action to alleviate poverty. . . . De facto wealth classifications demand active review only when two conditions exist: (1) the State has acted affirmatively in some way; (2) this act substantially impairs the social mobility of poor people. The state can
“state action” on the basis that the respective states had undertaken state-wide education systems. The presence of compulsory school attendance laws was particularly important, since it helped show that the states were undertaking legal support of all public education within the state and were not merely taking a permissive, “inactive” role.

With reference to the long-range significance of the instant cases, it should be noted that, even if they had not made findings of “state action” for fourteenth amendment purposes, four of the cases would retain their effect in the respective states, because they involved interpretation of state as well as federal constitutional requirements. The Serrano court held that the California constitutional mandate for a “system” of public schools was not violated by decentralized financing but that provisions, previously held to be equivalent to the federal equal protection clause, allegedly had been violated. The Robinson court held that the New Jersey system violated the state constitutional requirement of a “thorough” system. The Sweetwater case held that the Wyoming constitution’s provision for equal taxation required equalization of educational opportunity. The Van Dusartz court chose not to consider the Minnesota constitution’s requirement of a “general and uniform system,” though it suggested that the plaintiffs might have based their cause of action on that provision also. Thus, even if the United States Supreme Court should reject the Serrano approach, these cases will remain viable.

III. EDUCATION AS A FUNDAMENTAL INTEREST

The concept that interference with a “fundamental interest” requires “stricter scrutiny” of challenged state action under the equal protection clause than is required by the traditional “rational basis” test was pri-

be said to have acted affirmatively to discriminate . . . whenever its action raises the cost of some social resource above what it would be in a private, unregulated market, so that the poor’s access to that resource is reduced significantly. Id. at 1661-62 (citations omitted) (emphasis added).

44. See, e.g., 5 Cal. 3d at 602-05, 487 P.2d at 1254-56, 96 Cal. Rptr. at 614-16.

45. Perhaps the instant cases did not accord this factor as much weight as it deserved. They emphasized instead the cumulative effect of state involvement, a more tenuous basis for finding “state action,” but one which indicates that the result would be the same even in the absence of compulsory school attendance laws.

46. See note 45 supra.

47. Cf. 5 Cal. 3d at 596 n.11, 487 P.2d at 1249 n.11, 96 Cal. Rptr. at 609 n.11. The Serrano court impliedly found the California constitution internally inconsistent, since the invalidated financing system was established by the constitution itself.

The Rodriguez and Spano cases also expressly involved the invalidation of financing provisions of the state constitutions, as well as of state statutes. See 337 F. Supp. at 285; ----- N.Y.2d at -----; ----- N.E.2d at -----; ----- N.Y.S.2d at -----.

48. 118 N.J. Super. at 268-69, 287 A.2d at 211.

49. 491 P.2d at 1236-37.

50. 334 F. Supp. at 874.

51. See Developments: Equal Protection, supra note 23, at 1127-32. The “fundamental interest” analysis was borrowed from the due process doctrine, where it had been used to amplify that concept in the fourteenth amendment. It became unpopular when such due process was extended to include rights to employment and other economic advantages. Continuing debates over these theories have occupied...

53. Shapiro v. Thompson, 394 U.S. 618, 660-62 (1969) (Harlan, J., dissenting). The right to equal treatment in criminal procedure, for instance, has been presumed fundamental without any attempt to describe that quality. One commentator has explained:

Probability every interest found to be fundamental and therefore protected by the due process clause will also be fundamental under the equal protection clause, so that unequal treatment with respect to that interest would be upheld only on a very strong showing of justification. It does not appear, however, that every interest deemed fundamental under the equal protection clause will be protected by the due process clause. It may be, for example, that the due process clause does not require that a state provide a criminal defendant with an appeal as of right, whereas the equal protection clause does require that if the state provides an appeal to some it cannot deny it to others....


55. The Serrano court stated:

But plaintiffs' equal protection attack on the fiscal system has an additional dimension. They assert that the system not only draws lines on the basis of wealth but that it "touches upon," indeed has a direct and significant impact upon, a "fundamental interest," namely education. It is urged that these two grounds, particularly in combination, establish a demonstrable denial of equal protection of the laws.

5 Cal. 3d at 604, 487 P.2d at 1255, 96 Cal. Rptr. at 615. The court admitted that there was no direct authority for education as a "fundamental interest" for these purposes. Id. It discussed Hargrave v. McKinney, 413 F.2d 320 (5th Cir. 1969), on remand sub nom., Hargrave v. Kirk, 313 F. Supp. 944 (M.D. Fla. 1970), vacated and remanded sub nom. Askew v. Hargrave, 401 U.S. 476 (1971). The Fifth Circuit
The commentators have suggested four possible criteria which may determine "fundamental" status, and by which the Serrano court's conclusion can be examined: (1) the interest is basic to the operation of our political system and therefore preservative of all important rights;56 (2) the interest is integral to the identity of the individual and recognized implicitly by the ninth amendment;57 (3) the interest is personal to a group unable to vindicate its rights without judicial protection;58 or (4) the interest, out of fairness, must be protected because of the "severity of the detriment" when the interest is frustrated, a criterion closely analogous to the traditional fifth amendment due process analysis.59 The Serrano court justified the uniqueness of education on all but the third criteria:60 as the state's main way to socialize its citizens, as the chief influence outside the family in developing the psyche,61 and as the only way the

held that a cause of action had been stated, on grounds that a ceiling on tax rates for support of education denied equal protection. The three-judge district court, on remand, held that the traditional test of rationality could not be met by the system, and it granted summary judgment. The Supreme Court held summary judgment was improper and that the state's interests had to be fully explored. The weight of this case is thus somewhat less than the Serrano court suggested. See 5 Cal. 3d at 604 n.22, 487 P.2d at 1255 n.22, 96 Cal. Rptr. at 615 n.22. For a discussion of wealth classifications in the area of criminal procedure, see text accompanying notes 103-60 infra.


57. Cf. Shapiro v. Thompson, 394 U.S. 618 (1969); Skinner v. Oklahoma ex rel. Williamson, 316 U.S. 535 (1942). With reference to the proposition that social as well as physical mobility is the underlying rationale for all equal protection attacks on state interference, see Ratner, Inter-Neighborhood Denials of Equal Protection in the Provision of Municipal Services, 4 HARV. CIV. RIGHTS-CIV. LIB. L. REV. 1, 24-25 (1968).


The presumption of constitutionality . . . [is] based on an assumption that the institutions of state government are structured so as to represent fairly all the people. However, when the challenge to the statute is in effect a challenge of this basic assumption, the assumption can no longer serve. See also United States v. Carolene Products Co., 304 U.S. 144, 152 n.4 (1938); Rostow, The Democratic Character of Judicial Review, 66 HARV. L. REV. 193, 202-03 (1952).

59. See Michelman, supra note 28, at 14-16; Developments: Equal Protection, supra note 23, at 1130-31. See also note 51 supra. This criterion might be measured in absolute or relative terms. Michelman appears to use an absolute measure, while the test proposed in this Comment is more towards a relative measure. See text accompanying notes 172-79 infra.


61. Judge Sullivan in Serrano distinguished other municipal services on the basis that they were "essentially neutral in their effect on the individual psyche." 5 Cal. 3d at 610, 487 P.2d at 1259, 96 Cal. Rptr. at 619, citing Coons, Clune & Sugarman, supra note 60, at 389. But see Comment, Potholes, Lampposts and Policemen: Equal Protection and the Financing of Basic Municipal Services in the Wake of Hawkins and Serrano, 17 VILL. L. REV. 655, 672 nn.88-89, where the author stated that police and fire protection could have such an effect in a negative sense if they were denied.
poor and disadvantaged can escape their handicaps and compete on an equal basis. 62

An examination of interests which have previously been considered “fundamental” reveals that voting might be included by the first and third criteria, 63 freedom from criminal punishment by the fourth criterion, 64 and such interests as procreation and freedom to travel by the second criterion. 65 Because education meets all of these criteria, 66 it might easily be classed as a “fundamental interest,” but at the same time, by enlarging the application of each possible criterion, recognition of its “fundamental” status naturally increases the effective scope of the equal protection clause. For example, street lighting 67 might arguably be “fundamental” by either the first or second criterion. Thus, a state might be severely limited in its choice of methods for municipal improvement. 68

To limit the potentially pervasive effects, it has been suggested that the fourth criterion should be controlling; 69 that is, once a basic minimum of equality has been provided, inequalities will be permissible for budgetary, 70 experimental, 71 or other reasons. This criterion, arguably, may explain all the traditional “fundamental interests.” 72 For instance, the detriment from denial of the vote is an absolute exclusion from the political process, though it may not affect the personal life of a given individual significantly. 73 Criminal process involves deprivation of personal liberty. Restriction of travel would affect every aspect of one’s economic life as well as basic liberty. 74 Finally, restriction of procreation involves a

62. 5 Cal. 3d at 608-10, 487 P.2d at 1258-59, 96 Cal. Rptr. at 618-19.
63. See notes 56 & 59 supra.
66. The Serrano court made analogies between education and other accepted “fundamental interests.” For fuller discussion of the limitations of such comparisons, see Coons, Clune & Sugarman, supra note 60, at 355-69; Kurland, supra note 29, at 584-89. The latter contains a careful analysis of the precedents for a Serrano-type decision and a skeptical view of the advisability of structuring them to reach the Serrano result.
67. Hawkins v. Town of Shaw, 437 F.2d 1286 (5th Cir. 1971), held that services such as street paving, street lighting, sewage and others, could not be distributed on an unequal basis, according to race. See Comment, supra note 61. See also text accompanying notes 223-24 infra.
68. See Ratner, supra note 57, at 47-48, where the author indicated that a wide margin would be left for experimentation and piecemeal improvement.
69. See Michelman, supra note 28, at 32-46. Professor Michelman would substitute equal “minimum protection” for equal protection. Cf. note 59 supra.
72. This criterion is identified as a common thread in Developments: Equal Protection, supra note 23, at 1130.
73. Denial of the vote, like denial of criminal justice, is arguably less likely to affect large numbers of people in their personal lives than an interest like education.
74. For a discussion of the proposition that mobility is to be protected under “equal protection,” see notes 43 & 57 supra and 179 infra.
serious detriment to the life of a family. This criterion would include as well, however, such basic guarantees of safety as police and fire protection, while, as noted above, excluding other public services, individually less vital, such as street lighting or certain welfare benefits.

This fourth criterion, the severity of the detriment measured by a standard of fairness, highlights the major difficulty with designating education and other interests as "fundamental." If the interest is so basic that no unequal treatment can exist with reference to it unless "compelled" by the state interest, what are the limits of the interest and how are they to be measured? It may be noted that previously recognized "fundamental interests" have been of an absolute, almost imponderable, nature and have been treated by the courts much in that way. The interest in education, however, is seemingly not so imponderable. While education has undoubted value, its value is not absolute, as it involves many varying degrees of deprivation and affects different individuals in very different ways.

The problem of defining its limits goes to the very heart of the judicial development of any constitutional doctrine and characterizes the major distinction between the approaches of the Serrano and Spano courts to Supreme Court's summary affirmance of McInnis v. Ogilvie and Burruss v. Wilkerson. These latter cases held that children, parents and taxpayers had not stated causes of action by alleging that equal protection was denied

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75. This aspect of the doctrine may have special impact on attempts at population control and at prohibition of such control. Cf. YMCA v. Kugler, ___ F. Supp. ___ (D.N.J.) (1972), holding that in view of a woman's right to privacy, the state had no "compelling state interest" to support a statute prohibiting all abortions performed "without legal justification."

76. But see note 67 supra.

77. See note 37 and accompanying text supra.

78. For a discussion of the enormous burden of showing a "compelling state interest," see notes 161-71 and accompanying text infra.

79. Cf. Oregon v. Mitchell, 400 U.S. 112 (1970), wherein the diversity of opinions by the different justices might be viewed as stemming from disagreement on what was the actual substance of the admittedly "fundamental" right to vote.

80. See Developments: Equal Protection, supra note 23, at 1127-30, wherein the author indicated that the courts have used an ad hoc approach. See also Griswold v. Connecticut, 381 U.S. 479 (1965).

81. The Serrano court cited numerous authorities. 5 Cal. 3d at 604-09, 487 P.2d at 1255-58, 96 Cal. Rptr. at 615-18.

82. The 1966 Coleman Report, a federal study of education, found education to be of "minimal impact when compared with the influence of family and social background." Wall Street Journal, Mar. 2, 1972, at 1, col. 6.

83. 394 U.S. 322 (1969), aff'g mem. sub nom. McInnis v. Shapiro, 293 F. Supp. 327 (N.D. Ill. 1968). On facts similar to Serrano, the three-judge district court held that the fourteenth amendment does not require "that public school expenditures be made only on the basis of pupils' educational needs," noting that the plaintiff students never "offer[ed] a definition of this nebulous concept," and that the controversy was nonjusticiable for lack of "judicially manageable standards." 293 F. Supp. at 336, 335.

84. 397 U.S. 44 (1970), aff'g mem., 310 F. Supp. 572 (W.D. Va. 1969). The facts were similar to McInnis. The three-judge district court stated: "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."

310 F. Supp. at 574.
because their children were not being educated according to their needs. The Spano court concluded that the factual similarity underlying the instant cases and that of McInnis and Burruss required that the latter govern any equal protection claim on such facts. However, the duty of lower courts to examine the facts of each case in the light of the law must leave room for development of bridges between existing doctrines and new fact situations. The Spano court overlooked the argument, made by the Serrano court, that McInnis and Burruss failed to present any judicially workable standard for measuring the interest in education because they sought a mandate that states meet each child's particular educational needs. The Serrano court noted that the factual and legal emphasis on individual need, as opposed to an impermissible pattern of variance from the average educational offering in Serrano, could have been decisive in preventing the Supreme Court from imprinting this new fact situation with a definitive constitutional interpretation.

A conceptual distinction, on the basis of input and output, is particularly valuable here. The McInnis and Burruss arguments may be characterized as an attempt to measure the educational interest by the quality of the "output" — that is, that all children derive equal benefit.
from their educations — instead of by the quality of the "input" — that is, that the same resources be expended on each child's education. Not only did the Serrano, Van Dusartz, Rodriguez, and Robinson courts not demand equal output, only referring to it to show that meager input was strongly correlated with poor output, but they declined to examine particular facets of educational input, except for the purpose of showing a consistent pattern of classification, not for the purpose of proscribing isolated aberrations. The emphasis in every case was on equal availability of funds for general, quality education. In emphasizing that it was not requiring the state to dispense education according to need, the Van Dusartz court stated:

Plainly put, the rule is that the level of spending for a child's education may not be a function of wealth other than wealth of the state as a whole.

The interest was there described as the right "to have the level of spending for [children's] education unaffected by variations in the taxable wealth of their school district or their parent's." Thus, while these cases design-

93. *Id.* at 662 & n.33.

94. This distinction should be useful in analyzing and measuring other interests, such as welfare and public services. *Cf.* note 191 infra.

95. *See* note 97 and accompanying text infra.

96. The Robinson court undertook particularly careful analysis of input and output data to establish that improved input, even measured only as per pupil expenditure, was correlated with quality output. 118 N.J. Super. at 235-65, 287 A.2d at 193-209.

97. The Van Dusartz court stated:

The State makes the argument that what plaintiffs seek here is uniformity of expenditure for each pupil in Minnesota. Neither this case nor Serrano requires absolute uniformity of school expenditures.

334 F. Supp. at 876.

The Rodriguez court stated that the system's defect was that it "makes education a function of the local property tax base." 337 F. Supp. at 282. The court further stated:

In the instant case plaintiffs have not advocated that educational expenditures be equal for each child. Rather, they have recommended the application of the principle of "fiscal neutrality." Briefly summarized, this standard requires that the quality of public education may not be a function of wealth, other than the wealth of the state as a whole.

*Id.* at 283-84. *Cf.* note 226 infra.


99. The Robinson case is particularly interesting in this respect, since the system was invalidated in the face of an already adopted legislative program which, if fully funded, might have been adequate. 118 N.J. Super. at 270, 287 A.2d at 211. Judge Botter noted evidence of the strong correlation between input and output. He further stated:

[O]ne facet of the case at hand does invite a simple standard. Since the State Constitution requires the State Legislature to provide a thorough education for all pupils age 5 to 18, a tax levied to raise revenues for that specific State purpose should be applied uniformly to all members of the same class of taxpayers.

*Id.* at 276-77, 287 A.2d at 215.

100. 334 F. Supp. at 872 (emphasis added).

101. *Id.*
nated education as a "fundamental interest" for purposes of equal protection, therefore invoking "strict scrutiny" whenever inequalities exist with reference to it, they limited their holdings to the invalidity of dispensing education according to classifications by wealth.102

IV. CLASSIFICATION BY WEALTH

The designation of wealth classifications as "suspect," therefore requiring "strict scrutiny," has been derived principally from cases in the criminal procedure area,103 such as Griffin v. Illinois,104 which held that the right to appeal a conviction could not be conditioned on payment of a fee for a transcript. This case, for example, was relied on by the Serrano court.105 The wealth classifications in Griffin and other similar criminal cases, however, have always been accompanied by the "fundamental interest" in freedom from illegal punishment and in access to legal vindication.106 The analogy to these cases serves to identify the "egalitarian interest" which the judiciary has taken upon itself to protect;107 that is, while confinement had formerly been a legitimate alternative to payment of fines, the courts have held that it is no longer such, for it is a burden on the poor and is based solely upon financial status.108 Since it has been increasingly recognized that the realities of modern society forced upon certain persons, through no fault of their own, the disadvantages of poverty,109 the poor may be increasingly favored with judicial protection.

Beyond this, the analogy to the criminal cases seems forced.110 In the first place, the courts are in a special position to gauge unfair discriminations in the judicial system, while education has been traditionally

102. See note 115 infra.
103. See Developments: Equal Protection, supra note 23, at 1124. See also Tate v. Short, 401 U.S. 395 (1971) (forbidding imprisonment of indigents for non-payment of a fine when punishment for the crime was limited to fines); Williams v. Illinois, 399 U.S. 235 (1970) (forbidding such imprisonment beyond the statutory maximum for the crime); Douglas v. California, 372 U.S. 353 (1963) (forbidding the requirement of a fee for a transcript when a transcript was necessary for appeal).
105. In order to refute the state's argument that only purposeful discrimination is unlawful, the Serrano court, citing Griffin, went so far as to state that "several cases have held that where important rights are at stake, the state has an affirmative obligation to relieve an indigent of the burden of his own poverty by supplying without charge certain goods or services for which others must pay." 5 Cal. 3d at 602, 487 P.2d at 1253, 96 Cal. Rptr. at 613. This seems to be an oversimplified reading of Griffin.
110. See Kurland, supra note 29, at 584-87.
a purely legislative function. Secondly, an individual's payment of a fee, on the rationale that he is paying the costs of asserting a personal legal right, is far removed conceptually from the payment of property taxes for the general support of an educational system, regardless of whether and to what extent the taxpayer uses the service being paid for. Thirdly, services needed by a criminal defendant are offered specifically to protect him from the state's prosecution, which is presumably to his detriment, while educational services are themselves the only state action to which the individual is being subjected and are presumably a benefit. Finally, the relevant wealth in the instant cases is not simply that of the individual or even that of his family, since the wealth of a district often depends on the placement of industry, not of its inhabitants.

The case most often relied upon for the proposition that wealth classifications are "suspect" outside the criminal law area and which was cited in the instant cases is *Harper v. Virginia Board of Elec-

111. *See generally* Griffin *v.* Illinois, 351 U.S. 12 (1956). Justice Black stated for the Court:

"Both equal protection and due process emphasize the central aim of our entire judicial system — all people charged with crime must . . . "stand on a equality before the bar . . . ."


113. This distinction involves the question not explored in this Comment of generally beneficial versus wholly remedial state undertakings. The distinction may be a factor in determining whether there has been "state action."

114. In *Serrano*, the state argued that the discrimination had to be based on personal or family wealth to be invidious. The court answered that there was a correlation between family and district wealth, but that, in addition, "fortuitous presence" of any kind of property in a district was a suspect basis on which to apportion education. 5 Cal. 3d at 600-01, 487 P.2d at 1252-53, 96 Cal. Rptr. at 612-13. Industry may play a large part in determining the wealth of a district. A representative of the Suburban Action Institute claimed that "existing school finances give communities little choice but to pursue [industry] in order to obtain tax money." Wall Street Journal, Mar. 13, 1972, at I, col. 6. *See note 242 infra.*

115. The *Rodrigues* case cited language from McDonald *v.* Board of Election Comm'rs, 394 U.S. 802, 807 (1969), in support of classification by wealth as independently requiring "strict scrutiny," but that case found no classification by wealth and used only a "rational basis" test, even though an interest related to voting was involved — use of absentee ballots.

In contrast, the *Van Dusart* case, citing *Harper v. Virginia Bd. of Elections*, 383 U.S. 663 (1966), and *Griffin v. Illinois*, 351 U.S. 12 (1956), stated:

"This does not suggest that by itself discrimination by wealth is necessarily decisive. No court has so held. However, when the wealth classification affects the distribution of public education, the constitutional significance is cumulative. 334 F. Supp. at 876 (footnotes omitted). Notably, the court distinguished *Dandridge* as lacking a suspect classification."

The *Robinson* case did not put independent reliance on the "suspectness" of the wealth classification, and *Spano* used *Serrano* as blanket authority. The *Serrano* court stated:

"It is urged that these two grounds [lines drawn on the basis of wealth and impact on education], particularly in combination, establish a demonstrable denial
tions, wherein a poll tax was struck down on the alternative grounds of racial and wealth discrimination. Notably, however, the traditional "fundamental interest" in voting was also present. Only *Hobson v. Hansen* has suggested that wealth classifications, coupled with education, were "suspect," but again, racial discrimination was a major influence in that decision, and the appellate courts chose not to rely on the wealth classification rationale in affirming the lower court's decision.

Because of the complexities involved in such analogies to criminal law and voting rights cases, it seems that an analysis of the reasons offered for the "suspect" status of other classifications would best serve as a framework in which to examine wealth classifications in the new area of education in the instant cases.

The commentary suggests several reasons for particular classifications being designated "suspect." These include (1) a political disadvantage of the class, (2) an inability to divorce oneself from the class, (3) a possible stigma implied by distinctions based on the class characteristic, and (4) a particular responsibility of society for the initial burden of the class characteristic. Classifications previously deemed "suspect" might have been so for these reasons, but as noted with reference to designating interests "fundamental," the courts seldom attempt a detailed explanation. Race classifications, the original concern of the fourteenth amendment, might be designated "suspect" for the first, second, and third.

of equal protection of the laws. To this phase of the argument we now turn our attention.

Until the present time wealth classifications have been invalidated only in conjunction with a limited number of fundamental interests — rights of defendants in criminal cases ... and voting rights ... .

5 Cal. 3d at 604, 487 P.2d at 1255, 96 Cal. Rptr. at 615. The court fails to make clear whether the effects are independent or cumulative.

See *Michelman*, supra note 28, at 27–28, where, in 1969, the author stated: Yet it remains true that in no decision of the Court has any such doctrine [de facto wealth classification as suspect] been needed.


118. Id. The *Serrano* court only briefly noted the possibility of racial discrimination in the underlying facts of that case. 5 Cal. 3d at 590 n.1, 609 n.27, 487 P.2d at 1244–45 n.1, 1259 n.27, 96 Cal. Rptr. at 604 n.1, 619 n.27.


120. *See Developments: Equal Protection*, supra note 23, at 1126–27, suggesting that alienage and poverty might be distinguished from race, sex and illegitimacy on this point. See *Michelman, supra* note 28, at 33, suggesting that a suspect classification is one based on characteristics which the individual is "powerless to change currently and which is not the result of any decision freely made by him in the proximate past."


122. Id. at 8–9. The author suggested the courts' role could best be analyzed as "vindication of a state's duty to protect against certain hazards which are endemic in an unequal society, rather than as vindication of a duty to avoid complicity in unequal treatment." Id. (emphasis in original).

123. *See note 53 and accompanying text supra.*

Historically, classification by national origin has been included as "suspect" for the second and third reasons, and also the first when aliens were involved. Classifications distinguishing between sexes or legitimate and illegitimate children may be "suspect" for the second and third reasons. Classification based on wealth might be "suspect" for all four reasons. However, if justification for the designation of wealth classification as "suspect" were limited solely to the first reason (political disadvantage), the concept becomes very difficult to limit since, once it is admitted that a group may be politically disadvantaged even though every member may vote, protection might be sought by any group which by its nature has little political power. This would be reminiscent of the early excesses of economic due process, when judicial authority was used to vindicate "rights" sacrificed by the majority-rule system.

If the second reason is used to support the "suspect" status of wealth classifications, one of the principle "floodgates" of such status — the danger that every difference in the quality of life which varies according to wealth might require "strict scrutiny" — might be controlled. This would be accomplished by recognition in a given case that the difference complained of was not dependent on the inescapable aspects of poverty. For example, variations in economic advantage between small and large merchants would not be strictly scrutinized.

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129. Compare the majority opinion in Williams v. Rhodes, 393 U.S. 23, 63 (1968), with the dissent in the same case. But see Karst, supra note 51, at 742.
131. The concept of alleviating the effects of a majority rule has also played a part in equal protection analysis. See notes 140-48 and accompanying text infra.
132. The Spano court stated that the preliminary judgment as to the sufficiency of the complaint in the Serrano case was "a tenuous reed upon which to sustain the instant complaint and thereby further open the floodgates." ___ N.Y.2d at ___, ___ N.E.2d at ___, ___ N.Y.S.2d at ___.
135. See Developments: Equal Protection, supra note 23, at 1126-27. The author stated that this reason "may explain why classifications based on alienage — a legal status generally subject to change — and on poverty have received more lenient treatment than those based on race." Id. at 1127.
136. Id. For a discussion of the disfavor generated by "economic" due process, see note 51 supra.
pect” for a state to pass legislation to help, for example, the blind or the poor.137

The third reason would serve to make the distinction between benefit and detriment, but seems too broad by itself to be an adequate reason for “suspect” status. Even if used in conjunction with the second reason, it would not, it is suggested, offer a valid basis on which courts could analyze wealth distinctions with consistent results. Though the stigma of poverty has been recognized as an extra burden on the poor,138 it would seem to require some means by which a court could measure group prejudice, a task courts have heretofore avoided.139

Thoughtful commentators have explained that the fourth reason — the duty of a majoritarian society — is the one to be emphasized, particularly in the case of wealth distinctions.140 They urge that equal protection be used to insulate minorities against the harshest manifestations of majority rule. Since our economy of abundance has failed to provide for the minimal needs of all its members, governmental action which unnecessarily increases these burdens should be prohibited.141 Wealth fits this analysis better than do any of the traditional “suspect classifications,”142 except perhaps illegitimacy,143 since differences in wealth are peculiarly the product of our system of resource allocation and benefit distribution based on wealth inequality and incentives.144 Designation of a classification

137. See Developments: Equal Protection, supra note 23, at 1123-24 (discussion of “benign classifications.”)
138. See Brown v. Board of Educ., 347 U.S. 483, 494 (1954), for the proposition that separate schools are inherently unequal:
   The impact is greater when it has the sanction of the law; for the policy of separating the races is usually interpreted as denoting the inferiority of the Negro group. A sense of inferiority affects the motivation of a child to learn. 139. Id.
140. See Ratner, supra note 57, at 19-22; Michelman, supra note 28. Articulating his doctrine, Professor Michelman stated:
   It is no justification for deprivation of a fundamental right (i.e., involuntary nonfulfillment of a just want) that the deprivation results from a general practice of requiring persons to pay for what they get.
   Id. at 32. The author distinguished McInnis v. Ogilvie, 394 U.S. 322 (1969), as the rejection of a total equalization, in contrast to his proposal of an equal minimum. The Serrano court, and the Van Dusart, Rodriguez, and Robinson courts, chose instead to take the approach suggested by Professor Coons. Coons, Clune & Sugarman, supra note 60, at 366-67, 410-13. These courts distinguished McInnis as the rejection of needs, in contrast to equality, as the standard for measuring equal protection. They have left the emphasis, then, on relative inequality rather than shifting it to the power to reach a minimum average. The remedy will be the same, however, in this situation.
141. See Michelman, supra note 28, at 8-15.
142. It could be argued that majority prejudice, rather than race itself, is the operative characteristic in classifications by race, so that race also could fit this criterion.
143. Illegitimacy may be a product of societal life, since the formality of the parents' marriage is not an innate characteristic of a child.
144. Cf. Michelman, supra note 28, at 14-15. The author stated:
   The total effect [of emphasis on invidious classification] is to treat the pricing practice, rather than nonsatisfaction of a particular want, as chiefly constituting the evil to be curbed. What results finally is a palpable, if vague, impression that
as "suspect" for this reason permits a line to be drawn between benefits and detriments, by distinguishing between burdens on a minority for the sake of the majority (such as poor schools in poor counties so that a majority of counties may have local control — the situation in the instant cases) and burdens on the majority to help a minority (such as higher general taxes to support headstart programs). At the same time, however, it lends itself to the proposition that burdens on the majority for the minority's benefit are required. Thus, in the instant cases, compensatory programs for those unable to take full advantage of their equal educational opportunity might be required. This would, it will be noted, be equivalent to demanding some equalization of "output," a requirement which the instant cases carefully avoided. The majoritarian society reason for finding a classification "suspect" as presented by Professor Michelman, its main proponent, would allow the imposition of the requirement within a specific limit. This limit is described as the fulfillment of certain "just wants" which a reasonable man would consider not capable of being sacrificed for the sake of majority rule. Judicial application of the Michelman approach would seem to involve a departure from current judicial analysis, both by ignoring the "state action" limitation on equal protection in order to make positive requirements on states, and by requiring judicial inquiry as to what are the basic needs, or "just wants," in our society — an inquiry which seems to have been previously discarded in the context of substantive due process. The Michelman approach, therefore, would involve a valuable shift of emphasis from the relationship between types of classifications and state interests affecting "fundamental interests" to the relationship between types of classifications and individual expectations with respect to "fundamental interests." It is submitted that this shift of emphasis may be achieved by the "modified strict scrutiny" test proposed below, without such departures from the judicial practice under the doctrine of "strict scrutiny."

It should be noted from the foregoing analysis that, while courts have described "strict scrutiny" as appropriate where either a "fundamental

146. See notes 91-99 and accompanying text supra.
147. See note 115 supra.
149. Id.
151. Cf. note 59 supra. The approach does not actually examine the last relationship. It weighs the rationality of the deprivation relative to the "just wants" of all individuals rather than relative to a legislatively chosen classification.
152. See text accompanying notes 172-79 infra.
interest” or a “suspect classification” is present, judicial behavior indicates a delicate relationship between the two. As has been seen, reasons for designating an interest as “fundamental” cannot be analyzed without reference to the types of distinction being made by a challenged classification, nor can reasons for designating a classification “suspect” be analyzed in isolation from the interests being affected. Though the Serrano opinion suggested that the interest in education and classification by wealth independently commanded “strict scrutiny,” the Van Dusartz opinion, professing complete agreement with Serrano, distinguished the case of Dandridge v. Williams as one in which an arguably “fundamental interest” was not being affected by a “suspect classification.” Although cases holding that the equal protection clause is purely personal, and that it applies to classifications no matter how narrow, might suggest otherwise, it is suggested that inequality existing independent of any pattern from which a “suspect classification” might be implied would be permissible. Thus a gap in this area of equal protection seems to be the lack of a theory to explain the effects of the combination of a “fundamental interest” and a “suspect classification.” The instant cases were careful to limit their holdings to condemnation of the functional relationship between a district’s wealth and the qualitative input into the district’s educational system. The Serrano court, on whose analysis the other courts relied, reached this holding after separate examinations of education and wealth according to the “strict scrutiny” doctrine. Serrano offered no conceptual analysis of why only their combination was to be condemned, but only pleaded that the case be limited to its facts. Thus, while the Serrano court carefully applied “strict scrutiny,” its reasoning left a gap which was not filled by the last step of “strict scrutiny,” the search for a “compelling state interest” which necessitated the financing system.

V. Justification by a Compelling State Interest

It is notable that Serrano, Van Dusartz, Rodriguez, and Robinson rejected, for lack of a “rational basis” rather than under “strict scrutiny,” the respective states’ arguments that the Serrano result would mean sacrificing the states’ intent to have local decision-making determine the choice.

153. See note 115 supra.
154. Id.
156. Id.
158. Cf., e.g., Briggs v. Kerrigan, 431 F.2d 967 (1st Cir. 1970), wherein the court was not convinced that a pattern had been demonstrated, nor that the detriment was severe. See note 33 supra.
159. See notes 115 supra & 161 infra.
160. See, e.g., note 165 and accompanying text infra.
of local government priorities. The courts noted that there was, in effect, no causal relationship between a locality's willingness to tax itself for education and the amount of investment in its children's education. This point was decisive in Rodriguez, where the court found that the state did not offer any other justification. It also appears to have been decisive in Sweetwater, where it was clear that the decision by Sweetwater County to join Bairoil School District into its unified district was based on its being "naturally eager" to encompass a district with the "highest valuation per student" in the state, with no consideration having been given to the "education, convenience and welfare of the children."

Examination of the states' "compelling interest" was necessary in the instant cases because of their argument that local control of and responsibility for education were important state purposes. The Serrano court, however, declined to decide if these were "compelling," choosing instead to note that they did not, in any case, require the challenged discrimination for their accomplishment. Significantly, the court offered no details as to alternative means, saying only that, "[n]o matter how the state decides to finance its system of public education, it can still leave this decision-making power in the hands of local districts." Similarly, the Van Dusartz court merely stated that "it is the singular virtue of the Serrano principle that the State remains free to pursue all imaginable interests except that of distributing education according to wealth." The Robinson court alone explicitly decided that the state actually had no "compelling justification for making a taxpayer in one district pay a tax at a higher rate than a taxpayer in another district, so long as the revenue serves the common State educational purpose." However, even this court failed to offer any detailed alternatives to the system which it struck down. Only the Sweetwater case proposed concrete alternatives. As in the racial

161. The Serrano court stated:

We need not decide whether such decentralized financial decision-making is a compelling state interest, since under the present financing system, such fiscal freewill is a cruel illusion for the poor school districts.

5 Cal. 3d at 611, 487 P.2d at 1260, 96 Cal. Rptr. at 620. The Van Dusartz court stated:

By its own acts, the State has indicated it is not primarily interested in local choice in school matters. In fact, rather than reposing in each school district the economic power to fix its own level of per pupil expenditure, the State has so arranged the structure as to guarantee that some districts will spend low (with high taxes) while others will spend high (with low taxes).

334 F. Supp. at 876. For the holding in Rodriguez, see note 166 infra. For Robinson's conclusion, see 118 N.J. Super. at 275, 287 A.2d at 214.


163. 491 P.2d at 1235–36.

164. 5 Cal. 3d at 610, 487 P.2d at 1260, 96 Cal. Rptr. at 620.

165. 334 F. Supp. at 876.

166. 118 N.J. Super. at 278, 287 A.2d at 216. The Rodriguez case stated:

Not only are defendants unable to demonstrate compelling state interests for their classifications based upon wealth, they fail even to establish a reasonable basis for these classifications.

337 F. Supp. at 284.

167. See notes 180–91 and accompanying text infra.

168. The Sweetwater case suggested that local initiative for expenditures for other than capital improvements up to 10–15 per cent of the state-guaranteed minimum
VI. A Modified Strict Scrutiny Test

The courts in the instant cases adhered to the theory that the judicial refinements engaged in for the designation of "fundamental interests" and "suspect classifications" are merely preliminary steps to determine whether a state must show merely a rationally related interest under the "rational basis test," or a "compelling interest" under the "strict scrutiny test." It is submitted that the theory of "strict scrutiny" should be modified in such a way as to put less emphasis on the last step, the examination of the state's "compelling interest," which is handled perfunctorily in practice.

The modified test would provide a theory to describe the courts' actual mode of analysis as follows: (1) The court examines each case in order to discover a "fundamental interest" or a "suspect classification." "Fundamentalness" or "suspectness" is measured in the abstract, independently of one another. (2) The "fundamental interest" is examined in its relationship to the "suspect classification" in order to see whether the interest is reasonably subject to that classification. The standard of reasonableness is that of a citizen who is pursuing the interest in question. Instead of trying to ascertain the necessity of the means the legislature chose to pursue the state's "compelling interest," the court tests the reasonable expectations of a citizen with regard to his own legitimate interests.

would be constitutional. 491 P.2d at 1238. Compare Robinson v. Cahill, 118 N.J. Super. at 278 n.21, 287 A.2d at 216 n.21:

If monies are supplied to local districts from general State revenues sufficient for a "thorough" education, some districts may still desire to add to that sum by local property taxes. This may reintroduce inequities of various sorts; however, the issue was not argued, and my decision is not intended to reflect upon it.


172. See text accompanying note 22 supra.

173. The superficial nature of the courts' examinations of the state's "compelling interest" was treated in the preceding section. See text accompanying notes 161-71 supra.

174. See text accompanying notes 51-160 supra.

175. This analysis bears some similarity to Professor Michelman's proposed approach, which looks to the minimum wants of every member of the society. See notes 140-50 and accompanying text supra.
It is submitted that the courts in the instant cases\textsuperscript{176} followed this course without enunciating it. They gave prefunctory allegiance to a final analysis of “compelling state interests.” However, they had already made clear that education, besides being “fundamental” in an abstract sense, was at least basic enough that it should not vary purely because of wealth, and that classification by wealth, besides being “suspect” in an abstract sense, was at least questionable enough that it should not be the basis for distribution of education.\textsuperscript{177}

The modified test would have two principal advantages over the present “strict scrutiny” test in addition to describing more accurately the courts’ actual mode of analysis. On the one hand, it would relieve the court of the task of examining in a virtual vacuum the necessity and wisdom of legislative plans.\textsuperscript{178} On the other hand, it would put a less heavy burden of proof on the state, without shifting the burden to the plaintiff, who would have it under the “rational basis test.” It accomplishes this by asking the state to confront the asserted individual interests directly rather than to prove the absence of alternative means to achieve the state interest, an interest which inevitably pales in significance when set against deprivation of basic personal needs.\textsuperscript{179}

\section*{VII. THE ROLE OF THE COURTS}

Concern over judicial interference with legislative choice has manifested itself in warnings that education is uniquely the business of state legislatures and that the considerations are too multi-faceted and complex for the judiciary to handle, not only analytically but remedially.\textsuperscript{180} The district court’s opinion in \textit{McInnis} capsulized these concerns,\textsuperscript{181} and

\begin{itemize}
\item \textsuperscript{176} This analysis does not apply to the one case in disagreement — Spano v. Board of Educ., ___ N.Y.2d ___ N.E.2d ___ N.Y.S.2d ___ (Sup. Ct. 1972).
\item \textsuperscript{177} While they had reached that conclusion through an abstract analysis of fundamentalness and suspectness, the fact that the courts limited their holdings to condemning the functional relationship between educational quality and wealth lends strong support to this proposition. \textit{See} note 226 and accompanying text infra.
\item \textsuperscript{178} The problems associated with delineating the boundary between judicial and legislative functions are treated in the next section. \textit{See} text accompanying notes 180–91 infra.
\item \textsuperscript{179} It is noteworthy that the outcome of each case — the challenged discrimination is struck down or it is not — almost invariably depended upon which test the court initially chose to apply. \textit{Compare} Dandridge v. Williams, 397 U.S. 471 (1970), \textit{with} Shapiro v. Thompson, 394 U.S. 618 (1969); Serrano v. Priest, 5 Cal. 3d 584, 427 P.2d 1241, 96 Cal. Rptr. 601 (1971), \textit{with} McInnis v. Shapiro, 293 F. Supp. 327 (N.D. Ill. 1968), \textit{aff'd mem. sub nom.}, McInnis v. Ogilvie, 394 U.S. 322 (1969). Once the court decided “strict scrutiny” was appropriate, the state was hard put to show there were no alternatives for achieving its purpose. \textit{Cf.} text accompanying notes 161–71 supra.
\item \textsuperscript{180} \textit{See}, e.g., Harper v. Virginia Bd. of Elections, 383 U.S. 663, 680 (1966) (Harlan & Stewart, JJ., dissenting).
\item \textsuperscript{181} 293 F. Supp. 327 (N.D. Ill. 1968). The court there stated:
\begin{quote}
Evaluation of these variables necessarily requires detailed research and study,
\end{quote}
\end{itemize}
the Supreme Court's summary affirmance could be taken to indicate a lack to readiness to attack the issue.\textsuperscript{182} However, with the increasing legal concern over the inequalities in our society,\textsuperscript{183} and particularly with the development of doctrinal bases in cases such as \textit{Serrano}, the analytical tools are by now more familiar, and limits to judicial interference more easily discernable.

Once the time is determined to be ripe to proclaim the implications of a constitutional right in a new area, the judiciary has effected extremely complex remedies.\textsuperscript{184} The main difficulty has been to find the sensitive boundary between legislative and judicial concerns.\textsuperscript{185} It appears that the public awareness of a need for protection of educational opportunity has been maturing rapidly and is manifesting itself in numerous legislative studies of educational systems.\textsuperscript{186} On a national scale, and with a view to legislation, a reevaluation of the burden of local property taxation, particularly as it regressively affects low-income groups, is under way.\textsuperscript{187} Thus, the courts need not fear ineffectiveness or nonacquiescence.\textsuperscript{188} It is submitted that while the Supreme Court's decision in \textit{Dandridge}\textsuperscript{189} sustained a limit on welfare benefits on the "rational basis test" and may indicate a deceleration in applying "strict scrutiny," it should be distinguished by the fact that welfare systems are much newer than public education systems.\textsuperscript{190} No public consensus has yet appeared on the funda-

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\textsuperscript{82} Rolfe: The Aftermath of Serrano: The Strict Scrutiny Approach and the Vi

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mental rights involved in welfare, nor has there been adequate time even
for experimentation to define the elements which a court must utilize in
testing for a discriminatory effect of welfare programs. The benefits and costs of welfare programs are still very difficult to assess
or to predict. No indices of the effectiveness of welfare yet command the general
recognition that testing and pupil-teacher ratios do in evaluating education.

VIII. IMPLICATIONS FOR LOCAL GOVERNMENT

The advisability of applying the equal protection clause to the area
of educational opportunity cannot be evaluated without an analysis of the
practical effect the Serrano mandate will have on state legislatures and
local government, since such a constitutional doctrine cannot be developed
in isolation from the federal system contemplated by the Constitution. The limitations which the instant cases place upon the range of choice
available to state legislatures in providing support for their school systems
and upon the means open to them to provide for political choice at lower
levels of government will be the subject of this section.

At the outset, a brief description of the school system of California
as described in Serrano will serve as background for discussion of the
changes required by these cases. Then will follow a consideration of the
merits of state equalization efforts, a close examination of the standards
suggested by these cases, and a proposal as to the minimum changes
required.

The system described in Serrano may be treated as typical of the
systems in all the instant cases. The California state legislature author-

191. The benefits and costs of welfare programs are still very difficult to assess
or to predict. No indices of the effectiveness of welfare yet command the general
recognition that testing and pupil-teacher ratios do in evaluating education.

in part and dissenting in part). But cf. 400 U.S. at 135 (Douglas, J., dissenting in
part).

193. The Van Dusartz court explained:
The recently expired Minnesota system appears structurally indistinguishable
in its basic parts from the California system described in the Serrano opinion
334 F. Supp. at 872. The Rodriguez court stated:
[T]he Minimum Foundation Program provides grants for the costs of
salaries, school maintenance and transportation. Eighty percent of the cost of
this program is financed from general State revenue with the remainder apportioned
to the school districts in "the Local Fund Assignment."
337 F. Supp. at 281. The court in Robinson stated:
The case is similar to cases in other states, such as California, Minnesota and
Texas. . .
Public schools are financed primarily by local real property taxes augmented
by various forms of "state aid". . . .
118 N.J. Super. at 227, 229, 287 A.2d at 189, 190. The Sweetwater court cited
Serrano "as authority for our conclusions in this case." 491 P.2d at 1238. Justice

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ized each county to levy taxes in each school district within the county on the real property within each school district. The tax base for each school district was thus limited to the amount of that district’s taxable property. The amount of tax revenue which could be raised was limited to the annual school budget for each district (but was not required to meet that budget). The state legislature set a maximum rate, uniform throughout the state, for such taxation, effective unless a majority in a district voted to be taxed at a higher rate. Because most districts had so voted, the tax rate in each district was usually set by the district’s voters.

This method of school financing provided 55.7 per cent of the total education revenues in the state in 1968–69. The state legislature, through the State School Fund provided 35.5 per cent, out of general state tax revenues. The remaining 8.8 per cent was provided from federal and other sources.

The State School Fund appears to have been designed to assure that a basic amount, the “foundation program” minimum, uniform throughout the state, was available for each pupil. It accomplished this by supplementing the local taxation system in three ways. “Basic state aid” consisted of grants to each district of a flat uniform sum for each pupil. Secondly, “equalization aid” filled the gap between the “foundation program” minimum and the sum of “basic state aid” plus the funds which would have been produced by local taxation if all districts were taxed at a uniform, hypothetical rate. Thirdly, “supplemental aid” was available to districts whose voters had chosen to tax themselves above a certain minimum rate—a high minimum, since this aid was intended to supplement only extremely poor districts.

Turning to the role of these equalization efforts in the asserted denial of equal protection, it may be noted that the State School Fund “foundation

Parker stated in his dissent, however, that he could not “join either in the rationale or the result . . . . because it purports to utilize the pronouncement in [Serrano], a case which did not directly relate to the problems raised here . . . .” Id. at 1240. The Spano court characterized the plaintiffs’ allegations as an “emulation” of Serrano and rejected that case. ___ N.Y.2d at ___, ___ N.E.2d at ___, ___ N.Y.S.2d at ___.

194. This summary is based on the Serrano court’s description. 5 Cal. 3d at 591-95, 487 P.2d at 1245-48, 96 Cal. Rptr. at 605-09.

195. Id. at 592 n.2, 487 P.2d at 1246 n.2, 96 Cal. Rptr. at 606 n.2.

196. For minor exceptions based on level of schooling and variations in school size, see id. at 593 n.6, 487 P.2d at 1246 n.6, 96 Cal. Rptr. at 606 n.6.

197. The Van Dusart and Rodríguez cases had similar programs involving flat grants and equalization procedures, each accomplishing some but not enough equalization. The Van Dusart court stated:

The State has assisted the poorer districts with “equalizing” aid but in a manner which offsets only a portion of the influence of district wealth variations. 334 F. Supp. at 872-73. The Rodríguez court stated:

Within this ad valorem taxation system lies the defect which plaintiffs challenge. This system assumes that the value of property within the various districts will be sufficiently equal to sustain comparable expenditures from one district to another... The adverse effects of this erroneous assumption have been vividly demonstrated . . . .

337 F. Supp. at 281-82.
program" appears to indicate a state legislative policy to provide a basic minimum input per pupil throughout the state. Because this policy was effectuated, by the "equalization aid," and because the plaintiffs in Serrano made no claim that this minimum was inadequate, the Serrano court did not have to decide whether a basic minimum input per pupil was constitutionally required. Therefore, the State School Fund was not held constitutionally inadequate, but it was still unacceptable for two reasons. In the first place, the Serrano court noted that "basic state aid" was meaningless to poor districts and served as a bonus to districts which did not need "equalization aid." In addition, although the instant cases did not emphasize the fact, it may be noted that "supplemental aid" put a premium on high tax rates in poor districts, while not encouraging rich districts to choose higher tax rates and thereby to take a larger part of the school support burden. Thus, the "equalization" program treated rich and poor districts unequally in providing the "founda-

198. For a discussion of input as the measure of educational quality, see notes 91-99 and accompanying text supra. It can be argued that states have undertaken to provide minimum education on this basis. See notes 47-50 and accompanying text supra.

The states, in a sense, are estopped from arguing that cost is not related to quality, as the reasoning in the instant cases suggests. The Van Dusartz court stated:

While correlation between expenditure per pupil and the quality of education may be open to argument, the Court must assume here that it is high. To do otherwise would be to hold that in those wealthy districts where the per pupil expenditure is higher . . . the school boards are merely wasting the taxpayers' money.

334 F. Supp. at 874. The Rodriguez court did not mention the correlation between input expenditures and quality output, relying, it may be speculated, upon the fact that the extent of the disparities between per pupil expenditures in different counties raised a clear inference that quality was affected. The Robinson court did point to such an inference. It made extensive comparisons between districts based on different input quality measures, such as teacher-pupil ratios. It compared the average output of New Jersey schools with the national average, revealing "glaring, exceptional deficiencies." 118 N.J. Super. at 282, 287 A.2d at 202. The court noted that:

Not all shortcomings are the fault of the school system. The learning of a pupil from a deprived environment is impeded by many factors. For example, many pupils come to school hungry . . . . But there is ample evidence in the record that these limitations can be offset significantly by improved educational offering.

199. See note 197 and accompanying text supra.

200. The Robinson court did discuss adequacy, but the issue was relevant there primarily due to the state Constitutions mandate for a "thorough and efficient system." 118 N.J. Super. at 268, 287 A.2d at 210.

201. There has been much controversy as to whether a basic minimum requirement is or should be an indispensible part of equal protection analysis. See notes 140-48 and accompanying text supra.

202. The Serrano court stated that "basic aid . . . actually widens the gap between rich and poor districts." 5 Cal. 3d at 594, 487 P.2d at 1248, 96 Cal. Rptr. at 608; accord, 334 F. Supp. at 873 ("the guaranteed minimum acts "as a unique bonus solely for the benefit of rich districts"); 337 F. Supp. at 282 ("Any mild equalizing effects that state aid may have do not benefit the poorest districts").

203. The Robinson court considered the impact of state-offered incentives to local tax effort and the problem of districts relying on state aid. Cf. note 212 infra.
tion program” minimum. Secondly, even if “equalization aid” were offered on an equal basis, it failed to dispose of the unequal effect — educational quality varying with district wealth — of the taxation system. This unequal effect is the heart of the instant cases, since they require that the states institute systems which do not tend to have such an effect.

The choices available to a state depend upon exactly how broadly or narrowly courts will interpret the instant cases. The plaintiffs in Serrano made two principal claims. The court stated the first claim as follows:

The first cause alleges in substance as follows: Plaintiff children attend public schools. This public school system is maintained throughout California by a financing plan or scheme which relies heavily on local property taxes and causes substantial disparities among individual school districts in the amount of revenue available per pupil for the districts’ educational programs. Consequently, districts with smaller tax bases are not able to spend as much money per child for education as districts with larger assessed valuations.

It is difficult to discern whether the evil lies with: (1) the disparities in revenue, requiring a standard herein characterized as “equalization of per pupil input;” or (2) the inability to spend amounts equal to other counties, requiring a standard herein characterized as “tax base equalization;” or (3) the disparities caused by the heavy reliance on local property taxes, requiring a standard herein characterized as “release from tax dependence.” The second claim made by the Serrano plaintiffs was that residents of poor districts were required to tax themselves at a higher rate than were residents of wealthy districts to achieve the same educational quality input. This claim seems to address itself solely to “tax base equalization.”

A. Under Serrano as Broadly Interpreted

The broadest interpretation of Serrano would require “equalization of per pupil input.” It would be principally derived from the Serrano court’s statement of its holding on the first claim:

[W]e are satisfied that plaintiff children have alleged facts showing that the public school financing system denies them equal protection

204. See, e.g., Robinson v. Cahill, 118 N.J. Super. at 270, 287 A.2d at 211, wherein the court found that the newly passed legislative equalization effort, the Bateman Act, did not go far enough. Judge Botter wrote: “I conclude, therefore, that the Bateman Act as presently funded does not meet the State constitutional standard . . . .” Id. Cf. note 197 supra.

205. A third claim was that an adjudicable controversy existed as to the validity of the finance system. See 5 Cal. 3d at 618, 487 P.2d at 1266, 96 Cal. Rptr. at 626.

206. Id. at 590, 487 P.2d at 1244, 96 Cal. Rptr. at 604.

207. The court quoted the plaintiffs’ claim at length, saying that the “financing scheme thus fails . . . in several specified respects.” Id. at 590, 487 P.2d at 1244–45, 96 Cal. Rptr. at 604 (citation omitted). Because of the demurrer nature of the case, the court was not obliged to delineate an exact standard, but only to find a colorable claim.

208. Id. at 590–91, 487 P.2d at 1245, 96 Cal. Rptr. at 604–06.
of the laws because it produces substantial disparities among school
districts in the amount of revenue available for education.\textsuperscript{209}
This language requires, if taken alone, that an amount \textit{uniform throughout
the state} be available to each district according to the number of its pupils.
This suggests that a state would have to finance state schools wholly
from \textit{general} funds distributed to school districts in the same way \textquote{equaliza-
tion aid} is now distributed.\textsuperscript{210} Three principal effects on local govern-
ment would result: (1) Property taxes would still be a valid way to
raise school revenue,\textsuperscript{211} but value assessments would have to be made
on a uniform rather than local basis — to prevent districts from using
low assessments to shift more of the burden of educational support to the
state.\textsuperscript{212} (2) Local governments would have no control over the amount
of money to be spent on education within their boundaries; that is, the
value of education relative to other priorities would be a question solely
for the state legislature.\textsuperscript{213} It will be noted that the local government
would not be told where to put education in determining its budgetary
priorities; on the contrary, education would be wholly removed from
consideration in local budgetary decisions.\textsuperscript{214} (3) The administration
of education would be centralized, to the extent that local governments would
not be able to choose to give more funds per pupil to one district than
another, whether for need, experimentation or whatever, because the state
would be obliged to distribute funds \textit{to each district} on a per pupil basis.\textsuperscript{215}
It is submitted that such a broad interpretation of the instant cases
is unwarranted. An examination of the \textit{Serrano} opinion supports this
conclusion. In the first place, the \textit{Serrano} court\'s holding on the first

\textsuperscript{209}. \textit{Id.} at 618, 487 P.2d at 1265, 96 Cal. Rptr. at 626.

\textsuperscript{210}. The \textit{Sweetwater} court came closest to applying this broad reading of
\textit{Serrano}. That court proposed a system in which the state would determine the
total amount of funds needed for state schools, would \textquote{notify the county commis-
sioners what mill levy must be levied,} and would \textquote{notify the state treasurer what
proportion of these funds must go to each school district\textquoteright s in order that each district
\textquoteright s share per classroom unit.} 491 P.2d at 1238 (emphasis added).
\textit{\textquote{Classroom unit\textquoteright s} is a statutory measuring unit for \textquote{minimum educational needs
for foundation program purposes.} WYO. STAT. ANN. § 21.1-228(b) (Supp. 1971).
The court specified that a different unit might be used and made a significant exception
to equalizing — allowing local bond issues for capital improvements. It also
suggested that local initiative could raise input expenditures to 15 per cent above
the equalized level. See note 231 infra.

\textsuperscript{211}. The \textit{Sweetwater} court\'s proposed plan included a state-wide property tax.
491 P.2d at 1238.

\textsuperscript{212}. The \textit{Robinson} court, in examining the Bateman Act in light of the federal
equal protection clause, noted that even though it went \textquote{far toward equalizing the
revenue-raising power of local districts \ldots \textquote{it} equalize[d] only to a given level \ldots
\textquote{with} no assurance that local officials \ldots will use the added aid for improved education
by increasing budgets appreciably; they may simply use the aid to help keep

\textsuperscript{213}. Cf. note 210 \textit{supra}.

\textsuperscript{214}. For a discussion of the proposition that education is removed from market
pricing, see notes 43, 140 & 144 \textit{supra}.

\textsuperscript{215}. Cf. note 210 \textit{supra}. Presumably districts would have some discretion in
allocating funds among particular schools.
claim must doubtless be read in the context of the court's statement of that claim. Secondly, the court stated that it did not have to decide the issue of whether a state could leave to local governments some control over the budgetary priority of education — what the court called "fiscal freewill" because the state had effectively denied this control to some counties and therefore could not be heard to argue that this was its "compelling state interest." It seems that the court would not have reserved this question if it had considered that the answer was necessarily implied from its holding. Thirdly, the court's discussion of "uniformity," in answer to the defendants' contention that "territorial uniformity" could not be required, did not clarify what kind of "uniformity" was to be required, except "territorial uniformity in respect to the present financing system." It would appear that this language would not require uniform per pupil expenditure but only uniform effect from the financing system which was adopted; that is, such financing would not cause variations in per pupil expenditure. Fourthly, the court affirmed the importance of local control as to how money was to be spent — the allocation of educational funds within the local government unit. Fifthly, if "substantial disparities" alone violated equal protection, that principle would indeed "spell the destruction of local government" in all but superficial activities, once vital services such as police and fire protection were designated "fundamental" for equal protection purposes, as might be suggested by Hawkins v. Town of Shaw, which held that a town was obliged not to treat racial classes differently in the provision of important municipal services. But the Serrano court, disclaiming any "such dire consequences," declined to speculate further, and in so doing, characterized the principle being established as a command that "the relative wealth of school districts may not determine the quality of public education." Finally,

216. See note 206 and accompanying text supra.
217. 5 Cal. 3d at 611, 487 P.2d at 1260, 96 Cal. Rptr. at 620.
218. Id. Accord, 118 N.J. Super. at 271-72, 287 A.2d at 212.
219. 5 Cal. 3d at 610-13, 487 P.2d at 1260-61, 96 Cal. Rptr. at 619-22.
220. Cf. note 226 and accompanying text infra.
221. The court noted:
   The individual district may well be in the best position to decide whom to hire, how to schedule its educational offerings, and a host of other matters which are either of significant local impact or of such a detailed nature as to require decentralized determination... No matter how the state decides to finance its system... it can still leave this decision-making power in the hands of local districts.
5 Cal. 3d at 610, 487 P.2d at 1260, 96 Cal. Rptr. at 620.
222. This was the defendants' contention. Id. at 614, 487 P.2d at 1262, 96 Cal. Rptr. at 622.
223. 437 F.2d 1286 (5th Cir. 1971).
224. See note 67 supra.
225. 5 Cal. 3d at 613-14, 487 P.2d at 1262-63, 96 Cal. Rptr. at 622.
none of the instant cases interpreting *Serrano* has given it such an expansive reading.  

**B. Under Serrano as Narrowly Interpreted**

The narrowest interpretation of *Serrano* seems to consider the first holding in that case merely as a broad statement of the second holding, which established a standard of "tax base equalization." 227 This interpretation is offered by Professor Coons, 228 who has been instrumental in bringing these issues before the courts. 229 It would require that an amount *uniform through the state would be available per pupil, for each particular rate* at which a district chose to be taxed. Further, it would eliminate the variation in tax effectiveness which results when a resident's 2 per cent tax provides more funds per pupil in a wealthy district than in a poor one, and it would require that a state institute programs which would equalize the effective per pupil *tax base* of all districts in the state. The effects upon local government would resemble those under the broad interpretation with respect to (1) — value assessments would have to be made on a uniform basis if property taxes were retained, so that the same rate of tax would put an equivalent obligation on persons with similar property throughout the state. It would differ with respect to (2) and (3) — local governments would retain complete control over the budgetary priority of education, and the administration of education would not be centralized; that is, the state programs would distribute funds to local governments to then be distributed among the districts as they chose.

It appears that the instant cases might be limited to this interpretation, principally for the reason 230 that the *Serrano* court reserved the question

226. The *Robinson* court most clearly rejected this interpretation. It stated:

This is not to suggest that the same amount of money must be spent on each pupil in the State. The differing needs of pupils would suggest the contrary . . . . [An earlier New Jersey decision stated in dictum] that benefits "may indeed depend upon the district of a student's residence," [but that there remained] the question whether the State statutory scheme may, because of local failures, become unequal to the constitutional promise and command.

118 N.J. Super. at 273-74, 287 A.2d at 213. The *Rodriguez* court stated:

In the instant case plaintiffs have not advocated that educational expenditure be equal for each child. Rather, they have recommended the application of the principle of "fiscal neutrality." Briefly summarized, this standard requires that the quality of public education may not be a function of wealth, other than the wealth of the state as a whole. Unlike the measure offered in *McElhinny*, this proposal does not involve the Court in the intricacies of affirmatively requiring that expenditures be made in a certain manner or amount. On the contrary, the State may adopt the financial scheme desired so long as the variations in wealth among the governmentally chosen units do not affect spending for the education of any child.

227. See notes 206-08 and accompanying text supra.

228. See Coons, Clune & Sugarman, supra note 60. The authors advocate "power equalizing" to give each district an equal tax base per pupil for education purposes. *Id.* at 319-21.


230. See note 217 and accompanying text supra.
whether a state could leave with local governments the control over the amount of money spent on education in a district. In addition, none of the instant cases made statements condemning such "fiscal free will." However, it is submitted that this interpretation is more restrictive than the thrust of the instant cases suggests and that, if faced with the issue, a court following this thrust would not find such "fiscal free will" "compelling" where a "fundamental interest" like education was concerned. It is possible that courts may never be called upon to decide that issue, since few states, if any, have pursued the interest in "fiscal free will" with any consistency. The issue seems likely to arise only if wealthy local government units insist that their states pursue the interest consistently, by adopting a program on Coons' model, in order to preserve the "fiscal free will" that they, as wealthy districts, have been able to enjoy. Whether the issue will require judicial resolution or not, it is submitted that the enormous emphasis which the instant cases placed on the importance of education leads one to conclude that the state interest

231. However, the Sweetwater court stated:

Even if the pupil assessed valuations were fairly well equalized within a multiple-district county, it could . . . materially change from year to year, which would require a constant changing or gerrymandering of properties from one district to another.

491 P.2d at 1237. The Robinson court stated:

Poor districts have other competing needs for local revenue. The evidence shows that poorer districts spend a smaller proportion of their total revenues for school purposes. The demand for municipal services tends to diminish further the school revenue-raising power of poor districts. Another general disadvantage of poor districts is the fact that property taxes are regressive; they impose burdens in inverse proportion to ability to pay. This is because poor people spend a larger proportion of their income for housing.

118 N.J. Super. 273, 287 A.2d at 213. Thus it appears that even with power equalizing, other financial considerations would have unpredictable and often undesirable effects on the determination of the tax rate.

The Robinson court, of all the courts, most clearly rejected variable tax rates, but was motivated to do so partly by the New Jersey constitutional provision. See id. at 277, 287 A.2d at 215. The court also stated:

There is no compelling justification for making a taxpayer in one district pay a tax at a higher rate than a taxpayer in another district, so long as the revenue serves the common state educational purpose.

Id. at 278, 287 A.2d at 216 (footnote omitted). Furthermore, the court did not intend to decide the question of whether, once state revenues provided equal "thorough" education, local districts could contribute more funds through local taxes. Id. at 278 n.21, 287 A.2d at 216 n.21. However, this question seems to have been decided implicitly in the instant case by the court's conclusions as to federal equal protection:

Education serves too important a function to leave it also to the mood — in some cases to the low aspirations — of the taxpayers of a given district . . . Id. at 279, 287 A.2d at 216. It is not always clear whether these conclusions are compelled by state, federal, or both constitutions. Finally the court characterized the legislative duty as "equalizing tax burdens." Id. at 281, 287 A.2d at 217.

232. See note 161 and accompanying text supra.

233. Cf. Wall Street Journal, Mar. 2, 1972, at 18, col. 5:

Lawyers say it's entirely possible to satisfy the Serrano standard merely by redrawing school-district lines, or consolidating districts, to give every district roughly the same tax base. It's possible — but highly unlikely. It amounts to reslicing the pie without making it larger. Better-off districts would lose chunks of their tax base.

234. See text accompanying notes 51-102 supra.
in education is likely to encompass an interest in the best education that a state can offer to all its citizens. Thus, the many factors wholly irrelevant to education which must go into determination of local government budgetary priorities should not affect an individual’s educational opportunity. The Robinson court explicitly espoused this proposition.235

C. Under a “Release from Tax Dependence” Interpretation of Serrano

It is submitted that “release from tax dependence” best describes the standard which the instant cases establish,236 although the cases are probably inconclusive for the reasons discussed above.237 This interpretation falls between the broad and narrow interpretations just described. It requires that a state institute programs which assure that an amount uniform throughout the state will be available to each local government on the basis of the number of its pupils. Essentially a negative mandate,238 it requires that the state insure that the wealth of a school district is not a factor in the decision of how much money will be available per pupil in that district. This interpretation resembles the other two with respect to (1) — property taxes would be permissible, but assessments would have to be on a uniform state-wide basis. It differs from the narrow interpretation, however, in regard to (2) — local governments would not have control of the budgetary priority of education.239 It differs also from the broad interpretation on issue (3) — the administration of education would not be required to be centralized, because the state programs could distribute funds to local governments to be distributed as they chose in the education area. The latter result derives from the fact that, unlike “equalization of per pupil input,” this interpretation emphasizes educational policy as a local government function, instead of one with full responsibility lying with the state.240 The effect of this

235. See note 231 supra.
236. See text accompanying notes 172-79 supra.
237. See text accompanying note 174 supra. See also note 207 supra.
238. See note 165 and accompanying text supra.
239. It may be argued that the state involvement demanded by the Serrano decision is different only in degree from the present involvement. The Rodriguez court opined that “[t]he type of socialized education, not the question of its existence, is the only matter currently in dispute.” 337 F. Supp. at 284.
240. In Robinson, the court stated:
    Although districts can be created and classified for appropriate purposes, it was held ... that the state school tax remained a state tax even though assessed and levied locally upon local property, with revenues returned by the State.

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interpretation, then, on important municipal services which might in the future be designated as "fundamental interests," would be to require that local governments do not base their decisions with respect to allocation of these services upon the relative financial status of their subdivisions.

From the preceding analysis, it appears that a state school financing system based on property taxes would probably be acceptable under the instant cases if it required: (a) a uniform assessment of property value; (b) a uniform rate of taxation earmarked for education; and (c) that the state-wide average amount raised per pupil would be the amount to be redistributed to each local government unit on the basis of the number of its pupils.

The practical effects of uniform assessment and uniform tax rates on residential patterns, industry location, and other social patterns are beyond the scope of this Comment. However, should a state decide that other forms of raising revenue were preferable to any such effects, the third requirement would be the decisive one. In either case, the principal thrust of this last requirement is that wealthier local government units will be contributing to the support of functions of poorer local government units. Though this result would be novel perhaps to the operational concept of the independence of local governments in their local affairs, it is submitted that it comports with the constitutional concept that local governments derive their original authority from their state and that, to local districts. The court held that prior to the 1875 amendment [which added the education clause to the state constitution] public schools were a matter of local rather than state concern, but that the amendment made the support of public schools a state concern.

118 N.J. Super. 268, 287 A.2d at 210 (emphasis supplied by the court).


242. Cf., e.g., 118 N.J. Super. at 242–44, 287 A.2d at 197–98:

Other comparisons can be made. Industrial and commercial property distributions were studied by Neil Gold, Director of the Suburban Action Institute. He testified that 112 municipalities with 11% of the State's population had commercial and industrial property almost equal in value to that possessed by a group of municipalities containing 39% of the State's population. The first group raised only $62 million in taxes compared with $262 million by the second group. The first group raised these taxes at a tax rate under 2% while the poorer groups taxed at rates of 6% or more. Yet most of the poorer communities must serve people of greater need because they have large numbers of dependent minorities. . . .

Wealthy suburbs are able to attract industry from central cities by preferential tax rates. . . .

Rising tax rates in cities compel compromises in funding services for education and other purposes.

Neil Gold has concluded that Serrano's "likely effect on industrial location 'in the long run, by all odds [is] its most important' consequence." Wall Street Journal, March 13, 1972, at 1, col. 6.

243. Cf. 337 F. Supp. at 282. The court noted that the reverse existed in the present system:

There was expert testimony to the effect that the current system tends to subsidize the rich at the expense of the poor, rather than the other way around.

Id.
consequently, the unequal effects of local government boundaries fall subject to the state's responsibility under the equal protection clause.244

IX. Conclusion

Serrano v. Priest, and the cases it has inspired thus far, have spearheaded a judicial attack, under the equal protection clause, on unequal treatment of poorer neighborhoods in the provision of public education. Virtually all states face similar factual situations, and the Supreme Court, as final interpreter of the equal protection clause, has been called upon to decide the issue.245

The cases have followed the judicial practice under the equal protection doctrine of measuring the affected private interest to see if it is "fundamental," of looking to the legislative classification to see if it is "suspect," and of requiring the state to show a "compelling interest" which necessitates such a classification with respect to a private interest if either of the initial inquiries was answered in the affirmative. On the one hand, the cases have relied on a basis doctrinally sound both in precedent and reasoning. It would appear that education is a vital service which should not be withheld, except with good reason, and that wealth is a questionable basis on which to allow basic governmental services to be allocated. By limiting their holdings to condemnation of the concurrence of these two factors, the courts appear well within the bounds of the equal protection doctrine. On the other hand, the failure of the courts in these cases to illuminate the standards used to judge "fundamental" or "suspect" status, has left open the question of the future scope of such analyses. At the same time, the judicial reluctance to pass judgment upon the importance or wisdom of decisions by the legislative branch, has inevitably led to the placing of great emphasis on these initial inquiries. It appears that a method for testing the rationality of the relationship between the private interest and the legislative classification would better reflect that emphasis and might give more guidance as to how other private interests may be legitimately affected by legislative decisions.

As far as can be determined from these cases, which are essentially negative in their mandates, it appears that the standard which an acceptable school financing system must meet is that it insulate education from the budgetary considerations of local governments, probably by means of a state-wide revenue-raising procedure and by distribution of funds to each local government unit on the basis of the number of pupils within its bounds.

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244. Cf. Froelich v. City of Cleveland, 99 Ohio 376, 124 N.E. 212 (1919). The relationship between the state's laws and municipal laws which had been passed pursuant to home-rule provisions in the state constitution, along with a limited analogy to the federal system, was the subject of a poignant discussion by the Ohio court.

245. See note 19 and accompanying text supra.