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An Analysis and Review of School Financing Reform

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COMMENT

AN ANALYSIS AND REVIEW OF SCHOOL FINANCING REFORM

I. INTRODUCTION

Consider a taxing scheme where the wealth of a district is measured by the aggregate assessed property valuation in that district and where people living in poor districts are taxed at a higher rate than those living in more wealthy districts. Also consider that in the system just described, those who are taxed at the lower rate are able to spend more for educating their children than those who are taxed at the higher rate because they happen to live in wealthier districts. For example, in New York, for the same tax rate of $2.72 per $100 of assessed valuation, the town of Great Neck is able to spend 80 percent more per student for education than is Levittown.[1] This is so because Great Neck, with its greater property wealth, is able to raise nearly twice as much money for education as Levittown, which has less property wealth and, consequently, a smaller tax base upon which to draw.

The above described system illustrates the dominant financing scheme for elementary and secondary education in the United States.[2] Under such a system, revenues for education are raised predominantly by local property taxation. There are three major factors which determine how much a local school district is able to raise per pupil for education: (1) the overall assessed property valuation in the district subject to taxation; (2) the rate at which the local community is willing to tax itself; and (3) the total number of school age children in the district. The overall per pupil expenditure for education is then usually supplemented by some form of aid from the state government.[3]

One of the first court challenges to an existing system of school financing was *McInnis v. Shapiro*.[4] In *McInnis*, a group of students brought an action in federal court alleging that various Illinois statutes pertaining to the financing of education in that state violated the equal protection clause of the fourteenth amendment since the statutes resulted in wide variations in per pupil expenditures from one school district to another.[5] Acknowledging that such inequality existed, the court nonetheless said that before any violation of the equal protection clause could be found, plaintiffs had to show that any classification made rested upon grounds that were wholly irrelevant to a valid state purpose.[6] Applying this standard, the court found that the statutes were

1. New York State Commission on the Quality, Cost, and Financing of Elementary and Secondary Education, The Fleischmann Report on the Quality, Cost, and Financing of Elementary and Secondary Education in New York State 137 (1973) [hereinafter cited as Fleischmann Report].

2. J. Coons, W. Clune & S. Sugarman, Private Wealth and Public Education 2 (1970) [hereinafter cited as Private Wealth].

3. See notes 53-61 infra and accompanying text.

4. 293 F. Supp. 327 (N.D. Ill. 1968), aff'd per curiam sub nom. McInnis v. Ogilvie, 394 U.S. 322 (1969).

5. Id. at 328-29.

6. Id. at 332.

constitutional since they were designed to allow localities to determine the amount of education they wanted to provide.[7] The court found further that the state's desire to permit local decision making was a valid state purpose.[8] As to plaintiffs' claim that "only a financing system which apportions public funds according to the educational needs of the students satisfies the Fourteenth Amendment,"[9] the court ruled that no discoverable and manageable standards existed by which it could determine whether the Constitution was violated.[10] The United States Supreme Court affirmed the lower court decision.[11]

This Comment will first discuss various standards proposed by financing reformers to gauge equal educational opportunity and will consider the major financing schemes that are in existence. Secondly, it will review various attempts to reform educational financing through the courts. Finally, it will review avenues of reform that are still open through the judiciary in light of the Supreme Court's decision in *San Antonio Independent School District v. Rodriguez,*[12] and present an alternative plan for reforming school financing.

II. In Search of a Standard

As indicated earlier, plaintiffs in *McInnis* alleged that the fourteenth amendment dictated that educational expenditures be distributed according to the educational needs of the pupils rather than the wealth of the district wherein they resided. The court found the concept of equal educational opportunity elusive and beyond the judicial competence of the court.[13] Although the court did comment that "[p]resumably, students receiving a $1000 education are better educated that [sic] those acquiring a $600 schooling,"[14] such a presumption has not been universally accepted.[15]

One of the most controversial findings of the Coleman Report,[16] a survey on educational opportunities ordered by Congress, was that beyond some

7. Id. at 332-33.

8. Id. at 333-34.

9. Id. at 331 (emphasis omitted).

10. Id. at 335.

11. 394 U.S. 322 (1969).

12. 411 U.S. 1 (1973).

13. 293 F. Supp. at 335-36; accord, Burruss v. Wilkerson, 310 F. Supp. 572 (W.D. Va.), aff'd per curiam, 397 U.S. 44 (1970).

14. 293 F. Supp. at 331.

15. E.g., McDermott & Klein, The Cost-Quality Debate in School Finance Litigation: Do Dollars Make a Difference?, 38 Law & Contemp. Prob. 415 (1974) [hereinafter cited as Cost-Quality].

16. J. Coleman, Equality of Educational Opportunity (1966) [hereinafter cited as Coleman Report]. The Coleman Report evolved from the Equality of Educational Opportunity Survey (EEOS). This survey was undertaken in 1965 in accordance with a mandate from Congress to the U.S. Office of Education to conduct a survey "concerning the lack of availability of equal educational opportunities for individuals by reason of race, color, religion, or national origin in public educational institutions . . . ." Civil Rights Act of 1964, Pub. L. No. 88-352, § 402, 78 Stat. 247. This study represented the "second largest social science research project in history." On Equality of Educational Opportunity 5 (F. Mosteller & D. Moynihan eds. 1972).

minimum per pupil expenditure, no correlation exists between dollars spent and student performance as measured by achievement scores in standardized tests.[17] Critics of the report are quick to point out that this is not surprising since there is debate as to whether standardized tests adequately measure that which they purport to measure.[18] The use of scores from standardized achievement tests for measuring equality of education is known as the "output standard."[19]

In addition to using outputs, courts, educators and commentators have considered using the following as standards for measuring equality of educational opportunity: (1) equal dollars per pupil;[20] (2) fiscal neutrality;[21] (3) a maximum variable ratio;[22] (4) inputs;[23] and (5) minimum adequacy.[24]

The equal dollar per pupil standard measures equality of educational opportunity in terms of dollars spent per pupil. Under this standard, equality of educational opportunity exists when every pupil in the state receives the same dollar expenditure for education. It should be noted that no court has as yet adopted an equal dollar standard. In *McInnis*, the court pointed out that equal dollar expenditures were not "the exclusive yardstick of a child's educational needs."[25] Courts in both California[26] and New Jersey[27] also

17. Coleman Report, supra note 16, at 22, 325.

18. Cost-Quality, supra note 15, at 423-27. Standardized tests have been criticized on various grounds including: (1) The educational goals measured are limited; (2) achievement tests do not overlap very well with the objectives of the schools; (3) test designs are generally poor; (4) there are no assurances that the test measures that which it purports to measure. Id. at 424-26. See generally Note, Legal Implications of the Use of Standardized Ability Tests in Employment and Education, 68 Colum. L. Rev. 691 (1968); Note, The Legal Implications of Cultural Bias in the Intelligence Testing of Disadvantaged School Children, 61 Geo. L.J. 1027 (1973); Note, Constitutional Requirements for Standardized Ability Tests Used in Education, 26 Vand. L. Rev. 789 (1973).

19. Cost-Quality, supra note 15, at 420. See also J. Burkhead, Public School Finance Economics and Politics 76-78 (1964); R. Johns, K. Alexander & K. Jordan, Financing Education: Fiscal and Legal Alternatives 436-38 (1972).

20. McInnis v. Shapiro, 293 F. Supp. 327, 335 (N.D. Ill. 1968), aff'd per curiam sub nom. McInnis v. Ogilvie, 394 U.S. 322 (1969); Serrano v. Priest, 5 Cal. 3d 584, 595, 487 P.2d 1241, 1248, 96 Cal. Rptr. 601, 608 (1971); A. Wise, Rich Schools Poor Schools: The Promise of Equal Educational Opportunity 155 (1968) [hereinafter cited as Rich Schools Poor Schools]; Cost-Quality, supra note 15, at 417.

21. Coons, Introduction: "Fiscal Neutrality" After Rodriguez, 38 Law & Contemp. Prob. 299 (1974); Cost-Quality, supra note 15, at 418.

22. Hobson v. Hansen, 327 F. Supp. 844, 863-64 (D.D.C. 1971) (court decreed a remedy using a maximum variable ratio test although not specifically designating it as such); Rich Schools Poor Schools, supra note 20, at 156-57; Cost-Quality, supra note 15, at 418.

23. San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1, 84 (1973) (Marshall, J., dissenting); Cost-Quality, supra note 15, at 419-20.

24. Cost-Quality, supra note 15, at 421-23.

25. 293 F. Supp. at 335.

26. Serrano v. Priest, 5 Cal. 3d 584, 595-96, 487 P.2d 1241, 1249, 96 Cal. Rptr. 601, 609 (1971).

27. Robinson v. Cahill, 62 N.J. 473, 520, 303 A.2d 273, 297-98, cert. denied, 414 U.S. 976 (1973).

explicitly rejected the equal dollar standard. Because legitimate differences in expenditure often exist, for example, due to variations in the cost of living in different localities or due to the special needs of the handicapped, requiring equal dollars per pupil would not afford equal educational opportunity.[28] The rigidity of such a standard would not adequately provide for the needs of minority students, which could be compensated for by increased expenditures.[29] For these reasons, an equal dollar per pupil standard for equality of education is not likely to be acceptable to either the courts or to the reformers.

Another standard for equality of educational opportunity is fiscal neutrality.[30] Under this standard, equal educational opportunity would exist[31] whenever "[t]he quality of public education [is not] a function of wealth other than the wealth of the state as a whole."[32] This standard implicitly assumes a direct relationship between the amount spent for education and the quality of the education obtained, since wealthier districts would no longer be able to spend more for education (and thereby obtain a higher quality education), than poorer districts simply because of greater property wealth.[33] What makes this definition for equal educational opportunity all the more appealing is that it creates a manageable judicial standard without the need to define exactly what equality of educational opportunity is.[34]

28. In Robinson v. Cahill, the New Jersey court stated that "[it] should not be understood to mean that the State may not recognize differences in area costs, or a need for additional dollar input to equip classes of disadvantaged children for the educational opportunity." Id.

29. In McInnis, the court noted that deprived students need preferential treatment, not equal dollars. 293 F. Supp. at 335-36. The trial judge, in still another case, suggested that racial and cultural differences could no longer be ignored and that there existed a need to give the disadvantaged child special programs outside the regular school curriculum. Hobson v. Hansen, 269 F. Supp. 401, 471 (D.D.C. 1967), aff'd sub nom. Smuck v. Hobson, 408 F.2d 175 (D.C. Cir. 1969) (en banc). See also Kurland, Equal Educational Opportunity: The Limits of Constitutional Jurisprudence Undefined, 35 U. Chi. L. Rev. 583, 591 (1968); Montoya, Bilingual-Bicultural Education: Making Equal Educational Opportunities Available to National Origin Minority Students, 61 Geo. L.J. 991 (1973).

30. The fiscal neutrality principle was made famous by Professors Coons, Clune and Sugarman in their book Private Wealth and Public Education (1970). It was actually first articulated by Harlan Updegraff of the University of Pennsylvania in 1921. "He was the first theorist who proposed that wealth of the local school district be entirely eliminated as a factor affecting the quality of a child's education." R. Johns, Some Critical Issues in School Financing, in Constitutional Reform of School Finance 161 (K. Alexander & K. Jordan eds. 1973).

31. The California supreme court adopted fiscal neutrality as a standard in Serrano v. Priest, 5 Cal. 3d 584, 487 P.2d 1241, 96 Cal. Rptr. 601 (1971).

32. Private Wealth, supra note 2, at 2 (emphasis omitted).

33. The debate among educators and sociologists over whether increased educational expenditures necessarily lead to improved educational outputs (as measured by achievement on standardized tests) has never been resolved. As noted earlier, critics of the Coleman Report find fault with the design of the achievement tests used. See notes 18 & 19 supra and accompanying text. Even though the exact relationship between educational expenditures and the resultant quality of that education is not known precisely, "[i]f money is inadequate to improve education, the residents of poor districts should at least have an equal opportunity to be disappointed by its failure." Private Wealth, supra note 2, at 30.

34. Van Dusartz v. Hatfield, 334 F. Supp. 870 (D. Minn. 1971); Serrano v. Priest, 5 Cal. 3d 584, 487 P.2d 1241, 96 Cal. Rptr. 601 (1971).

Fiscal neutrality appears to be an ideal standard. It permits variations in educational expenditures only for reasons other than the wealth of the district. One system of school financing which satisfies the fiscal neutrality standard is district power equalizing (DPE). Under a DPE formula,[35] the amount of expenditure per pupil is not a function of the wealth of the district in which the student resides, but rather is a function of the rate of taxation for that district. The state guarantees a specified expenditure per pupil based upon the rate of taxation—the greater the rate, the greater the guarantee.[36] Thus, a district which is poor in property wealth and unable to raise the necessary revenues for the per pupil expenditure specified under the DPE formula would receive state funds sufficient to meet the level of expenditure per pupil specified under the formula. Conversely, education revenues raised by wealthier districts in excess of that permitted by the formula would be recaptured by the state for redistribution to poorer districts.[37] In this manner, variations in educational expenditures which result from district property wealth disparities are eliminated since the variations result only from differences in the rate of taxation. Therefore, such a system is not dependent on wealth but is instead fiscally neutral.

Critics argue that equality of educational opportunity could not exist under a fiscal neutrality standard since variations in educational expenditures would still be permitted.[38] For example, under a DPE formula, owing to variations in tax rates from one district to another, expenditure levels for education per pupil would also vary. However, variations which still existed would no longer be a function of the property wealth of the district, but would instead be a function of the taxing effort exerted by the local community, a depen-

35. See Private Wealth, supra note 2, at 162-242 for a detailed explanation.

36. The mechanics of a DPE plan can be illustrated by the following hypothetical: the state legislature enacted a school financing aid plan guaranteeing a per pupil expenditure according to the table below:

Rate of Taxation for Education	State Guaranteed Expenditure Per Pupil
2.00%	$1000
3.00%	$1500
4.00%	$2000

(All rates in between those listed shall be proportioned linearly.)

Suppose that School District A has an assessed property valuation of $40,000 per pupil while District B has an assessed valuation of $70,000 per pupil. Assume further that both districts have a property taxation rate of 2 percent for education. District A is able to raise only $800 per pupil for education, while District B is able to raise $1400 per pupil. Since the legislature has guaranteed $1000 per pupil for education for all districts taxing at the 2 percent rate, District A will receive $200 in state aid while District B would not receive any and could even lose up to $400 to the state in the form of recapture if the state plan so requires. See note 37 infra and accompanying text.

37. Private Wealth, supra note 2, at 162-242.

38. Colman, Financing Schools and Other Public Services, 4 Urban Law. 623, 635 (1972); Cost-Quality, supra note 15, at 419; Richards, Equal Opportunity and School Financing: Towards a Moral Theory of Constitutional Adjudication, 41 U. Chi. L. Rev. 32, 65-66 (1973).

dence which is difficult to condemn. Conceptually at least, it seems only fair to allow those who are willing to tax themselves at a higher rate a greater per pupil expenditure than those taxing themselves at a lower rate. Under such a system, a district can provide any level of expenditure specified in the state plan simply by choosing the appropriate rate of taxation under the legislature's formula.

Equality of educational opportunity can also be gauged by the maximum variable ratio standard.[39] Under this standard, equality of educational opportunity would exist as long as the maximum deviation for any given district does not exceed a specified, albeit arbitrary, limit, such as plus or minus twenty-five percent of the median per pupil expenditure in the state.[40] The maximum variable ratio, by itself, does not do much to ensure equality of educational opportunity. If the maximum variable ratio is set at zero percent, it would be identical to an equal dollar standard.[41] If the ratio is set too high, the resulting disparities in per pupil expenditure would be as serious as those in existing financing systems which rely solely on *ad valorem* property taxation.[42] When used in conjunction with existing DPE schemes,[43] however, the concept of maximum variable ratio becomes a workable test for guaranteeing equal educational opportunities to all students in the state, regardless of the wealth of the district wherein they reside.[44]

Equality of educational opportunity can also be measured in terms of the educational "inputs" that a student is given. This standard, suggested by Justice Marshall in his dissent in *Rodriguez*,[45] enables a court to consider the physical facilities, teacher-student ratios, and teacher training, as well as

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39. Rich Schools Poor Schools, supra note 20, at 143-59; Cost-Quality, supra note 15, at 418.

40. E.g., in Hobson v. Hansen, 327 F. Supp. 844 (D.D.C. 1967), the district court ordered that no expenditure could deviate by more than five percent from the mean per pupil expenditure without adequate justification. Id. at 863-64. This decree was granted upon motion by the plaintiffs for additional relief. Earlier, the public school system in the District of Columbia was found to have unconstitutionally deprived Negro and poor children of their right to equal educational opportunity. Hobson v. Hansen, 269 F. Supp. 401 (D.D.C. 1967), aff'd sub nom. Smuck v. Hobson, 408 F.2d 175 (D.C. Cir. 1969) (en banc).

41. If no deviation from a median expenditure level is permitted, it is equivalent to requiring all districts to spend an equal dollar amount per pupil where the dollar amount is set equally for all students at the median level of expenditure in the state.

42. If the permissible deviation is very high, for example plus or minus 500 percent of the median per pupil expenditure in the state, wealthy districts would be allowed to spend five times as much for education as the median per pupil expenditure in the state, while poor districts would be allowed to spend one-fifth as much as the median. Thus, the allowed variation from the lowest to the highest would be 25 to 1.

43. See, e.g., Kan. Stat. Ann. §§ 72.7030-.7079 (Cum. Supp. 1974); Mich. Comp. Laws Ann. §§ 388.1101-.1279 (Supp. 1975); Wis. Stat. Ann. §§ 121.02-.22 (Supp. 1975). For an excellent summary of legislative reform in the area see Grubb, The First Round of Legislative Reforms in the Post-Serrano World, 38 Law & Contemp. Prob. 459 (1974) [hereinafter cited as Legislative Reforms].

44. See notes 173 & 174 infra and accompanying text for a further explanation.

45. 411 U.S. at 84 (Marshall, J., dissenting).

intangible factors in determining whether equal educational opportunity exists in a given state.[46]

The majority in *Rodriguez*, however, preferred a minimum adequacy standard rather than an input standard.[47] According to the majority, as long as every student in the state was provided with an education that met minimum standards, no deprivation existed.[48] Justice Marshall in his dissent noted that the majority did not specify any guidelines for determining what level of expenditure would be considered minimally adequate and therefore constitutional.[49] What is minimally adequate for one child may be inadequate for another, owing to the special needs of those who are physically handicapped or who are handicapped by reason of being minority students. The standard offered by the majority in *Rodriguez* is no less unmanageable than the standards which the majority purported to reject.[50]

Although there is controversy surrounding the relationship between the amount of dollars spent and the quality of the education received when measured by achievement on standardized tests, it is submitted that there is a direct relationship between spending and the quality of education when measured by the physical inputs given a child for education.[51] It is suggested that society should not create artificial barriers to equality of educational opportunity, and that existing systems of school financing based upon property wealth create just such an artificial barrier by granting a favored status to students in rich districts.[52]

III. Review of Major School Financing Plans

Except for the state of Hawaii[53] which has a system of full state funding for education,[54] all existing state systems of financing education rely on local *ad*

46. In Sweatt v. Painter, 339 U.S. 629 (1950), a precursor to Brown v. Board of Educ., 347 U.S. 483 (1954), the Supreme Court held that a black law school did not provide educational opportunities equal to those provided at the University of Texas Law School. In its analysis, the Court considered both tangible and intangible differences. With respect to the intangibles, the Court considered "qualities which are incapable of objective measurement but which make for greatness in a law school." 339 U.S. at 634.

47. 411 U.S. at 37, 45.

48. Id. at 24.

49. Id. at 89 (Marshall, J., dissenting).

50. See id. at 54.

51. While increased spending does not necessarily lead to increased achievement on standardized achievement tests, increased spending presumably would lead to higher quality educational inputs such as smaller classes, larger libraries and better laboratory facilities.

52. Students in wealthy districts are given a preferred status because of the regressive features of the funding system, as shown in notes 158-63 infra and accompanying text.

53. Hawaii Rev. Stat. § 296-36 (1968).

54. Full state funding of education exists when the state provides all or nearly all of the money needed to finance public education. The President's Commission on School Finance recommended full state funding as an alternative to existing systems of school financing. President's Commission on School Finance, Schools, People and Money: The Need for Educational Reform (1972); cf. Fleischmann Report, supra note 1, at 86. The most frequent objection to full state funding is that local control would be emasculated. Many people believe, however, that

valorem property taxation supplemented by various forms of state aid. The state aid may, for example, be in the form of a flat grant for each pupil in the state regardless of the wealth of the school district in which he resides. Since rich and poor districts alike receive the same amount of school aid, this method does nothing to alleviate variations in expenditures per pupil among the various school districts within the state.

Another commonly used form of state aid is the foundation plan.[55] Under this plan, the state guarantees a minimum standard of education by giving the local school district a grant dependent on the amount of money raised by the local district. To qualify for the grant, a district must impose local taxes at a specified minimum rate. The amount of money raised by that district will be supplemented by state revenues to the extent necessary to ensure the minimum expenditure per student set by the foundation plan in that particular state.[56] Although disparities may be lessened with a foundation plan of state aid, such a plan cannot provide for equal educational opportunity since there is nothing in the formula to eliminate fully any existing disparities.[57] The plan merely ensures a minimum level of education within the state.

One of the most widely discussed alternative plans for financing education is district power equalizing. District power equalizing has been discussed earlier in connection with fiscal neutrality.[58] In the ideal situation, DPE

loss of local control is nothing more than a myth. San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1, 129-30 (1973) (Marshall, J., dissenting) (local control called a sham); Governor v. State Treasurer, 389 Mich. 1, 33, 203 N.W.2d 457, 471 (1972), vacated, 390 Mich. 389, 212 N.W.2d 711 (1973) (found local control to be a "hoax"); Fleischmann Report, supra note 1, at 86; Silard & Goldstein, Toward Abolition of Local Funding in Public Education, 3 J. Law & Educ. 307, 332 (1974) [hereinafter cited as Silard & Goldstein]. The Fleischmann Commission pointed out that in Great Britain local schools obtain most of their funds from the Central Ministry, yet remain "fiercely independent." Fleischmann Report, supra note 1, at 87.

55. The foundation program, proposed almost fifty years ago, represents one of the last major innovations in public school financing. Silard & Goldstein, supra note 54, at 307; see, e.g., Calif. Educ. Code §§ 17301-18480 (West 1969), as amended, (West Supp. 1975).

56. Private Wealth, supra note 2, at 64. If, for example, the state legislature decided to ensure a minimum foundation level of $800 per pupil for education, the state would provide funds necessary to meet this level to qualifying school districts. To qualify under the plan, the state usually requires some minimum rate of taxation. Thus, if the minimum qualifying school tax rate were 1 percent and District A has $60,000 in assessed property valuation per pupil and exerts a tax effort of 1 percent, it would qualify for state aid under the plan and would receive $200 from the state per student since District A could raise only $600. See generally id. at 63-95.

57. New Jersey, at the time Robinson v. Cahill, 118 N.J. Super. 223, 287 A.2d 187 (1972), aff'd, 62 N.J. 473, 303 A.2d 273, cert. denied, 414 U.S. 976 (1973), was decided, had a foundation type plan of state aid. Tractenberg, New Jersey, Robinson v. Cahill: The "Thorough and Efficient" Clause, 38 Law & Contemp. Prob. 312, 314 n.22 (1974). The New Jersey supreme court initially gave the legislature until December 31, 1974 to enact new legislation which would be compatible with the court's mandate for financing education. Robinson v. Cahill, 63 N.J. 196, 306 A.2d 65 (1973). It has subsequently extended its allowance of the existing financing system through the 1976-77 school year. Robinson v. Cahill, 67 N.J. 333, 339 A.2d 193 (1975). The New Jersey legislature is currently wrestling with the problem. Robinson v. Cahill is discussed in detail in notes 116-131 infra and accompanying text.

58. See notes 30-38 supra and accompanying text.

produces the same per pupil expenditure for all districts having the same tax rate. Unfortunately, in those states that have adopted a DPE plan, or some modified form of it, the principal ingredient of recapture is all too often missing.[59] In fact, most states which have enacted DPE have also enacted save-harmless clauses, so that wealthier districts would not receive less state aid under DPE than they had previously received.[60] Since, in the absence of a recapture provision, wealthier districts will still spend more per pupil for education than less wealthy districts taxing at the same rate, most of the existing DPE plans are in reality nothing more than foundation plans in disguise.[61]

Of course, most state aid plans are not as simple as those described. Many states combine features drawn from several plans.

IV. CONSTITUTIONAL ISSUES LEADING TO *Rodriguez*

The first major case won by education finance reformers was *Serrano v. Priest*.[62] *Serrano* was a class action brought by students and parents in California seeking declaratory relief and an injunction against discrimination in school financing. The California supreme court decided the case on both federal and state constitutional grounds.[63] It found a violation of the equal protection clauses of both the federal and state constitutions existed in that the "system discriminates on the basis of the wealth of a district and its residents."[64] Moreover, education was found to be a fundamental right.[65]

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59. Of the seven states analyzed in Legislative Reforms, supra note 43, only one state, Maine, provided for recapture of funds which are in excess of that needed to provide the expenditure per pupil guaranteed by the state for that given tax rate. Id. at 481. Maine has subsequently repealed this provision. Law of June 22, 1973, ch. 556, § 1, [1973] Me. Laws 994 (repealed 1975).

60. E.g., Mich. Comp. Laws Ann. § 388.1121 (Supp. 1975); Wis. Stat. Ann. § 121.08(4)(a) (Supp. 1975). For example, if a district had received $200 per pupil in state aid prior to the enactment of the DPE plan, under a save-harmless clause it would continue to receive $200 from the state even though it would not be entitled to any aid under the DPE formula. Note that the save-harmless clause goes one step beyond the mere absence of recapture since the passage of DPE is literally "harmless" to these districts.

61. A crucial difference does exist, however. Under a foundation plan of state aid, the state guarantees just one minimum dollar amount for education per pupil while under a DPE plan without recapture, there is a varying guarantee, one for each rate of taxation. See note 36 supra.

62. 5 Cal. 3d 584, 487 P.2d 1241, 96 Cal. Rptr. 601 (1971).

63. The court noted that two provisions of the California constitution were "substantially the equivalent" to the federal equal protection clause. Id. at 596 n.11, 487 P.2d at 1249 n.11, 96 Cal. Rptr. at 609 n.11. The two provisions of the California constitution referred to by the court were art. I, § 11 and art. I, § 21. For an analysis of the state issues see Karst, Serrano v. Priest: A State Court's Responsibilities and Opportunities in the Development of Federal Constitutional Law, 60 Calif. L. Rev. 720 (1972).

64. 5 Cal. 3d at 604, 487 P.2d at 1255, 96 Cal. Rptr. at 615.

65. Id. at 609, 487 P.2d at 1258, 96 Cal. Rptr. at 618. The court cited Brown v. Board of Educ., 347 U.S. 483 (1954). It is interesting to note that just two years after Serrano, the United States Supreme Court, also citing Brown, reached exactly the opposite conclusion in Rodriguez. 411 U.S. at 29-39.

From the time of the decision in *Serrano,* until the time the United States Supreme Court decided *San Antonio Independent School District v. Rodriguez,*[66] courts in Minnesota,[67] Texas,[68] New Jersey,[69] Arizona,[70] Wyoming,[71] Kansas,[72] and Michigan[73] reached the same conclusion as the California court in *Serrano.* During that same period, only lower courts in New York[74] and in Indiana[75] upheld their respective school financing statutes as constitutional.

On March 21, 1973, the United States Supreme Court decided the case of *San Antonio Independent School District v. Rodriguez.*[76] This decision has been hailed as the "most important event in the history of American school financing."[77] The action was brought by a group of parents from the Edgewood Independent School District which had the highest *ad valorem* property tax rate in the San Antonio metropolitan area, but was able to raise only $26 per pupil for education in 1967-68.[78]

In *Rodriguez,* the Supreme Court in a 5-4 decision rejected the *Serrano* rationale of fiscal neutrality,[79] refused to declare that education was a "fundamental right"[80] and refused to find a "suspect classification."[81] As a result, the Court employed the rational basis test in evaluating the Texas school finance system.[82]

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66. 411 U.S. 1 (1973).

67. Van Dusartz v. Hatfield, 334 F. Supp. 870 (D. Minn. 1971).

68. Rodriguez v. San Antonio Independent School Dist., 337 F. Supp. 280 (W.D. Tex. 1971), rev'd, 411 U.S. 1 (1973).

69. Robinson v. Cahill, 118 N.J. Super. 223, 287 A.2d 187 (1972), aff'd, 62 N.J. 473, 303 A.2d 273, cert. denied, 414 U.S. 976 (1973).

70. Hollins v. Shofstall, Civ. No. C-253652 (Ariz. Super. Ct., June 1, 1972), rev'd, 110 Ariz. 88, 515 P.2d 590 (1973).

71. Sweetwater County Planning Comm. v. Hinkle, 491 P.2d 1234 (Wyo. 1971), juris. relinquished, 493 P.2d 1050 (Wyo. 1972).

72. Caldwell v. Kansas, Civ. No. 50616 (D. Kan., Aug. 30, 1972).

73. Governor v. State Treasurer, 389 Mich. 1, 203 N.W.2d 457 (1972), vacated, 390 Mich. 389, 212 N.W.2d 711 (1973).

74. Spano v. Board of Educ., 68 Misc. 2d 804, 328 N.Y.S.2d 229 (Sup. Ct. 1972).

75. Jensen v. Board of Tax Comm'rs, 41 U.S.L.W. 2390 (Ind. Cir. Ct. 1973).

76. 411 U.S. 1 (1973). For a more detailed discussion of Rodriguez see generally Areen & Ross, The Rodriguez Case: Judicial Oversight of School Finance, 1973 Sup. Ct. Rev. 33; The Supreme Court, 1972 Term, 87 Harv. L. Rev. 57, 105-16 (1973); Comment, San Antonio Independent School District v. Rodriguez: A Retreat from Equal Protection, 22 Clev. St. L. Rev. 585 (1973); Note, San Antonio Independent School District v. Rodriguez: Inequitable But Not Unequal Protection Under the Fourteenth Amendment, 27 Sw. L.J. 712 (1973).

77. Yudof & Morgan, Texas, Rodriguez v. San Antonio Independent School District: Gathering the Ayes of Texas—The Politics of School Finance Reform, 38 Law & Contemp. Prob. 383, 391 (1974).

78. 411 U.S. at 12.

79. Id. at 50-53.

80. Id. at 35.

81. Id. at 28.

82. In order to appreciate fully the significance of the Rodriguez decision, it is necessary to understand the equal protection analysis used by the Court. The equal protection clause does not

Probably the greatest setback to school finance reformers was the Court's holding in *Rodriguez* that education was not a fundamental right for purposes of equal protection analysis.[83] Justice Powell, speaking for the majority, stated that

> [e]ducation, of course, is not among the rights afforded explicit protection under our Federal Constitution. . . . As we have said, the undisputed importance of education will not alone cause this Court to depart from the usual standard for reviewing a State's social and economic legislation.[84]

Although it was claimed that there was a strong nexus between education and other explicitly guaranteed constitutional rights such as free speech and voting, the Court did not find this argument controlling.[85]

In addition to holding that education was not a fundamental right, the

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deny the states the right to set up classifications. It requires only that the classifications be reasonable; that is, it requires that the class chosen be differentiated by common characteristics and that there be a rational relation between the classification and the purpose of the law. E.g., Reed v. Reed, 404 U.S. 71 (1971).

There are two situations where the mere showing that a classification is rationally related to a legitimate state purpose is insufficient to sustain the classification. The first is where the classification impinges upon a fundamental right. In such a case, the classification must be justified by a "compelling" state interest. Shapiro v. Thompson, 394 U.S. 618, 634 (1969). The second situation in which a mere showing of a rational relationship is not a sufficient justification is when a "suspect classification" is involved. Graham v. Richardson, 403 U.S. 365 (1971) (aliens). When neither of these two situations is present, the classification is presumed to be valid, and the state need show only that some rational relationship exists between the state objective and the classification that is the subject of the challenge. San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1, 40 (1973); Lindsey v. Normet, 405 U.S. 56, 72-73 (1972); Dandridge v. Williams, 397 U.S. 471, 486-87 (1970); Morey v. Doud, 354 U.S. 457, 465-66 (1957); Williamson v. Lee Optical, Inc., 348 U.S. 483, 490-91 (1955); Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61, 78 (1911). See also B. Schwartz, Constitutional Law 285-322 (1972).

83. 411 U.S. at 35-37.

84. Id. at 35.

85. Id. at 35-36. In Rodriguez, plaintiffs argued that freedom of speech would be a meaningless guarantee unless the speaker were able to articulate his thoughts intelligently and persuasively. Also it would not be possible to make effective use of the right to vote unless there existed an informed electorate. The Supreme Court, however, replied that although it has been zealous in the protection of these rights, it has never presumed the authority or the ability to guarantee the "most effective speech or the most informed electoral choice." Id. at 36 (emphasis omitted). A great number of school finance reformers believe that had education been deemed a fundamental right by the Supreme Court, many of the existing school district classifications would not be able to withstand application of the compelling interest test. The Rodriguez Court agreed with the court in Serrano that school finance systems such as those in California and Texas "will not pass muster" under a "strict scrutiny" standard of review. Id. at 16-17. Since the Court applied the less stringent rational basis test, however, it found the Texas system constitutional. Justice Powell wrote that "[t]he need is apparent for reform in tax systems which may well have relied too long and too heavily on the local property tax." Id. at 58. Justice Stewart, concurring, added that "[t]he method of financing public schools in Texas, as in almost every other State, has resulted in a system of public education that can fairly be described as chaotic and unjust." Id. at 59 (Stewart, J., concurring).

Court found that classification by district property wealth was not suspect.[86] The Court stated that it could not find a discernible class of poor who had been discriminated against. Moreover, even if such a class were identifiable, there would be no equal protection violation since the deprivation was not absolute.[87]

In *Rodriguez,* Justice White in dissent opined that the parents and children in the Edgewood school district had suffered invidious discrimination in violation of the equal protection clause.[88] In his view, the class consisted of parents and children in Edgewood and other similarly situated school districts where the tax base was sufficiently small as to make comparable per pupil expenditure for education impossible.[89]

Justice Marshall's dissenting opinion[90] is especially noteworthy, because "it represents the first explicit adoption by a member of the Court" of an alternative to the two-tier approach for equal protection analysis currently subscribed to by the majority.[91] Justice Marshall objected to the majority's attempt "to establish today that equal protection cases fall into one of two neat categories which dictate the appropriate standard of review—strict scrutiny or mere rationality."[92] He offered a sliding scale test for equal protection analysis.

Whether the Court will adopt a sliding scale standard for equal protection, or conclude someday that education is a fundamental right, would be mere speculation. It is evident in either case, however, that Justice Marshall's dissent has set the theoretical groundwork on which to build anew in the areas of both equality of educational financing and equal educational opportunity.

V. Reform Through the State Courts

Much of the early school finance litigation alleged a violation of both state and federal constitutions.[93] Since *Rodriguez* has apparently signaled the demise of the federal equal protection clause[94] as a vehicle for reform, this

86. Id. at 28.

87. Id. at 25. The Court's distinction between absolute and relative deprivation has been the focal point of criticism. Coons, Introduction: "Fiscal Neutrality" After Rodriguez, 38 Law & Contemp. Prob. 299, 304 (1974).

88. 411 U.S. 1, 68 (White, J., dissenting).

89. Id. at 69.

90. Id. at 70 (Marshall, J., dissenting).

91. Roos, The Potential Impact of Rodriguez on Other School Reform Litigation, 38 Law & Contemp. Prob. 566, 569 (1974). This alternative approach was proposed by Professor Gerald Gunther. Gunther, Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection, 86 Harv. L. Rev. 1, 20-37 (1972). See also Comment, Equal Protection in Transition: An Analysis and a Proposal, 41 Fordham L. Rev. 605 (1973).

92. 411 U.S. at 98 (Marshall, J., dissenting).

93. E.g., Serrano v. Priest, 5 Cal. 3d 584, 487 P.2d 1241, 96 Cal. Rptr. 601 (1971); Robinson v. Cahill, 62 N.J. 473, 303 A.2d 273, cert. denied, 414 U.S. 976 (1973).

94. The Supreme Court in Rodriguez left open the possibility that an absolute deprivation of education might be a violation of the federal equal protection clause. It may also be a violation of the equal protection clause where the class discriminated against is readily identifiable or where it can be shown that present inequities result from a history of deliberate economic segregation or

Comment will consider various legal approaches that are still open to finance reformers.

Although the Supreme Court in *Rodriguez* did not find a violation of the federal equal protection clause, a school financing system such as that challenged in *Rodriguez*, may nonetheless violate a state's own equal protection clause. Where, as in *Serrano,* an independent state ground exists for declaring a state statute unconstitutional, a pronouncement by the United States Supreme Court that the statute did not violate the federal equal protection clause would not have any effect on the unconstitutionality of the state statute.[95] Since all but four states have an equal protection clause in their constitutions,[96] reform through the use of a state equal protection clause is still a viable method of legal attack.

In addition to *Serrano,* challenges to existing systems of school financing as violating a state equal protection clause have been made in various cases including *Governor v. State Treasurer*[97] and *Shofstall v. Hollins.*[98]

In *Governor v. State Treasurer,* the Supreme Court of Michigan held that the primary issue was one of equality of educational support.[99] It reasoned that the state constitution[100] made education a fundamental right.[101] This, taken together with the state's equal protection clause, required that all school districts be provided with equal financial support and maintenance.[102] As measured by this guideline, the court found the system which existed at the time of the suit unconstitutional.[103]

Implicit in the court's analysis was the adoption of an input standard for gauging equality of educational opportunity. Justice Marshall espoused a similar standard in his dissent in *Rodriguez.*[104] Under such a standard, the issue is then what resources are provided for the children's education, rather than what the children are able to do with them.[105] This appears to be a

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other purposeful discrimination. 411 U.S. 1, 25, 37. For a discussion of the type of cases which might fit within these categories see Tractenberg, Reforming School Finance Through State Constitutions: Robinson v. Cahill Points the Way, 27 Rutgers L. Rev. 365, 382-84 (1974).

95. C. Wright, Federal Courts § 107, at 482 (2d ed. 1970). This is true because the state's highest court speaks with final authority on what is unconstitutional under state law. See, e.g., Scripto, Inc. v. Carson, 362 U.S. 207, 210 (1960); American Ry. Express Co. v. Kentucky, 273 U.S. 269, 272 (1927); Thompson v. Engelking, 96 Idaho 793, 818, 537 P.2d 635, 660 (1975) (Donaldson, J., dissenting).

96. The states of Colorado, Delaware, Mississippi and Montana do not have equal protection clauses in their constitutions.

97. The case is entitled Governor v. State Treasurer in the official report but Milliken v. Green in the unofficial and in the court records. 389 Mich. 1, 203 N.W.2d 457 (1972), vacated, 390 Mich. 389, 212 N.W.2d 711 (1973).

98. 110 Ariz. 88, 515 P.2d 590 (1973).

99. 389 Mich. at 11-12, 203 N.W.2d at 460.

100. Mich. Const. art. VIII, § 2.

101. 389 Mich. at 25-28, 203 N.W.2d at 468-69.

102. Id. at 11-12, 203 N.W.2d at 460-61.

103. Id. at 37-38, 203 N.W.2d at 473-74.

104. 411 U.S. at 84 (Marshall, J., dissenting).

105. Id.

better approach than applying an output standard, since the controversy[106] over the exact relationship between dollars spent and quality of the resultant education is circumvented.

Since the Michigan supreme court based its decision on an interpretation of state constitutional requirements only, the conclusion that the financing system was unconstitutional could withstand a contrary holding, founded on federal constitutional mandates, by the United States Supreme Court.[107] Almost a year after its original decision, however, the Michigan supreme court concluded that the case should never have been heard, and consequently dismissed the complaint and vacated the earlier decision.[108] Apparently the court felt that the Michigan legislature had moved sufficiently fast towards reforming the financing statutes in the state and that the case had become moot.[109]

In the *Shofstall*[110] case, taxpayers and students in Arizona brought suit alleging that the state system of financing public education violated both the state and federal equal protection clauses. The trial court had granted summary judgment to the plaintiff taxpayers on the ground that the system of school financing in Arizona invidiously discriminated against them.[111] The Arizona supreme court reversed, holding that although the state constitution did guarantee a basic right to education, any system of education would meet the requirement, provided it was "rational, reasonable and neither discriminatory nor capricious."[112] The court then went on to find the Arizona system constitutional. The court accepted Justice Powell's argument[113] from *Rodriguez* that if property taxation were unconstitutional for financing education, it would likewise be unconstitutional for financing other essential

106. See notes 15-19 supra and accompanying text.

107. See note 95 supra and accompanying text. The court ruled that in the state of Michigan, education was a fundamental right. 389 Mich. at 25-28, 203 N.W.2d at 468-69.

108. The case was presented to the Michigan supreme court on certification by the lower court. Michigan court rules give the supreme court discretion to permit a lower court to certify a question for appeal on the motion of the governor of the state. Mich. Gen. Ct. R. 797. The court therefore was able to decide that the question should not have been certified. This decision has been criticized because there is no discretion to deny the governor the opportunity to seek declaratory relief in the trial court and, if unsuccessful, to appeal to the state supreme court in the usual fashion. Mich. Const. art. V, § 8; Mich. Gen. Ct. R. 521. Thus, the proper disposition would appear to be a remand of the case to the trial court and not a dismissal of the entire case. Hain, Michigan: Milliken v. Green: Breaking the Legislative Deadlock, 38 Law & Contemp. Prob. 350, 359 (1974).

109. 390 Mich. 389, 212 N.W.2d 711 (1973). Although the case had become moot, the court did not say so explicitly. The concurring opinions also only implied that the case was moot by pointing out changed circumstances. Id. at 389 n.1, 401-02, 212 N.W.2d at 711 n.1, 717-18. The Michigan legislature had reformed the state school financing system by enacting a form of district power equalizing. See generally Mich. Comp. Laws Ann. §§ 388.1101-.1279 (Supp. 1975).

110. 110 Ariz. 88, 515 P.2d 590 (1973).

111. Id. at 89, 515 P.2d at 591.

112. Id. at 90, 515 P.2d at 592.

113. Id. at 91, 515 P.2d at 593.

services.[114] Implicit in this argument is the assumption that local property taxation, even with its detrimental effect on education, cannot be condemned as unconstitutional for financing education, without also condemning it as unconstitutional for financing all other essential services such as fire and police protection. No effort was made, however, to distinguish between education and other essential services. It is submitted that a very fundamental distinction exists, not so much in the nature of the importance of the services compared, but in their availability. For example, disparities in funding may cause one fire department to be less efficient than another. In an emergency, however, assistance can be obtained from nearby communities. On the other hand, a child who is receiving an inferior education has no recourse and cannot invite himself to attend classes in another school district.

As in *Shofstall*, most state courts are generally reluctant to expand the meaning of their state equal protection clauses beyond the interpretation which the United States Supreme Court is willing to give to the equal protection clause of the fourteenth amendment. Still another avenue remains, however, for an attack on present school finance inequities—the education clauses of specific state constitutions.[115]

VI. Litigation Through a State Education Clause

Two weeks after the United States Supreme Court decided *Rodriguez*, the New Jersey supreme court handed down its decision in *Robinson v. Cahill*.[116] In *Robinson*, plaintiffs argued that the equal protection clauses of both the United States and New Jersey constitutions prohibited the state from dis-

114. 411 U.S. 1, 54. "[I]f local taxation for local expenditures were an unconstitutional method of providing for education then it might be an equally impermissible means of providing other necessary services . . . ." Id.

115. Nearly all states have provisions in their state constitutions regarding public education. For example, some state constitutions mandate a "thorough and efficient" system of public schools. Md. Const. art. VIII, § 1; Minn. Const. art. VIII, § 3; N.J. Const. art. VIII, § 4; Ohio Const. art. VI, § 2; Pa. Const. art. III, § 14; S.D. Const. art. VIII, § 15; W. Va. Const. art. XII, § 1; Wyo. Const. art. VII, § 9. Some state constitutions mandate a "general and uniform" system of public schools. Ariz. Const. art. XI, § 1; Idaho Const. art. IX, § 1; Ind. Const. art. VIII, § 1; N.C. Const. art. IX, § 2; Ore. Const. art. VIII, § 3; Wash. Const. art. IX, § 2. Other state constitutions mandate a "uniform" system of public education. Colo. Const. art. IX, § 2; Fla. Const. art. IX, § 1; Nev. Const. art. XI, § 2; N.M. Const. art. XII, § 1; N.D. Const. art. VIII, § 148; Utah Const. art. X, § 1; Wis. Const. art. X, § 3. Still other states have provisions in their state constitutions mandating that the state provide an "efficient" system of public instruction. Ark. Const. art. XIV, § 1; Del. Const. art. X, § 1; Ky. Const. § 183; Tex. Const. art. VII, § 1. Arkansas and Delaware, in addition to requiring efficiency, mandate that the system of public education be "general." Ark. Const. art. XIV, § 1; Del. Const. art. X, § 1. While there are other state constitutional provisions relating to education, the above examples have been chosen because of the existence of key phrases such as "thorough and efficient" and "general and uniform." See Tractenberg, Reforming School Finance Through State Constitutions: Robinson v. Cahill Points the Way, 27 Rutgers L. Rev. 365 (1974).

116. 62 N.J. 473, 303 A.2d 273, cert. denied, 414 U.S. 976 (1973).

criminating in favor of children living in wealthy districts.[117] Plaintiffs also alleged that the "thorough and efficient"[118] clause of the New Jersey constitution required the state to provide each and every child in the state with equal educational opportunity.[119] On the basis of evidence showing substantial fiscal disparities among New Jersey's 600 school districts, as well as evidence showing a direct relationship between property wealth and per pupil expenditures, the trial court concluded that disparities in per pupil spending had an adverse effect on the quality of education provided to children living in poor districts.[120] Hence, there was a violation of the equal protection clauses of both the federal and state constitutions.[121] On appeal, the state supreme court rejected the lower court's equal protection argument.

In a unanimous decision, the New Jersey supreme court accepted the trial court's finding of fact that the "disparity in the number of dollars spent per pupil" was based upon residency in the various school districts.[122]

While acknowledging that "[c]onceivably a State Constitution could be more demanding"[123] than the federal equal protection clause, the court declined the invitation to give to the New Jersey equal protection clause a meaning not contained in the equal protection clause of the fourteenth amendment.[124] Classification by wealth was specifically deemed not to be "suspect"[125] and education was found not to be a fundamental right in New

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117. 118 N.J. Super. 223, 287 A.2d 187 (1972), modified and aff'd, 62 N.J. 473, 303 A.2d 273, cert. denied, 414 U.S. 976 (1973).

118. The New Jersey constitution reads: "The Legislature shall provide for the maintenance and support of a thorough and efficient system of free public schools for the instruction of all the children in the State between the ages of five and eighteen years." N.J. Const. art. VIII, § 4, ¶ 1.

119. Complaint at Second Count ¶¶ 3 & 5, at 18, as quoted from Tractenberg, New Jersey: Robinson v. Cahill: The "Thorough and Efficient" Clause, 38 Law & Contemp. Prob. 312, 314-15 (1974).

120. 118 N.J. Super. 223, 280, 287 A.2d 187, 217 (1972).

121. Id.

122. 62 N.J. at 481, 303 A.2d at 276. The court found it evident "that State aid does not operate substantially to equalize the sums available per pupil." Id. It noted also that "the quality of educational opportunity does depend in substantial measure upon the number of dollars invested," although no explanation was offered as to how such a conclusion was reached. Id., 303 A.2d at 277. At the time the original complaint was filed, the New Jersey financing statute, N.J. Stat. Ann. §§ 18A:58-1 to 58-18.1 (Supp. 1975), provided for a traditional foundation plan. Under the New Jersey plan as it existed, for each school district that raised its fair share of tax dollars, the state guaranteed a minimum foundation level, by providing the difference between that level and the amount actually raised. See note 57 supra for the present status of this plan.

123. 62 N.J. at 490, 303 A.2d at 282.

124. See id. at 492, 500-01, 303 A.2d at 283, 287. The court refused to decide Robinson on the basis of the state's equal protection clause largely because it felt that such a decision would require a rigid solution as a remedy. Considering the argument given by Justice Powell in Rodriguez, it perceived difficulty in separating education from other essential services. Id. at 492, 303 A.2d at 283. The court stated that, while nothing could be more fundamental than food and shelter, there were still varying levels of welfare assistance in New Jersey. Id. at 495, 303 A.2d at 284.

125. Id. at 492, 303 A.2d at 283.

Jersey.[126] Although the court concluded that the New Jersey constitution[127] did not require that all taxpayers be treated equally, it did find that the "thorough and efficient"[128] clause warranted that all students be given equal educational opportunity.[129] In measuring whether there was equal educational opportunity, the court adopted the dollar input standard and found that the constitutional mandate was not met.[130] It pointed out that under the dollar input standard, the existing system of school financing in New Jersey could not satisfy the constitutional mandate unless the lowest per pupil expenditure existing in the state was itself within that requirement. Rather than declare what the specific monetary requirement was under the state constitution, the court said only that the constitution's "thorough and efficient" clause guaranteed to every school age child an educational opportunity "which is needed in the contemporary setting to equip a child for his role as a citizen and as a competitor in the labor market."[131]

The decision in *Robinson* has paved the way for a new approach to the financing of education. As an alternative to an equal protection attack, *Robinson* has shown that existing school financing systems may be condemned as violative of a state constitution's education clause. Other court challenges based upon an alleged violation of a state's education clause have been brought in both Idaho[132] and Washington.[133]

In *Thompson v. Engelking*,[134] the Idaho supreme court reversed a lower court finding that the Idaho system for financing education violated the state constitution. The lower court noted that the constitution mandated that the state provide and maintain a uniform system of public schools.[135] Although

126. Id. at 494, 303 A.2d at 284.

127. N.J. Const. art. VIII, § 1, ¶ 1(a).

128. Id. § 4, ¶ 1.

129. The court stated that it did not doubt that equal educational opportunity for all children was precisely in the minds of the framers of the state constitution. Furthermore, the mandate that there be maintained a "thorough and efficient" system of free public schools could have "no other import." 62 N.J. at 513, 303 A.2d at 294.

130. The court used the dollar input criterion because it was "plainly relevant" and because it had been shown "no other viable criterion for measuring compliance with the constitutional mandate." Id. at 515-16, 303 A.2d at 295.

131. Id. at 515, 303 A.2d at 295. In tying the constitutional requirement to competition in the labor market, the court indirectly showed an awareness that school financing inequities result in many other socioeconomic inequities. Professor Coons and his colleagues warned the reformers of school financing not to treat school finance reform "as an outrider of the racial problems." Coons, Clune & Sugarman, Educational Opportunity: A Workable Constitutional Test for State Financial Structures, 57 Calif. L. Rev. 305, 355 (1969). But a nexus does exist since "racially separate schools inhibit elimination of school inequality, and unequal schools retard eradication of school segregation. . . . [H]ousing restrictions [are defended] by the argument that low-cost housing will mean an influx of poor families, which will cause a reduced tax base for the operation of their schools. In this way, one social injustice is made the excuse for another . . . ." Silard & Goldstein, supra note 54, at 324-25.

132. Thompson v. Engelking, 96 Idaho 793, 537 P.2d 635 (1975).

133. Northshore School Dist. No. 417 v. Kinnear, 84 Wash. 2d 685, 530 P.2d 178 (1974).

134. 96 Idaho 793, 537 P.2d 635 (1975).

135. Id. at 795, 537 P.2d at 637. The Idaho constitution requires that the legislature "establish

acknowledging that the legislature had a constitutional duty to establish and maintain a system of public schools, the court felt that the enactment of a foundation plan by the state sufficiently satisfied that constitutional mandate.[136]

The court rejected the notion that equality of education required equal dollar expenditure per pupil.[137] As pointed out in this Comment,[138] the equal dollar standard is not only not exclusive, but also has not been accepted by any court to date.[139] By failing to perceive and consider that other standards exist to gauge equality of educational opportunity, the court did a disservice both to itself and to the school children in Idaho.[140] In spite of the Idaho constitution's mandate,[141] the court's only concession was that, even if the constitution required equality of education, it did not demand equal dollar expenditure.[142] The question of whether equal educational opportunity itself was actually mandated by the education clause of the Idaho constitution was never resolved by the court. It was with this failure that the dissent took issue.

The problem, as the dissent perceived, rested not in the disparities in educational expenditure alone, but instead with the variations in the ability to raise revenues for education owing to wide disparities in district property wealth.[143] The dissent criticized the majority opinion for declaring on the one hand that it was the duty of the legislature to fund at least a part of the school system, and stating on the other hand that existing funding levels were somehow adequate without saying exactly why. To the dissent, the mandate of the constitution was clear. Although equal dollars per pupil were not required, the constitution did require the state to provide a system of education that was substantially free from dependence upon variable property wealth.[144] To the dissent it was clear that a general and uniform system is one which is fiscally neutral, not one which requires equal dollars per pupil.[145] It is submitted that the dissent's reasoning is more persuasive. A general, uniform and thorough system of education is not necessarily one that requires

and maintain a general, uniform and thorough system of public, free common schools." Idaho Const. art. IX, § 1.

136. 96 Idaho at 810-11, 537 P.2d at 652-53. Contra, Serrano v. Priest, 5 Cal. 3d 584, 487 P.2d 1241, 96 Cal. Rptr. 601 (1971); Robinson v. Cahill, 62 N.J. 473, 303 A.2d at 273, cert. denied, 414 U.S. 976 (1973). These two cases are discussed at notes 62-65 & 116-31 supra and accompanying text.

137. 96 Idaho at 799-800, 537 P.2d at 641-42. Both the courts in California and New Jersey likewise rejected the notion that equal dollar expenditure was required for equality of educational opportunity.

138. See notes 13-49 supra and accompanying text.

139. See notes 25-28 supra and accompanying text.

140. As pointed out in notes 13-49 supra and accompanying text, many other standards for gauging equality of educational opportunity exist.

141. Idaho Const. art. IX, § 1.

142. 96 Idaho at 799-800, 537 P.2d at 641-42.

143. Id. at 827-28, 537 P.2d at 669-70 (Donaldson, J., dissenting).

144. Id. at 828, 537 P.2d at 670.

145. Id. at 827, 537 P.2d at 669.

equal dollars per pupil, but it must be one which does not have any inherent biases favoring one group over another. Disparities in taxable property wealth is just such a bias. Under fiscal neutrality, educational expenditures may vary for any reason other than the wealth of the school district. It is further submitted that a general, uniform and thorough system of education would exist under fiscal neutrality.

Another recent case decided under a state constitution's education clause was *Northshore School District No. 417 v. Kinnear.*[146] The issue in *Kinnear* was the same as that in *Thompson,* that is, whether the state had fully met its constitutional responsibility of providing a "general and uniform system of public schools."[147] A majority of the Washington supreme court could agree only that plaintiffs had failed to prove their case.[148] Two of the majority justices, in a separate opinion, explicitly refused to concur in the part of the majority opinion which suggested that the state was currently providing ample education for all students.[149] Because only three justices explicitly found the existing system of funding education to be constitutional and because the author of the majority opinion has since retired from the bench, it is possible that future cases in Washington will be decided in accordance with the dissent's finding that the existing system of financing education is unconstitutional.[150] Washington is the only state whose constitution speaks of education as a "paramount duty."[151] Since the eventual outcome of litigation in the state of Washington in the area of educational financing will undoubtedly have an impact on similar court challenges in other states having education clauses less forcefully drafted, it becomes important to consider the analysis given by the *Kinnear* dissent.

The dissent emphasized that the Washington constitution placed an absolute duty on the state alone to provide ample provision for the education of all school age children within the state.[152] This duty was deemed dominant above all other duties of the state since it was the only duty made "paramount" by the state constitution.[153] Not only did the constitution impose "upon the State a *'paramount duty* . . . to make *ample* provision . . .' but it

146. 84 Wash. 2d 685, 530 P.2d 178 (1974).

147. Wash. Const. art. IX, § 2. Five separate opinions were filed. 84 Wash. 2d 685, 530 P.2d 178 (1974).

148. 84 Wash. 2d at 729, 530 P.2d at 203.

149. Id. at 730-31, 530 P.2d at 203-04 (Rosellini, J., concurring). Justice Wright concurred with Justice Rosellini. The concurring justices noted that "[we] do not, however, concur in those portions of the opinion which would seem to suggest that the State is now providing 'ample' education for all students. There is too much public opinion to the contrary and too many facts of which the members of this court are inescapably aware to justify such a conclusion." Id. at 730, 530 P.2d at 203.

150. Morris & Andrews, Ample Provision for Washington's Common Schools: Northshore's Constitutional Promises to Keep, 10 Gonzaga L. Rev. 19, 28 (1974).

151. The Washington constitution reads: "It is the paramount duty of the state to make ample provision for the education of all children residing within its borders, without distinction or preference on account of race, color, caste, or sex." Wash. Const. art. IX, § 1.

152. See 84 Wash. 2d at 755, 530 P.2d at 215-16 (Stafford, J., dissenting).

153. Id. at 754-56, 530 P.2d at 215-16.

requires that the goal be achieved 'without distinction or preference on account of race, color, *caste,* or sex.' "[154] The dissent concluded that the constitution assured to every school age child in the state an education unaffected by cultural heritage or wealth.[155]

Because of the paramount duty of the state, the education clause was deemed to provide an independent guarantee of equal protection, in addition to whatever guarantees were provided by the state's equal protection clause.[156] The importance of this conclusion lies in the implication that, perhaps because of the greater guarantee, the state could not justify the disparities in educational expenditures resulting from the present school financing system, even if the state were able to show that "a compelling interest" existed.[157]

VII. Conclusions and a Proposal

Because of the present practice of financing education predominantly through *ad valorem* property taxes, a school district located in an area which is relatively poor in property wealth must levy a tax at a rate considerably higher than must a wealthy district in order to raise the same amount of school dollars. Since one cannot justify different educational needs of children on the basis of the wealth of the district in which they reside, it is difficult to justify the variations in the level of educational services which result from tax base disparities. The present system of school financing is unfair to children living in poor districts since the tax base from which educational resources can be raised is severely limited.[158] To make matters worse, most states have limitations on the maximum tax rate which may be levied for financing education.[159] Thus, because of the tax limits imposed, people living in less wealthy districts very often could not spend as much per child even if they were willing to accept an onerous rate of taxation.[160] The most regressive

154. Id. at 755-56, 530 P.2d at 216 (footnote omitted).

155. Id. at 756, 530 P.2d at 216-17.

156. Id., 530 P.2d at 217.

157. In Kinnear, the dissent characterized the majority decision as "a legal pygmy of doubtful origin" that "cannot withstand a critical analysis either factually or legally," and whose "comfortable 'solution' may be short-lived." Id. at 732, 530 P.2d at 204 (Stafford, J., dissenting).

158. The practice of financing education through ad valorem property taxation hurts those with fixed income the most. E.g., Report of the Citizens Union Committee on Education Finance, Financing Public Education in New York State: An Analysis of the Fleischmann Commission Report, 48 N.Y.U.L. Rev. 6, 7-9 (1973).

159. A majority of states have maximums on the rates of taxation for financing education. Harrison, What Now After San Antonio Independent School District v. Rodriguez?: Electoral Inequality and the Public School Finance Systems in California and Texas, 5 Rutgers-Camden L.J. 191, 194 (1974); e.g., N.J. Stat. Ann. §§ 52:27BB-92 to -93 (1955); Texas Educ. Code Ann. § 20.04 (1972).

160. In addition to tax ceilings, some states even have laws prohibiting the use of non-property taxation for school financing. Harrison, What Now After San Antonio Independent School District v. Rodriguez?: Electoral Inequality and the Public School Finance Systems in California and Texas, 5 Rutgers-Camden L.J. 191, 196 (1974).

feature of local property taxation, however, is the fact that the total amount of taxes paid is deductible against taxable income for purposes of federal income taxation.[161] Because the federal income tax structure is graduated, people in higher income brackets receive a greater benefit from a tax deduction than those in lower income brackets.[162]

Since property taxes are usually imposed at the local level, children residing in areas that are heavily populated by retired citizens may often be shortchanged.[163] Furthermore, because the available tax revenues cannot be ascertained far in advance, planning for the educational needs of the children in a school district is often impossible.

The substantial inequities which existed in the financing of elementary and secondary education brought about pressure for reform in the early 1900's.[164] It was not until the late 1960's, however, that the use of court litigation became widespread.[165]

Since the California supreme court's pronouncement in *Serrano*, school finance reform has vacillated between success and failure. The refusal by courts to overturn patently inequitable financing legislation on the ground that equal educational opportunity is too nebulous a concept for the judiciary is unfortunate, since a standard can always be found which is both equitable and manageable. This Comment has described six of the many different standards available for gauging equality of educational opportunity.[166] As noted, equality of educational opportunity can be measured in terms of inputs or in terms of outputs. It can also be measured in terms of the maximum

161. Int. Rev. Code of 1954, § 164.

162. B. Bittker & L. Stone, Federal Income Estate and Gift Taxation 190 (4th ed. 1972). For example, a person who is in the seventy percent marginal tax bracket actually ends up paying only thirty percent of every dollar paid for property taxes since he is allowed a deduction for an amount which, if taxed, would have been taxed at seventy percent. This is in contrast to someone in the twenty-five percent marginal tax bracket who actually ends up paying seventy-five percent of every dollar paid for property taxes. In Rodriguez, the Supreme Court pointed out that the few wealthiest districts in Texas have the highest median family income and spend the most on education, and that the several poorest districts have the lowest income and spend the least on education. For the remaining districts, however, no direct correlation exists between family income and educational expenditure. 411 U.S. at 26-27.

163. See Silard & Goldstein, supra note 54, at 317-18. Since retired citizens most likely do not have school age children, they are less likely to vote for increased school spending. Id. It is, of course, possible that in an area heavily populated by retired citizens, there will be a relatively small number of school age children. In such a situation, per pupil expenditure could be high.

164. R. Johns, Some Critical Issues in School Financing, in Constitutional Reform of School Finance 160 (K. Alexander & K. Jordan eds. 1973).

165. See, e.g., Rodriguez v. San Antonio Independent School Dist., 337 F. Supp. 280 (W.D. Tex. 1971), rev'd, 411 U.S. 1 (1973); McInnis v. Shapiro, 293 F. Supp. 327 (N.D. Ill. 1968), aff'd per curiam sub nom. McInnis v. Ogilvie, 394 U.S. 322 (1969); Hobson v. Hansen, 269 F. Supp. 401 (D.D.C. 1967), aff'd sub nom. Smuck v. Hobson, 408 F.2d 175 (D.C. Cir. 1969) (en banc); Serrano v. Priest, 5 Cal. 3d 584, 487 P.2d 1241, 96 Cal. Rptr. 601 (1971); Governor v. State Treasurer, 389 Mich. 1, 203 N.W.2d 457 (1972), vacated, 390 Mich. 389, 212 N.W.2d 711 (1973); Robinson v. Cahill, 62 N.J. 473, 303 A.2d 273, cert. denied, 414 U.S. 976 (1973).

166. See notes 13-49 supra and accompanying text.

allowable deviation from a median per pupil expenditure for education in a particular state. This standard is called the maximum variable ratio standard. Other standards discussed in this Comment included fiscal neutrality, equal dollars per pupil and minimum adequacy. Under fiscal neutrality, equality of educational opportunity would exist whenever the variations in per pupil expenditure for education are not the result of wealth differences in school districts.[167]

The Supreme Court's decision in *Rodriguez* did not completely rule out the possibility that present education financing laws could be violative of the federal equal protection clause. The Court merely found that there was no absolute deprivation in the Texas system and that the class discriminated against in *Rodriguez* was not readily identifiable.[168] Even had the Court ruled out the federal equal protection clause as an instrument for education financing reform, the Court's decision would not preclude a finding by a state court that a violation of a state equal protection clause existed. Moreover, challenges may be made in state courts based on specific education clauses such as the "thorough and efficient"[169] or the "uniform and general" clauses.[170]

A more expeditious approach may be to persuade the individual state legislatures of the need for reform. Much activity in the form of legislative reform did take place in the early 1970's, spurred in part by court challenges. A large number of the reforms enacted were variations of the district power equalizer (DPE) type.[171] Most of these enactments, however, were without a recapture clause and, in fact, usually contained a save-harmless clause[172] so that wealthier districts would not receive any less state aid than they did prior to the new legislation. It has been said that "[t]he inclusion of save-harmless clauses, [as well as the deletion of a recapture provision] reflects both political necessity and a justifiable desire to minimize the disruption of the transition to a new financing system."[173] It is submitted that equal educational opportunity can exist despite the presence of political necessities. Any DPE formula without a provision for full recapture does very little to equalize educational opportunities since the pre-existing disparities in per pupil expenditures could not be eliminated without recapture. Because the realities of political necessity will often preclude the enactment of full recapture, it is suggested that the recapture provision be tied into a maximum variance ratio formula. Under such a system of DPE, each district will still be guaranteed an equal sum per pupil for a given tax rate. Unlike a true DPE formula, there is no complete recapture initially owing to political necessities. Unlike most of the existing DPE plans, some recapture would take place, but only if the total per pupil

167. See notes 30-38 supra and accompanying text.
168. See note 87 supra and accompanying text.
169. See notes 116-31 supra and accompanying text.
170. See notes 134-57 supra and accompanying text.
171. See notes 43 & 58-61 supra and accompanying text.
172. See note 60 supra and accompanying text.
173. Legislative Reforms, supra note 43, at 467.

expenditure for a given district exceeded a maximum variance allowed by the state.[174]

In tying recapture to a maximum variable ratio, it would be politically expedient to set the initial ratio rather high; then wealthy districts would not lose much education revenue due to recapture. In order to achieve convergence, however, reformers will have to insist that, as part of this solution, the legislature provide that the maximum allowable variable ratio approach one over a finite period of time. True fiscal neutrality would result as the ratio reaches one, since all revenue raised in excess of that allowed by the DPE plan would be recaptured by the state. In this manner, disruption of the existing system of school financing will be kept to a minimum. Over a period of time, true convergence would result and a new level of educational opportunity would be achieved.

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174. For example, if the state were to guarantee $900 per pupil for all districts taxing at the rate of $2.56, any district taxing at that same rate and raising more than $900 per student would be allowed to use that excess so long as the total per pupil expenditure did not exceed some maximum ratio of $900, such as 125 percent.