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State Court Intervention in School Finance Reform

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ARTICLES

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I. INTRODUCTION

UNDER CHIEF JUSTICE EARL WARREN, the United States Supreme Court implemented a new view of judicial activism that included undertaking social reforms traditionally considered a legislative function and which required the judicial branch to become directly involved in the administration of reform programs. In the area of school financing, cases decided since the Warren reform movement have been inconsistent and dependent upon the Court's attitude toward the limits of judicial activism.[1] The outcome is determined to a great degree by the Court's balancing of its competency to decide the issues against the probable effectiveness of its decision.

To understand the courts' interpretation of the issues involved in school finance cases and to predict the success of a constitutional challenge to a state statute, it is necessary to recognize the increasingly political nature of the decisions. The legal issues in state court litigation of school financing systems are framed in terms of the denial of equal protection (or equal educational opportunity) and the right to education.[2] An examination of recent state court decisions indicates that the analysis is directed not at the method of distribution of state funds but at the adequacy of the funding with the aim of compelling the state to fund all public education at a higher level.[3] Therefore, what appears to

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[1] Rodriguez v. San Antonio Indep. School Dist., 411 U.S. 1 (1973); Serrano v. Priest *I*, 5 Cal. 3d 584, 487 P.2d 1241, 96 Cal. Rptr. 601 (1971); Robinson v. Cahill *I*, 62 N.J. 473, 303 A.2d 273 (1973), *cert. denied*, 414 U.S. 976 (1974).

[2] Rodriguez v. San Antonio Indep. School Dist., 411 U.S. 1 (1973).

[3] *See, e.g.*, Danson v. Casey, 33 Pa. Commw. Ct. 614, 382 A.2d 1238 (1978) (plaintiffs alleged no discrimination against their Philadelphia school district but claimed that the state formula failed to provide sufficient state support to the district); Seattle School Dist. No. 1 v. State, 90 Wash. 2d 476, 585 P.2d 71 (1978) (holding that the state financing system failed to produce enough funds to allow the districts to carry out a basic program of education as required by the state constitution).

be at issue in school finance cases is not the discovery and imposition of equalizing formulas but the determination of the scope of the area in which complicated educational and fiscal policy issues are to be decided and the extent to which state educational policies are subject to judicial review.

In assessing its competency to review the constitutionality of a state school financing system, a court must deal with the absence of objectively discernible standards for determining the adequacy or equality of the educational opportunities provided by the state system. Since no one system has been proven to produce equal opportunity, a court, particularly when the litigants before it are unrepresentative of the population to be affected by its decision,[4] is virtually without guidance in upholding or striking down a statute based on a constitutional challenge. Of equal importance in shaping a remedy is the court's assessment of its ability to take into consideration the political forces interested in the outcome of school finance litigation.[5] For example, the general issue of taxation and the narrower issue of whether the taxation basis should be primarily income or property, as well as questions of control of educational policy and funding, have been the subject of public debate and advocacy on all sides. Conflicting proposals have come from teachers' unions, property owners, commercial establishments and local school boards.

The wide interest in school finance reform is attributable to the impact the level of state funding has on business and industry within the state, property values and the quality of neighborhoods, and the income of all state residents. An additional fact to be taken into consideration is that complicated tax statutes and formulas for funding public education preclude informed public debate of the issues.

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[4] The school finance reform movement appears to be an elitist rather than fundamental movement, spearheaded by a network of education finance scholars, lawyers, and personnel from the United States Office of Education. *See* Kirst, *The New Politics of State Education Finance*, 60 PHI DELTA KAPPAN 417, 428 (1979). Typically, the plaintiffs in the litigation are urban school districts, usually serving children of poor inner city residents rather than those of the middle and upper classes whose interests are more regularly represented in state legislatures. *See, e.g.*, Board of Educ., Levittown Union Free School Dist. v. Nyquist, 94 Misc. 2d 466, 408 N.Y.S.2d 606 (Sup. Ct. 1978); Board of Educ. v. Walter, 58 Ohio St. 2d 368, 390 N.E.2d 813 (1979). *See also* J. COONS, W. CLUNE, & S. SUGARMAN, PRIVATE WEALTH AND PUBLIC EDUCATION 5 (1970).

[5] For a discussion of the competing forces joined in the school finance reform movements, see Kirst, *supra* note 4. At the very least, the movements include, on the one side, educators, scholars, and state department of education personnel who want to reform school financing through leveling up the lowest spending school districts, thereby spending more state money on education. On the other side are proponents of property tax reduction, parents of children in private schools, and persons who advocate shrinking the size of government and leveling down expenditures for public education.

The income climate of the state plays an important part in a school finance decision. The initial school finance reforms occurred in the early 1970s during a period of economic growth, but decisions are currently being made as the economy appears to be heading into a recession and while the nation is in the midst of a movement to reduce and roll back property taxes. Current conditions are basic to the school finance reform issue.[6]

In gauging its effectiveness in the school finance reform area, a court must be cognizant of the political, social, and economic ramifications of its decisions as well as the constitutional limitations on its power to fashion and enforce a remedy. In addition, any legislative opposition must be considered before a decision is rendered. While the separation of powers doctrine would preclude a court from appropriating additional sums for educational purposes, a court's decision that the system must be funded at a higher level in order to achieve adequate or equal educational opportunities would mandate an increase in taxes upon the taxpayers of the state. If the court renders a decision in opposition to the legislature, judicial alternatives become limited to either the continual review of legislative enactments until they are in accord with the value judgments of the court or an acquiescience to the legislature at some future point in time.[7] Because of the high probability of an on-going conflict with the legislature, only the most activist courts will undertake reform in opposition to the legislature. This article will focus on the nature, appropriateness, and consequences of judicial activism and judicial restraint in the school financing area.

II. BRIEF HISTORY OF PUBLIC SCHOOL FINANCE

The systems of financing public education currently in effect have developed through a history of local control, past compromises, and an incremental state assumption of funding. If a state without a previous history of public education financing were now proposing the initiation of a plan, it is highly unlikely that the system of dual responsibility for school financing currently in effect in all of the states would be

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[6] Within the year prior to the Ohio Supreme Court's decision in Board of Educ. v. Walter, 58 Ohio St. 2d 308, 390 N.E.2d 813 (1979), California voters elected to reduce property taxes to a maximum of one percent of market value and to prohibit additional taxes even if approved by the voters of the taxing district. In 1978 an additional 12 states adopted similar funding restriction measures. Kirst, *supra* note 4, at 429. For full discussions of the implications of California's "Proposition 13" on public education in the state, see Guthrie, *Proposition 13 and the Future of California's Schools*, 60 PHI DELTA KAPPAN 12 (1978); Rader & Lang, *Proposition 13 and the Poor! The New Alchemy in the Golden State*, 12 CLEARINGHOUSE REV. 681 (1979).

[7] The experiences of one court which chose to engage in a running battle with a state legislature are chronicled in Robinson v. Cahill *I*, 62 N.J. 473, 303 A.2d 273 (1973), *cert. denied*, 414 U.S. 976 (1974), and its progeny. *See* note 80 *infra* and accompanying text.

adopted.[8] A brief review of school finance reform movements, which have consistently advocated greater assumption of control and responsibility for education by the state, puts into perspective the reformist role urged on the courts in current cases.

The earliest schools were established following the principles of representation and resolution of governmental functions at the lowest effective level.[9] These schools were, therefore, supported voluntarily by largely rural localities and governed by a locally-elected board. The first reform movement, which culminated in the second half of the nineteenth century, attempted to secure a state-mandated education for every child but was not a complete success. The success of this movement was limited to districts with the authority to organize and tax residents for the support of schools.[10] As long as the population and wealth of the state remained relatively evenly distributed, the system of local control and funding was effective. Several imbalances developed during the industrial revolution, however, as a result of the migrations of population to and concentrations of wealth in large cities. As a result, small rural districts became impoverished. Earlier in the twentieth century, states began to contribute to the support of local schools on a large scale by awarding to each district "flat grants" based either on a per pupil basis or per teacher basis.[11] The ideal supporting this system was that with a maximum effort the school district could supplement its own resources with the grant monies to provide a basic education. However, the fact that grants were awarded to every district regardless of its ability to raise the funds locally suggests that no value was placed on the equality of the education offered throughout the state.[12]

By the early 1920s, it was apparent that the flat grant system administered without regard to the actual need and cost of providing an education was both ineffective for small, poor districts and unnecessary for large, wealthier ones. As a result of the pioneering work of two school finance reformers, George J. Strayer and Robert M. Haig, a second reform movement produced wide-spread adoption among the states

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[8] *See* W. GARMS, J. GUTHRIE, & L. PIERCE, SCHOOL FINANCE: THE ECONOMICS AND POLITICS OF PUBLIC EDUCATION (1978). In 1974-75, state governments provided 43% of total public school expenditures. Federal funds accounted for approximately eight percent of total school revenues. The remainder of school revenue is raised by local tax levies. *Id.* at 79.

[9] The history of school finance reform is well documented and discussed in J. COONS, W. CLUNE, & S. SUGARMAN, *supra* note 4, at 39-242.

[10] *Id.* at 47-48. *See also* Justice Powell's discussion in Rodriguez v. San Antonio Indep. School Dist., 411 U.S. 1, 6-10 (1973). Texas, for example, has recognized the right to tax local property for educational purposes at least since 1883.

[11] W. GARMS, J. GUTHRIE, & L. PIERCE, *supra* note 8, at 188.

[12] For discussions of the equalizing or nonequalizing effects of the "flat grant" systems, see J. COONS, W. CLUNE, & S. SUGARMAN, *supra* note 4, at 52-61; W. GARMS, J. GUTHRIE & L. PIERCE, *supra* note 8, at 188-90.

of the Strayer-Haig Foundation Program, a system based upon the establishment of a minimum support level necessary to fund an education. The Foundation Program contained a guarantee that the state would provide funds up to the minimum support level to any district that could not raise the minimum guaranteed amount by taxing the property within its district at a state-specified participation rate.[13]

The Foundation Program, modified by the addition of special categorical grants for special purposes such as transportation and, more recently, education of handicapped or disadvantaged pupils, represented the prevailing method of sharing the dual responsibility for school financing in a majority of the states until the early 1960s.[14] While the Foundation Program was a vast improvement over the flat grant system, it shared two deficiencies. First, it incorporated no incentive for local districts to tax themselves at a rate that would produce revenue in excess of the guaranteed foundation level. Second, it failed to compensate for the fact that, depending on property wealth of the district, two districts taxing at the same state-specified participation rate might produce greatly disparate revenues; the wealthier districts produced revenue in excess of the foundation level and retained the funds for local use while poorer districts whose local contribution fell short of the foundation level were limited to the foundation guarantee. These two deficiencies were compounded by the frequent failure of the legislators to provide for increases in the guaranteed level in order to absorb increases in the cost of education.[15]

Spurred by the egalitarian reform of the 1960s, the most current school finance reform movement has effectively advocated the adoption of "percentage equalizing" or "district power equalizing" plans.[16] The

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[13] Implicitly, the state specifies a dollar amount per pupil that is necessary to guarantee a minimally adequate education. The state computes each district's contribution at a fixed tax rate and provides only the difference between the amount computed and the guaranteed expenditure level. Thus, if the state guaranteed level is $500 per pupil, and district *A* with assessed property valuation of $10,000 per pupil levies a 20 mill or two percent tax, district *A* will raise $200 at the local level and will receive $300 in state aid; district *B* with an assessed valuation per pupil of $25,000, levying taxes at the same rate, would receive $700 from local sources and would receive no state aid but would have available an additional $200 beyond the foundation level to spend on educational purposes within its district.

For additional examples and discussions of equalizing effects of the Foundation Program, see J. COONS, W. CLUNE, & S. SUGARMAN, *supra* note 4, at 63-95; W. GARMS, J. GUTHRIE, & L. PIERCE, *supra* note 8, at 190-93.

[14] *See* J. COONS, W. CLUNE, & S. SUGARMAN, *supra* note 4, at 60. As of 1965, only 11 states (Alaska, Arizona, Connecticut, Delaware, Hawaii, Nebraska, New Mexico, North Carolina, South Carolina, South Dakota, and Vermont) still employed fundamentally "flat grant" programs. U.S. DEP'T OF HEALTH, EDUC. & WELFARE, STATE PROGRAMS FOR PUBLIC SCHOOL SUPPORT (1965).

[15] *See* W. GARMS, J. GUTHRIE, & L. PIERCE, *supra* note 8, at 184-85.

[16] Coons, Clune, and Sugarman, the originators of the district power equalizing concept, take care to distinguish it from the "percentage equalizing" formula

ideal of the two equalizing plans is to preserve local control of the education and spending level on a "fiscally neutral" basis so that the total amount of revenue available for education for each pupil is not dependent on the property wealth of that district. Briefly, these systems are designed to equalize the property wealth base upon which the school districts raise local educational revenue through voter-approved taxes. To do this the state computes a formula that guarantees the same number of dollars (in state and local funds combined) to all districts taxing themselves at the same tax rate regardless of the amount actually raised by local taxation of property within the district. Under such a system, a poorer district could theoretically have as much total educational revenue available to it as a wealthier district if both districts were taxing at the same rate.

Typically, however, states impose a limitation on the local tax rate to be matched; this limitation becomes a ceiling resembling the guaranteed foundation level and precludes equalization of district revenues beyond the ceiling level.[17] Another deficiency of the district power equalizing plans is that the educational expenditures of the district are dependent on tax levies voted by residents of the district; the quality of the education available to children in each district is, therefore, dependent on the value placed on education by the child's neighbors. The ceiling limitation and voted tax rate are variables not necessarily related to the child's need or interest in a specific level of education.

With one exception,[18] the school financing systems that have been challenged within the past five years in state courts have all been either modified foundation plans or power equalizing plans. Both types of plans usually impose ceilings on the amount of state participation and lack

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developed and popularized by Benson. C. BENSON, THE ECONOMICS OF PUBLIC EDUCATION (1961). *See* J. COONS, W. CLUNE, & S. SUGARMAN, *supra* note 4, at 163-97, 201-42. In philosophy, objective and outcome, however, the two systems are similar. The reader interested in the fairly complicated mathematical formulations of the percentage equalizing system is directed to W. GARMS, J. GUTHRIE, & L. PIERCE, *supra* note 8, at 193-99 for a concise discussion of the differences in the two computations.

[17] The Ohio system is typical, providing as it does that every school district taxing at the rate of 20 mills will be guaranteed $960 per pupil (*i.e.*, $48 per pupil per mill, state and local funds combined) and that for every mill of tax effort beyond the 20 mill minimum participation rate, up to 30 mills, the state will guarantee an additional $42 per pupil per mill. OHIO REV. CODE ANN. § 3317.022 (Page Supp. 1978). The effect of the statute is to guarantee each district taxing at 20 mills the equivalent of a $48,000 tax base per pupil and for every mill above 20 but below 30 mills, a guaranteed equivalent tax base of $42,000 per pupil. To the extent that a district's average valuation is greater than $48,000, it would receive no state aid but would be allowed to keep all monies generated by the local tax rate for the district's educational expenditures.

[18] Connecticut's "flat grant" system, which in 1975 awarded $235 per pupil without regard to the ability of the district to raise funds locally, was declared unconstitutional in Horton v. Meskill, 31 Conn. Supp. 377, 332 A.2d 113 (Super. Ct. 1974).

provisions for the recapture of excess revenues generated by the wealthier districts.[19] Both modified foundation plans and power equalizing plans have been held constitutional and unconstitutional by respective state courts.[20]

III. THE IMPACT OF *RODRIGUEZ* ON STATE COURT LITIGATION

The five-to-four decision by the United States Supreme Court in *Rodriguez v. San Antonio Independent School District*,[21] which upheld the constitutionality of the Texas school financing system against a fourteenth amendment equal protection challenge, was a serious and unexpected setback to the movement for school finance reform. Prior to *Rodriguez*, reformers had observed the willingness of the Warren Court

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[19] In its pure form, the Coons district power equalizing system calls for districts with assessed valuations higher than the one guaranteed by the state (*i.e.*, in Ohio valuation in excess of $48,000, *see* note 17 *supra*) to turn over to the state revenue raised in excess of that guaranteed by the state. For example, in Ohio districts with assessed valuations of $60,000, taxing at 20 mills would raise $1,200. Under a pure district power equalizing system, the district would be required to turn over to the state the $280 attributable to the higher valuation, above $48,000, of the district. In practice, only Wisconsin had incorporated this "recapture" provision in its district power equalizing system. This provision was successfully challenged by plaintiffs from so-called "negative aid" districts as violative of state constitutional taxing provisions in Buse v. Smith, 74 Wis. 2d 550, 247 N.W.2d 141 (1976).

[20] The "district power equalizing" model advocated by school finance reformers, J. COONS, W. CLUNE, & S. SUGARMAN, *supra* note 4, at 200-44, and adopted by more than eighteen states as of 1975, has been challenged in state court litigation in Montana, New York, Ohio, and Wisconsin. *See* State *ex rel.* Woodahl v. Straub, 164 Mont. 141, 520 P.2d 776, *cert. denied*, 419 U.S. 845 (1974) (district power equalizing scheme held constitutional); Board of Educ., Levittown Union Free School Dist. v. Nyquist, 94 Misc. 2d 466, 408 N.Y.S.2d 606 (Sup. Ct. 1978) (district power equalizing system discriminates against large cities); Board of Educ. v. Walter, 58 Ohio St. 2d 368, 390 N.E.2d 813 (1979) (district power equalizing scheme with "save harmless" and "reward for effort" provisions held constitutional); Buse v. Smith, 74 Wis. 2d 550, 247 N.W.2d 141 (1976) (recognized aid provisions of district power equalizing scheme held violative of state constitutional requirement of uniform taxation). Although the absence of a negative aid or recapture provision in the Ohio statute may seem to distinguish it from Wisconsin cases, this distinction is probably inappropriate since Ohio case law has established precedent for the "capture" of excess revenue generated by one district and its redistribution to a poorer district. *See* Miller v. Korns, 107 Ohio St. 287, 143 N.E. 773 (1923). The several funding formulas are readily viewed as variants of each other and, with rare exceptions, different states exhibit more similarities than differences in funding schemes. More specifically, for cases holding state foundation plans to be constitutionally sound, see Thompson v. Engelking, 96 Idaho 793, 537 P.2d 635 (1975); Olsen v. State, 276 Or. 9, 554 P.2d 139 (1976). *But see* Serrano v. Priest *II*, 18 Cal. 3d 728, 557 P.2d 929, 135 Cal. Rptr. 345 (1977) (financing plan held unconstitutional); Seattle School Dist. No. 1 v. State, 90 Wash. 2d 476, 585 P.2d 71 (1978) (financing plan held unconstitutional).

[21] 411 U.S. 1 (1973). *See* W. GARMS, J. GUTHRIE, & L. PIERCE, *supra* note 8, at 184-85.

to extend the scope of equal protection to classifications based on wealth in prisoner rights and voting cases. There was also recognition of constitutionally-protected fundamental rights that were not explicitly guaranteed in the Constitution.[22] The nation as a whole had observed the particular protection afforded education by the federal courts. Since the decision of *Brown v. Board of Education*[23] in 1954, there had been frequent judicial intervention in local school decisions with the courts accepting jurisdiction to administer reforms directly, ordering redistribution of teachers as well as pupils, monitoring student-teacher ratios with respect to race and teacher experience, and enjoining school closings.[24] Taking their cue from the segregation decisions and the reform mood created by these opinions, a number of state and federal

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[22] *E.g.*, Harper v. Virginia State Bd. of Elections, 383 U.S. 663 (1966) (states may not impose payment of fee as prerequisite to right to vote in state elections); Douglas v. California, 372 U.S. 353 (1963) (denial of court-appointed counsel for indigent defendant on direct appeal of right in criminal case violates equal protection clause of fourteenth amendment); Griffin v. Illinois, 351 U.S. 12 (1956) (state laws requiring indigent criminal defendants to pay for transcripts of court proceedings found to constitute *de facto* discrimination against defendants totally unable to pay). Not all state-imposed restrictions on the right to vote in state elections were found by the Warren Court to violate equal protection standards, however, even though they would seem to bear more heavily against less affluent citizens. *E.g.*, Lassiter v. Northampton County Bd. of Elections, 360 U.S. 45 (1959) (states may require passing of literacy test as precondition to right to vote in state elections so long as test is fairly administered and not used to discriminate against a class).

For a discussion of the legal approach suggested by these cases for the school finance area, see J. COONS, W. CLUNE, & S. SUGARMAN, *supra* note 4, at 339-93.

[23] 347 U.S. 483 (1954).

[24] *See, e.g.*, Keyes v. School Dist. No. 1, 413 U.S. 189 (1973) (outlining criteria that would facilitate a finding of *de jure* discrimination in northern areas without a background of state mandated school segregation and validating court-imposed district wide remedies based on finding of intentional discrimination in only part of the district); Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1 (1971) (courts may impose interim rezoning in school districts to correct past discrimination, with busing seen as a permissible tool available to courts in implementing *Brown* principles); Green v. County School Bd., 391 U.S. 430 (1968) ("freedom of choice" desegregation plans, allowing students to choose a school to attend, held not to comply with *Brown* mandate; school districts have affirmative duty to desegregate and courts will see to it that the duty is not breached). It is interesting to conjecture the extent to which the decision in *Rodriguez* was influenced by the Court's opportunity to observe over almost 20 years the consequences of its decision in *Brown* and the unsatisfactory attempts of the federal courts to monitor the segregation of school systems. The majority in *Rodriguez* asserted that "[n]othing this Court holds today in any way detracts from our historic dedication to public education." 411 U.S. at 30. But it is difficult not to agree with Justice Marshall's assessment in his dissent that "the majority's holding can only be seen as a retreat from our historic commitment to equality of educational opportunity. . . ." 411 U.S. at 71 (Marshall, J., dissenting).

courts prior to *Rodriguez* had found various states' school financing systems unconstitutional on federal equal protection grounds.[25]

Because of the impact of the *Rodriguez* decision on the state courts deciding subsequent cases, it is important to recognize the school-finance related issues decided in *Rodriguez*. The claim of the plaintiffs was that the Texas system, in essence a typical foundation program funded in large measure by local property tax revenue, unconstitutionally denied children in property-poor districts equal protection under the fourteenth amendment by failing to provide through state supplementary funds the same level of educational expenditure as was available to children in property-wealthy districts.[26] The numerous interwoven issues and observations in the Court's opinion may be conveniently grouped under three headings: 1) choice of the equal protection test to be applied;[27] 2) availability and accessibility of judicially-determinable standards for assessing equality and adequacy of education; 3) appropriateness of judicial as opposed to legislative remedial action.

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[25] Van Dusartz v. Hatfield, 334 F. Supp. 870 (D. Minn. 1971); Burruss v. Wilkerson, 301 F. Supp. 1237 (W.D. Va. 1968) (overruling motion to dismiss); McInnis v. Shapiro, 293 F. Supp. 327 (D.N.D. 1968), *aff'd sub nom.* McInnis v. Ogilvie, 394 U.S. 322 (1969) (per curiam). Among the notable exceptions to this early pro-reform trend were the Westchester County, New York Supreme Court in Spano v. Board of Educ., 68 Misc. 2d 804, 328 N.Y.S.2d 229 (Sup. Ct. 1972) and the federal district court for Maryland in Parker v. Mandel, 344 F. Supp. 1068 (D. Md. 1972).

[26] The Texas system was a modified Foundation Program that required each district to contribute a percentage of the minimum guarantee, based on a formula that took into account revenue-raising ability of the district. Because of disparities in the value of district property, however, the Edgewood school district, taxing itself at a rate of $1.05 per $100 of assessed property, could raise only $26 per pupil above its contribution to the Local Fund Assignment for total available state and local educational expenditures of $248 per pupil. This amount was supplemented by $108 in federal funds for a total per pupil expenditure of $356. By contrast, the Alamo Heights district, taxing itself at the rate of $.85 per $100 of valuation, yielded $333 per pupil over and above its contribution to the Foundation Program, leaving it with $558 per pupil after the state support from the Foundation Program was added. It also received $36 per pupil from federal sources for a total expenditure of $594 per pupil.

[27] The well established two-tiered equal protection test requires the court to decide whether the challenged statute operates to the disadvantage of some suspect class or impinges upon a fundamental right explicitly or implicitly protected by the Constitution, and if so, to apply strict judicial scrutiny. If no suspect class or fundamental right is present, the court applies the rational basis or rational relationship test, a less stringent review which is limited to an inquiry whether the statute rationally furthers some legitimate, articulated state purpose; the court therefore applies a presumption of constitutionality of the statute and holds it unconstitutional only if it invidiously discriminates against a person or class of persons. For a very recent Supreme Court pronouncement of the equal protection test, see Ambacn v. Norwick, 441 U.S. 68 (1979) (a state may require U.S. citizenship as a prerequisite for certification as public school teacher without violating the equal protection clause).

Writing for the *Rodriguez* majority, Justice Powell discussed the lack of consensus among educators, legislators, and social scientists concerning the appropriate measurements of educational quality,[28] the difficulty of predicting the effect of untested alternative financing schemes,[29] and the separation of powers and federalism principles suggested by the second and third groups of issues.[30] The decision rested on the Court's conclusion, after consideration of the first set of issues, that the appropriate equal protection test for school finance cases was the rational basis rather than the strict scrutiny test. In coming to this conclusion, the majority considered and ruled out the possibility of extending strict scrutiny constitutional protection to residents of school districts, either as pupils or as taxpayers, on the basis of wealth discrimination.[31] Rejecting an argument based on the nexus of education to the intelligent exercise of first amendment rights, the Court concluded that there is no constitutionally-guaranteed right to education.[32] As a consequence of these holdings, the Court applied the rational basis test, which requires only that the challenged statute rationally further some legitimate articulated state purpose. The Court held that the preservation of local control in allowing residents to decide at the district level the nature, quality, and price of the education provided to their children and to supplement the minimum funding provided by the state was a sufficiently compelling state purpose under the rational basis test to justify the disparities in district educational expenditures.[33]

Although *Rodriguez* foreclosed use of the federal equal protection provision and the federal courts for school finance litigation, the decision did not foreclose state court litigation. While the reformers' position became more difficult because of the likelihood that state courts would find state equal protection clauses to be coextensive with the federal guarantee,[34] the *Rodriguez* decision left several avenues open for

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[28] 411 U.S. at 43.

[29] *Id.* at 41.

[30] *Id.* at 39, 58.

[31] *Id.* at 19-29. The court's difficulty was in finding a definitive description of the disfavored class, since it appeared that the Texas system might be regarded as discriminating against 1) 'poor' people whose income fall below some identifiable level of poverty, or 2) those who are relatively poorer than others, or 3) all those who, irrespective of income, happen to reside in poorer school districts. Only in the first instance would the court find wealth discrimination; of the social science evidence presented to the court, the most influential was a law review article demonstrating that, in Connecticut at least, income-poor people did not necessarily reside in property-poor districts. *See* Note, *A Statistical Analysis of the School Finance Decisions: On Winning Battles and Losing Wars*, 81 YALE L.J. 1303 (1972), *cited by* Justice Powell at 411 U.S. at 23 n.53.

[32] 411 U.S. at 35.

[33] *Id.* at 51-52.

[34] *See, e.g.*, the court's statement in Olsen v. State, 276 Or. 9, 11, 554 P.2d 139, 142 (1976), that "the scope of the equal protection clause of the Oregon Constitu-

state court intervention. *Rodriguez* suggested a broader test for the fundamentality of an asserted right[35] and suggested that additional evidence of actual injury and of cause and effect relationships of educational expenditures and student achievement might be persuasive under state equal protection clause standards.[36] As a policy basis, the Court found the complexity of the issues and the inter-involvement of state fiscal and educational policy, as well as the current state legislative preoccupation with the school financing area, additional considerations for exercising restraint.[37] The major impact of *Rodriguez* was to return questions of quality, financing, and administration of public education to the state level. The decision left to the state courts the ability to decide whether the reform issues are within the province of the legislature or judiciary.[38]

To complete the chronology of litigation since *Rodriguez*, it is important to note that the immediate impact on the school finance reform movement was negative. With one exception,[39] the highest state courts

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tion and the Fourteenth Amendment is the same." *Accord*, Milliken v. Green, 390 Mich. 389, 395, 212 N.W.2d 711, 714 (1973) (Michigan Constitution secures the same right of equal protection as is secured by the equal protection clause of the fourteenth amendment).

[35] The test enunciated, assessing "whether there is a right to education explicitly or implicitly guaranteed by the Constitution," 411 U.S. at 34, has not been consistently applied by the state courts considering school finance systems after *Rodriguez*. The state courts in Oregon, Idaho, and Ohio, for example, followed the lead of the New Jersey Supreme Court in rejecting this test, which would seem to equate mere inclusion in the state's constitution with a finding that the right was fundamental. *See* Thompson v. Engelking, 96 Idaho 793, 537 P.2d 635 (1975); Robinson v. Cahill *I*, 62 N.J. 473, 303 A.2d 273 (1973), *cert. denied*, 414 U.S. 976 (1974); Board of Educ. v. Walter, 58 Ohio St. 2d 368, 390 N.E.2d 813 (1979); Olson v. State, 276 Or. 9, 554 P.2d 139 (1976).

[36] Note the Court's language in addressing the relationship between educational opportunity and the exercise of first amendment rights: "Even if it were conceded that some identifiable quantum of education is a constitutionally protected prerequisite to the meaningful exercise of [a first amendment] right, we have no indication that the present levels of educational expenditures in Texas provide an education that falls short." 411 U.S. at 36-37. Consider also the Court's statement in a footnote to the opinion that "an educational financing system might by hypothesized, however, in which the analogy to the wealth discrimination cases would be considerably closer." *Id.* at 25 n.60. Apparently, such would be the case if elementary and secondary education were made available only to persons able to pay a state assessed tuition figure. This, of course, was not the argument in *Rodriguez*.

[37] *Id.* at 40, 58.

[38] Addressing as it does questions of federalism rather than the doctrine of separation of powers which affects division of authority by coordinate branches of government, the United States Supreme Court did not preclude review of legislative enactments by state courts. *Id.* at 39, 58.

[39] This series of cases is known as Robinson v. Cahill, *I* through *VII, discussed in* notes 55-82 *infra*, and accompanying text.

created a "trend" of non-intervention in school finance legislation that lasted through 1976. In late 1973, the Arizona Supreme Court reversed a lower state court's holding and upheld the constitutionality of the state's financing provisions through application of the rational basis test.[40] Later that same year, the Michigan Supreme Court noted that an earlier hearing in which it declared the state's school financing system unconstitutional had been improvidently granted and vacated its former order and opinion.[41] Within the next three years, three additional state supreme courts, those of Washington,[42] Idaho,[43] and Oregon,[44] each adopted a rational basis test in reviewing and finding their state plans constitutional. With the sole exception of the New Jersey Supreme Court,[45] which issued a reformist opinion two weeks after the *Rodriguez* decision, it was not until 1977 that a few state supreme court decisions began to suggest that reform through state court litigation was still a possibility. Within a two-year period the highest courts in Connecticut,[46] California,[47] and Washington[48] adopted an activist position in overturning their state school financing systems. A non-interventionist Ohio

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[40] Shofstall v. Hollins, 110 Ariz. 88, 515 P.2d 590 (1973).

[41] Milliken v. Green, 389 Mich. 1, 203 N.W.2d 457 (1972), *vacated*, 390 Mich. 389, 212 N.W.2d 711 (1973). For an insightful discussion of the sequence of events and political involvements affecting these decisions, see Hain, Milliken v. Green, *Breaking the Legislative Deadlock*, 38 L. & CONTEMP. PROB. 350 (1974). The challenged legislation was a multilevel foundation program under which different foundation guarantees and computational tax rates applied to districts whose assessed valuation fell into different intervals. In 1972 the program provided guarantees that ranged from $54.13 to $10,125.00 per pupil. In 1973 the legislature enacted a guaranteed tax base plan (essentially a district power equalizing system) which provided each district with a fixed revenue per mill of tax rate. In 1973 the guarantee was set at $38 per mill per pupil on the first 22 mills of operating taxes; provision was made for annually changing the amount of guarantee and the mill levy guarantee. Districts taxing above the "equalized" millage rate were entitled to retain the excess revenue produced by the levy. An analysis of school districts and budgetary behavior, based on econometric models used to estimate the effects of the pre- and post-reform financing systems on expenditures per pupil, suggests that the 1973 legislation has had little effect on the distribution of revenues among the districts; the analysis suggests that this is so not because the plan itself is ineffective but because the school districts response (*i.e.*, in voting mill levies) has been conservative. *See generally* S. CARROLL, THE SEARCH FOR EQUITY IN SCHOOL FINANCE: MICHIGAN SCHOOL DISTRICT RESPONSE TO A GUARANTEED TAX BASE (1979).

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

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

[44] Olsen v. State, 276 Or. 9, 554 P.2d 139 (1976).

[45] Robinson v. Cahill *I*, 62 N.J. 473, 303 A.2d 273 (1973), *cert. denied*, 414 U.S. 976 (1974).

[46] Horton v. Meskill, 172 Conn. 592, 376 A.2d 359 (1977).

[47] Serrano v. Priest *II*, 18 Cal. 3d 728, 557 P.2d 929, 135 Cal. Rptr. 345 (1977).

[48] Seattle School Dist. No. 1 v. State, 90 Wash. 2d 476, 585 P.2d 71 (1978).

Supreme Court decision in 1979 which upheld the state financing systems has now thrown new grist into the analysis mill.[49]

To the extent that the Supreme Court's choice of the rational basis test and its reluctance to fashion standards for measuring educational quality expressed a value judgment that the role of the federal courts in public education should be reduced, the effect of its decision in *Rodriguez* was to shift the essential question of judicial involvement to each of the state courts. It is not suprising, therefore, that the post-*Rodriguez* decisions appear to be an unrelated series of ad hoc decisions which reflect the bias of the state's population toward reform rather than a uniform trend based on objective legal reasoning or criteria. In each instance of state court litigation that followed *Rodriguez* the issues were framed in similar terms: 1) whether under the state equal protection statute the state's funding formula denies equal protection and equal benefits to the children of the state by failing to compensate for disparities in resources available on the basis of local revenue raised,[50] and 2) whether the state's constitutional requirement to provide a "general and uniform" or an "efficient and thorough" system of public schools for the children of the state is fulfilled when a state fails to contribute at an adequate level to provide the required level of education to every child.[51]

In addressing the equal protection issue, each of the state courts confronted, as did the Supreme Court in *Rodriguez*, the choice of tests to be applied. The state courts also dealt with the problem of measuring equality and defining the "education" guaranteed by the state constitution as well as with the problem of resolving the appropriateness of judicial rather than legislative determination of these standards and definitions. While one might expect that courts inclined to a position of judicial restraint would tend to avoid a decision by focusing on such threshold questions as standing, absence of indispensable parties (such as the legislature or the governor), or even the political question issue itself, the course of the litigation did not follow this route. Regardless of the outcome of their decisions, the state courts have been adamant in asserting their authority to review their respective legislatures' enactments in the school financing area.[52] For courts inclined to a position of judicial restraint, the reasoning and outcome of *Rodriguez* in the choice

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[49] Board of Educ. v. Walter, 58 Ohio St. 2d 368, 390 N.E.2d 813 (1979).

[50] The constitutions of all but four states contain equal protection provisions. Lindquist & Wise, *Developments in Education Litigation: Equal Protection*, 5 J.L. & EDUC. 1, 22-23 (1976).

[51] Twenty-nine states guarantee a system of "thorough and efficient" education in their constitutions. *Id.* at 23.

[52] *See* Serrano v. Priest *II*, 18 Cal. 3d 728, 751, 557 P.2d 929, 942, 135 Cal. Rptr. 345, 357 (1977); Northshore School Dist. No. 417 v. Kinnear, 84 Wash. 2d 685, 530 P.2d 178 (1975).

of the equal protection test was determinative;[53] for courts inclined to judicial activism, the choice of test was summarily resolved and their focus directed to the issues of manageable criteria for assessing educational equality and appropriateness of judicial intervention. An analysis of the opinions and facts in "interventionist" decisions demonstrates the approaches available to courts inclined to intervene, as well as the climate, conditions, and consequences of intervention. In the discussion which follows, the primary analysis will be directed to the circumstances in these states and the contributions of each in establishing a legal basis for judicial intervention.

IV. STATE COURT INTERVENTION

A. *New Jersey: Defining Education and the Limits of Judicial Enforcement*

Delivering its decision two weeks after *Rodriguez v. San Antonio Independent School District*,[54] the New Jersey Supreme Court in *Robinson v. Cahill*[55] was demonstrably conscious of the impediments to an interventionist provision. Yet the court advanced the reform movement by an active challenge to the New Jersey system of funding education. The plaintiffs, students and taxpayers had argued that the New Jersey system of financing public schools violated federal and state constitutional provisions requiring the state to provide a "thorough and efficient" system of public schools.[56] The court conceded that the federal equal protection claim was governed by *Rodriguez* but asserted that the "question [of] whether the equal protection demand of our State Constitution is offended remains for us to decide. Conceivably a State Con-

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[53] *See, e.g.*, Thompson v. Engelking, 96 Idaho 793, 537 P.2d 635 (1975); Board of Educ. v. Walter, 58 Ohio St. 2d 368, 390 N.E.2d 813 (1979); Olsen v. State, 276 Or. 9, 554 P.2d 139 (1976).

[54] 411 U.S. 1 (1973).

[55] 62 N.J. 473, 303 A.2d 273 (1973), *cert. denied*, 414 U.S. 976 (1974) (Robinson *I*).

[56] In brief, the challenged system, which had been adopted in 1970 as the Bateman Act, provided minimum support aid to districts ranging from $110-160 per pupil on a weighted basis which depended on the different cost of educating pupils at different levels. In addition the system contemplated "incentive equalization aid" to equalize district taxing power for districts with equalized assessed property valuation amounting to less than the guaranteed valuation by varying categories of districts, *i.e.*, $30,000 for a "basic district," not less than $45,000 for a "comprehensive district." The system also included Minimum Support provisions which guaranteed funds to every district without regard to need for equalization funds and guaranteed "save harmless" funds to districts that would not otherwise qualify for state aid under the equalization formula. Although enacted in 1970, and intended to be phased in over a period of years, the system had not yet been fully funded and, in fact, the legislature had failed in the second year to appropriate enough funds to carry the system to the second level of phase-in. Evidence at trial demonstrated disparities in per pupil revenue

stitution could be more demanding."[57] However, even prior to the Supreme Court's announcement in *Rodriguez* the New Jersey court had determined that disparities in district expenditures for education and in taxpayer burdens did not constitute violations of the state equal protection provisions.[58] Consequently, the court followed the lead of the United States Supreme Court in holding that "[w]ealth is not at all 'suspect' as a basis for raising revenues" and that "taxes in different taxing districts in the State need not be uniform."[59] Without involving itself in the attempt to define the class of students (property-poor or income-poor) who might be the subjects of discrimination, the court affirmed the right of residents of a political subdivision "within substantial limits to decide how much to raise for services which are necessary or sufficiently desirable to justify the exertion of the taxing power."[60] Distinguishing the racial discrimination at the heart of *Brown v. Board of Education*,[61] the court also followed *Rodriguez* in finding no fundamental right to education and in asserting that if there were such a right "local control" might well be a compelling state interest sufficient to justify the discrimination.[62]

Considering that the New Jersey state constitution specifically mandated the legislature to "provide for the maintenance and support of a thorough and efficient system of free public schools for the instruction of all the children in this state,"[63] the court might easily have found

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from $700 to $1,500 per pupil, depending upon the district; and both the trial court and the New Jersey Supreme Court accepted this as prima facie evidence of denial of equal educational opportunity.

[57] 62 N.J. at 490, 303 A.2d at 282.

[58] *See id.* at 492, 303 A.2d at 282-83.

[59] *Id.* at 494, 303 A.2d at 283. In a footnote in *Rodriguez*, the Supreme Court pointed out that "this Court has never doubted the propriety of maintaining political subdivisions within the states, and has never found in the Equal Protection Clause any *per se* rule of 'territorial uniformity.'" 411 U.S. at 54 n.110.

[60] 62 N.J. at 493, 303 A.2d at 283.

[61] 347 U.S. 483 (1954).

[62] "Inherent in the concept of local government is the belief that the public interest is furthered when the residents of a locality are given some voice as to the amount of services and expenditures therefor, provided that the cost is borne locally to stimulate citizen concern for performance. Thus it may not be 'irrational' to deal with education in those terms." 62 N.J. at 499, 303 A.2d at 286. Compare the court's discussion of the equal protection standard to be applied in Board of Educ., Levittown Union Free School Dist. v. Nyquist, 94 Misc. 2d 466, 408 N.Y.S.2d 606 (Sup. Ct. 1978). In that case, the court noted that the objective of a state school financing system is that of "providing a method of remedying inequalities in the right to educational opportunities which would exist in the absence of intervention by means of state aid." *Id.* at 526, 408 N.Y.S.2d at 638. The court consequently concluded that the New York state system, relying as it did on a formula that operated as a function of local property wealth and that included flat grants and "save harmless" provisions, failed to meet even the rational basis test. *See* the further discussion of this case at note 68 *infra*.

[63] N.J. CONST. art. IV, § 7, para. 6. *See* 62 N.J. at 508, 303 A.2d at 281-88.

justification for its position in the test for a fundamental right enunciated in *Rodriguez* which seemed to suggest that the mere inclusion of a right or governmental service in the Constitution would raise the benefit to the status of a fundamental right.[64] The problem with this analysis, according to the New Jersey court, is that there are many rights explicitly guaranteed in the Constitution, including, for example, the right to acquire and hold property, which are not likely candidates for the preferred strict scrutiny review. Rather than becoming caught in the web of the fundamental or non-fundamental right distinction, the New Jersey court avoided the equal protection claims altogether and reached results compatible with them through its analysis of the state education clause.[65]

From the beginning of school finance litigation the absence of judicially determinable standards for measuring the efficiency, thoroughness, or adequacy of education has proved a major obstacle to reform through the courts.[66] Before proceeding to make the argument for equal or minimum expenditures, it is necessary to establish that expenditures are related to the quality of the education offered. While most commentators agree that there is some relationship between the amount of money expended and the quality of education in a particular school

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[64] Rodriguez v. San Antonio Indep. School Dist., 411 U.S. 1, 34 (1973).

[65] The lead of the New Jersey court in rejecting the *Rodriguez* fundamental right formulation was followed in Oregon, Idaho, and Ohio. In each case, the court cited the *Robinson I* analysis as a basis for refusing to apply strict scrutiny, thereby upholding on a rational basis test the constitutionality of their state's statute. *See* note 35 *supra*.

[66] In the early stages of school finance reform litigation, the difficulty of assessing educational quality proved the major stumbling block. In the United States district court's consideration of the Illinois school financing system, the plaintiffs had attempted to persuade the court that the fourteenth amendment required that public school expenditures be made only on the basis of pupils' educational needs. McInnis v. Shapiro, 293 F. Supp. 327 (N.D. Ill. 1968), *aff'd sub nom.* McInnis v. Ogilvie, 394 U.S. 322 (1969) (per curiam). While noting that educational needs presumably included the interaction of such factors as the quality of teachers, the students' potential, prior education, environmental and parental upbringing, and physical plant, the court concluded that there were no discoverable and manageable standards by which it could determine, assuming arguendo that the Constitution required expenditures to be made on the basis of educational need, when the Constitution was satisfied and when it was violated. The court was unwilling to equate expenditures with quality because "[d]eprived pupils need more aid than fortunate ones. Moreover, a dollar spent in a small district may provide less education than one used in a large district. . . . [C]osts vary substantially throughout the state." 293 F. Supp. at 335-36 (footnote omitted). Concluding that the assessment of educational need is a function belonging to the legislature or a state board of education, the court unequivocably stated its willingness to address this problem: "Even if there were some guidelines available to the judiciary, the courts simply cannot provide the empirical research and consultation necessary for intelligent educational planning." *Id.* at 336 (footnote omitted).

system, the correlation is by no means established or exact.[67] Once the cost-quality premise is accepted, however, there remains the problem of determining whether per pupil expenditures should be equalized across the state or whether the expenditures should take into account the special needs of some students and the variations in the costs of providing teachers and materials in different parts of the state.[68]

Since the New Jersey legislature and state board of education had failed to establish minimum educational standards for the state's schools or to define the goals and functions of public education, the *Robinson I* court had no objective measure on which to rely for its assessment of whether the constitutional mandate had been met. The court, however, was not deterred by its inability to define the "thorough and efficient" education with exactness. Announcing as a guideline that "the Constitution's guarantee must be understood to embrace that educational opportunity which is needed in the contemporary setting to equip a child for

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[67] For a discussion of this correlation and the problems encountered in establishing reliable data concerning it, see McDermott & Klein, *The Cost Quality Debate in School Finance Litigation: Do Dollars Make a Difference?* 38 L. & CONTEMP. PROB. 415 (1974).

[68] In Board of Educ., Levittown Union Free School Dist. v. Nyquist, 94 Misc. 2d 466, 408 N.Y.S.2d 606 (Sup. Ct. 1978), the trial court held that the New York system of school financing violated the state constitution on two grounds: in failing to remedy the inequalities in educational resources that existed among school districts because of reliance on local property taxation (a violation of the equal protection provision) and, somewhat parodoxically, in failing to provide greater than average resources to urban school districts (a violation of both the equal protection clause and of the constitutional mandate to provide a "state wide system of free common schools in which all children may be educated"). While the arguments with respect to inequities created by variations in district valuation were familiar, the court's approach to the problem of "municipal overburden" and its requirement that special weighting be given to urban school districts is unique.

Based on the evidence presented by five metropolitan school districts that had entered the suit as intervenors, the court found that "the ability of the urban school districts to finance education within their borders is, indeed, seriously impaired by a cluster of demands on the urban tax dollar collectively known as a municipal overburden. . . . In some districts, such as the large urban district here, the cost of providing essential non-educational services caused a drain on local revenue thereby reducing the amount of money available for educational purposes." *Id.* at 496, 408 N.Y.S.2d at 621. The court also noted the reduced purchasing power of the urban education dollar and concluded: "The state aid statute in failing to give effect to the inordinate education overburdens of the large city school districts and as a result providing them less assistance operates in a discriminatory fashion and violates [equal protection requirements]." *Id.* at 535, 408 N.Y.S.2d at 644. Since the state financing system awarded only equal (or in some cases, reduced) state aid to city districts, the state revenues were held to be insufficient to provide the education guaranteed by the state constitution; the court found that application of the state aid formula to city districts was tantamount to excluding those underachieving pupils from educational programs. *Id.* at 534, 408 N.Y.S.2d at 643.

his role as a citizen and as a competitor in the labor market,"[69] the court concluded that some standard of quality was implied. Looking at the proved disparities in dollar expenditure per pupil, which varied from $700 to $1,500 per pupil depending on the district, the court reasoned that unless one supposes the unlikely proposition that the lowest district expenditure happens to coincide with the level of expenditure needed to fund an education at the "thorough and efficient" level, the constitutional mandate had not been met.[70] Absent some set of established measurable standards, disparity in district expenditures is itself prima facie evidence of failure to provide a thorough and efficient system.[71]

The New Jersey court was not exactly comfortable with this equation of non-equal expenditures to non-compliance with the mandate to provide a thorough and efficient system. Neither was it interested, initially,[72] in creating a judicial definition and standards of education. Consequently, *Robinson I* interpreted the constitutional provision to include the two-fold command to the legislature to define in some discernible way the educational obligation imposed by the state constitution and to compel the local school districts to raise the money necessary to provide that level of educational opportunity to the pupils residing there. If the local districts failed in that endeavor, the implication was that the state itself must meet its continuing obligation to provide a thorough and efficient education.[73]

The New Jersey court's opinion was most immediately noteworthy for the new approach it offered by application of the state's "thorough and efficient" education clause rather than the equal protection clause. The United States Supreme Court in *Rodriguez* had advised that "the very complexity of the problems of financing and managing a statewide public school system suggests that 'there will be more than one constitutionally permissible method of solving them,' and that, within the limits of rationality, 'the legislature's efforts to tackle the problems' should be entitled to respect."[74] Moreover, the Court's recognition that the school financing challenge represented a direct attack on the manner in which the state chooses to raise and disburse state and local tax revenue[75] forecast the difficulty that state courts must overcome in determining whether to intervene in school finance reform. Since state

[69] 62 N.J. at 515, 303 A.2d at 295.

[70] *Id.*

[71] In later considerations of the state system, the New Jersey court seemed to forget that the issue decided was the right to a thorough and efficient education and interchanged this right with the right to equal educational opportunity. *See* Robinson v. Cahill *IV*, 67 N.J. 333, 339 A.2d 193, *reprinted in corrected form in* 69 N.J. 133, 351 A.2d 713 (1975).

[72] *See* the history of this litigation, *discussed in* note 80 *infra.*

[73] 62 N.J. at 519, 303 A.2d 297-98.

[74] 411 U.S. at 42, (*citing* Jefferson v. Hackney, 406 U.S. 535, 546-47 (1972)).

[75] The Court in *Rodriguez* was emphatic in articulating its federalism concerns. "While [t]he maintenance of the principles of federalism is a foremost con-

courts review state legislative enactments, the issue is not one of federalism as it was in *Rodriguez*, but one of separation of powers.[76] Once a state court has declared its financing provisions unconstitutional it must decide to what extent it is appropriate to supervise the legislature, to retain jurisdiction, and to continue reviewing statutory enactments until they are in conformity with the court's perception of adequacy or equality. Although the legislature is usually not named a party defendant because of legislative immunity, it is the only party capable of directing compliance with whatever order is issued by the court.

The relief requested is most frequently a declaration that the state financing system is unconstitutional and an injunction prohibiting the distribution of funds under the existing funding formula.[77] Typically the courts grant the declaratory judgment, but rather than create disruption in the current or upcoming school year they postpone the effect of the judgment until a future specified time while retaining jurisdiction to review after the legislature has acted or has had reasonable time to

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sideration in interpreting any of the pertinent constitutional provisions under which this Court examines state action,' it would be difficult to imagine a case having a greater potential impact on our federal system than the one now before us in which we are urged to abrogate systems of financing public education presently in existence in virtually every State." 411 U.S. at 44 (footnote omitted).

[76] For a discussion of the separation of powers implications in school financing litigation see Robinson v. Cahill *IV*, 69 N.J. 133, 174-84, 351 A.2d 713, 735-40 (1975) (Mountain, Clifford, J.J., dissenting). *See also* Note, Robinson v. Cahill: *A Case Study in Judicial Self-Legitimation*, 8 RUT.-CAM. L.J. 508 (1977), which discusses the series of *Robinson* opinions in light of the state's political climate and argues that, even measured against a liberal standard for judicial decision-making, the boundaries of the judicial function in a democratic form of government were over-stepped.

[77] There is precedent in the school segregation and busing cases for such direct intervention by the courts. Relief approved by the United States Supreme Court in Griffin v. County School Board, 377 U.S. 218 (1964), included an order to the county supervisors requiring them to levy taxes, to raise needed funds, and to open, operate, and maintain the public schools in the county. Furthermore, court activism in ordering school busing with its accompanying expenses and increased costs for school districts is too well accepted to need documentation. Clearly the courts enjoy broad discretion in ordering equitable remedies to prevent or cure a constitutional violation. This principle is less open to question, however, in the busing and segregation cases, decisions made by federal courts taking measures to ensure state compliance with mandates of federal constitution. Such actions are well grounded in the doctrine of federal supremacy. The problem is different, however, when a state court is directing such orders against a coordinate branch of its own government. It is at this point that the political nature of the school financing litigation comes most clearly into focus. *See* Landsman, *Can Localities Lock the Doors and Throw Away the Keys?* 7 J.L. & EDUC. 431 (1978), which presents the case for an equal protection challenge to the fiscally motivated shutdown of a public education program and suggests that the relief granted in *Griffin* would be inappropriate where state constitutions and statutes require statewide public education and where there is significant ongoing state financial and administrative involvement in local public education.

act.[78] If the legislature produces a new funding formula, no further court action may be necessary. If there is no appropriate action by the legislature, the court might order injunctive relief either enjoining the distribution of any funds for schools, and thereby effectively closing the schools, or ordering redistribution of appropriated funds by a formula that it deems more equalizing. As an alternative the court might order the local school districts to submit their budgets to the state auditor for collection of the remaining revenue required by uniformly assessing all property in the state.[79] If at some point state officers refuse to comply with the court's orders, they presumably would be liable for contempt.

The history of *Robinson* litigation, *I* through *VII*,[80] chronicles with painful clarity the imbroglio that awaits a court attempting to intervene directly in ordering school finance reform. During the course of these cases the New Jersey court imposed a succession of remedies, attempting at each stage to force the legislature to define the constitutional education obligation and to compel the local school districts to raise

[78] *See, e.g.*, Robinson v. Cahill *I*, 62 N.J. 473, 520, 303 A.2d 273, 298 (1973), *cert. denied*, 414 U.S. 976 (1974).

[79] *See* the dissent of Judge Pashman, suggesting the court adopt these broader remedies, in Robinson v. Cahill *IV*, 69 N.J. 133, 155-74, 351 A.2d 713, 724-35 (1975) (Pashman, J., dissenting).

[80] Robinson v. Cahill *VII*, 70 N.J. 464, 360 A.2d 400 (1976); Robinson v. Cahill *VI*, 70 N.J. 155, 358 A.2d 457 (1976); Robinson v. Cahill *V*, 69 N.J. 449, 355 A.2d 129 (1976); Robinson v. Cahill *IV*, 67 N.J. 333, 339 A.2d 193, *reprinted in corrected form in* 69 N.J. 133, 351 A.2d 713 (1975); Robinson v. Cahill *III*, 67 N.J. 35, 335 A.2d 6 (1975); Robinson v. Cahill *II*, 63 N.J. 196, 306 A.2d 65 (1973); Robinson v. Cahill *I*, 62 N.J. 473, 303 A.2d 273 (1973), *cert. denied*, 414 U.S. 976 (1974).

Out of *Robinson I* came simply a declaration of the unconstitutionality of the New Jersey system of financing its schools, acknowledging that it was the role of the legislature to enact a new system. When, after two years, the legislature had not yet approved an alternative system, the court, which had retained jurisdiction, was confronted with the dilemma of enforcing its earlier decision. After noting that courts customarily forego the specification of legislation, and that it would be "premature and inappropriate for the Court at the present posture of this complex matter to undertake, *a priori*, a comprehensive blue-print for 'thorough and efficient' education, and seek to impose it upon the other branches of government," 69 N.J. at 144, 351 A.2d at 718, the court concluded nevertheless that if it did not act, no action would be taken. In provisional remedy for the 1976-77 school year only, it ordered the redistribution of legislatively appropriated funds according to a plan that moved toward greater equalization by eliminating the minimum support provisions to districts that did not otherwise qualify for state aid by eliminating the "save harmless" funds. Such action was justified, the court argued, because the legislature had defaulted. The court's provisional order was subject to the possiblity that the legislature might appropriate legislation to be effective the 1976-77 year, in which case the court's order would be set aside. *Id.* at 155, 351 A.2d at 724. Subsequently, the legislature enacted the Public School Education Act of 1975, and upon motion from a number of differing parties, the court took the unusual step of agreeing to rule on the facial constitutionality of the statute even though there had been no lower court determination of the issues and no evidentiary hearing at which a record could be made. The new legislation defined standards for assessing the thorough and efficient education required by the constitution, but the funding

necessary funds to meet this obligation. The distinction made by a majority of the court that it might order the distribution of "appropriated" funds but would be constitutionally prohibited from ordering an actual appropriation seemed less than compelling, and dissenters pointed out that the appropriation of public funds as an adjunct to the taxing power is singularly and peculiarly within the province of the legislature.[81] While no court welcomes such an on-going conflict with the legislature, it should be clear from the outset that such is the predictable extension of the activist position.[82]

B. *California: Defining Equal Educational Opportunity in Terms of Fiscal Neutrality*

The California school finance system was declared unconstitutional in 1971 in the decision of *Serrano v. Priest I*.[83] Two years later, in *Serrano*

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formulas still contained the minimum support and "save harmless" provision that the court had found objectionable; furthermore one might easily argue, as the several dissenting justices did, that the system, while moving in the direction of equalizing local revenues, did not advance very far toward equalization. Nevertheless, the court, probably hoping that this would be the end, gave its approval to the legislation contingent on the legislature's appropriating funds for it. Robinson v. Cahill *V*, 69 N.J. 449, 355 A.2d 129 (1976). Several months later, when the legislature had not provided for full funding of the Public Education Act by the April deadline that the court had given it, a divided court issued an order enjoining the expenditure of any funds for the support of free public schools by any state, county or municipal officer unless timely legislative action was taken providing for the funds of the act, effective July 1, 1976, for the upcoming school year. Robinson v. Cahill *VI*, 70 N.J. 155, 358 A.2d 457 (1976). The litigation ended several weeks later when the legislature passed the funding measure and the court ordered its earlier injunction dissolved. The court was given credit for the imposition of a state income tax by the legislature to fund the educational system.

For an enlightening discussion of the *Robinson* implications, see Tractenberg, *Reforming School Finance through State Constitutions: Robinson v. Cahill Points the Way*, 27 RUTGERS L. REV. 365 (1974).

[81] "We assume it would not be disputed that the power of appropriating public funds is commonly understood to be a legislative function. If the Court undertakes to reallocate funds the ultimate disposition of which has been fixed by the Legislature pursuant to the exercise of its acknowledged power of appropriation, how is this new-found power of the Court to be controlled? How can it be checked? We discern no way that this can be done. The power to appropriate is *singularly* and *peculiarly* the province of the Legislature." Robinson v. Cahill *IV*, 69 N.J. 133, 180, 351 A.2d 713, 737-38 (1975) (Mountain, Clifford, J.J., dissenting) (emphasis in original).

[82] In fact, in the New Jersey litigation, which began with a unanimous court in *Robinson I*, the course of the events apparently came as a surprise to some of the justices. Examining the full history of the *Robinson* cases, one can see the justices being carried to the logical conclusion of their activist position, with several backing off as the going became rockier.

[83] 5 Cal. 3d 584, 487 P.2d 1241, 96 Cal. Rptr. 601 (1971) (reversing a judgment of dismissal and remanding for trial on a holding that if such allegations were sustained, the state public school financing system must be declared invalid as in violation of state and federal equal protection guarantees).

v. Priest II,[84] the California Supreme Court was asked to review the interim legislation designed to reform the system after the first *Serrano* decision. The new legislation[85] eliminated some of the objectional features, but substantial disparities in district revenues and the mechanisms for perpetuating the disparities remained.[86] Both the old and reformed systems were essentially foundation programs with a mandatory local tax rate required for participation in the program coupled with a flat grant of $125 per pupil. The reform legislation substantially raised the guaranteed foundation level[87] and eliminated a "reward for effort" provision that had given supplemental aid to districts willing to vote a higher tax rate than that required to take part in the foundation program. The second major aspect of the new program involved the creation of "revenue limits" or limitations on maximum expenditures per pupil in each school district. As explained in the court's opinion:

> These provisions allowed a district without a voter override to levy taxes at a rate no higher than would increase its expenditures per pupil over 1972-73 base revenues by a permitted yearly inflation factor. A district having a school tax rate which produced revenues in excess of foundation levels would receive inflation adjustments which, when added to the full inflation allowance, did not reach the foundation level, could increase its revenues up to 16 percent of the preceding year's revenue limit.[88]

The intended effect was to allow poorer districts to move with relative rapidity toward the rising foundation levels while allowing richer districts to increase their revenue bases at a much slower rate.

Returning to its conclusions in *Serrano I*, in which the holding of unconstitutionality had been based on both the federal and the state equal protection guarantees, the California court in *Serrano II*, unlike the New Jersey court in *Robinson v. Cahill*,[89] relied exclusively on the state

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[84] 18 Cal. 3d 728, 557 P.2d 929, 135 Cal. Rptr. 345 (1977).

[85] *See* 1972 Cal. Stats. ch. 1406; 1973 Cal. Stats. ch. 208.

[86] For a full description of the pre- and post-*Serrano I* legislation, see Serrano v. Priest *II*, 18 Cal. 3d 728, 737-44, 557 P.2d 929, 932-36, 135 Cal. Rptr. 345, 348-52 (1977).

[87] The reform legislation raised the foundation level from $355 to $765 per pupil in the elementary grades and from $488 to $950 per high school pupil. At the same time it raised the "computational tax rate," *i.e.*, the hypothetical rate each district is required to levy in order to enjoy full participation in the state aid program, from $1.00 to $2.23 on each $100 of assessed valuation at the elementary level and from $.80 to $1.64 at the high school level. *Id.* at 742, 557 P.2d at 935, 135 Cal. Rptr. at 351.

[88] *Id.* at 743, 557 P.2d at 935-36, 135 Cal. Rptr. at 351-52.

[89] 62 N.J. 473, 303 A.2d 273 (1973), *cert. denied*, 414 U.S. 976 (1974) (Robinson *I*).

equal protection claim in striking down the new legislation. In doing so, the California court suggested two additional methods for circumventing the conclusion of *Rodriguez*; the first involving an expansive reading of the state equal protection clause while the second created, through the doctrine of fiscal neutrality,[90] an objective criterion for assessing equal educational opportunity.

Suggesting that Californians might have come to expect a greater protection of their interests than the remainder of the country, the court asserted that while the state equal protection provisions are "substantially the equivalent of" the fourteenth amendment guarantees, they are nevertheless "possessed of an independent vitality which . . . may demand an analysis different from that which would obtain if only the federal standard were applicable. . . . [I]n the area of fundamental civil liberties . . . [o]ur first referrent is California law and the full panoply of rights Californians have come to expect as their due."[91] Under an expanded concept of equal protection the court found both a suspect class (since local wealth is the principal determinant of revenue) and a fundamental right to education,[92] thus finding an appropriate basis for strict scrutiny, and moved on to address the nature of that fundamental right.

The court exhibited no hesitation in adopting the proposition that the quality of education correlated to, and could be measured by, expenditures made for education.[93] While not requiring that the system provide an equal expenditure level per pupil in every district, the court endorsed the doctrine of fiscal neutrality, adhering to the principle that the educational resources available to a child may not be a function of wealth of the district in which he resides. Translating this principle into a judicial standard, the court adopted the following prescription: "[E]quality of educational opportunity requires that all school districts possess an equal ability in terms of revenue to provide students with substantially equal opportunities for learning."[94] Any system which con-

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[90] The principle "that the quality of public education may not be a function of wealth other than the wealth of the state as a whole" originated with and was first adopted by the California Supreme Court in Serrano v. Priest *I*, 5 Cal. 3d 584, 487 P.2d 1241, 96 Cal. Rptr. 601 (1971).

[91] 18 Cal. 3d 728, 768, 557 P.2d 929, 950, 135 Cal. Rptr. 345, 366, (quoting in part from People v. Longwill, 14 Cal. 3d 943, 538 P.2d 753, 123 Cal. Rptr. 297 (1975)) (footnote omitted).

[92] 18 Cal. 3d 728, 766, 557 P.2d 929, 951, 135 Cal. Rptr. 345, 367 (1976).

[93] Defendants had argued for an "output" measure of educational quality, *i.e.*, an examination of the effectiveness of the education prefaced by comparing performance of pupils from each district on statewide achievement tests. The court concluded, however, that "even using pupil output as a measure of the quality of a district's educational program, differences in dollars do produce differences in pupil achievement." *Id.* at 748, 557 P.2d at 939, 135 Cal. Rptr. at 355.

[94] *Id.* at 747-48, 557 P.2d at 939, 135 Cal. Rptr. at 355.

ditions the full entitlement to educational benefits on wealth, thereby classifying recipients on the basis of their collective affluence and making the quality of the child's education depend upon the resources of his local district, does not meet this standard. By allowing wealthier districts a substantial advantage in obtaining higher quality staff, program expansion and variety, beneficial student-teacher ratios, and modern equipment and materials, the reformed California system was ineffective. A foundation program which allows some districts to go beyond the state minimum level through taxation of property within the district denies equal educational opportunity to some children. Reasoning from this position, the court concluded that either some form of full state funding or district power equalizing would be appropriate alternatives to the California foundation program.[95]

Concededly the fiscal neutrality principle allows "leveling down" as well as "leveling up." Unlike the New Jersey court which mandated a higher level of educational funding and quality, the California court's emphasis is genuinely on equality. Quoting the trial court, the supreme court noted:

> The equal protection of the laws provision of the California Constitution mandates nothing less than that all such persons shall be treated alike. If such uniformity of treatment were to result in all children being provided a low-quality educational program, or even a clearly *inadequate* educational program, the California Constitution would be satisfied.[96]

In taking this position, the court presumably recognizes the political impossibility of legislators requiring districts which pride themselves on the quality of available education to lower their expenditures rather than to fund other districts at the same level. In fact, the California legislation suggests the accommodation. Under the reform plan, wealthy districts were not "leveled down" but they were to be held at the pre-

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[95] The full list of "workable, practical and feasible" alternative methods articulated by the *Serrano II* court includes:

> (1) full state funding, with the imposition of a statewide property tax; (2) consolidation of the present 1,067 school districts into about five hundred districts, with boundary realignments to equalize assessed valuations of real property among all school districts; (3) retention of the present school district boundaries but the removal of commercial and industrial property from local taxation for school purposes and taxation of such property at the state level; (4) school district power equalizing, which has as its essential ingredient the concept that school districts could choose to spend at different levels but for each level of expenditure chosen the tax effort would be the same for each school district choosing such level whether it be a high-wealth or a low-wealth district; (5) vouchers; and (6) some combination of two or more of the above.

Id. at 747, 557 P.2d at 938-39, 135 Cal. Rptr. at 354-55.

[96] *Id.* at 754 n.28, 557 P.2d at 943 n.28, 135 Cal. Rptr. at 359 n.28.

sent level while the poorer districts "leveled up." The court found no particular problem with this approach except that the period of convergence, which the trial court had found could be effected in as few as six years,[97] would take up to twenty years under the formula adopted by the legislature.[98] To the extent that equal tax rates still produce differing expenditure levels or, in the alternative, that equal expenditure levels can be produced by differing tax rates, the system would continue to generate school revenue in proportion to the wealth of the individual district.[99] Consequently, local control would continue to be a function of district wealth under the new law. In such a setting the revenue limits, by taking 1972-73 as their base, perpetuate inequities from property tax base differentials and are too slow to produce convergence, particularly since the legislation allowed districts to exceed the revenue limits if a majority of voters in the district voted an override.

Although not available at the time of the court's decision in *Serrano II*, a recent National Institute of Education report verifies the conclusion that the California reform legislation has improved wealth neutrality but that revenues remain highly dependent on property tax bases.[100] The first year of reform saw a dramatic increase in state aid channeled to lower-spending districts through a higher level foundation plan, and distribution of revenues became more equal. But the revenue limits which had been designed to hold down revenue growth in high-spending districts so that low-spending districts could catch up also limited the rate at which the latter could increase their revenues. Increases in state aid, therefore, had to be translated at least partially into tax relief. The major effect of California's reform legislation was to create taxpayer equity. Before reform, low property value districts levied substantially greater tax rates than high-spending districts. The combination of increased state aid and revenue limits led to substantial reduction in the low-spending districts' tax rates.[101]

The passage of Proposition 13 in California suggests one of the ways in which the populace can counteract the effects of *Serrano II*.[102] By

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[97] *Id.* at 749 n.22, 557 P.2d at 940 n.22, 135 Cal. Rptr. at 356 n.22.

[98] *Id.* at 744, 557 P.2d at 937, 135 Cal. Rptr. at 353.

[99] *Id.* at 745, 557 P.2d at 937, 135 Cal. Rptr. at 353.

[100] S. CARROLL, THE SEARCH FOR EQUITY IN SCHOOL FINANCE: RESULTS FROM FIVE STATES 72 (1979).

[101] *Id.* at 73-74.

[102] Proposition 13 was passed by California voters in June, 1978. CAL. CONST. art. XIIIA. In brief, Proposition 13 returned most real property to its 1975-76 assessed valuation and limited property tax to one percent of full cash value. It also prohibited the enactment of any new taxes except upon a two-thirds vote of the California legislature for any new state tax measure and two-thirds vote of the electorate for any new local tax measure. For discussion of the effects of Proposition 13 in general and on public education in particular, see Guthrie, *Proposition 13 and the Future of California's Schools*, 60 PHI DELTA KAPPAN 12 (1978); Rader & Lang, *supra* note 6.

enacting through initiative petition a property tax limitation of one percent, California voters have in effect enacted a uniform state-wide tax rate and prepared the way for equalization. Even in districts with the highest amounts of property wealth per pupil, property tax revenues will not likely constitute the state-mandated minimum per pupil expenditure level, and all of California's districts will qualify for equalization aid. In such a situation, the state cannot constitutionally sustain substantial variations in per pupil expenditures, and within some reasonable time all expenditure differences for which there is not a sound educational justification will need to be eliminated. Some commentators, therefore, expect expenditure parity to be achieved within three to five years.[103] Along with this, however, it is to be expected that school districts will substantially lose control over expenditures. If the state specifies per pupil expenditure levels and specifies within tight boundaries the school programs for which funds must be spent, and if local tax rate discretion has been eliminated, there is little discretion left to the local school districts.

C. *Connecticut: The Clear-Cut Case*

The Connecticut Supreme Court's decision in *Horton v. Meskill*[104] in early 1977 was the first interventionist decision to be issued in a suit *filed* after *Rodriguez*. Of the state funding systems, Connecticut's was certainly the one most open to challenge. This system made no attempt to equalize expenditures among districts;[105] instead it awarded flat grants of $215 per pupil to every school district without regard to the financial capability of the district to raise funds for education. Local expenditures consequently accounted for seventy percent of all school expenses,[106] and disparities among district expenditures ranked Connecticut fiftieth among the states in its efforts to distribute state aid in a way which equalized the abilities of the districts to finance education.[107]

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[103] Guthrie, *supra* note 102, at 13-14.

[104] 172 Conn. 615, 376 A.2d 359 (1977).

[105] Public schools in Connecticut are financed primarily by two means: funds raised by the town by assessment on local property and funds distributed by the state based on a flat grant per pupil. The flat grant for 1973-74 was $215 per pupil; subsequently it was raised to $250 per pupil. *Id.* at 592, 376 A.2d at 365-66.

[106] *Id.* at 629, 376 A.2d at 366.

[107] *Id.* at 635, 376 A.2d at 368. The U.S. Department of Health, Education and Welfare compiles data and reports it in the form of a "disparity index," the ratio of expenditures at the 95th percentile of students to expenditures at the fifth percentile of students. The exclusion of the highest and lowest five percent is intended to allow for circumstances that might justify some extreme unevenness in the distribution of resources. In 1975 the disparity index for Connecticut was 2.29, *i.e.*, districts spending at the 95th percentile spent 2.29 times the expenditures per pupil as those at the fifth percentile. The 1975 index for California was 2.02, for New Jersey 1.95, for Washington 1.83, and for Ohio 1.78. Full state funding, as is the case in Hawaii, produces an index of 1.00. U.S. DEP'T. OF HEALTH, EDUC. & WELFARE, SCHOOL FINANCE REFORM IN THE SEVENTIES: ACHIEVEMENTS AND FAILURES (1977).

The Connecticut court concluded that education in that state was a fundamental right. Its decision was based on the history of public education in Connecticut and on state constitutional language making schooling mandatory, ascribing to the state the duty to equalize educational opportunities.[108] To evaluate the equal distribution of this benefit, the court adopted the criteria accepted by the trial court for evaluating the "quality of education," including: size of classes; training, experience, and background of staff members; materials, books, and supplies; school philosophy and objectives; type of local control; test scores as measured against ability; degree of motivation and application of the students; and course offerings and extracurricular activities.[109] By adopting the conclusion that "the optimal version of these criteria is achieved by higher per pupil operating expenditures, and because many of the elements of a quality education require higher per pupil operating expenditures, there is a direct relationship between per pupil school expenditures and the breadth and quality of educational programs,"[110] the court created its judicially manageable standard for review of the system.

With respect to the problem of separation of powers, the court was in an ideal position. The Connecticut General Assembly had established a commission to study school finance and equal educational opportunity; the commission had reported that the present system was "inherently inequitable" and that "Connecticut [was] not providing equal educational opportunity for all its children."[111] Consequently, the court made no attempt to mandate a particular system and could graciously announce that the choice of system was a legislative function. In holding the system unconstitutional, the court added its support to a reform movement that had already begun and provided additional justification for legislators whose constituency might be reluctant to accept reforms that returned to their districts less state aid than under the existing system. It laid a foundation for a system that would recognize differences in the abilities of districts to raise local funds as well as recognize differences in educational costs based on relevant economic and educational factors. The court noted encouragingly that substantial progress toward equalization could be made by redistributing the flat grant monies according to a different formula without the need of additional state taxes.[112]

D. *Washington: Reversing Restraint in Front of Activism*

An examination of two challenges to the Washington state school financing system provides a clear illustration of the conflicting out-

[108] 172 Conn. at 644-45, 376 A.2d at 372.

[109] *Id.* at 634, 376 A.2d at 368.

[110] *Id.*

[111] *Id.* at 592, 376 A.2d at 376.

[112] *Id.*

comes that are to be expected depending upon whether the particular court is inclined to practice judicial restraint or judicial activism. The 1975 decision in *Northshore School District No. 417 v. Kinnear*[113] is typical of the non-interventionist decisions rendered shortly after *Rodriguez*. The plaintiffs' claim that the existing system[114] violated both the state equal protection clause and the constitutional provision requiring the state to make ample provision for the education of all children of the state was based largely on documentation of the broad variations in district valuation and the consequent disparities in per pupil expenditures.[115] In rejecting the plaintiffs' claim, the court recorded its impatience with the attempt to prove a constitutional violation by percentages and statistics and devoted a large part of the opinion to citing the testimony of experts challenging the validity of the statistics and of their claimed correlations to educational quality. Noting that among the many graphs, charts, bulletins, and tables produced by the plaintiffs there was no objective proof that the state had failed to discharge its duty to make ample provision for the education of the children of the state, the majority opinion did suggest that proof of real injury to students would have been more persuasive to the court.[116]

Under the Washington system, the state mandated, that each school district provide an educational program complying with the state statutes and the regulations of the State Board of Education and the Superintendent of Public Instruction. Because the state funds were inadequate to fund the level of instruction required by the legislature, the districts were authorized to seek additional funding from the district by

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[113] 84 Wash. 2d 685, 530 P.2d 178 (1975).

[114] The Washington system in effect at the time suit was filed was a foundation program that guaranteed to each district $365 per "weighted pupil." To determine a "weighted pupil," the state superintendent's office applied a formula by taking the average yearly enrollment of the district, counting kindergarten children as one half, and making increased allowance for educating different categories of students. Among these variations were .3 to be added for each high school student, .2 for each vocational student. Some additional weighting was allowed to provide incentives for higher certification, training and experience in the educational staffs. In order to participate in the program, the district was required to tax property in the district at 14 mills levied upon 25% of the fair market value; 85% of the amount raised by the district tax ("assumed money," since the district was assumed to have received this amount from its regular property tax levy regardless of whether it did in fact receive that amount) was deducted from the $365 per pupil guarantee and the difference (if positive) paid by the state to the district. *Id.* at 692-93, 530 P.2d at 183. Since the apparent 15% bonus (or "leeway") was not equalized, it provided greater benefits to school districts with a higher assessed valuation per student. While each district would receive 15%, the dollar amounts per pupil would vary with differences in assessed valuation per pupil. *Id.* at 747, 530 P.2d at 212.

[115] *Id.* at 696, 530 P.2d at 185.

[116] *Id.* at 694, 530 P.2d at 184.

way of special levy elections. Since the districts had no independent power to levy property taxes, the special levies had to be approved by the voters of the district. Such a levy could not be voted on more than two times in any one year, and districts unsuccessful in getting a levy approved were required to operate within the funds provided by the state. During the 1975-76 school year, forty percent of the students in the state were in levy-loss districts.[117] The plaintiffs had presented evidence that in many cases the failure of a special levy had required the districts to cut personnel, eliminate classes, and reduce the number of educational materials and textbooks available to students. The five-justice majority was looking for more dramatic injury which could be causally linked to the state's funding system. The following language suggests the type of proof the court would have found persuasive:

> There was no evidence that any children had been deprived of accreditation, promotion or admission to other schools because his district failed to meet state standards or that any student or parent had been forced to bring suit to compel his district to provide classes that met state standards. Nor was it shown that the Office of the State Superintendent of Public Instruction had held any petitioner district to be substandard.[118]

In addition to its reluctance to discover actual injury to school children as a consequence of the system's heavy reliance on local property tax levies, the court's opinion is marked by concern for the consequences of holding the system unconstitutional. Such a decision might demand "sweeping changes in the statutory code," perhaps requiring the court to "abolish all school districts . . . abolish all special school levies . . . establish a lowest common denominator level of educational standards and prohibit individual districts from exceeding it by means of local funds."[119] The language and tone of the majority opinion make it clear that this court had no interest in intruding into the legislative domain.

Three years later, in *Seattle School District No. 1 v. State*,[120] plaintiffs relied exclusively on the state's education clause,[121] which described the

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[117] This statistic was cited in Seattle School Dist. No. 1 v. State, 90 Wash. 2d 476, 485, 585 P.2d 71, 78 (1978).

[118] 84 Wash. 2d at 694-95, 530 P.2d at 184.

[119] *Id.* at 713, 530 P.2d at 194.

[120] 90 Wash. 2d 476, 585 P.2d 71 (1978).

[121] In 1973 the legislature had eliminated from the formula both "assumed money" and, on a phased-in basis, "leeway money." The levying authority of the local school districts for regular property taxes was also eliminated, and regular property tax for schools was placed at the state level with the revenue distributed under the apportionment formula. In order to alleviate the possible adverse impact of these changes, the legislature enacted a "grandfather clause" guaranteeing each district no less than 95% of the average amount received per enrolled pupil during the preceding three school years, excluding any excess

state's duty to provide an ample education as "paramount,"[122] and won a declaratory judgment which explicitly stated that 1) the state's duty to provide an ample education is mandatory on the legislature and includes the duty to define and provide funds for a "basic education" by means of regular and dependable tax sources; 2) special excess levies used to fund in whole or in part the "basic education" mandated by the constitution are unconstitutional but may be utilized to fund "enrichment programs" that go beyond the constitutional mandate. While the majority in *Northshore* had been willing to accept evidence as to what constituted a showing of "ample opportunity for an education," complaining that "petitioners make virtually no showing whatever as to the standards or curriculum which is or ought to be necessary to meet the state's duty to provide a common school education for all children,"[123] the majority in *Seattle* exhibited abundant resourcefulness, employing, in the absence of a legislative definition of a basic education, three separate approaches to the question of basic education and finding that the state's provision of funds to the district was inadequate.[124]

The court looked first at the requirements of the state established by statutes and regulations and accepted the conclusion that even at the minimum pupil-teacher ratio contained in the state definitions of teacher ratios, salary expenses and teacher certifications, the cost of such a program significantly exceeded the available state funding. Applying the standards set by accreditating agencies, the court found the funding equally deficient. Finally, the court used an inexact collective wisdom approach, focusing upon the theoretical normal range ability student and applying the state-wide aggregate average per pupil deployment of certificated and classified staff and nonsalary related costs for the maintenance and operation of a school program for the normal range student. Again, the court found that the ratio established by collective wisdom was not being funded by the state.

To look for differences in evidence or facts in the two cases is to invite frustration. The key difference is in the attitude of the court toward its responsibility or authority to confront the legislature. Justice Stafford's minority opinion from *Northshore*, in which he was joined by only two other justices, became, in only slightly revised form, the majority opinion in *Seattle*. In the interim four of the five justices in the majority in *Northshore* had been replaced on the court;[125] presumably

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levies. *Id.* at 530-31, 585 P.2d at 101. Despite the "grandfather clause," the conversion to the state equalization formula represented a loss of approximately $2 to $4 million to the Seattle school district. *Id.* at 532, 585 P.2d at 102.

[122] *See* discussion at *id.* at 497-500, 585 P.2d at 84-85.

[123] 84 Wash. 2d at 695, 530 P.2d at 184.

[124] 90 Wash. 2d at 533-35, 585 P.2d at 102-03.

[125] Voting with the majority in *Northshore* were Justices Hale, Hunter, Hamilton, Rosellini, Wright, and Weaver; dissenting were Justices Stafford, Utter, and Finley. In *Seattle*, Justices Wright, Brachtenbach, Horowitz, and

the new judges were more disposed to the activist position because the *Seattle* opinion confronts directly and at length the problem of separation of powers and judicial overreaching. The opinion takes pains to distinguish the separation of powers argument advanced by the defendants from the question of judicial discretion and judicial restraint, asserting: "Once it is determined that judicial interpretation and construction are required, there remains no separation of powers issue. Thereafter, the matter is strictly one of judicial discretion."[126]

In answer to defendants' argument that the court should not act "unless things become bad enough," the majority responded: "Clearly, these arguments are not addressed to a 'separation of powers' question. Rather, they are directed at *judicial restraint*."[127] In arriving at this position, the court had to establish that the state constitution's education clause was in need of interpretation and construction and to counter the argument that the particular mandate of the constitution, directed as it was to the legislature, was not enforceable by the judiciary. The court's fairly ingenious maneuvering to find a lack of clarity and need for interpretation of the constitutional provision suggests the extent of its determination to exercise judicial discretion, especially since what is unclear is the definition of "ample education" and the responsibility for making that determination had been vested in the legislature.[128] The court's further attempt to provide a basis for judicial enforcement of the legislative mandate is equally dubious, resting as it does on a distinction between "personal" and "public" guarantees and the characterization of the ample education guarantee as a personal guarantee similar to the right to trial by jury.[129] In the protection of *personal rights* the Washington court believed that it had the power to determine whether the legislature had fulfilled its mandate and "to go to any length within the limits of judicial procedure, to protect such constitutional guarantees"; however, in the "large field of governmental activity having to do with *public affairs*, only, there are many things that might be done or left undone in derogation of mandatory constitutional provisions which the courts would be powerless to correct."[130]

While the court refrained from retaining jurisdiction and extended the date for compliance with its order to July, 1981, the effect of the

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Dolliver joined Justice Stafford's majority opinion; Justice Utter filed a concurring opinion advocating a more limited ruling, and Justice Rosellini joined by Justices Hicks and Hamilton, dissented, primarily on separation of powers grounds.

[126] *Id.* at 504-05, 585 P.2d at 88.

[127] *Id.* (emphasis in original).

[128] *Id.* at 573, 585 P.2d at 124-25 (Rosellini, J., dissenting).

[129] *Id.* at 501-02, 585 P.2d at 86.

[130] *Id.*

judgment is nevertheless to order the legislature to define education and to allocate additional revenues to public education. As Judge Rosellini points out in his dissent, the court has made the initial determination on the method and level of state funding.[131] Unlike the situation in Connecticut, there is no suggestion in this case that there are funds in the state treasury that have been wrongfully withheld or distributed. Instead, as the dissent notes, "[t]he sum and substance of the complaint is that the funds made available by the State are inadequate. . . ."[132] In adopting this position, the Washington court has moved from a position of routine judicial restraint to one of complete activism.

V. THE OHIO EXPERIENCE

The most recent school financing challenge to reach a state supreme court, *Board of Education v. Walter*,[133] emerged as a non-interventionist decision in a climate that presented contradictions and factors leading toward the extremities of judicial restraint and intervention. A review of this Ohio case defines some limitations still inherent in the school finance reform area despite the experiences of states whose courts have assumed an interventionist position.

In several respects the Ohio situation was ripe for court action. The Ohio Constitution contains an equal protection clause as well as a "thorough and efficient" education clause essentially identical to that in New Jersey litigation,[134] and the district power equalizing plan enacted in 1975 contained "save harmless" and other provisions that had been declared unequalizing in other courts.[135] The trial court's findings

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[131] *Id.* at 563, 585 P.2d at 120 (Rosellini, J., dissenting).

[132] *Id.* at 576, 585 P.2d at 126 (Rosellini, J., dissenting).

[133] 58 Ohio St. 2d 368, 390 N.E.2d 813 (1979).

[134] Relevant provisions include OHIO CONST. art. I, § 2, which provides that "All political power is inherent in the people. Government is instituted for their equal protection and benefit. . . ." (known as the equal protection clause); OHIO CONST. art. VI, § 2, which provides that "The General Assembly shall make such provisions, by taxation, or otherwise, as, . . . will secure a thorough and efficient system of common schools throughout the state. . . ." (known as the "thorough and efficient" clause); OHIO CONST. art. VI, § 3, which provides that "Provision shall be made by law for the organization, administration, and control of the public school system of the state supported by public funds. . . ." (known as the educational support clause); and OHIO CONST. art. II, § 26, which provides that "All laws, of a general nature, shall have uniform operation throughout the state. . . ." (known as the uniform operation clause).

[135] The challenged provisions of the school financing system were codified as follows: OHIO REV. CODE ANN. § 3317.022 (Page Supp. 1978) (state "basic aid" formula); *id.* § 3317.02(E) ("save harmless" provisions); *id.* § 3317.023(A)-(C) (staffing cost adjustments to state basic aid); *id.* § 3317.53(A) repealed 1978 (additional staffing cost adjustments). At the time *Walter* was being litigated in the trial court the last provision, section 3317.53(A), was still in effect though it had been prospectively repealed by the legislature. That repeal became effective July 1, 1978.

established the low level of funding for Ohio schools and found the actual injury that had been persuasive to the Washington court in incidents of schools forced to close or encountering difficulty in complying with state minimum standards because of lack of funds.[136] Finally, a poor correlation between the property tax provisions supporting public schools and the school financing formula created a mathematical certainty of continuing under-funding and inequities in school funding.[137]

On the other hand, an equal number of considerations militated for a position of judicial restraint.[138] This is clear from the court's assertion early in its opinion that the enactment by the General Assembly of a guaranteed yield formula and the establishment of the guarantee level were a "policy decision"[139] and the court's reluctance to use the judicial process to resolve a political controversy. In spite of the fact that this challenge on behalf of the Cincinnati school system was not cast as a taxpayer-equity suit, the court was aware that in effect it was being asked to determine the appropriate level and adequacy of funding for education and not simply the appropriate or equalizing distributional system for funds already appropriated. Sufficiently noteworthy is the court's conclusion that "this case is more directly concerned with the way in which Ohio has decided to collect and spend state and local taxes than it is a challenge to the way in which Ohio educates its children."[140] Approaching the case from this direction, the court does not reach the question of the nature of the benefit or of the right of school children to have that state benefit dispersed equally.

Because of the contradictions within the system, the Ohio court had to balance the factors in favor of judicial intervention versus restraint to

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[136] Findings of Fact and Conclusions of Law at 53-71, Board of Educ. v. Walter, No. A7602725 (Ohio C.P. Hamilton County Dec. 5, 1977).

[137] *E.g.*, *id.* at 21-22, 33-42. The relevant property tax provisions are found at OHIO REV. CODE ANN. § 5705.02 (Page 1973) (ten-mill limitation); *id.* § 5705.07 (provision for voted levy in excess of ten-mill limitation); OHIO REV. CODE ANN. § 5705.194 (Page Supp. 1978) (provision allowing school boards to declare need for emergency school levy). Roll-back provisions are codified at OHIO REV. CODE ANN. § 319.301 (Page 1979).

[138] Concern for the funding of education had been the subject of intensive political debate. During the decade prior to the filing of *Walter*, a number of events had transpired that had led the urban schools into a period of decline. School levies had failed at the rate of 67%, and in 1976 *seven* schools closed for lack of funds. EDUCATION REVIEW COMMITTEE REPORT, 113th Ohio Gen. Assembly, 1st Sess. (1979). Ohio ranks 50th in percentage of personal income spent on education. The former governor Gilligan, elected in 1972, had been strongly supported by an educational faction which he had promised increased state expenditures for education. A state income tax had been enacted in 1972 presumably for this purpose, but many educators felt that Gilligan had failed to make good on his promise.

[139] 58 Ohio St. 2d at 371, 390 N.E.2d at 817.

[140] *Id.* at 375-76, 390 N.E.2d at 819.

render a decision. The trial court had assumed an activist position but was reversed by a non-intervening supreme court. A review of the decision will show that the Ohio Supreme Court was not exercising a position of judicial restraint as much as it was giving the legislature an opportunity to complete the implementation of their planned funding system before a judicial decision would be rendered criticizing the system.

A. *The System*

The challenged funding system had been enacted by the General Assembly in 1975 after several years of legislative attention to the school finance issue. As did many other state legislatures, the Ohio General Assembly commissioned a study of the state system in light of the first *Serrano v. Priest*[141] decision with the first report of the Legislative Service Commission appearing in 1972.[142] Within the legislature itself a bipartisan, bicameral Education Review Committee was formed to prepare recommendations for adoption by the General Assembly.[143] The committee's two-fold charge was to correct unequal distribution of resources and to insure instruction of high quality for individual needs.[144] For political and state budget reasons the committee recognized that it could not propose the most ideal funding of education; instead it set out to propose a "limited and feasible set of practical alternatives."[145] Prior to 1975 Ohio had financed its schools under a guaranteed foundation program which suffered from all the usual inequities associated with such programs, including the disparities in educational expenditures based on property wealth of the school districts, the inequities of varying millage rates, and the disincentive to property-poor districts to assess themselves at higher than the minimum rate required for participation in the program. More significantly, however, the presence of "no loss" clauses in the foundation plan resulted in no schools in the state receiving aid under the foun-

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[141] 5 Cal. 3d 584, 487 P.2d 1241, 96 Cal. Rptr. 601 (1971) (Serrano *I*).

[142] OHIO LEGIS. SERV. COMM'N, SERRANO V. PRIEST, EQUAL PROTECTION OF THE LAWS AND OHIO PUBLIC SCHOOL FINANCE, REP. NO. 106, 109th Ohio Gen. Assembly, 2d Sess. (1972).

[143] Amended Substitute H.B. No. 86, 110th Ohio Gen. Assembly, 1st Sess. (1973).

[144] EDUCATION REVIEW COMMITTEE REPORT, 110th Ohio Gen. Assembly, 2d Sess. (1974). In gathering information for its report the committee held public hearings in four cities: Cincinnati, Lima, Cleveland, and Nelsonville; it heard testimony from over 200 students, parents, teachers, school administrators, members of school boards, community leaders, and interested citizens. Reports available to the committee included extensive computer analyses of statistical data prepared by the Ohio Department of Education, the Department of Taxation, the Board of Tax Appeals, and the United States Bureau of the Census. *Id.* at iv, v.

[145] *Id.* at 2.

dation formula in 1974.[146] By 1974 every school district had found it advantageous to compute its state aid supplement based on guarantees of no less aid than in prior years.

The 1975 plan, described as the Guaranteed Yield Plan, was intended to create an incentive for local districts to tax themselves at higher rates while using "save harmless" clauses providing a minimum amount of basic state aid to protect districts suffering declines in local property wealth and pupil enrollments.[147] It included provisions for State Basic Aid and Categorical Aid grants to supplement revenue raised at the local level by school districts from property taxes. State Basic Aid was computed on a typical district power equalizing formula[148] but without a recapture provision and with a ceiling beyond which revenue raised at the local level would not be matched or equalized by state funds. The objective of the State Basic Aid provision was stated in terms of "equal yield" and "reward for effort." Under the "equal yield" provision the state guaranteed that every district that levied millage of twenty mills would receive $48 per pupil per mill levied. In order to adjust for different assessments in effect at the time the legislation was passed, the statute provided for an adjustment in assessment by the percentage of assessed value to true value, thereby arriving at a state equalized mill. For every mill levied between twenty and thirty mills the formula provided a guarantee of $42 per pupil per mill. School districts which had revenue from these millage rates exceeding the state guarantees (which were based on property valuation of $48,000 for the first twenty mills and $42,000 for the millage between twenty and thirty mills) were allowed to keep the excess revenue.[149]

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[146] *Id.* at 5.

[147] *Id.* School enrollments in Ohio have been declining by about three percent per year since 1971 and are projected to continue declining until the mid-1980s. Since an incremental decline in enrollment cannot be translated immediately into reduced expenditures or staff reductions, declining enrollments have impaired the operation of the Guaranteed Yield formula generally. A decline in enrollments causes property values per pupil to increase. This in turn decreases the amount of state aid per pupil. In spite of a provision in the formula permitting school districts to use the average of their three most recent years' enrollments in calculating the State Basic Aid allocations, central city schools which are experiencing the most rapid decline in pupil enrollments have been particularly adversely affected. EDUCATION REVIEW COMMITTEE REPORT, 113th Ohio Gen. Assembly, 1st Sess. (1979). *See* OHIO REV. CODE ANN. § 3317.02 (Page Supp. 1979).

[148] *See* OHIO REV. CODE ANN. § 3317.022 (Page Supp. 1978).

[149] Because of the extreme diversity in millage rates and the large number of no loss guarantees in the foundation formula, the Education Review Committee proposed a four-year phase-in period for the legislation along with a two-year guarantee to "save harmless" with respect to total aid per pupil. The state guarantee, set at $48 per pupil per assessed (state equalized) mill for the first 20 mills levied by the local district, was intended to bring all but the very wealthiest

Founded as it was in a theory of incentives and "reward for effort," the plan was not intended to provide complete pupil equity. The focus instead was on taxpayer equity and the generation of equal revenues from equal property taxation rates. The education review and property tax provisions, including provisions for rolling back the millage rate when property values increase due to inflation and provision for triennial updating of assessments, produced the most severe shortcomings in the Ohio plan.

A school district's funding under the Basic Aid program was qualified by several other provisions, each challenged by the plaintiffs as unconstitutional, including "save harmless" provisions which assured to districts that would not otherwise qualify for aid under the new basic formula at least as much state aid as under the previous formula.[150] The final subject of plaintiff's challenge was certain provisions penalizing, through reduced aid, school districts that failed to maintain specified pupil-staff ratios and rewarding with additional aid districts that hired teachers and staff at a higher salary based on greater experience or advanced training.[151] The Categorial Aid grants,[152] which may be spent by the district only for the purposes stated, were pegged to minimum salaries of personnel hired to deliver categorical services. Additional funding for transportation was calculated based on millage. In addition, there was a provision for impacted pupil aid.

Several mechanisms for property tax relief operate contrary to the school financing formula. These are: 1) the ten-mill limitation,[153] 2) the property tax roll-back,[154] and 3) the provision for triennial update and sexennial reassessment.[155] Under the ten-mill limitation school districts are authorized to levey unvoted property taxes but are subject to the provision that unvoted property taxes on any one piece of property cannot exceed ten mills or one percent of assessed value. In practice, then, if another taxing authority has already levied taxes on property, the school district is limited to the difference between the millage for the

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districts in the state within the Guaranteed Yield Plan. When fully funded, the state basic aid plan would produce a statewide average educational expenditure of $1,200.

[150] OHIO REV. CODE ANN. § 3317.02(E) (Page Supp. 1978).

[151] *Id.* § 3317.023(A)-(C); *id.* § 3317.53(A)-(B).

[152] *Id.* § 3317.024.

[153] The Ohio Revised Code, which incorporates OHIO CONST. art. XII, § 2, includes the following: "The aggregate amount of taxes that may be levied on any taxable property in any . . . taxing unit shall not in any one year exceed ten mills on each dollar of tax valuation of such subdivision or other taxing unit, except for taxes specifically authorized to be levied in excess thereof. OHIO REV. CODE ANN. § 5705.02 (Page 1973).

[154] OHIO REV. CODE ANN. § 319.301 (Page 1979), *discussed in* text accompanying note 157 *infra*.

[155] OHIO REV. CODE ANN. § 5715.01 (Page Supp. 1978).

other services and ten mills. Since participation in the state funding system requires a local millage for school purposes of twenty mills, the authority of a school district to levy taxes within the ten-mill limit is insignificant.[156]

The effect of the property tax roll-back is more dramatic. Not only does this provision deprive the school district of the benefits of the increase in assessed value as inflation raises the value of property within the district, but it also operates to diminish state support under the "reward for effort" provision. Under the roll-back provision, the auditor is directed to "determine by what percent the sums levied by the tax to levy the same number of dollars . . . as were charged against all real property in the district by the tax in the preceding year."[157] As the amount of personal property within the district increases, the sum to be required from real estate property taxes decreases in percentage terms and produces what is effectively a lower millage rate, which in turn entitles the district to less state aid as "reward for effort."[158]

The final provision affecting the school financing formula is the property tax section calling for triennial updating of assessments and sexennial reassessment. Because of the roll-back provisions, which operate as well when property is updated or reappraised, the school district may suffer a dramatic decrease in funding every three years. This would happen, for example, if the district had been taxing at a millage between twenty and thirty, and, as a consequence of reassessment at the inflated values, the millage required would effectively be at or below twenty mills. In this case the school district would lose state funds at the same time that it did not benefit from the increased valuation of the property within the district.[159] Passage of additional millage would remedy this problem, but during the interim the school district's budget would be disproportionately affected, and there would be the possibility that the voters would not approve additional millage. For the Cincinnati school district, which underwent a triennial updating that reduced its millage rate and therefore entitled it to a lesser guaranteed millage during the first year of funding under the new plan, the combined effect of the

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[156] School districts are authorized to make tax levies in excess of the ten-mill limitation upon vote of the people. OHIO REV. CODE ANN. § 5705.07 (Page 1973).

[157] OHIO REV. CODE ANN. § 319.301 (Page 1979). The roll-back operates only against real property and does not affect revenue received as a consequence from taxation of personal property within the district. Local school revenues are raised from both real and personal property taxes.

[158] The roll-back provision does not reduce the millage rate below 20 mills. OHIO REV. CODE ANN. § 319.301(A)-(B) (Page 1979).

[159] The effect of the reassessment and updating provisions on the school funding system is discussed in EDUCATION REVIEW COMMITTEE REPORT, 113th Ohio Gen. Assembly, 1st Sess. (1979), which notes that the largest decreases in State Basic Aid occur in property-poor districts which experience significant growth in real property values and have high proportions of real property. *Id.* at 4.

property-tax roll-back and reassessment produced a decrease in the amount of money the school district received from the state. Making several reasonable assumptions about enrollment, increases in categorical aid, future millage increase, and tax revenue growth, the Cincinnati school district could predict that by 1980-81 its entitlement to Basic State Aid would be reduced to zero.[160] Declining enrollment and a very slight increase in property valuation over a five-year period would put Cincinnati outside the Basic State Aid program by 1980-81 even though average per pupil costs could be expected to increase by approximately 139%.[161]

B. *The Trial Court's Findings*

The plaintiffs' suit in *Walter* was filed in April, 1976,[162] during the first year of funding under the new plan and was based on both the state constitution's "thorough and efficient" education clause and the equal protection clause.[163] The plaintiffs' arguments went to the adequacy and manner of funding, with the bulk of the evidence directed to proving that some districts could not raise sufficient funds and that the state system had consequently deteriorated in quantity and quality.

At trial[164] the plaintiffs concentrated on evidence describing the conditions in Ohio's 617 school districts and the disparities existing in per

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[160] Findings of Fact and Conclusions of Law at 37, Board of Educ. v. Walter, No. A7602725 (Ohio C.P. Hamilton County Dec. 5, 1977).

[161] *Id.* at 33-36.

[162] Suit was filed in the Court of Common Pleas of Hamilton County on April 5, 1976, as a class action seeking declaratory judgment that the Ohio system of financing public elementary and secondary education was unconstitutional under the Ohio Constitution. Parties plaintiff included: a) the Board of Education of the City School District of the City of Cincinnati; b) members of that Board; c) the Superintendent of Schools for the City School District of the City of Cincinnati; d) the Clerk-Treasurer of the City School District of the City of Cincinnati; e) the named students who reside in the City School District of the City of Cincinnati and who attend Cincinnati public schools; f) the named parents of children attending such schools who also are owners of real property located in the Cincinnati School District; g) all of the above in their representative capacities and as representative parties on behalf of all similarly situated school districts in Ohio, the members of the boards of education for such school districts, all administrators employed by such school districts, the students who reside therein and attend public, elementary, and secondary schools operated by such school districts, the parents of such students, and the owners of real property situated in such districts.

Parties defendant were the Superintendent of Public Instruction, State of Ohio (with whom rests the responsibility of calculating the amounts of state aid payable to each school district under the Ohio Revised Code Chapter 3317); the State Board of Education; the Department of Education; and the Controlling Board (which administers the School Foundation Program).

[163] *See* note 134 *supra.*

[164] Trial commenced on December 6, 1976, and concluded on December 5, 1977. The trial court heard 78 days of testimony, including that of 77 witnesses and the

pupil expenditures among the districts. The trial court adopted in toto the plaintiffs' proposed findings of fact, which described the resources available to urban schools as barely adequate to maintain a minimal education program because of escalating costs, declining revenues, and tax failures that had resulted in reductions of staff, limited after-hours usage of the school building, poor maintenance, higher pupil-teacher ratios, vandalism, curtailed school days, elimination of summer school, inadequate libraries, and few musical or cultural offerings.[165] The court found the Cincinnati school district "financially destitute, starved for funds, lack[ing] teachers, adequate buildings and equipment and that the children resident in that district are receiving submarginal educational opportunities."[166] Similar findings were reached with respect to other municipal school districts. Urban districts were found to have the highest pupil-teacher ratios and the lowest level of instructional expenditures while at the same time requiring more funds than non-urban school districts in order to deliver the same level of educational program.[167] By contrast, certain well-financed suburban districts were found to have the resources to offer broad curricula, low pupil-teacher ratios, diagnostic measures and support personnel, media centers, extracurricular programs, higher paid teachers and professional personnel, and drama, music, and language courses.[168]

Apart from mere subjective conclusions concerning differences in educational quality that existed because of the disparities in funding available to property-poor and property-rich districts, the plaintiffs offered objective evidence of injury in two respects: 1) the inability of schools to comply with the state prescribed "minimum standards"[169] and

introduction of approximately 2,400 exhibits. The record consists of 7,530 pages of transcript. The trial court adopted and filed 388 pages of findings of fact and 35 conclusions of law submitted by the plaintiffs.

[165] Findings of Fact and Conclusions of Law at 93-94, Board of Educ. v. Walter, No. A7602725 (Ohio C.P. Hamilton County Dec. 5, 1977).

[166] *Id.* at 111.

[167] *Id.* at 119-20.

[168] *Id.* at 125-40. In addition, the trial court specifically found: 1) a substantial number of children, including all students enrolled in school districts which had less than $1,100 in total state and local per pupil expenditures in 1975-76 (62% of the total student population), were receiving less than adequate educational services and opportunities, *id.* at 142; 2) the disparities in expenditures for instruction were directly related to the total state and local per pupil revenue disparities, *id.* at 145; 3) there is a strong negative correlation between instructional expenditures and pupil-teacher ratio, *id.* at 148; 4) there is a correlation between total revenue per pupil and the quantity and quality of educational services a school district is able to provide, *id.* at 169; and 5) there is a relationship between the educational services provided and the educational attainment of students, *id.* at 175.

[169] The Ohio Board of Education is directed by statute to prescribe and promulgate minimum standards to be applied to all schools "for the purpose of requiring a general education of high quality" which each school must meet for

2) school closings because of lack of funds. Of the 1,869 schools inspected during the period from 1972 through 1976, ninety-seven percent were found not to be in compliance with one or more of the standards promulgated by the Ohio Board of Education.[170] Of these, fifty-three percent were deficient in curriculum and instruction, and sixty-three percent were deficient in staff and personnel.[171] Moreover, under Ohio law, which forbids a school district from operating at a deficit,[172] seventeen school districts in 1976 and fifty-one school districts in 1977 applied for closing permits.[173] Apart from the evidence of actual injury to school children that is inherent in the school closing, the closing itself evidences the unwillingness of the district to assume responsibility for school support since the closing application may be made only after two prior unsuccessful tax levy elections in that year.[174] Since the school is still required to be open and provide instruction for 182 days, the effect of closing is not limited to one academic year. By lengthening the term

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chartering purposes. OHIO REV. CODE ANN. § 3301.07 (Page Supp. 1978). Among the areas to be covered by the standards are curriculum; certification of teachers, administrators and other professional personnel; instructional materials and equipment, including library facilities; organization, administration and supervision of each school; buildings, grounds, health and sanitary facilities; admission of pupils; such requirements for promotion from grade to grade "as will assure that they are capable and prepared for the level of study to which they are certified"; requirements for graduation; and such other factors as the board finds necessary. *Id.* § 3301.07(D).

[170] Findings of Fact and Conclusions of Law at 54, Board of Educ. v. Walter, No. A7602725 (Ohio C.P. Hamilton County Dec. 5, 1977).

[171] *Id.* at 55.

[172] *See* OHIO REV. CODE ANN. § 5705.412 (Page Supp. 1978), which prohibits school districts from making any contract or order involving the expenditure of money unless the district has been certified by the Treasurer to have sufficient funds under existing levies to operate an adequate educational program on the days set forth in its adopted school calendar for the current fiscal year. *See also id.* §§ 3313.483, 3313.437, which prescribe the procedure whereby a school district which has insufficient funds to open on all days set forth in its school calendar must seek authorization to close for the remainder of the fiscal year. The problem of school closings was exacerbated in Ohio prior to 1979 because the school districts' fiscal year did not coincide with the state's fiscal year. In addition, Amended Substitute Senate Bill No. 59 authorizes school districts unable to meet operating expenditures for the remainder of the school year to enact voter-approved district income tax. *See id.* § 3317.62. *See also id.* § 3317.61, which provides the mechanism for emergency school advancement loans for financially troubled districts.

[173] Findings of Fact and Conclusions of Law at 57, Board of Educ. v. Walter, No. A7602725 (Ohio C.P. Hamilton County Dec. 5, 1977). Of the 51 school districts which had applied for closing permits as of November 1977, 33 had been certified by the auditor for closings ranging from 3 to 63 days, for a total of 856 school days affecting 282,635 students. *Id.* at 63-69. The trial court specifically found that children deprived of schooling as a result of school closings suffered educational losses. *Id.* at 70.

[174] *Id.* at 55.

in the fiscal year after closing, the school district is exhausting money that has been budgeted for the upcoming year, and the problem continues indefinitely.[175]

With respect to the allegations of inequities in the statutory system, the plaintiffs presented evidence demonstrating the variations in district property valuation, ranging from $282,897 per pupil to $4,286 per pupil in 1975-76.[176] Because of this disparity, the twenty mill levy raised $5,658 per pupil in the highest valuation district and only $86 per pupil in the lowest valuation district[177] and created an inequality in districts' per pupil expenditures for which the Basic State Aid formula failed to compensate.[178]

The plaintiffs' contention that the "save harmless" provision and the premium and penalties provisions are anti-equalizing was not contested.[179] Under the "save harmless" provision $5 million in 1975-76 and $10 million in 1976-77 was awarded to school districts, including fifteen of the twenty wealthiest districts. No "save harmless" money was awarded to the urban school districts or to school districts which had applied for closing permits.[180] As the funding formula approaches full funding, the amount distributed under these provisions will increase. Under the penalties provision a school district forfeits some of its basic aid if it fails to maintain a specified teacher-pupil ratio and specified educational service personnel ratio.[181] On the other hand, districts hiring

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[175] *Id.* at 62, Board of Educ. v. Walter, No. A7602725 (Ohio C.P. Hamilton County Dec. 5, 1977).

[176] *Id.* at 211.

[177] *Id.* at 213.

[178] *Id.* at 209. In Ohio, local tax revenues account for 62.8% of total expenditures for education. *Id.* at 50. Consequently, 1975-76 per pupil expenditures varies from $604 in the poorest districts to $3,537 in the wealthiest, a ratio of 6.1 to 1 for State Basic Aid and local support, or from $722 to $3,563, a ratio of 4.91 to 1 when total state support (including categorical grants) was added to local support. *Id.* at 43. For that year, school districts in the 90th percentile of property wealth averaged $1,460 in total state aid per pupil, those in the 10th percentile averaged $776, but the overwhelming majority of pupils attended school in school districts funded at less than $110 per pupil. *Id.* at 47. These failures of the Basic Aid provision to compensate for disparities in expenditure are mitigated somewhat by the fact that the statistics used are for the first year of funding, which was phased in at the 17% level, *i.e.*, the school districts received 17% of the difference between what they received under the former funding formula and what they would receive under the new formula if the computation of state aid were made at the full funding level under the statute.

[179] *See* Robinson v. Cahill *I*, 62 N.J. 473, 303 A.2d 273 (1973), *cert. denied*, 414 U.S. 976 (1974).

[180] Findings of Fact and Conclusions of Law at 297-99, Board of Educ. v. Walter, No. A7602725 (Ohio C.P. Hamilton County Dec. 5, 1977).

[181] *See* note 160 *supra*. In 1975-76, 401 districts incurred penalties related to one or more of the mandates. Findings of Fact and Conclusions of Law at 294, Board of Educ. v. Walter, No. A7602725 (Ohio C.P. Hamilton County Dec. 5, 1977).

teachers with higher levels of experience are awarded premiums.[182] Since the amount of money available for instructional personnel correlates statistically with total state and local support, the overall effect of these provisions is to penalize poor districts.[183]

Based on these facts and the trial court's willingness to believe testimony of expert witnesses correlating disparities in instructional expenditures with quality of education and educational attainment of pupils, the trial court ruled that the current system of school financing, which relied to a large extent on local property wealth and voted levies, failed to provide equal educational opportunity to the children of the state.[184] With respect to the claim that the system denied school children in the state the benefits of a "thorough and efficient" system of schools, the trial court concluded that the Ohio Constitution had created an enforceable constitutional right to more than a minimal education.[185] Since the duty to provide a thorough and efficient system is a state duty, the inability of a school district to secure sufficient revenue to finance such a system imposes on the state the duty to provide the additional funds necessary, and the constitutional standard is not met if any of the school districts are starved for funds or lack teachers, buildings, or equipment.[186]

With respect to the equal protection clause, the court specifically held that the statutory system resulted in disparate treatment of school children and that this disparate treatment, based as it was on the property wealth of a district, resulted in discrimination against a majority of Ohio's school children.[187] Applying the strict scrutiny test to the resulting discriminatory treatment, the court examined the possible compelling state purposes which might justify the discrimination and found them all wanting. The court found the purpose of local control not compelling[188] and was not persuaded by the defendant's claim that the state lacked the resources to adequately fund education.[189] Specifically, the court found unconstitutional the mandate provisions,[190] the "save harmless" clauses,[191] and the concept of district power equalizing,[192] with

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[182] *See* note 135 *supra*. In 1975-76, 230 districts received awards. Findings of Fact and Conclusions of Law at 294, Board of Educ. v. Walter, No. A7602725 (Ohio C.P. Hamilton County Dec. 5, 1977).

[183] Findings of Fact and Conclusions of Law at 294, Board of Educ. v. Walter, No. A7602725 (Ohio C.P. Hamilton County Dec. 5, 1977).

[184] *Id.* at 376.

[185] *Id.* at 368.

[186] *Id.* at 371.

[187] *Id.* at 376-77.

[188] *Id.* at 397.

[189] *Id.*

[190] *Id.* at 380-82.

[191] *Id.* at 382-84.

[192] *Id.* at 384-87.

its attendant reward for effort, because they link the quality of education to property wealth, income wealth (since income wealth correlates with tax rate), and voter willingness to fund educational opportunity.

Since the trial court based its decisions on the adequacy of the education provided and on the manner of distributing state funds for education on the challenged system, an affirmance of either the education or equal protection clause grounds would lead to an affirmance of the trial court's holding of unconstitutionality. In fact, based on arguments repeated before the Ohio Supreme Court, the court of appeals[193] upheld the trial court's ruling on the equal protection claim affirming the constitutional right to education but reversed the ruling that the current system failed to provide for a "thorough and efficient" system. The court held that the determination of whether a system was "thorough and efficient" had been constitutionally assigned to the legislature.

C. *The Ohio Supreme Court's Decision*

In *Walter*, the Ohio Supreme Court held that the statutory financing scheme did not violate either the equal protection or the "thorough and efficient" clauses of the Ohio Constitution.[194] The court asserted that it intended to apply the two-tiered equal protection test in determining whether the statutory provisions violated the state equal protection clause. Under this analysis, unequal treatment of classes of people is valid if a state can show a rational basis for the inequality unless the discrimination impairs the exercise of a fundamental right or establishes a suspect classification. If the infringement of a fundamental right is involved, the discrimination becomes the subject of strict judicial scrutiny and will be upheld only upon a showing of a compelling state interest.[195]

Although the court stated its objection to the *Rodriguez* definition of a fundamental right as one explicitly or implicitly guaranteed by the Constitution,[196] it agreed with the *Rodriguez* choice of the rational basis test for equal protection claims. The court reasoned that the case was an inappropriate one for "strict scrutiny" because it "deals with difficult questions of local and statewide taxation, fiscal planning, and education policy."[197]

Applying the traditional rational basis test to the wide disparities in district expenditures, the court concluded that local control, which includes "not only the freedom to devote more money to the education of

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[193] Board of Educ. v. Walter, 10 Ohio Op. 3d 26 (1st Dist. Ct. App. 1978).

[194] Board of Educ. v. Walter, 58 Ohio St. 2d 368, 390 N.E.2d 813 (1979).

[195] *Id.* at 373, 390 N.E.2d at 817. *See* note 27 *supra.*

[196] 58 Ohio St. 2d at 374, 390 N.E.2d at 818.

[197] *Id.* at 375, 390 N.E.2d at 819. *Cf.* San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1, 44-53 (1973) (stating with particularity the rationale for applying the rational basis test).

one's children but also control over and participation in the decision-making process as to how these local tax dollars are to be spent,"[198] justified the system with its inherent disparities. In applying the rational basis test the court adopted the presumption of constitutionality of the state statute and noted that it would be held invalid only upon a showing beyond a reasonable doubt that the statute was without a rational basis and therefore unconstitutional.

Although in *Walter* the supreme court adopted a presumption of constitutionality with respect to legislative educational directives, the court did not entirely foreclose judicial review of legislative enactments in the area of education. It adopted the standard from *Miller v. Korns*,[199] defining a thorough and efficient system as follows:

> With this very state purpose in view, regarding the problem as a state-wide problem, the sovereign people made it mandatory upon the General Assembly to secure not merely a system of common schools, but a system thorough and efficient throughout the state. A thorough system could not mean one in which part or any number of the school districts of the state lacked teachers, buildings or equipment.[200]

In the application of this standard, the Ohio Supreme Court asserted that the wide discretion granted to the General Assembly is not unlimited and that "in a situation in which a school district was receiving so little local and state revenue that the students were effectively being deprived of educational opportunity . . . such a system would clearly not be thorough and efficient"[201] and would be subject to judicial review. The court noted that the evidence of school closings and the widespread inability of school districts to meet the state's minimum standards were not the equivalent of "educational deprivation." Noting that the school closings, which it denominated "school districts' calendar adjustments," had not resulted in any student receiving less than the full 182 days of instruction required by statute,[202] the court ignored the cumulative effect of school closings. It also disregarded the fact that by adjusting the calendar and extending it further into the next year, the district was depleting the upcoming year's funds. As were the other courts that adopted a non-interventionist position, the Ohio Supreme Court was emphatic in asserting its authority to decide the issue before it.[203] The defendants had argued that the court should refrain on

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[198] 58 Ohio St. 2d at 377, 390 N.E.2d at 820.

[199] 107 Ohio St. 287, 140 N.E. 773 (1923) (upholding the General Assembly's power to collect funds from one district for use in another school district).

[200] *Id.* at 297-98, 140 N.E. at 776.

[201] 58 Ohio St. 2d at 387, 390 N.E.2d at 825.

[202] *Id.* at 388, 390 N.E.2d at 825-26.

[203] *Id.* at 384, 390 N.E.2d at 813.

"political question" grounds from judicial review of the General Assembly's constitutional duty under the education clause.[204]

The defendants also contended that the trial court overstepped its power in deciding that the finance system represents an "abdication" by the General Assembly of its duty under the education clause. The court of appeals agreed with the defendants in addition to criticizing the trial court for substituting "its judgment for that of the legislative and executive branches of government as to what constitutes high quality education in this State and as to what is the most appropriate method to secure such an education."[205] Even though the Ohio Supreme Court asserted its authority to review and enforce the mandates of the constitution which are directed at the legislative branch, the court nevertheless noted "the deference to be provided to the General Assembly in education matters"[206] and took as guidance the language of a much earlier Ohio case: "'*[W]ith the wisdom or the policy of such legislation the court has no responsibility and no authority.* Its duty is limited to interpretation of such provisions as are not clear, and the carrying into execution of laws enacted which are not in conflict with constitutional provisions.'"[207]

The impression created by *Walter* is that of a court extremely unwilling to establish the pro-reform trend suggested in many interventionist cases, including the New York case of *Board of Education, Levittown Union Free School District v. Nyquist*.[208] This is evident in the high standard of proof of unconstitutionality required by the Ohio Supreme Court and its willingness to reinterpret factual findings of the trial court as well as in its aborted legal analysis of the equal protection issues. One also gets the impression from this opinion that the court would act differently if things got bad enough.[209] At base is the court's belief that its intervention is not needed and that reform can be appropriately achieved through the legislature. This is the crux of judicial restraint and the position likely to be taken by an Ohio court because of the climate generated by events occurring within the state.

As noted in the court's opinion, the Ohio General Assembly has not been reluctant to engage in continuing study and reformation of the educational financing system.[210] The "guaranteed yield" system had

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[204] *Id.* at 383-84, 390 N.E.2d at 813.

[205] Board of Educ. v. Walter, 10 Ohio Op. 3d 26, 32 (1st Dist. Ct. App. 1978).

[206] 58 Ohio St. 2d at 385, 390 N.E.2d at 813.

[207] *Id.* at 385, 390 N.E.2d at 813 (emphasis in original), *quoting* State *ex rel.* Methodist Children's Home Ass'n, Board of Educ., 105 Ohio St. 438, 448, 138 N.E. 865, 868 (1922).

[208] 94 Misc. 2d 466, 408 N.Y.S.2d 606 (Sup. Ct. 1978). *See* notes 62, 68 *supra*.

[209] The *Walter* court intimated that if funding were sufficiently inadequate as to deprive students of educational opportunities, it would be inclined to contravene legislative determinations. 58 Ohio St. 2d at 387, 390 N.E.2d at 825.

[210] *Id.* at 378-80, 390 N.E.2d at 820-22.

been advocated by many school finance reformers as the most advanced formula for achieving equalization of state expenditures and had been enacted in 1975 to replace the ailing Foundation Program after several years of legislative study of the school finance issue. The very facts urged on the court to encourage intervention also militated against its involvement; school closings, teachers' strikes, the problems of court intervention in busing, and the low level of state funding of education[211] had led to heightened public awareness of the problems in the schools but had not produced consensus concerning substitute proposals.

In light of this public debate, the fact that the challenged system was in only its first year of a four-year phase-in program when the litigation was brought is also significant. Throughout the trial the plaintiffs were hindered by the necessity of presenting both current statistics and extrapolations under a full-funding model.[212] While plaintiffs' evidence suggested that the system presently had a dis-equalizing effect,[213] the defendants' projections suggested that equalization would be achieved through full funding.[214] Consequently, the supreme court was left to its own competency to decide which projections would prevail. The decision to abstain should not be surprising where the outcome of the present system is unknown and the alternatives untested.

The *Walter* decision, although written in a tone of judicial restraint, cannot be interpreted as an opinion prohibiting the judicial reform of school finance systems. The court has placed the primary responsibility for school finance reform on the legislature but has not denied the judicial branch the power to review legislative reforms that have been put into effect.

VI. CONCLUSION

This review of recent state court decisions suggests that there is sufficient basis for state court intervention in school finance reform at the present time. The interventionist decisions have established a basis for invoking either the strict scrutiny or the rational basis test for equal protection claims and for overcoming the lack of judicially manageable standards for assessing educational quality and equality. It is important to note, however, that the actions of any one state court are likely to

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[211] In late session on June 28, 1979, the Ohio General Assembly agreed on an appropriations bill that included $3.5 billion for primary and secondary public education and that guarantees most districts a seven percent increase in State Basic Aid and a ten percent increase in 1981 over the 1979 level. The Blade, June 29, 1979, at 1, col. 4. *See* Act of July 30, 1979, [1979] Ohio Laws 6-3.

[212] Such conclusions and extrapolations are interspersed throughout the trial court's Findings of Fact and Conclusions of Law, Board of Educ. v. Walter, No. A7602725 (Ohio C.P. Hamilton County Dec. 5, 1977).

[213] *Id. passim.*

[214] *See generally* Brief for Defendants-Appellants, Board of Educ. v. Walter, 58 Ohio St. 2d 368, 390 N.E.2d 813 (1979).

have little predictive value for litigants in another state despite similarities in state constitutional provisions or funding systems. The conflicting goals of school finance reform, educational versus property tax equality, and increased state spending for education make many state courts justifiably leery of intervening in an area of questionable authority and of imposing a judicial solution in an atmosphere charged with political debate. The likelihood of judicial intervention would appear to be greater if the facts show egregious inequality in educational opportunity and if there is widespread public support for the proposition that the current system fails to provide the education guaranteed by the particular state constitution. Nevertheless, such circumstances by no means guarantee judicial intervention.

Neither is there consensus regarding the probable success of the proposed alternative funding models. Recent studies of the results of school finance reform in representative states suggest, in fact, that reform measures have had little effect on the equalization of educational opportunity. District power equalizing formulas have had little effect on the wealth neutrality of the financing system, and weighting systems designed to compensate for higher costs of providing educational services and materials in some locations widened disparities in revenues and instructional expenditures per pupil among the districts, creating a demonstrable income-educational revenues relationship rather than the property-revenue relationship that existed previously.[215] Because such

[215] Guaranteed tax base plans in Kansas and New Mexico, designed to equalize district taxing power, have had little effect on fiscal neutrality. In Kansas, which coupled school financing reform measures with a ten percent rebate of income taxes to the district for the purpose of reducing district property taxes, ceilings were placed on the amount of revenue that could be raised by each district (the lower of fifteen percent of previous year's budget or five percent of the median budget for districts in the same size category). The effect of this reform was to shift the school tax burden from property tax to the income tax and to return more tax money to the high wealth districts in which higher spending rates produced a greater income tax rebate. Consequently, educational revenues have become more closely tied to income wealth than under the pre-reform plan. S. CARROLL, *supra* note 100, at 104-07, 121-25. Reform measures in Michigan which placed no ceiling on a district's revenue-generating power have produced somewhat more fiscal neutrality than prior to reform, but richer districts shall have a clear advantage. Wealthier districts have not cut educational spending; poorer districts have increased educational budgets, but at a relatively controlled rate. Analysts attribute the slight change to the conservative response to district votes. *Id.* at 137-38. Reform measures in Florida and New Mexico have brought both states very close to full state funding of public schools. Both states' financing systems include a state-wide property tax rate and formulas based on "weighted-student" indices adjusted for district cost differentials. Florida's adjustment factors are based on the cost of living index for the county; since the cost of living is higher in high income districts, and because the distribution of "weighted-pupils" is virtually identical to the distribution of all pupils, the effect of the reform has been to widen disparities in instructional revenues per pupil, decreasing wealth neutrality and creating an income bias. *Id.* at 88-89. The New

systems are indexed to teacher-experience factors and existing salaries as well as to the higher salaries required to attract teachers to city school districts, weighting systems tend to lock in disparities from the pre-reform period. The more refined systems that might be designed by statisticians to compensate for these differences are unlikely to survive the legislative process without the addition of exceptions and "save harmless" clauses that reflect compromise and special interest group advocacy by the currently favored districts.

None of this is to suggest that the courts should entirely foreclose consideration of the school finance issue, but it does suggest recognition of the difficult dilemma facing a judiciary concerned about actual or apparent judicial overreaching. It is difficult to define the role of a state court that wishes to assume a non-interventionist position in a suit challenging a legislatively-enacted funding system. Avoiding the issue entirely by dismissing the action on the political question basis will lessen the impetus for reform. Even if a court does not want to assume an interventionist position, it should be critical of the obvious inequities in legislation. A non-intervening court pointing out problems to the legislature may continue reform in the area of legislative changes. To date no state supreme court has adopted the middle ground which would invalidate the statute to the extent that it includes provisions that are clearly dis-equalizing while upholding legislative discretion with respect to the remainder of the funding formula. An order enjoining disbursement of funds under such provisions would provide a principled decision that keeps judicial intervention to a minimum but avoids the charge that the court has been blind to an obvious inequality.

Mexico reform system has had a similar effect, creating a significant relationship between income wealth of the district and instructional expenditures. The cost adjustment factor under the New Mexico system is based on teacher training and experience in each district. Because of the tradition of higher teacher salaries in high-wealth districts, the weighting and adjustment systems provide additional "equalizing" revenues to high-wealth districts as well as to urban high-cost schools. *Id.* at 148-55.