CASE COMMENTS

Demise Of The Pygmy: *Seattle School District No. 1 v. State*

In *Northshore School District No. 417 v. Kinnear,*[1] the Washington Supreme Court upheld the constitutionality of the Washington system of funding grade school education through state funds and local property tax levies, ruling the state had satisfied its explicit obligation under the Washington Constitution to "make ample provision for the education of all [resident] children."[2] Subsequently, a partially reconstituted court, in *Seattle School District No. 1 v. State,*[3] overruled the *Northshore* decision, holding the system's reliance on special levies to meet expenditures for "basic education"[4] is an unconstitutional and insufficient means of meeting the state's duty. Justice Stafford, dissenting in *Northshore,* termed the majority opinion in that case "a legal pygmy of doubtful origin"[5] and predicted a short life for the court's "comfortable 'solution.'"[6] Justice Stafford's recent majority opinion in the *Seattle School District* case amply fulfilled his prophecy. Although the *Seattle School District* court ultimately reached the proper result, it unfortunately used a questionable mode of constitutional analysis[7] and exceeded unnecessarily the bounds of its judicial function.[8]

The Northshore *Decision*

In *Northshore,* the Washington Supreme Court faced primarily two alternative issues: whether the Washington Constitu-

1. 84 Wash. 2d 685, 530 P.2d 178 (1974).

2. WASH. CONST. art. IX, § 1. *See* note 12 *infra.*

3. 90 Wash. 2d 476, 585 P.2d 71 (1978). The court in *Northshore* consisted of Chief Justice Hale, and Justices Finley, Hamilton, Hunter, Rosellini, Stafford, Weaver (*pro tempore*), Wright, and Utter. In the *Seattle School District* case the court consisted of Chief Justice *Wright*, and Justices Brachtenbach, Dolliver, *Hamilton*, Hicks, Horowitz, *Rosellini, Stafford,* and *Utter*. (Names of justices participating in both cases appear in italics.)

4. For a discussion of the term "basic education," see notes 61 and 65 *infra* and text accompanying notes 71-87 *infra.*

5. 84 Wash. 2d at 732, 530 P.2d at 204.

6. *Id.*

7. *See* text accompanying notes 56-58 *infra.*

8. *See* text accompanying notes 71-87 *infra.*

tion protects a fundamental interest in education that, under equal protection analysis, would invoke strict judicial scrutiny,[9] or whether the state constitution provides an independent basis for challenging the state's school financing system.[10] Petitioners in *Northshore* presented four issues for resolution based on state constitutional provisions: (1) whether, under article I, section 12, the state's financing system denied children equal educational opportunity;[11] (2) whether, under article I, section 12, the state's financing system denied taxpayers protection from unequal tax burdens; (3) whether, under article IX, section 1, the state had failed to meet its "paramount duty" to "make ample provision for the education of all [resident] children;"[12] and (4) whether, under article IX, section 2, the state had failed to provide a "general and uniform" system for distributing educational resources.[13]

The court's decision was highly fragmented, encompassing five separate opinions.[14] Chief Justice Hale's majority opinion

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9. 84 Wash. 2d at 720, 530 P.2d at 198. Conventional equal protection analysis is two-tiered. If state action abridges a "fundamental interest," *e.g.*, Shapiro v. Thompson, 394 U.S. 618 (1969) (freedom to travel), or creates a classification based on suspect criteria, *e.g.*, McLaughlin v. Florida, 379 U.S. 184 (1964) (race), courts subject the state action to strict scrutiny. To be upheld, state action creating a suspect classification or abridging a fundamental interest must further a compelling state interest. Other state action need bear only a rational relationship to a legitimate state purpose.

10. Apart from equal protection analysis, a state law may be invalid simply because it abridges a right conferred either by the state constitution or the Federal Constitution, whether or not the law's purpose is to create a classification. The key is to find a substantive right conferred by the Washington Constitution.

11. WASH. CONST. art. I, § 12 provides:

> No law shall be passed granting to any citizen, class of citizens, or corporation other than municipal, privileges or immunities which upon the same terms shall not equally belong to all citizens, or corporations.

The Washington Supreme Court generally regards this equal privileges and immunities provision and the equal protection clause of the fourteenth amendment to the United States Constitution as substantially identical. Texas Co. v. Cohn, 8 Wash. 2d 360, 374, 112 P.2d 522, 529 (1941).

12. WASH. CONST. art. IX, § 1 provides:

> It is the paramount duty of the state to make ample provision for the education of all children residing within its borders without distinction or preference on account of race, color, caste, or sex.

13. WASH. CONST. art. IX, § 2 provides in pertinent part:

> The legislature shall provide for a general and uniform system of public schools. The public school system shall include common schools, and such high schools, normal schools, and technical schools as may hereafter be established.

14. Chief Justice Hale wrote the majority opinion; Justices Hamilton and Hunter concurred in that opinion in all respects. Justice Rosellini concurred in the result by separate opinion, concluding only that petitioners had failed to prove their case. Justice

held that the United States Supreme Court's decision in *San Antonio Independent School District v. Rodriguez*[15] controlled the equal education and equal tax burden issues, because the equal protection clause of the fourteenth amendment to the United States Constitution and the privileges and immunities clause of article I, section 12 of the Washington Constitution must be interpreted identically.[16] He dismissed the "ample provision for . . . education" issue for lack of proof,[17] and concluded the

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Wright concurred with Rosellini. Justice Weaver also concurred in the majority result by separate opinion, taking exception to the dissent's harsh words and concluding only that petitioners had not established their case. Justice Stafford dissented, taking issue with the majority's analysis and disregard of the trial court's findings. Laying the ground work for his majority opinion in *Seattle School Dist.*, Justice Stafford found that article IX, § 1 imposed a paramount constitutional duty on the state to make ample provision for education of all resident children. In turn, this duty gave rise to a correlative right that is absolute and can never be impaired. Because the state's school funding system compels reliance on special levies and because the property tax base in many school districts was inadequate even to support their operating and maintenance budgets, the state had failed its obligation and had unconstitutionally impaired an absolute right the court should enforce. Justice Finely concurred in Justice Stafford's dissent. Justice Utter concurred in the dissent by separate opinion, but on the ground that the state's constitution should be construed as demanding more than the Federal Constitution in establishing education as a fundamental interest. *See* note 16 *infra.*

15. 411 U.S. 1 (1973). The court split in a narrow 5-to-4 decision, upholding the Texas school financing system based on local district real property taxation. The majority found the existence of "some inequality" in the manner in which the state's school system is funded inevitable and held such disparities not *so irrational* as to be *invidiously* discriminatory. *Id.* at 51, 55. The dissent, on the other hand, concluded the Texas funding disparities constituted discriminatory state action under the fourteenth amendment equal protection clause and found in any event the state had selected a means wholly inappropriate to the ends it sought to achieve. *Id.* at 90, 129 (Marshall, J., dissenting).

16. Chief Justice Hale dismissed petitioner's contention that because the duty imposed by article IX is the "paramount duty of the state," the state's obligation to administer its educational laws is so much greater under the state constitution that compliance with the fourteenth amendment may fall short of compliance with the state's own equal protection clause. He concluded that by unbroken precedent the fourteenth amendment and article I, § 12 have the same meaning and must be applied identically. 84 Wash. 2d at 720-21, 530 P.2d at 198. See note 29 *infra* concerning possible reasons for not applying a higher standard under the state's equal protection clause.

17. In the words of the majority:

> 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, and supply no comparative basis for a ruling as a matter of law that the State has not been and now is not discharging its paramount duty. . . .
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> Accordingly, petitioners' first claim of unconstitutionality, that children who live in school districts with low assessed valuation of property per pupil are denied equal protection of the laws contrary to the fourteenth amendment to the United States Constitution and Const. art. 1, § 12, and, therefore, are

school system was "general and uniform" to the minimum degree necessary to enable students to transfer between districts without loss of credit.[18] Unfortunately, the Chief Justice ignored critical distinctions between *Rodriguez* and *Northshore* and misconstrued petitioner's argument concerning ample provision for education.

As in *Northshore,* the school financing system in *Rodriguez* produced marked interdistrict funding disparities due to substantial reliance on local property tax levies. Plaintiffs in *Rodriguez* argued this system unconstitutionally discriminated against poor people residing in school districts having a low property tax base,[19] and impermissibly interfered with the exercise of a fundamental right.[20] Applying fourteenth amendment equal protection analysis, the district court found in plaintiff's favor, holding wealth a "suspect" classification and education a fundamental right.[21] Under either condition the school financing system could be upheld only on a showing of a compelling state interest, a burden the state was unable to meet.[22] The Supreme Court reversed, holding first, that wealth itself did not constitute a suspect class requiring strict scrutiny;[23] second, that because the Texas school financing system did not create any other class possessing the traditional indicia of suspectness,[24] no other suspect

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victims of the State's failure to discharge its paramount duty to them, is not . . . supported by the evidentiary data in the case . . . .

84 Wash. 2d at 695, 707, 530 P.2d at 184-85, 191.

18. By the court's definition a "general and uniform system of public schools" is:

> one in which every child in the state has free access to certain minimum and reasonably standardized educational and instructional facilities and opportunities to at least the 12th grade—a system administered with that degree of uniformity which enables a child to transfer from one district to another within the same grade without substantial loss of credit or standing and with access by each student of whatever grade to acquire those skills and training that are reasonably understood to be fundamental and basic to a sound education.

84 Wash. 2d at 729, 530 P.2d at 202.

19. 411 U.S. at 5, 19 n.49.

20. *Id.* at 29.

21. San Antonio Independent School Dist. v. Rodriguez, 337 F. Supp. 280, 282-84 (1971).

22. *Id.* at 282-84.

23. In wealth discrimination cases a suspect class comprises individuals who, because of their impecunity, are completely unable to pay for some desired benefit and, as a consequence, sustain an absolute deprivation of a meaningful opportunity to enjoy that benefit. 411 U.S. at 20.

24. The traditional indicia of suspectness are that the class is saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated

class could exist; and third, that the system did not abridge a fundamental interest explicitly or implicitly protected by the Constitution.[25] After finding neither of the conditions requiring strict judicial scrutiny, the Court applied a rational relationship test and concluded such a relationship existed between the state's legitimate interest in preserving local control and the financing system employed.[26] In *Northshore,* however, Chief Justice Hale failed to recognize a crucial distinction between the *Rodriguez* and *Northshore* situations. The Washington Constitution, unlike the Federal Constitution, explicitly provides for education.[27] Additionally, the *Rodriguez* Court stated that had education been found to constitute a constitutionally protected interest to which

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to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process. *Id.* at 28.

25. While agreeing with the conclusion of the district court that education was of immense significance to both the individual and society, *id.* at 30, the Court determined that:

> It is not the province of this Court to create substantive constitutional rights in the name of guaranteeing equal protection of the laws. Thus, the key to discovering whether education is "fundamental" is not to be found in comparisons of the relative societal significance of education . . . . Rather, the answer lies in assessing whether there is a right to education explicitly or implicitly guaranteed by the Constitution. . . . Education, of course, is not among the rights afforded explicit protection under our Federal Constitution. Nor do we find any basis for saying it is implicitly so protected.

Id. at 33-35 (citations omitted).

26. The Court found state legislatures are entitled to broad discretion in raising and disbursing state and local tax revenues and in dealing with the complex and unsettled problems of financing and managing a public school system. In such circumstances, the Court concluded judicial restraint was necessary to avoid interfering with continued research and experimentation vital to finding solutions to educational problems and keeping abreast of changing conditions. Noting that local participation and control in this process promote public support and are vital to innovation and educational excellence, the Court determined that the Texas system of school financing encouraged such local control and participation and satisfied the equal protection clause in furthering a legitimate state purpose or interest. *Id.* at 40-55.

The Court's analysis has been criticized for the questionable use of precedent by which it demonstrated that all roads lead to the minimum rationality test and because:

> [T]he Court's application of the test showed how crucial it was for upholding the Texas scheme that even slightly heightened scrutiny be avoided at all costs. For even the minimum rationality hurdle could be cleared only by the same absence of rigor which characterized the Court's choice of the test in the first place . . . . The Court's willingness to believe that local funding promotes local control might at first seem plausible enough. But insofar as local control is a concomitant of local . . . funding, the Texas system afforded local control only to the property-rich districts.

L. TRIBE, AMERICAN CONSTITUTIONAL LAW 1131 (1978).

27. *See* note 12 *supra.*

the strict scrutiny standard applied, the Texas levy system would not have passed muster.[28] Because the Washington Constitution explicitly provides for education as a protected interest, ample justification existed in *Northshore* to distinguish *Rodriguez* and enter a contrary result.[29]

In addition, Chief Justice Hale and the entire *Northshore* court chose to consider the "ample provision" question in a substantive sense—whether the funding provided was "ample" to meet the educational requirements of the state's school children. Petitioners had attempted to avoid substantively defining "ample provision" for reasons of unmanageability and nonjusticiability.[30] Instead, petitioners asserted that where the state con-

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28. 411 U.S. at 16-17.

29. The court may have been reluctant to find the school financing system unconstitutional on equal protection grounds, fearing the implications of such a decision on other state services. If equal protection requires uniformity of per-pupil expenditure between school districts, or, stated alternatively, if local taxation for local governmental services is unconstitutional where per-citizen expenditures vary between locales, the same rationale may be applied to other public services delegated to local governmental units, such as police and fire protection, courts, water, and health services. *Id.* at 54. In fact, this was the principal reason the New Jersey Supreme Court declined to apply the United States Supreme Court's *Rodriguez* fundamental interest analysis to the explicit provision for education found in the New Jersey Constitution. Robinson v. Cahill, 62 N.J. 173, 303 A.2d 273 (1973). Justice Stafford suggested a means of avoiding this concern in his *Northshore* dissent, concluding that the "unique position of public education in the constitutional scheme" served to distinguish education (as the paramount duty of the state) from other essential services. 84 Wash. 2d at 764-65, 530 P.2d at 221. If Justice Stafford's paramount duty analysis is unsound, however, so is this distinction. *See* note 14 *supra.*

30. Before *Northshore,* because the issues presented to the courts lacked judicially manageable standards and were not well suited for judicial resolution, litigation of the constitutional dimensions of funding public education through local property tax levies had been unsuccessful. For example, in McInnis v. Shapiro, 239 F. Supp. 327 (N.D. Ill. 1968), plaintiffs alleged such a school financing system violated fourteenth amendment equal protection and due process provisions. Wide variations in per-pupil expenditures between districts deprived some students of the educational fulfillment accorded other students in the system. The district court concluded that the controversy was nonjusticiable, since the complaint would have required the court to determine the "educational needs" of students in the system in order to measure the degree to which the system satisfied those needs. Absent such a definition, the court found that "there are no 'discoverable and manageable standards' by which a court can determine when the constitution is satisfied and when it is violated." *Id.* at 335. Finally, the court concluded that "if other changes are needed in the present system, they should be sought in the legislature and not in the courts." *Id.* at 336-37.

Following *McInnis,* the district court for the Western District of Virginia dismissed an action challenging the Virginia school financing system in Burruss v. Wilkerson, 310 F. Supp. 572 (W.D. Va. 1969). In suggesting that plaintiffs seek legislative relief, the court noted that it had "neither the knowledge, nor the means, nor the power to tailor the public moneys to fit the varying needs of [the] students throughout the state." *Id.* at 574. Petitioners in *Northshore* hoped to forestall a similar fate by avoiding the educational

tribution to funding is so meager that special levies are *required,* the state has effectively delegated the decision as to what constitutes "ample provision" to the local districts.[31] As a procedural matter, they argued, this delegation is impermissible where local districts provide vastly disparate educational services.[32] Rather than identifying a particular level of constitutionally required funding, petitioners asked the court to find that, whatever the level of education the state chooses to provide, all districts must afford children equal opportunity to reach that level.[33] Because petitioners had not introduced conclusive evidence on the substantive issue, the court found they had failed to prove their case.[34] Justice Stafford's prophetic dissent set the stage for the litigation that followed on precisely that issue.

Seattle School District No. 1: Northshore *Falls*

Exactly one year after the *Northshore* decision, Seattle School District No. 1, certain named King County taxpayers, and children enrolled in the district schools brought petitions for mandamus, prohibition, and declaratory judgment in the Washington Supreme Court. Petitioners claimed the state had failed to discharge its "paramount duty" to make "ample provision for the education" of its resident children pursuant to article IX, section 1 and to "provide for a general and uniform system of public schools" pursuant to article IX, section 2.[35] After a hearing, the supreme court referred the matter to the Thurston County Superior Court for an expedited resolution of all issues of fact and law, subject to direct appeal to the supreme court.[36]

Following trial, the superior court entered its judgment, declaring: (1) the Seattle School District's children have a constitu-

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adequacy issue and focusing on the fairness question. Andersen, *School Financing in Washington—The Northshore Litigation and Beyond,* 50 WASH. L. REV. 853, 878-80 (1975). *See also* Brief for Petitioner at 10-18, Northshore School Dist. No. 417 v. Kinnear, 84 Wash. 2d 685, 530 P.2d 178 (1974).

31. Brief for Petitioner at 13, Northshore School Dist. No. 417 v. Kinnear, 84 Wash. 2d 685, 530 P.2d 178 (1974).

32. *Id.* at 15-16.

33. *Id.* at 16-18. This approach is in accord with the holding in Brown v. Board of Education, 347 U.S. 483, 493 (1954): Educational opportunity, "where the state has undertaken to provide it, is a right which must be made available to all on equal terms."

34. *See* note 17 *supra.*

35. 90 Wash. 2d at 486, 585 P.2d at 78.

36. Petitions for writs of mandamus and prohibition directed to state officers are filed directly in the Washington Supreme Court. WASH. R. APP. PROC. 16.2(b).

tional right to an adequately funded educational program; (2) the legislature is required to fund, or provide dependable and regular tax sources for funding, a *basic*[37] program of education; (3) the state's reliance, in whole or in part, on a funding system that incorporates special levies to fund "basic education" is unconstitutional; and (4) special levies may be used to fund only "enrichment programs."[38] Appellants[39] assigned error to numerous factual and legal conclusions and appealed the judgment.[40] The supreme court affirmed.

After resolving several threshold issues,[41] Justice Stafford's majority opinion undertook a comprehensive examination of article IX, section 1. From this examination he concluded that article IX, section 1 creates a judicially enforceable duty on the state to fund education at a minimum level. He then outlined the nature and scope of that duty and established the legislative responses necessary for its discharge.

In concluding that article IX, section 1[42] creates a judicially enforceable duty, the majority opinion rejected the argument that section 1 is merely a preamble, or policy declaration, without enforceable substantive effect and rejected appellants' argument concerning the placement and publisher's titling of section 1.[43] Attributing particular significance to the framers' choice of the

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37. The Washington Constitution contains no provision concerning "basic" education. The trial judge apparently introduced the term to limit the scope of article IX, § 1 to judicially manageable proportions. *See* notes 61 & 65 *infra* and text accompanying notes 71-87 *infra*.

38. 90 Wash. 2d at 486-89, 585 P.2d at 78-80. The court defined enrichment programs as all educational programs exceeding the basic education required by article IX, § 1. *Id.* at 487, 585 P.2d at 79.

39. Appellants were the State of Washington, the Speaker of the House of Representatives and the President of the Senate as representatives of the legislature, the Superintendent of Public Instruction, the State Treasurer, and each member of the State Board of Education. *Id.* at 486, 585 P.2d at 78.

40. *Id.* at 486-89, 585 P.2d at 78-80. The trial court entered 698 findings of fact, 102 conclusions of law, and 47 paragraphs of judgment. Appellants assigned error to 9 findings of fact, 41 conclusions of law, and 37 paragraphs of judgment.

41. The court considered and resolved that: (1) rendering a declaratory judgment was appropriate in this case; (2) the petitioners had standing to seek declaratory relief; and (3) the court had jurisdiction to decide the constitutional issue. 90 Wash. 2d at 489-97, 585 P.2d at 80-84.

42. *See* note 12 *supra*.

43. Appellants argued that the location of § 1 of article IX and the Washington code publishers' consistent denomination of § 1 as "Preamble" indicate § 1 is merely a prefatory statement of purpose lacking legal force. 90 Wash. 2d at 497, 585 P.2d at 84.

words "paramount duty,"[44] the court concluded that, rather than "explaining goals, or designating objectives to be accomplished," section 1 "is declarative of a constitutionally imposed duty" having substantive implications beyond the mere establishment of a "general and uniform system of public schools."[45] Finding no indication that article IX, section 1 is to be accorded anything less than its plain meaning and that the framers declared only once in the entire Washington Constitution that a specified function is the state's *paramount* duty, the court concluded that, by imposing upon the state a *paramount* duty to make ample provision for the education of all resident children, the Washington Constitution created "a duty that is supreme, preeminent, or dominant."[46]

Other interpretations of article IX, section 1, however, are equally plausible and, perhaps, more logically consistent. If, as the court seems to believe, the paramount duty of the state is to make ample provision for education, all other state functions are subordinate.[47] As the court recognized in *Northshore,* however, such an interpretation is inconceivable.[48] Considering the status

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44. The court noted that:

> Nothing contained in [article IX, § 1] or in the *Journal of the Washington State Constitutional Convention of 1889* (1962) indicates that Const. art. 9, § 1 was intended to have the subordinate status of a mere preamble or that the language "paramount duty" was to be accorded anything less than its plain meaning. Unlike the hortatory language found in the education articles of other states, nothing in Const. art. 9, § 1 suggests that it does not actually declare the State's educational *duty.* Without question the language used by other states was before the drafters of our state constitution. But, it is significant that such vague laudatory language was rejected and the specific term *paramount duty* was adopted. There is no doubt the imperative wording . . . was intentional.

Id. at 498-99, 585 P.2d at 85.

45. Appellants argued that the framers of the state constitution had intended only that § 1 be implemented through the general and uniform system of public schools to be provided under article IX, § 2. *See* note 13 *supra.* The court concluded that if the framers had intended to equate the state's paramount duty with provision of a general and uniform school system, they would have said so expressly. Because they provided instead that the paramount duty of the state was to make ample provision for education, such "ample provision" must possess substantive content beyond the mere requirement of a general and uniform school system. 90 Wash. 2d at 499, 585 P.2d at 85.

46. *Id.* at 511, 585 P.2d at 91.

47. In support of this conclusion, the court quoted Stiles, *The Constitution of the State and Its Effects upon Public Interests,* 4 WASH. HIST. Q. 281, 284 (1913): "One who carefully reads Article IX might also wonder whether, after giving to the school fund all that is here required to be given, anything would be left for other purposes." 90 Wash. 2d at 511, 585 P.2d at 91.

48. The majority in *Northshore* noted that:

> As heavy as the duty may be acknowledged to be—and no one denies that free public education is one of the great responsibilities of the state—we cannot

of public education at the time the framers drafted the Washington Constitution,[49] a more likely intention was to place principal responsibility for providing education on the state, rather than on private individuals. The drafters of section 1 of article IX reasonably intended to make clear that the state, rather than individuals or local communities, holds the paramount duty to make ample provision for education. This interpretation of the drafters' purpose would not result in the absurdity that is the logical extension of the court's holding in *Seattle School District No. 1.* No one seriously can contend, for example, that provision for education takes precedence over other necessary expenditures in time of state emergency. Yet, this is the clear implication of the court's interpretation of "paramount duty." Under the court's interpretation, section 1 constitutes more than a statement of policy; it creates a judicially enforceable, absolute obligation.

Although recognizing that not all constitutionally imposed duties are judicially enforceable,[50] the *Seattle School District*

> construe the phrase to have such indomitable consequences in relation to all other parts of the State constitution.
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> We cannot hold this duty to be the be-all and end-all, the alpha and omega of state government . . . . If, as their argument implies, the term "paramount duty" to make ample provision for the education of all children imposes a supreme and overriding duty upon the state to the denigration or reduction of all other duties constitutionally imposed or statutorily assumed, then it follows that any tax may be imposed and any public funds . . . may be preempted and allocated to schools by decree of this court of "the paramount duty." This, of course, was not the intendment of the constitution . . . .

84 Wash. 2d at 714-16, 530 P.2d at 194-95.

49. Prior to the "great reform" of 1850-1900, most people regarded education as an individual, religious, or charitable enterprise. J. COONS, W. CLUNE & S. SUGARMAN, PRIVATE WEALTH AND PUBLIC EDUCATION 47 (1970) [hereinafter cited as COONS]; N. EDWARDS & H. RICHEY, THE SCHOOL IN THE AMERICAN SOCIAL ORDER 293, 299 (2d ed. 1963); S. NOBEL, A HISTORY OF AMERICAN EDUCATION 166-67 (1954). "Public" education consisted of religiously or philanthropically financed charity schools and rate-bill schools, which taxed the parents of attending children. Both were infamously inadequate. Progress toward state support for public education was grudging and gradual. State governments, unwilling to assume the task of educating, delegated responsibility to the smallest possible local unit—parents of school children and local communities. COONS, *supra*, at 47-48.

The eventual compromise of responsibilities for education balanced local control of financing against the quality and equality of education. Given the relative uniformity of wealth and population distribution of the early 1800's, the system was tolerable, but the economic revolution following the Civil War upset this balance and many localities found themselves wholly unable to finance adequate education. COONS, *supra*.

50. Specifically, the court conceded that duties committed solely to the legislature are nonjusticiable. 90 Wash. 2d at 501-04, 585 P.2d at 86-87. The court pointed out that the language of article IX, § 1 addresses not the legislature exclusively, but the state generally. *Id.* at 501, 506, 585 P.2d at 86, 88. On the other hand, the court also recognized

court acknowledged it had the power to enforce the state's constitutional duty to make ample provision for education.[51] The court concluded, however, that the real dispute was not judicial enforceability *per se,* but disagreement over which governmental body has the power to interpret and construe section 1.[52] Appellants had argued that because article IX, section 1 is not self-executing, the duty imposed rests solely on the legislature.[53] Because the sole remedy for breach of such a duty lies with the voters, any judicial enforcement of the duty or any attempt to give it substantive content would violate the separation of powers doctrine.[54] The court, on the other hand, found interpretation and construction of the constitution to be exclusively judicial functions: "[O]nce 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.*"[55] Analysis of this issue ultimately turns on judicial competence to give substantive definition to the phrase "ample provision for . . . education," a matter discussed at length in the concurring and dissenting opinions.

Having determined that section 1 imposes a substantive duty on the state to make ample provision for the education of all resident children, the court then examined the nature of the duty. The court applied Hohfeldian analysis,[56] a theoretical construct for evaluating, *inter alia,* the creation of rights and the imposition of duties. Under Hohfeldian analysis, the jural correlative of the state's duty to provide for education is the children's right to be provided with education. Because the children's right to education arises through interpretation of the state constitution, the court labeled it a true right, and, applying its conception of pure Hohfeldian analysis, stated that a true right is *absolute.* Thus, the state's duty to make ample provision for education cannot be relieved for *any* reason.[57] Accordingly, the court declined to

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that the duty of § 1 is not self-executing; the legislature must act to discharge it. *Id.* at 504, 523, 585 P.2d at 87-88, 97.

51. *Id.* at 502, 585 P.2d at 86-87.

52. *Id.* at 503, 585 P.2d at 87.

53. *Id.* at 504, 585 P.2d at 87-88. *See also* note 50 *supra.*

54. 90 Wash. 2d at 504, 585 P.2d at 87-88.

55. *Id.* at 504-05, 585 P.2d at 88.

56. W. HOHFELD, FUNDAMENTAL LEGAL CONCEPTIONS (W. Cook ed. 1923). Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning,* 23 YALE L.J. 16 (1913).

57. 90 Wash. 2d at 513 n.13, 585 P.2d at 92 n.13. The court concluded that true rights are created by a positive constitutional grant or, by Hohfeldian analysis, follow from an

consider whether the state had a compelling reason for failing to comply with its constitutional duty; the exclusive and critical question asked was whether the state in fact had fulfilled its duty to provide for education.

To answer this question, the court considered the scope of the state's duty. The court acknowledged that the state must fulfill its duty by means of a general and uniform system of public schools.[58] Accepting the trial court's definitions of ample, provision, and education,[59] the supreme court held the state's duty to make ample provision for education requires full funding for the state public school system,[60] but only to the extent of "basic education."[61] Furthermore, the court concluded full funding for basic education means dependable and regular tax revenues.[62]

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affirmatively imposed constitutional duty. Hohfeld's analysis, however, does not distinguish between rights that exist by virtue of a positive constitutional grant and those that exist because constitutions have provided for noninterference with a specific legal entitlement. Noninterference is, in fact, a duty imposed on the state and the jural correlative of the right to the specific legal entitlement. *See generally* W. HOHFELD, *supra* note 56, at 36-43. The enjoyment of any right presupposes noninterference. Given a sufficiently grievous exigency, it is difficult to imagine any right guaranteed by the Constitution a court could not impair at least temporarily. In any event, in none of his writings did Hohfeld assert that true rights are absolute.

58. 90 Wash. 2d at 513, 585 P.2d at 92.

59. For purposes of article IX, § 1, the trial court provided the following definitions:

> "[A]mple" means liberal, unrestrained, without parsimony, fully sufficient; "provision" means preparation, measures taken beforehand, for the supply of wants, measures taken for a future exigency; "education" in its total sense comprehends all that series of instruction and discipline which is intended to enlighten the understanding, correct the temper, and form the manners and habits of youth, and fit them for usefulness in the future. In its most extended signification it may be defined, in reference to man, to be the act of developing and cultivating the various physical, intellectual, aesthetic and moral faculties.

Id. at 516, 585 P.2d at 93-94.

60. *Id.* at 518, 585 P.2d at 95.

61. *Id.* at 519, 585 P.2d at 95. No substantive standards were available to the court from which to divine those programs of education constitutionally required by article IX, § 1. Recognizing the absurdity of requiring the legislature to fund all education encompassed within the scope of the ordinary meaning of the word, the court inserted the adjective "basic" to reduce the concept to manageable proportions. Giving no explanation of the derivation of its newly created concept, and declining to define what it meant by "basic education," the court noted that the state's constitutional duty "embraces broad educational opportunities needed in the contemporary setting to equip their children for their role as citizens and as potential competitors in today's market as well as in the market-place of ideas," and that it must prepare them to "participate intelligently and effectively in our open political system" and "to be able to inquire, to study, to evaluate and to gain maturity and understanding." *Id.* at 517-18, 585 P.2d at 94-95.

62. *Id.* at 520, 585 P.2d at 96.

Because special levies are neither dependable nor regular,[63] the court concluded any statutory scheme authorizing use of special excess levies to fund *basic* education is unconstitutional.[64] To fulfill its absolute duty to provide for education, the legislature must, by July 1, 1981, define "basic education," determine the level of funding sufficient to allow school districts to provide children with basic education, and provide such finding through regular and dependable tax sources.[65]

Criticizing the Majority: Justice Utter Concurs, Justice Rosellini Dissents

Justice Utter concurred with the majority's result, but on limited grounds. He found the state had not met its "constitutional duty to fund ample education in a general and uniform way."[66] Reading article IX, section 1 to guarantee the state's children a right of education "without distinction or preference,"[67] and article IX, section 2 to require a general and uniform system of public schools,[68] he concluded the state constitution's drafters contemplated an educational system that, through statewide planning and financial support, affords each child an equal opportunity to learn.[69] The challenged system of local levy

63. Terming the statutory system "unstable," the court found special levies were wholly "dependent on the whim of the electorate and . . . then available only on a temporary basis." *Id.* at 525, 585 P.2d at 98.

64. *Id.* at 526, 585 P.2d at 99. The court, however, did not prohibit all resort to special levies. The court permits the legislature to use such levies to fund enrichment programs, activities, and support services that go beyond the basic education required by the constitution. *Id.* at 526-27, 585 P.2d at 99.

65. The court noted that the legislature

> has not as yet fully implemented Const. art. 9, §§ 1 and 2 by defining or giving substantive content to "basic education" or a basic program of education. Thus, the Legislature must hereafter act to comply with its constitutional duty by defining and giving substantive meaning to them.
>
> . . . .
>
> Finally, the constitution requires more than a mere definition of "basic education" or a basic program of education . . . . [T]he state also has an affirmative paramount duty to make ample provision for funding the "basic education" or program of education defined. This funding must be accomplished by means of dependable and regular tax sources and cannot be dependent on special excess levies.

Id. at 519-20, 585 P.2d at 95-96.

66. *Id.* at 545, 585 P.2d at 109 (Utter, J., concurring).

67. *Id.* at 546-47, 585 P.2d at 109. *See* note 12 *supra.*

68. *See* note 13 *supra.*

69. 90 Wash. 2d at 547, 585 P.2d at 109. This conclusion comports with the requirement of Brown v. Board of Education, 347 U.S. 483 (1954), that where a state has under-

financing is unconstitutional because it violates both the letter and spirit of this egalitarian promise.[70] Finding it unnecessary to give substantive content to the "paramount duty" of article IX, section 1, Justice Utter commented:

> Having found the challenged system to be unconstitutional, I should not reach beyond such holding to find with the majority that the constitution mandates a specific "basic education" be provided the state's children. For the court to cast in terms of a constitutional doctrine the meaning of this term properly subjects it to the criticism voiced by the dissent, and deprives the people of this state of a continuing legislative and political dialogue on what constitutes a proper education.[71]

In his dissent, Justice Rosellini chastised the majority for assuming the legislative function of defining the state's minimum education level.[72] He concluded that this issue was not well suited for judicial resolution because no justiciable controversy was before the court; petitioners made no showing that the legislature had failed to perform its duty to support public schools in the petitioner school district.[73] By Justice Rosellini's interpretation, the constitution does not impose a judicially enforceable duty on the legislature to provide such support, and the judgment of the court wrongfully interfered with the functions of the legislature and was unenforceable and inimical to the welfare of the citizenry.[74] Reading article IX as a whole, he observed that nothing in that article *directs* the legislature to raise revenue to supple-

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taken to provide it, educational opportunity is a right which must be made available to all on equal terms. *See* note 33 *supra*.

70. In his words, "The system of local levy financing challenged here is an anathema to the egalitarian promise of these provisions, violating them in both letter and spirit." 90 Wash. 2d at 547, 585 P.2d at 109.

71. *Id.*, 585 P.2d at 109.

72. *Id.* at 563, 585 P.2d at 119 (Rosellini, J., dissenting). Before the court could determine if the state had fulfilled its constitutional duty to fund basic education in the Seattle School District, the court needed a definition of "basic education." Because the legislature had not provided one the court itself defined basic education. *Id.*

73. In support of this conclusion Justice Rosellini pointed out that the school district had failed to prove the funds available to it were not sufficient to discharge the state's duty to provide ample education to resident children where the district actually had an $8 million surplus. *Id.* at 564, 585 P.2d at 120. In addition, the average salaries of the district's certified and classified employees were above the state average; the increase in pupil-staff ratios was minimal; and there was no proof of a positive relationship between salaries, pupil-teacher ratios, or expenditures per pupil and educational achievement. On this record he could not find that the funds available to the school district were insufficient. *Id.* at 564-67, 585 P.2d at 120-22.

74. *Id.* at 583, 585 P.2d at 130.

ment the school funds created by section 3; rather, it *empowers* the legislature to do so. The court, he concluded, cannot interpret a permissive grant of discretionary power to create a mandatory duty.[75]

Finally, Justice Rosellini noted that resolving this case required the court to define "ample" funding for "basic education" in the petitioner school district. Thus, the court entered upon a policy determination for which no judicially manageable standards exist and for which the court has neither the facilities to acquire the knowledge nor the expertise necessary to give content to those terms.[76] Furthermore, the terms would require continuing subjective and discretionary judgments as to their meaning to

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75. Throughout article IX, and in particular § 3, which establishes a common school fund to apply exclusively to the support of common schools, the legislature's participation in school funding is framed in discretionary, permissive terms:

> The legislature *may* make further provisions for enlarging said fund.
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> . . . .
>
> . . . The sources of said fund shall be . . . such other sources as the legislature *may* direct.
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> . . . .
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> To the extent that the moneys in the common school construction fund are in excess of the amount necessary to allow fulfillment of the purpose of said fund, the excess shall be available for deposit . . . or . . . current use of the common schools, as the legislature *may* direct.

WASH. CONST. art. IX, § 3 (emphasis added). As Justice Rosellini noted, "How then can it be construed to *impose* upon the legislature a mandatory, affirmative duty to levy taxes and appropriate money for the support of the schools?" 90 Wash. 2d at 571, 585 P.2d at 124 (emphasis added).

76. Justice Rosellini observed:

> The words "education" and "ample" are both capable of broad or narrow meaning depending upon the viewpoint of the user. Also, the content of both is apt to change with changing times. Both cry out for the exercise of legislative wisdom and discretion.
>
> The majority sees that the word "education" is so broad that the imposition of a mandatory duty to support a complete education would be intolerable. By judicial fiat, it adds an adjective and narrows the meaning to something which it deems manageable.
>
> Having decided that the term "education" as used in Const. art. 9, § 2, is a narrow one, actually meaning only "basic education," the majority had next found it necessary to provide the legislature with guidelines to aid that body in deciding what courses . . . to fund[,] [a]pparently . . . because there is no commonly accepted notion of what constitutes "basic education," just as there is no commonly accepted notion of what comprises an "education."
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> . . . .
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> The school financing problem is vastly more complicated than the mere designation and funding of a minimum program. It is not within the expertise of the court to comprehend its complexities . . . . Neither has it the facilities to acquire the knowledge which would support an intelligent judgment.

Id. at 572-75, 585 P.2d at 124-26. *See also* San Antonio Independent School Dist. v. Rodriguez, 411 U.S. at 89 (Marshall, J., dissenting).

reflect the changing needs of society.[77] By requiring the current legislature to establish the constitutional dimensions of basic education, subject to judicial approval in some later litigation, the court would bind future legislatures to an educational program that might not reflect the best interests of the state's citizens.[78] By limiting the means available to fund this educational package,[79] the court interfered with the exercise of the legislature's independent judgment in raising and allocating state revenues, a power constitutionally reserved to that department.[80]

Both Justices Utter and Rosellini criticized the majority for answering a political question properly within the legislative ambit.[81] Thus, in the strictest sense, the issue of defining basic education is nonjusticiable.[82] The majority relied on *Marbury v.*

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77. The concept of basic education extant at the drafting of the Washington Constitution could not meet current basic educational needs, and a contemporary concept will not meet the educational needs of society 50 years from now. Thus, "flexibility in the choice of educational programs and legislative discretion in the funding of them are necessary if the best interests of the children of this state and the people as a whole are to be served." 90 Wash. 2d at 574, 585 P.2d at 125.

78. *Id.*, 585 P.2d at 125. *See id.* at 547, 585 P.2d at 109 (Utter, J., concurring).

79. The majority declared that *"any* statutory scheme which authorizes the use of special excess levies to discharge the State's paramount duty of making ample provision for 'basic education' " is unconstitutional. *Id.* at 526, 585 P.2d at 99 (emphasis added).

80. In Justice Rosellini's words: "The majority's action disturbs the legislature's constitutional power to decide what revenues shall be raised and how the funds in the public treasury shall be appropriated and allocated among the various offices, institutions and services of the state." *Id.* at 563, 585 P.2d at 120 (Rosellini, J., dissenting).

81. Both Justice Utter and Justice Rosellini agreed that the issue of the adequacy of public education belongs to the legislature with its unique factfinding and opinion gathering capabilities. Because a court necessarily limits its inquiry to the interests of the particular litigants, the result does not reflect the collective judgment of the representatives of all those with a stake in the outcome. *Id.* at 547, 551, 574-75, 585 P.2d at 109, 112, 125-26.

82. Although the political question doctrine is somewhat confused, finding expression in at least three different theories of government, the United States Supreme Court has identified several factors as defining a nonjusticiable political question:

> It is apparent that several formulations which vary slightly according to the settings in which the questions arise may describe a political question, although each one has one or more elements which identify it as essentially a function of the separation of powers. Prominent on the surface of any case held to involve a political question is found [1] a textually demonstrable constitutional commitment of the issue to a coordinate political department; or [2] a lack of judicially discoverable and manageable standards for resolving it; or [3] the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or [4] the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or [5] an unusual need for unquestioning adherence to a political decision already made; or [6] the potentiality of embarassment [*sic*] from multifarious pronouncements by various departments on one question.

Madison[83] and its more recent progeny[84] for the proposition that constitutional interpretation and construction are within the exclusive province of the judiciary.[85] But even the *Marbury* Court envisaged political institutions resolving at least some constitutional issues.[86] Indeed, this is explicit in the *Rodriguez* Court's recognition that questions of educational policy require legislative resolution.[87] The court, therefore, should not have assumed

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Baker v. Carr, 369 U.S. 186, 217 (1962).

The first three of these factors suggest sufficient grounds for classifying the issue of "ample provision for . . . education" as a political question. Precedent in other courts, the various economic, social, and philosophical problems involved, and the court's lack of competence to resolve the issue all point to the absence of judicially manageable standards. In addition, throughout its decision the majority recognizes that the ultimate duty to give substantive definition to the provisions of article IX, § 1 rests with the legislature. *See, e.g.*, 90 Wash. 2d at 518-19, 585 P.2d at 95. Nevertheless, the court itself makes the initial policy decision necessary to resolve the case by finding that ample provision for education had not been made with respect to the petitioner school district. *Id.* at 536-37, 585 P.2d at 104. *See generally* L. TRIBE, AMERICAN CONSTITUTIONAL LAW 71-79 (1978) (discussing the political question doctrine).

83. 5 U.S. (1 Cranch) 137 (1803).

84. The majority cites, for example, United States v. Nixon, 418 U.S. 683 (1974); Powell v. McCormack, 395 U.S. 486 (1969); Baker v. Carr, 369 U.S. 186 (1962) and numerous state cases in accord therewith. 90 Wash. 2d at 496-97, 503-04, 506-08, 585 P.2d at 83-84, 87-88, 93.

85. *See* text accompanying notes 52 & 55 *supra*.

86. The Court in *Marbury* noted that:

> By the Constitution of the United States, the President is invested with certain important powers, in the exercise of which he is to use his own discretion, and is accountable only to his country in his political character and to his own conscience . . . .
>
> . . . [W]hatever opinion may be entertained of the manner in which executive discretion may be used, still there exists, and can exist, no power to control that discretion. The subjects are political.

5 U.S. (1 Cranch) at 165-66.

87. The *Rodriguez* Court concluded:

> Education . . . presents a myriad of "intractable economic, social, and even philosophical problems." . . . On even the most basic questions in this area the scholars and educational experts are divided . . . . The ultimate wisdom as to [financing, expenditures, the proper goals of a system of public education, effective management,] and related problems of education is not likely to be divined for all time even by the scholars who now so earnestly debate the issues.
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> . . . .
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> The consideration and initiation of fundamental reforms with respect to state taxation and education are matters reserved for the *legislative* processes of the various States . . . . We hardly need add that this Court's action today is not to be viewed as placing its judicial imprimatur on the status quo. The need is apparent for reform in tax systems which may well have relied too long on the local property tax. And certainly innovative thinking . . . is necessary to assure both a higher level of quality and greater uniformity of opportunity. These matters merit the continued attention of the scholars who already have

the task of defining minimum education for the Seattle School District nor should the court have found that the constitution mandates a specific basic education requiring legislative definition. Indeed, Washington lawmakers had acted during the pendency of the appeal and, in light of the extensive school financing legislation passed,[88] the court's action was particularly inappropriate.[89]

Conclusion

The *Seattle School District* court could have avoided venturing beyond the conventional bounds of judicial function and dispensed with its dubious Hohfeldian analysis by adopting Justice Utter's analysis, applying traditional equal protection analysis,[90] or adopting an independent basis for reviewing article IX.[91] There is ample ground to conclude, under any standard the court wished to apply, that if the state's purpose in using special excess levies to fund education was to maximize local control and local initiative,[92] the Washington levy system was not rationally re-

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contributed much by their challenges. But *the ultimate solutions must come from the lawmakers* and from the democratic pressures of those who elect them.

411 U.S. at 42-43, 58-59 (emphasis added; citations omitted).

88. That legislation is contained principally in two acts: the Washington Basic Education Act of 1977, ch. 359, 1977 Wash. Laws 1st Ex. Sess., and the "Levy Lid" Act, ch. 325, 1977 Wash. Laws 1st Ex. Sess. The Basic Education Act defines the basic educational program to be provided under the act, including goals, program requirements, and the determination of state resources to implement the program. The Levy Lid Act provides a permanent lid of 10 per cent of the local school district budget on the amount of money a district can be asked to fund through special excess levies. The majority noted the passage of these laws in a footnote, but declined to pass on their constitutionality because the trial court had not considered them. 90 Wash. 2d at 519 n.14, 585 P.2d at 95 n.14. Justice Utter, in his concurring opinion, did not share the view that the court could not consider the legislature's recent activities:

> This court has often sustained the proposition that the law governing a case on appeal is that applicable at the time of the disposition of the appeal, not that existing at the time of the trial court's decision.

Id. at 550, 585 P.2d at 111 (Utter, J., concurring).

89. This is not to say the court should not have decided the case, only that the mode of constitutional analysis employed and the scope of the court's decision were inappropriate.

90. Recall, however, that implications other than the fundamental interest concerns of *Rodriguez* may be involved. *See* note 29 *supra.*

91. *See* note 10 *supra.*

92. The majority in *Northshore* states that special excess levies are not only

> consistent with local participation in school administration but are the most vital and effective means by which the people of a given school district may maintain, improve and enhance the processes of education for their children without at the same time depriving the parents of children of other districts from

lated to that purpose. By first finding that present state funding of local school districts is inadequate to provide basic education and that a minimum level of funding is essential to true local control, the *Seattle School District* court effectively concluded the levy system is not rationally related to achieving local control and, in fact, defeats true local control. That is, without minimum funding, local districts lack the means to make meaningful decisions about educational programming.[93]

If the Washington special excess levy system were truly dedicated to local fiscal control, one would expect the quality of educational opportunity provided in each district to vary with the decision of the voters in that district as to the level of sacrifice they wish to make for public education. The Washington system is incapable of producing the desired result. Local school districts cannot choose to have the best education in the state by imposing the highest tax rate. Instead, a district's taxable wealth, a factor over which local voters exercise little control, largely determines the quality of education that district can offer its children. Thus, a special levy financing system based on local district wealth bears no rational relationship to the goal of providing local districts a meaningful option to improve educational opportunities to the extent increased funding would achieve that goal.

The *Northshore* court's unfortunate framing of the issue of ample provision for education in terms of the state's substantive duty directly influenced the conclusions of the *Seattle School District* court. Although reaching the proper result, the *Seattle School District* court not only used questionable analysis to con-

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doing the same.

84 Wash. 2d at 711-12, 530 P.2d at 193. *See also* San Antonio Independent School Dist. v. Rodriguez, 411 U.S. at 48-50 (discussing the merits of local control).

93. As the California Supreme Court noted in Serrano v. Priest:

> [S]o long as the assessed valuation within a district's boundaries is a major determinant of how much it can spend for schools, only a district with a large tax base will be truly able to decide how much it really cares about education. The poor district cannot freely choose to tax itself into an excellence which its tax rolls cannot provide. Far from being necessary to promote local fiscal choice, the present financial system actually deprives the less wealthy districts of that option.

5 Cal. 3d 584, 611, 487 P.2d 1241, 1260, 96 Cal. Rptr. 601, 620 (1971). In *Serrano*, the California court held the state's financing system, which derived more than half its public school funds from property taxes levied by local school districts, discriminated among citizens on the basis of wealth, that such a classification was suspect, that it infringed on a fundamental interest, and that local participation and control did not present a compelling state interest justifying such discrimination. Thus, the California public school system violated the equal protection provisions of the California Constitution.

clude the state had a substantive duty to provide basic education, but also exceeded unnecessarily the conventional bounds of judicial function and interfered with the legislature's ability to exercise its independent judgment in matters outside the court's expertise.

Warren C. Thompson III