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Equal Protection and Public School Financing: Serrano v. Priest

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EQUAL PROTECTION AND PUBLIC SCHOOL FINANCING:

SERRANO v. PRIEST[1]

The Baldwin Park Unified School District expended $577.49 to educate each of its public school children in the 1968-69 school year.[2] During the same period the Beverly Hills Unified School District spent $1,231.72 per child.[3] On August 30, 1971 the California Supreme Court in *Serrano v. Priest*[4] ruled that the public school financing system which allows such a disparity in educational disbursements invidiously discriminates against the poor because it makes the quality of a child's education a function of the wealth of his parents and neighbors.[5] Recognizing that the right to an education in our public schools is a fundamental interest which cannot be conditioned upon wealth, the court was unable to discern any compelling state purpose necessitating the present method of financing and therefore concluded that such a system violates the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.[6]

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1. 5 Cal. 3d 584, 487 P.2d 1241, 96 Cal. Rptr. 601 (1971), *modified*, 5 Cal. 3d 884a (Advance sheet Nov. 9, 1971).

2. CAL. DEPT. OF EDUC., CAL. PUBLIC SCHOOLS, SELECTED STATISTICS 1968-69, at 90-91 (1970).

3. *Id.*

4. 5 Cal. 3d 584, 487 P.2d 1241, 96 Cal. Rptr. 601 (1971). Justice McComb entered a lone dissent.

5. *Id.* at 589, 487 P.2d at 1244, 96 Cal. Rptr. at 604.

6. *Id. Accord*, Rodriguez v. San Antonio Indep. School Dist., — F. Supp. — (W.D. Tex. 1971) (Texas school financing system based on local property taxes is unconstitutional in that it discriminates on the basis of wealth, denies to plaintiffs a fundamental interest in education, and is not supported by a compelling state interest); Van Dusartz v. Hatfield, 334 F. Supp. 870 (D. Minn. 1971) (Minnesota school financing system unconstitutional on same grounds).

The plaintiffs' complaint in *Serrano* also alleged that the financing system violates article I, sections 11 and 21 of the California Constitution. Section 11 provides: "All laws of a general nature shall have a uniform operation." Section 21 states:

> No special privileges or immunities shall ever be granted which may not be altered, revoked, or repealed by the Legislature; nor shall any citizen, or class of citizens, be granted privileges or immunities which, upon the same terms, shall not be granted to all citizens.

Since the California Supreme Court has construed these provisions as "substantially the equivalent" of the Equal Protection Clause of the Fourteenth Amendment to the Federal Constitution (Department of Mental Hygiene v. Kirchner, 62 Cal. 2d 586, 400 P.2d 321, 43 Cal. Rptr. 329 (1965)), the court's analysis of the plaintiffs' federal equal protection contention is also applicable to their claim under the state constitutional provi-

The plaintiffs, Los Angeles County public school children[7] and their parents,[8] set forth three causes of action in their complaint against the state[9] and county[10] officials charged with administering and financing the California public school system. They alleged in substance that: (1) as a direct result of the financing scheme, educational opportunities made available to children attending public schools in certain districts were substantially inferior to educational opportunities made available to children in other districts; (2) the financing scheme caused parents in certain districts to pay at a higher tax rate than taxpayers[11] in other school districts while obtaining the same or lesser edu-

sions. 5 Cal. 3d at 596 n.11, 487 P.2d at 1249 n.11, 96 Cal. Rptr. at 609 n.11. See text accompanying notes 161-67 *infra*.

Because of the confusion regarding the California Supreme Court's initial decision, a modification opinion was entered on October 21, 1971. 5 Cal. 3d 884a (Advance sheet Nov. 9, 1971). Although in the initial decision the supreme court merely reviewed and reversed the dismissal of the complaint entered after the trial court sustained the general demurrers filed by the defendants, it appears that as a result some persons were paying property taxes under protest and filing for refunds. L.A. Times, Oct. 22, 1971, part 1, at 1, col. 3. The protesters were not entirely unjustified in their belief that the initial decision disposed of the case on its merits. *See* 5 Cal. 3d at 589, 487 P.2d at 1244, 96 Cal. Rptr. at 604: "We have determined that this funding scheme invidiously discriminates against the poor. . . ." However, the court clarified in its modification opinion that (1) the initial decision was not final and on the merits; (2) the initial decision determined plaintiffs' allegations to be legally sufficient and thus remanded the case to the trial court for further proceedings; (3) should the trial court find the present system unconstitutional (what else could it do in light of the strong language of the initial decision?) it could provide for enforcement through orderly transition; and (4) a judgment that the present system is unconstitutional need not be retroactive, and the present plan should remain operable until an appropriate new plan can be put into effect. 5 Cal. 3d 884a (Advance sheet Nov. 9, 1971).

7. The plaintiff children claimed to represent a class consisting of all public school pupils in California "except children in that school district, the identity of which is presently unknown, which school district affords the greatest educational opportunity of all school districts within California." 5 Cal. 3d at 589, 487 P.2d at 1244, 96 Cal. Rptr. at 604.

8. The plaintiff parents claimed to represent a class of all parents who have children in the school system and who pay real property taxes in the county of their residence. *Id.*

9. The state officials are the Treasurer, Superintendent of Public Instruction and the Controller of the State of California. *Id.*

10. The county officials are the Tax Collector and Treasurer, and the Superintendent of Schools of the County of Los Angeles. These officials are sued both in their local capacities and as representatives of a class composed of the school superintendent, tax collector and treasurer of each of the other counties of the state. *Id.*

11. The parents brought suit under section 526a of the Code of Civil Procedure:

> An action to obtain a judgment, restraining and preventing any illegal expenditure of, waste of or injury to, the estate, funds, or other property of a county, town, city or city and county of the state, may be maintained against any officer thereof, or any agent, or other person, acting in its behalf, either by a

cational opportunities; and (3) an actual controversy had arisen and existed between the parties.[12] The trial court sustained general demurrers filed by the defendants and after a review and affirmance in the court of appeal[13] the California Supreme Court granted a hearing.

Fundamental to an analysis of the constitutional problems presented in *Serrano* is an understanding of the California public school financing system. The California Constitution directs the legislature to provide for a system of common schools[14] and the levying of local taxes to contribute support for those schools.[15] As a result, local property taxes supplemented by aid from the State School Fund provide over 90 percent of the state school financing.[16]

The actual revenue which a local district can raise is the product of two factors: (1) the assessed valuation of property within its borders, and (2) the rate of taxation within the district.[17] The assessed valuation within a school district varies widely and is totally beyond the control of the residents of that district.[18] Thus, in 1969-70 the assessed

citizen resident therein, or by a corporation, who is assessed for and is liable to pay, or, within one year before the commencement of the action, has paid, a tax therein. This section does not affect any right of action in favor of a county, city, town, or city and county, or any public officer; provided, that no injunction shall be granted restraining the offering for sale, sale or issuance of any municipal bonds for public improvements or public utilities.

In Blair v. Pitchess, 5 Cal. 3d 258, 486 P.2d 1242, 96 Cal. Rptr. 42 (1971), the California Supreme Court ruled taxpayers *qua* taxpayers have sufficient standing to seek injunctive relief to restrain public officers from expending their own time and the time of other officials in carrying out the provisions of an unconstitutional law. The *Serrano* court agreed that the plaintiff parents had sufficient standing to state a cause of action. 5 Cal. 3d at 618, 487 P.2d at 1265-66, 96 Cal. Rptr. at 625-26.

12. Plaintiffs prayed for: (1) a declaration that the present financing system is unconstitutional; (2) an order directing defendants to reallocate school funds in order to remedy this invalidity; and (3) an adjudication that the trial court retain jurisdiction of the action so that it may restructure the system if defendants and the state legislature fail to act within a reasonable time. 5 Cal. 3d at 591, 487 P.2d at 1245, 96 Cal. Rptr. at 605.

13. 10 Cal. App. 3d 1110, 89 Cal. Rptr. 345 (1970).

14. The Legislature shall provide for a system of common schools by which a free school shall be kept up and supported in each district at least six months in every year, after the first year in which a school has been established. CAL. CONST. art. IX, § 5.

15. The Legislature shall provide for the levying annually by the governing body of each county, and city and county, of such school district taxes, at rates not in excess of the maximum rates of school district tax fixed or authorized by the Legislature, as will produce in each fiscal year such revenue for each school district as the governing board thereof shall determine is required in such fiscal year for the support of all schools and functions of said district authorized or required by law. *Id.* § 6.

16. 1 LEGISLATIVE ANALYST, PUBLIC SCHOOL FINANCE, EXPENDITURES FOR EDUCATION 5 (1971).

17. 5 Cal. 3d at 592, 487 P.2d at 1246, 96 Cal. Rptr. at 606.

18. *Id.*

valuation per unit of average daily attendance[19] of elementary school children ranged from a low of $103 to a high of $952,156.[20] The rate of taxation in a particular district is limited by statute[21] although a majority of the district's voters may decide in a tax override election[22] to surpass the maximum. Therefore, the revenue raised in a given school district is flexible only to the extent that the voters in that district are willing and able to tax themselves for education.

The school funds which a district raises by local taxation are supplemented by the state from the State School Fund pursuant to the "foundation program."[23] This is accomplished through at least one of several methods. Each district, regardless of its wealth and taxing power, receives $125 per year for each school child in the form of "basic state aid."[24] Since, by statute, a school district must receive from combined local and state funds at least $355 per elementary school pupil[25] and $488 per high school student,[26] the state is under an obligation to further contribute to those districts which cannot reach

19. Most determinations of school aid are not based on total enrollment, but on "average daily attendance," a figure computed by compiling the number of students actually present on each school day and dividing that by the total days school was taught. CAL. EDUC. CODE ANN. §§ 11252, 11301, 11401 (West 1969). Average daily attendance approximates 98 percent of total enrollment. 4 LEGISLATIVE ANALYST, PUBLIC SCHOOL FINANCE, GLOSSARY OF TERMS MOST OFTEN USED IN SCHOOL FINANCE 2 (1971). Hereinafter, any reference to "per pupil" or "per child" means per unit of average daily attendance. 5 Cal. 3d at 592 n.4, 487 P.2d at 1246 n.4, 96 Cal. Rptr. at 606 n.4.

20. 5 LEGISLATIVE ANALYST, PUBLIC SCHOOL FINANCE, CURRENT ISSUES IN EDUCATIONAL FINANCE 7 (1971).

21. CAL. EDUC. CODE ANN. § 20751 (West 1969).

22. *Id.* § 20803.

23. The system of public school support should effect a partnership between the State, the county, and the local district, with each participating equitably in accordance with its relative ability. The respective abilities should be combined to provide a financial plan between the State and the local agencies known as the foundation program for public school support. Toward this foundation program, each county and district, through a uniform method should contribute in accordance with its true financial ability. *Id.* § 17300.

24. The Superintendent of Public Instruction shall allow one hundred twenty-five dollars ($125) to each elementary school district for each unit of average daily attendance therein during the fiscal year . . . but not less than two thousand four hundred dollars ($2,400) shall be allowed to any elementary school district, to be known as basic state aid. *Id.* § 17751.

The same provision is made for high school districts. *Id.* § 17801.

25. The Superintendent of Public Instruction shall compute an amount determined by multiplying the total average daily attendance, exclusive of pupils attending the seventh and eighth grades of a junior high school, by $355. This is the foundation program for elementary districts. *Id.* § 17656 (West Supp. 1971). The same amount is credited to the elementary school district for each pupil in the seventh and eighth grades. *Id.* § 17660 (West Supp. 1971).

26. For each high school district which has an average daily attendance of 301 or more during the fiscal year, [the Superintendent of Public Instruction] shall

the required minimum expenditure when the basic grant is added to their local taxing effort. This additional grant is known as "equalization aid."[27] The state, however, does not apply the actual local tax contribution for purposes of determining the amount of a district's equalization aid.[28] To do so would reward a school district for reducing its own contribution from local taxes since equalization aid is theoretically the difference between the statutory minimum and the combination of local taxes and basic aid. Instead, the state computes equalization aid by determining how much local tax revenue would be raised at a hypothetical local tax rate of one dollar on each $100 of assessed valuation in elementary school districts and eighty cents per $100 in high school districts.[29] To that figure is added the $125 basic aid grant and if the sum is less than the statutory minimum, the gap is closed by equalization aid funds.[30] In this way, while basic aid is a flat rate, equalization aid is contributed by the state in inverse proportion to the wealth of the district.

In addition to basic state aid and equalization aid, extremely poor districts who are willing to make an extra local tax effort may receive a further state subsidy in the form of "supplemental aid."[31] Despite the disproportionate state subsidies, however, great disparities continue to exist between wealthy school districts like Beverly Hills and

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multiply the average daily attendance by four hundred eighty-eight dollars ($488). *Id.* § 17665 (West Supp. 1971).

27. If the total amount allowed to, and computed for, any elementary school district pursuant to Section 17751 . . . [see note 24 *supra*] . . . is less than the amount of the foundation program of school support computed for such district pursuant to Sections 17651 to 17680, inclusive [see notes 25-26 *supra*] [the Superintendent of Public Instruction] shall add to the amount computed for such district pursuant to Section 17751 . . . such additional amount, to be known as state equalization aid, as may be necessary to equal that computed for such district pursuant to Sections 17651 to 17680. CAL. EDUC. CODE ANN. § 17901 (West 1969).

Basically the same provision is made for high school districts. *Id.* § 17902.

28. The Superintendent of Public Instruction shall compute for each district described herein . . . the amount, to be known as district aid, which a tax levied on each one hundred dollars ($100) of 100 percent of the assessed valuation in such district as shown by the equalized assessment roll of the district for the current year would produce if levied, if such tax was:

(a) One dollar ($1) in an elementary school district.

(b) Eighty cents ($0.80) in a high school district.

(c) Twenty-five cents ($0.25) in a junior college district. *Id.* § 17702.

29. *Id.*

30. *See* note 27 *supra.*

31. Under this program an elementary district having an assessed valuation below $12,500 per pupil may receive up to an additional $125 per child. A high school district having an assessed valuation less than $24,500 per pupil may receive up to $72 in supplemental aid. In either instance, the district must set its local tax rate sufficiently high. CAL. EDUC. CODE ANN, §§ 17920-26 (West 1969).

poorer districts like Baldwin Park.[32] In short, the state effort is not sufficient to eliminate substantial differences in the ability of school districts to collect taxes based upon the assessed valuation of real property within its borders.[33]

In addition to their argument that the financing scheme fails to provide the poor with equal protection of the law as required by both the federal and state[34] constitutions, the plaintiffs in *Serrano* attacked the system as violating article IX, section 5 of the California Constitution which states: "The Legislature shall provide for a system of common schools by which a free school shall be kept up and supported in each district at least six months in every year. . . ." The present method of school financing, according to the plaintiffs, produces separate and distinct systems, each offering varying educational opportunities depending upon the financial resources of the district. The court rejected this argument, relying upon their earlier decision that "common" meant only uniform in terms of prescribed courses of study and educational progression from grade to grade. Thus, the provision does not require

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32. For example, in the school year 1968-69 the Baldwin Park Unified School District spent $577.49 to educate each school child; the Pasadena Unified School District spent $840.19 per student; and the Beverly Hills Unified School District expended $1,231.72 per child. CAL. DEPT. OF EDUC., CAL. PUBLIC SCHOOLS, SELECTED STATISTICS 1968-69, at 90-91 (1970).

33. An example may be helpful in demonstrating the basic pattern of the school financing scheme. Assume an elementary school district with 10,000 elementary school children, a total real property assessed valuation of $100 million within its borders, and a tax rate of $0.75 per $100 of assessed valuation. Determination of the amount of equalization aid for this hypothetical school district is as follows:

(1) The state disregards the actual tax rate of $0.75 per $100 of assessed valuation and computes the amount of revenue which the district would collect if it taxed real property at a rate of one dollar per $100 of assessed valuation. In this example:

$100,000,000/$100 × $1 = $1,000,000

(2) The local contribution per child is computed. In this example:

$1,000,000/10,000 children = $100/child

(3) To that figure is added the flat basic aid grant of $125 per child. In this example:

$100 + $125 = $225

(4) The equalization aid contribution is computed by subtracting the above step 3 figure from the foundation minimum of $355 per child for elementary school districts. In this example:

$355 − $225 = $130

(5) The state is then under an obligation to contribute a total of $255 per child to the district: $125 per child as basic state aid and $130 per child as equalization aid. Any supplemental aid is in addition to this amount. Thus, while all districts will spend a minimum of $355 per elementary child, wealthy districts are able to expend far more this amount.

34. See note 6 *supra*.

equal spending.[35] An interpretation of section 5 as a mandate for equal spending would create a conflict with section 6[36] of the same article which specifically authorizes the element of the fiscal system of which the plaintiffs complained. Noting that principles of construction dictate that where constitutional provisions can reasonably be construed to avoid a conflict, such an interpretation should be adopted,[37] the court ruled that section 5 could not bear the plaintiffs' interpretation.[38] Having disposed of preliminary matters, the court proceeded to an analysis of the plaintiffs' constitutional attack on the financing scheme.

The Equal Protection Clause of the Fourteenth Amendment has undergone a rapid and dramatic transformation over the last several years, its role changing from an instrument of minimal judicial intervention to that of a far reaching tool for the protection of fundamental rights not expressly specified in the Constitution.[39] The "traditional" application of equal protection is demonstrated in *McGowan v. Maryland*[40] where the United States Supreme Court declared Sunday closing laws to be consistent with the Equal Protection Clause. Chief Justice Warren declared that states are allowed a wide discretion in enacting legislation which affects some groups of citizens differently than others and a state would be *presumed* to have acted within its constitutional power despite the fact that its laws resulted in some inequality.[41] To overcome this presumption it must be shown that no rational relationship existed between the state's objectives and the means employed for reaching those objectives.[42] It was this "traditional" test which the California court of appeal applied to determine whether the instant school financing scheme was not unconstitutional. Citing *McInnis v.*

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35. 5 Cal. 3d at 596, 487 P.2d at 1249, 96 Cal. Rptr. at 609, *citing* Piper v. Big Pine School District, 193 Cal. 664, 669, 673, 226 P. 926, 928, 930 (1924).

36. See note 15 *supra.*

37. Even if the court were to adopt plaintiffs' construction, there would then be an irreconcilable conflict with section 6; and since section 6 was adopted more recently, it would prevail. 5 Cal. 3d at 596, 487 P.2d at 1249, 96 Cal. Rptr. at 609, *citing* People v. Western Airlines, Inc., 42 Cal. 2d 621, 637, 268 P.2d 723, 732 (1954) *and* County of Placer v. Aetna Cas. & Sur. Co., 50 Cal. 2d 182, 189, 323 P.2d 753, 757 (1958).

38. 5 Cal. 3d at 596, 487 P.2d at 1249, 96 Cal. Rptr. at 609.

39. *E.g.*, Douglas v. California, 372 U.S. 353 (1963) [for discussion see text accompanying notes 66-67 *infra*]; Smith v. Bennett, 365 U.S. 708 (1961) [see text accompanying note 65 *infra*]; Burns v. Ohio, 360 U.S. 252 (1959) [see note 61 *infra*]; Griffin v. Illinois, 351 U.S. 12 (1956) [for discussion see text accompanying notes 60-64 *infra*].

40. 366 U.S. 420 (1961).

41. *Id.* at 425-26.

42. *Id.*

Shapiro,[43] wherein a three-judge federal district court ruled that a similar Illinois public school financing plan did not violate the Equal Protection Clause, Justice Dunn speaking on behalf of the court of appeal said:

> The court determined in *McInnis* that the school financing legislation did not violate the equal protection clause, because variations in the amount of money spent per pupil are reasonably related to the legislative policy of delegating authority to school districts,[44] including the right to determine their own tax burden according to the importance which they place upon public schools.[45]

Since a rational relationship can be found between the objective and the means, the traditional test would not support the *Serrano* plaintiffs' contentions that they had been denied the equal protection of the law.

In recent years, the United States Supreme Court has adopted a more stringent test by which to measure equal protection in cases involving "suspect classifications"[46] or "fundamental interests."[47] In such instances it is not enough that the statute be rationally related to the state's objective; instead, the state bears the burden of establishing not only that it has a *compelling* interest which justifies the law[48] but also, in California at least, that the distinctions drawn by the law are *necessary* to further its purpose.[49] It is this standard, the plaintiffs claimed, by which the public school financing scheme must be measured.

Racial classifications have long been considered "suspect" in light of

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43. 293 F. Supp. 327 (N.D. Ill.), *aff'd mem. sub nom.* McInnis v. Ogilvie, 394 U.S. 322 (1969).

44. A like policy is expressed by the California Legislature. "The system of public school support should be designed to strengthen and encourage local responsibility for control of public education." CAL. EDUC. CODE ANN. § 17300 (West 1969).

45. 89 Cal. Rptr. at 348-49.

46. *E.g.*, Loving v. Virginia, 388 U.S. 1 (1967) [for discussion see text accompanying notes 57-58 *infra*]; Griffin v. Illinois, 351 U.S. 12 (1956) [for discussion see text accompanying notes 60-64 *infra*]; Korematsu v. United States, 323 U.S. 214, 216 (1944) [for discussion see text accompanying notes 54-56 *infra*].

47. *E.g.*, Harper v. Board of Elections, 383 U.S. 663, 670 (1966) [for discussion see text accompanying note 90 *infra*]; Reynolds v. Sims, 377 U.S. 533, 561-62 (1964) [for discussion see text accompanying notes 88-89 *infra*]; Skinner v. Oklahoma, 316 U.S. 535, 541 (1942) [for discussion see text accompanying notes 85-87 *infra*].

48. Shapiro v. Thompson, 394 U.S. 618 (1969).

49. Westbrook v. Mihaly, 2 Cal. 3d 765, 471 P.2d 487, 87 Cal. Rptr. 839 (1970), *vacated and remanded*, 403 U.S. 915 (1971) (to be reconsidered in light of Gordon v. Lance, 403 U.S. 1 (1971), holding that West Virginia's requirement for a 60% majority referendum does not violate the Equal Protection Clause). There, the

the Fourteenth Amendment.[50] The elimination of racial discrimination was one of the primary purposes of that Amendment and the unconstitutionality of classifications drawn upon racial lines has been a continuously voiced theme in equal protection doctrine.[51] The United States Supreme Court enunciated the basic objective of the Fourteenth Amendment in 1873, eight years after its passage:

> [N]o one can fail to be impressed with the one pervading purpose found [in the Fourteenth Amendment] . . . . [W]e mean the freedom of the slave race, the security and firm establishment of that freedom, and the protection of the newly-made freeman and citizen from the oppressions of those who had formerly exercised unlimited dominion over him.[52]

In 1880, the Court struck down an obviously discriminatory West Virginia statute which prohibited Negroes from serving on juries, declaring:

> [The Fourteenth Amendment] was designed to assure to the colored race the enjoyment of all the civil rights that under the law are enjoyed by white persons, and to give to that race the protection of the general government, in that enjoyment, whenever it should be denied by the States. . . .[53]

In *Korematsu v. United States*,[54] the Court noted the special treatment given to cases involving racial issues and stated that

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California Supreme Court held that requiring a local bond issue to be approved by a two-thirds majority vote violated the Equal Protection Clause. Such a requirement would be valid only if "it can be shown *necessary* to promote a compelling state interest." *Id.* at 787, 471 P.2d at 502, 87 Cal. Rptr. at 854 (emphasis added).

50. *See, e.g.*, Korematsu v. United States, 323 U.S. 214 (1944) [for discussion see text accompanying notes 54-56 *infra*]; Loving v. Virginia, 388 U.S. 1 (1967) [for discussion see text accompanying note 57 *infra*].

51. *See, e.g.*, Slaughter-House Cases, 83 U.S. (16 Wall.) 36 (1873); Strauder v. West Virginia, 100 U.S. 303 (1879).

52. Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 71 (1873). The Court upheld a Louisiana law which chartered a corporation and granted to it a 25 year monopoly to maintain slaughterhouses. While deciding the law did not deprive citizens of equal protection, the Court discussed at length the purpose of the Thirteenth and Fourteenth Amendments.

53. Strauder v. West Virginia, 100 U.S. 303, 306 (1879). The petitioner had sought to remove his state prosecution to a federal court because the West Virginia law prohibited Negroes from serving on juries. The Court ruled that persons cannot be excluded from a jury solely because of their race.

54. 323 U.S. 214 (1944). The petitioner, an American citizen, was convicted in a federal district court for remaining in San Leandro, California, a "Military Area" during World War II, contrary to an order that all persons of Japanese ancestry should be excluded from that area.

> all legal restrictions which curtail the civil rights of a single racial group are immediately *suspect.* That is not to say that all such restrictions are unconstitutional. It is to say that courts must subject them to the most *rigid scrutiny.*[55]

In *Korematsu,* the restrictions based upon Japanese ancestry withstood the "rigid scrutiny" because of the government's compelling interest in segregating persons of Japanese descent during a time of war, when invasion by the Japanese Empire was feared to be imminent.[56] The "suspect" nature of cases involving racial discrimination is made clear in *Loving v. Virginia,*[57] a recent case in which a statute prohibiting interracial marriage was ruled unconstitutional. After pointing out that this was not a case involving mere economic regulation, the Court noted:

> In the case at bar . . . we deal with statutes containing racial classifications, and the fact of equal application does not immunize the statute from the very heavy burden of justification which the Fourteenth Amendment has traditionally required of state statutes drawn according to race.[58]

By virtue of the fact that the very *raison d'ètre* of the Fourteenth Amendment was to eliminate unequal treatment of the races under the law, the "suspect" nature of statutes which seek to impose liabilities or deprive an individual of rights solely because of his race have been continually recognized by the courts.

Race, however, has not been the only classification regarded as suspect by the courts in their determination of equal protection questions. As Justice Sullivan noted in *Serrano*: "One factor which has repeatedly come under close scrutiny of the high court is wealth."[59] The application of this doctrine is seen in *Griffin v. Illinois*[60] where a state law requiring defendants in criminal matters to pay a fee for a complete trial transcript[61] was declared invalid. Without the transcript it was impossible for defendants to obtain complete appellate review of their cases. The United States Supreme Court ruled that the Illinois statute created two classifications of defendants: (1) those who could afford to pay the fine and thus obtain a copy of their trial transcript, and (2) those

55. *Id.* at 216 (emphasis added).
56. *Id.* at 223-24.
57. 388 U.S. 1 (1967).
58. *Id.* at 9.
59. 5 Cal. 3d at 597, 487 P.2d at 1250, 96 Cal. Rptr. at 610.
60. 351 U.S. 12 (1956).
61. In Burns v. Ohio, 360 U.S. 252 (1959) the same result was reached with regard to an Ohio law requiring the paying of a docket fee. The Court relied extensively on its prior decision in Griffin v. Illinois, 351 U.S. 12 (1956).

who could not afford to pay the fee and thus were barred from receiving a copy of the trial record.[62] The Court concluded that once a state decides to provide for a system of appellate review,[63] it cannot establish a procedure which has the effect of precluding certain individuals simply because of their economic circumstances.[64] In 1961 this principle was extended to required fees for the filing of habeas corpus petitions.[65]

Thus far the Court had scrutinized classifications drawn upon wealth only as the result of an actively imposed statute that required the payment of a fee, without which the criminal defendant was unable to pursue his procedural rights. But in *Douglas v. California*[66] the state was placed under an obligation to provide legal counsel for indigent defendants on appeal. In *Douglas,* there existed no legislatively imposed requirement for fees that tended to classify defendants by their economic status. Rather, there merely existed the fact of poverty and the resulting inability of defendants to effectively assert their rights. Speaking for the Court, Justice Douglas concluded:

> There is lacking that equality demanded by the Fourteenth Amendment where the rich man, who appeals as of right, enjoys the benefit of counsel's examination into the record, research of the law, and marshalling of arguments on his behalf, while the indigent, already burdened by a preliminary determination that his case is without merit, is forced to shift for himself.[67]

Justice Harlan, who had previously dissented in *Griffin v. Illinois,*[68] protested the Court's mandate that a state *actively* eliminate differences in the economic plight of criminal defendants:

> Laws such as these do not deny equal protection to the less fortunate

62. 351 U.S. at 17-19.

63. *Id.* at 18-19.

64. Justice Burton and Justice Minton, with whom Justice Reed and Justice Harlan joined, dissented:

> The court finds in the operation of these requirements . . . an invidious classification between the "rich" and the "poor." But no economic burden attendant upon the exercise of a privilege bears equally upon all, and in other circumstances the resulting differentiation is not treated as invidious classification by the State, even though discrimination against "indigents" by name would be unconstitutional. Thus, while the exclusion of "indigents" from a free state university would deny them equal protection, requiring the payment of tuition fees surely would not, despite the resulting exclusion of those who could not afford to pay the fees. And if imposing a condition of payment is not the equivalent of a classification by the State in one case, I fail to see why it would be so regarded in another. *Id.* at 35.

65. Smith v. Bennett, 365 U.S. 708 (1961).

66. 372 U.S. 353 (1963).

67. *Id.* at 357-58.

68. *See* note 64 *supra.*

for one essential reason: the Equal Protection Clause does not impose on the States "an affirmative duty to lift the handicaps flowing from differences in economic circumstances."[69]

There were other methods, however, by which a state might classify its citizens according to wealth. Many states made certain crimes punishable by both imprisonment and fine. State sentencing provisions provided that if the convicted criminal could not pay the fines, his period of confinement would be continued for a length of time to be determined by some conversion of unpaid dollars to days served in prison.[70] In *Williams v. Illinois*[71] the Supreme Court ruled that such imprisonment provisions created two classes of imprisoned criminals solely on the basis of their ability to pay the fine. Since the class unable to pay the fine was incarcerated for a longer period than those whose financial status allowed payment, indigent violators were denied equal protection of the law.[72]

It is noteworthy that in each of these instances there was no doubt concerning the state's ability to show a rational relationship between the statute or policy involved and the state's objective. Mandatory filing fees are rationally related to a state's objective of providing revenue to meet the cost of handling the documents involved in a criminal appeal.[73] A policy of not providing indigent defendants with legal counsel on appeal rationally relates to the state's objective of conserving its resources.[74] And a law requiring defendants to work off fines in

69. 372 U.S. at 362. Justice Stewart joined in the dissent.

70. For example, section 1-7(k) of the Illinois Criminal Code of 1961 provides:

> Working out fines. A judgment of a fine imposed upon an offender may be enforced in the same manner as a judgment entered in a civil action; Provided, however, that in such judgment imposing the fine the court may further order that upon non-payment of such fine, the offender may be imprisoned until the fine is paid, or satisfied at the rate of $5.00 per day of imprisonment; Provided, further, however, that no person shall be imprisoned under the first provision hereof for a longer period than 6 months.

71. 399 U.S. 235 (1970).

72. *Id.* at 242. In Tate v. Short, 401 U.S. 395 (1971), this principle was extended to offenses punishable by fine only. The petitioner was unable to pay fines of $425 accumulated on nine convictions for traffic offenses. The court, which otherwise had no authority to impose prison sentences, confined the petitioner under TEX. CODE CRIM. PROC., art. 45.53 (1966) which allowed a defendant to be incarcerated at the rate of one day in jail for each $5 of fine owed The United States Supreme Court struck down the statute, relying on its decision in *Williams*. 401 U.S. at 397.

73. "[I]f a transcript is used, it is surely not unreasonable to require the appellant to bear its cost. . . ." 351 U.S. at 34 (Harlan, J., dissenting).

74. *Cf.* Shapiro v. Thompson, 394 U.S. 618, 633 (1969). The Court recognized "that a State has a valid interest in preserving the fiscal integrity of its programs." In *Shapiro* the Court was reviewing welfare payments. For discussion of *Shapiro* see notes 92-96 *infra* and accompanying text.

prison serves the state's policy of deterring violation of its criminal statutes.[75] But in each case, despite the rational relationship, the defendants were found to have been denied the equal protection of the law.

The *Serrano* plaintiffs contended that the California public school financing scheme classifies on the basis of wealth. This argument was advanced in order to taint the financing scheme by characterizing it as a system based upon a suspect classification, and therefore require it to be measured by the stricter "compelling state interest" test rather than by the "rational relationship" equal protection test. If the state were merely required to show that a rational relationship existed between its financing plan and its declared policy[76] of allowing local districts to determine their own level of school spending, plaintiffs were destined for failure.[77] On the other hand, the public officials would have an insurmountable task establishing a compelling state interest for maintaining the present system.[78] Realizing this, the defendants' efforts were not directed toward establishing such an interest, rather, their defense was more fundamental to the issue—they disputed the proposition that the financing scheme discriminated on the basis of wealth at all.[79]

First, the defendants argued, since through basic state aid funds are distributed equally to all pupils, and equalization aid is distributed in a manner beneficial to poor districts, the scheme does not discriminate against poorer districts.[80] The court rejected this argument, however, noting that while state contributions partially alleviated the disparities in local revenue, the system taken as a whole discriminates because it generates revenue in proportion to the unequal wealth of the district.[81] Second, the defendants asserted that the only proper index of a district's wealth is the total assessed valuation of its property. The court dismissed this argument by noting that "the only meaningful measure of a district's wealth in the present context is not the absolute value of its property, but the ratio of its resources to its pupils. . . ."[82] The de-

75. *See* Williams v. Illinois, 399 U.S. at 241:

A State has wide latitude in fixing the punishment for state crimes. Thus, appellant does not assert that Illinois could not have appropriately fixed the penalty, in the first instance, at one year and 101 days. Nor has the claim been advanced that the sentence imposed was excessive in light of the circumstances of the commission of this particular offense.

76. *See* note 44 *supra.*

77. See text accompanying notes 43-45 *supra.*

78. See text accompanying notes 102-110 *infra.*

79. 5 Cal. 3d at 598, 487 P.2d at 1250, 96 Cal. Rptr. at 610.

80. *Id.*

81. *Id.* at 599, 487 P.2d at 1251, 96 Cal. Rptr. at 610-11.

82. Defendants argued that assessed valuation per child is not reliable as an index of wealth of a district because a district with a low total assessed valuation but a very

fendants also argued that the wealth of a school district does not necessarily reflect the wealth of the families who live there. The court rejected this argument, declaring: "We think that discrimination on the basis of district wealth is equally invalid [as discrimination on the basis of individual wealth]."[83] In short, the court responded affirmatively to the plaintiffs' contention that the school financing system classifies on the basis of wealth: "We find this proposition irrefutable."[84]

Classifications based on suspect criteria are not the only factual situations which require extraordinary scrutiny by the judiciary; even if the classification is not inherently suspect, it may deprive certain individuals of prerogatives that are so basic in nature as to be considered "fundamental" rights. If this is the case, the burden is again on the state to show that it has a compelling interest which would be jeopardized if it were not for the classification.

This doctrine began to emerge in *Skinner v. Oklahoma*[85] where an "habitual criminal" protested a state law allowing his sexual sterilization.[86] After first noting that the case touched "a sensitive and important area of human rights," Justice Douglas warned:

> [S]trict scrutiny of the classification which a State makes in a sterilization law is essential, lest unwittingly, or otherwise, invidious discriminations are made against groups or types of individuals in violation of the constitutional guaranty of just and equal laws.[87]

Twenty-two years later in *Reynolds v. Sims*[88] the constitutionality of state voting apportionment plans was at issue. Despite the absence of

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small number of students will have a high per pupil base and appear "wealthy." Expenditure per pupil is untrustworthy because that figure is partly determined by the district's tax rate which can be varied by the taxpayers. Thus, a district with a high total assessed valuation might levy a low tax and end up spending the same amount per pupil as a poorer district which had decided to tax itself at a higher rate. To this argument the court responded that this merely points out how a richer district is favored because it can provide better education for its children with less tax effort. *Id.* at 599, 487 P.2d at 1251, 96 Cal. Rptr. at 611.

83. *Id.* at 601, 487 P.2d at 1252, 96 Cal. Rptr. at 612. The court also said that a correlation between individual wealth and district wealth was a material fact to be treated as admitted by the demurrers. *Id.* at 600-01, 487 P.2d at 1252, 96 Cal. Rptr. at 612.

84. *Id.* at 598, 487 P.2d at 1250, 96 Cal. Rptr. at 610.

85. 316 U.S. 535 (1942).

86. Oklahoma's Habitual Criminal Sterilization Act allowed sterilization of those criminals who, having been convicted two or more times of felonies involving moral turpitude, were thereafter convicted of such a felony. Ch. 26 art. 1, [1935] Okla. Laws 94.

87. 316 U.S. at 541.

88. 377 U.S. 533 (1964).

suspect criteria, the Court subjected the state plans to unusual scrutiny[89] because of the impairment of the fundamental right to vote. This same right is affected when the state attempts to make payment of a poll tax a prerequisite to its exercise. Such a tax was declared unconstitutional in *Harper v. Board of Elections*[90] where the Court's policy with regard to potential denial of basic fundamental rights was expressed:

> We have long been mindful that where fundamental rights and liberties are asserted under the Equal Protection Clause, classifications which might invade or restrain them must be closely scrutinized and carefully confined.[91]

In *Shapiro v. Thompson*[92] the fundamental interest doctrine was applied to invalidate state laws requiring a specified residency period before an individual could be eligible to receive welfare payments. The effect of such statutes was to create two classes of persons, indistinguishable from each other except in regard to the length of time they had been residents of the state.[93] Since needy families could not move to such a state without placing themselves in a situation where they would have no means of support, their constitutional right to interstate travel[94] was restricted.[95] Having linked the restrictive statute to a fundamental interest, the Court ruled that, in the absence of compelling governmental

89. [N]either history alone, nor economic or other sorts of group interests, are permissible factors in attempting to justify disparities from population-based representation. *Id.* at 579-80.

90. 383 U.S. 663 (1966).

91. *Id.* at 670.

92. 394 U.S. 618 (1969).

93. See text accompanying note 139 *infra.*

94. Although the right to travel has not been traced to any specific constitutional provision, it has been treated as a constitutional right by the Court. In Kent v. Dulles, 357 U.S. 116 (1958), where the Court held that the Secretary of State could not constitutionally promulgate regulations denying passports to certain "subversive" individuals, Justice Douglas said: "The right to travel is a part of the 'liberty' of which the citizen cannot be deprived without due process of law under the Fifth Amendment." 357 U.S. at 125. In Aptheker v. Secretary of State, 378 U.S. 500 (1964), the Court decided that section 6 of the Subversive Activities Control Act of 1950, 50 U.S.C. § 785 (1964), which prohibited members of the Communist Party from applying for a passport, encroached upon the right to travel. And in United States v. Guest, 383 U.S. 745 (1966), where the Court concluded that a conspiracy to deprive Negroes of the right to travel from state to state was reviewable under the Criminal Appeals Act, 18 U.S.C. § 3731 (1970), Justice Stewart stated:

> Although there have been recurring differences in emphasis within the Court as to the source of the constitutional right of interstate travel. . . . All have agreed that the right exists. 383 U.S. 745, 759 (1966).

95. 394 U.S. 618, 631-32 (1969).

interests, such a law is unconstitutional because of its denial of equal protection.[96]

With the developing fundamental interest doctrine in mind the *Serrano* plaintiffs alleged that the school financing scheme infringed upon a fundamental interest, namely education.[97] If education could be established as a fundamental right, the way would then be cleared for invocation of the compelling interest requirement. In fact, the California court of appeal refused to accept the argument that education could be compared to such basic rights as interstate travel and voting.[98] The California Supreme Court, however, agreed with the plaintiffs, noting that in today's society education plays such an indispensable role that it must be considered fundamental in nature. Quoting excerpts from a broad spectrum of sources[99] extolling the value of education,[100] Justice Sullivan concluded: "We are convinced that the distinctive and priceless function of education in our society warrants, indeed compels, our treating it as a fundamental interest."[101]

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96. *Id.* at 634.

97. 5 Cal. 3d at 604, 487 P.2d at 1255, 96 Cal. Rptr. at 615.

98. 89 Cal. Rptr. at 349.

99. *See, e.g.*, Brown v. Board of Educ., 347 U.S. 483, 493 (1954):

> Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms.

The court also referred to excerpts from Abington School Dist. v. Schempp, 374 U.S. 203 (1963) (prohibiting Bible readings in public schools); McCollum v. Board of Educ., 333 U.S. 203 (1948) (prohibiting religious education in public schools); Manjares v. Newton, 64 Cal. 2d 365, 411 P.2d 901, 49 Cal. Rptr. 805 (1966) (compelling a school district to furnish bus service where the refusal to furnish such service resulted in a denial of the opportunity to attend school); San Francisco Unified School Dist. v. Johnson, 3 Cal. 3d 937, 482 P.2d 878, 92 Cal. Rptr. 309 (1971) (where the court considered a claim that school districts had been gerrymandered to avoid integration); Piper v. Big Pine School Dist., 193 Cal. 664, 226 P. 926 (1924) (upholding the right of an Indian girl to attend state public schools).

100. The defendants argued that these "education" cases are not of precedential value because they do not consider education in the context of wealth discrimination, but rather in the context of racial segregation or total exclusion from school. To this the court replied: "Our quotation of these cases is not intended to suggest that they *control* the legal result which we reach here, but simply that they eloquently express the crucial importance of education." 5 Cal. 3d at 605-06 n.23, 487 P.2d at 1256 n.23, 96 Cal. Rptr. at 616 n.23.

101. *Id.* at 608-09, 487 P.2d at 1258, 96 Cal. Rptr. at 618 (footnote omitted).

Having found both a suspect classification in the form of wealth and a fundamental interest in education, the court concluded that the justifying interest asserted by the state did not compel the continuance of the present scheme.[102] The compelling state interest which the defendants advanced in support of the current system was California's policy "to strengthen and encourage local responsibility for control of public education."[103] The court felt that this interest of local control embodied two aspects which should be considered separately: (1) local responsibility for control of the administrative affairs of public schools, and (2) local choice of, and responsibility for, the financial needs of public education.[104] First, the court acknowledged the propriety of vesting in the local districts control of the administrative decision-making powers. The court recognized that the individual district may be in the best position to make many detailed decisions such as whom to hire and how to schedule its educational offerings.[105]

> But even assuming arguendo that local administrative control may be a compelling state interest, the present financial system cannot be considered necessary to further this interest. No matter how the state decides to finance its system of public education, it can still leave this decision-making power in the hands of the local districts.[106]

Second, the court found it unnecessary to decide whether local free choice in determining the amount of a district's educational expenditures was a compelling state interest since "under the present financing system, such fiscal freewill is a cruel illusion for the poor school districts."[107] If it is assumed that a more accurate reflection of a community's commitment to education is the rate at which citizens are willing to tax themselves for public education,[108] then, since Baldwin Park spends less than

102. *Id.* at 610-11, 487 P.2d at 1259-60, 96 Cal. Rptr. at 619-20.

103. See note 44 *supra.*

104. 5 Cal. 3d at 610, 487 P.2d at 1260, 96 Cal. Rptr. at 620.

105. *Id.*

106. *Id. See* Coons, Clune & Sugarman, *Educational Opportunity: A Workable Constitutional Test for State Financial Structures*, 57 CALIF. L. REV. 305 (1969) wherein the authors suggest six possible school financing systems which do not discriminate on the basis of wealth but which do allow subsidiarity in the administration of the school system. These include: centralized state financing to districts on an *equal* per pupil basis with districts (1) free to allocate to all reasonable uses, or (2) compelled to spend on an equal per pupil basis, or (3) compelled to allocate to various categorical uses; allocation to districts on a *reasonable* basis other than per pupil thus allowing categorical special aid for (4) the blind, gifted and disadvantaged and (5) curricular specialization to be chosen by the district; or (6) direct aid to students (rather than to districts). *Id.* at 398-99.

107. 5 Cal. 3d at 611, 487 P.2d at 1260, 96 Cal. Rptr. at 620.

108. *Id.*

$600 per child and Beverly Hills spends over $1200 per child,

> Baldwin Park should be deemed far more devoted to learning than Beverly Hills, for Baldwin Park citizens levied a school tax of well over $5 per $100 of assessed valuation, while residents of Beverly Hills paid only slightly more than $2.[109]

Hence, since assessed valuation within a district is a major determinant of how much money can be spent for schools, the present financing scheme actually deprives less wealthy districts of local fiscal choice.[110]

The *Serrano* decision manifestly extends the compelling state interest test beyond its previously established limits. However, the precise boundaries of this extension remain undefined. Does the compelling interest test as set down by the United States Supreme Court merely

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109. *Id.*

110. *Id.* Relying upon Salsburg v. Maryland, 346 U.S. 545 (1954) (upholding a Maryland statute which allowed illegally seized evidence to be admitted in gambling prosecutions in one county while barring use of such evidence elsewhere in the state) and Board of Educ. v. Watson, 63 Cal. 2d 829, 409 P.2d 481, 48 Cal. Rptr. 481 (1966) (rejecting a constitutional attack on a statute which required special duties of the tax assessor in counties with a population in excess of four million even though only Los Angeles County would be affected), the defendants argued that territorial uniformity in respect to the present financing system is not constitutionally required. 5 Cal. 3d at 611, 487 P.2d at 1260, 96 Cal. Rptr. at 620. The court noted that when *Salsburg* was decided the Fourth and Fourteenth Amendments had not yet been interpreted to exclude unlawfully procured evidence in state trials and thus the Maryland statute was treated as being only a procedural rule of evidence. *Id.* at 612 n.28, 487 P.2d at 1261 n.28, 96 Cal. Rptr. at 621 n.28. Thus, in both cases the courts simply applied the traditional equal protection test and sustained the provisions after finding some rational basis for the geographic classification. *Id.* The *Serrano* court rejected the defendants' geographic argument, relying on two lines of recent decisions indicating that where fundamental rights or suspect classifications are at issue, a state's general freedom to discriminate on a geographical basis is significantly curtailed by the Equal Protection Clause.

The first line of decisions was comprised of "school closing" cases, typified by Griffin v. School Bd., 377 U.S. 218 (1964) where the Court invalidated the state's effort to close schools in only one part of the state when continued segregation was the objective. The Court concluded in *Griffin*: "Whatever nonracial grounds might support a State's allowing a county to abandon public schools, the object must be a constitutional one. . . ." *Id.* at 231.

The *Serrano* court also relied on the legislative apportionment cases, e.g., Reynolds v. Sims, 377 U.S. 533 (1964) [For discussion see text accompanying notes 88-89 *supra*], reasoning that "if a voter's address may not determine the weight to which his ballot is entitled, surely it should not determine the quality of his child's education." 5 Cal. 3d at 613, 487 P.2d at 1262, 96 Cal. Rptr. at 622.

Even if territorial uniformity were not required by the Equal Protection Clause with respect to the school financing system, it would appear that the California Supreme Court would be free to interpret the California Constitution as imposing such a requirement. (See text accompanying notes 161-67 *infra.*) The *Serrano* court did not specifically discuss this.

require *either* a fundamental interest *or* a suspect classification? Is the relationship between the two types of factual situations which will invoke the test disjunctive in nature; or is the test conjunctive, requiring the presence of *both* a suspect class and the impairment of a fundamental interest? The language of the Court indicates that either situation alone is sufficient. For example, in *McDonald v. Board of Election Commissioners*[111] Chief Justice Warren stated:

> [A] careful examination on our part is especially warranted where lines are drawn on the basis of wealth or race, . . . two factors which would *independently* render a classification highly suspect and thereby demand a more exacting judicial scrutiny.[112]

Justice Harlan, in his dissenting opinion in *Shapiro v. Thompson*,[113] stated the rule as he understood the *Shapiro* majority's formulation:

> [S]tatutory classifications which *either* are based upon certain "suspect" criteria *or* affect "fundamental rights" will be held to deny equal protection unless justified by a "compelling" governmental interest.[114]

In *Serrano*, the California Supreme Court implies the same understanding.[115] The application of the doctrine where race is the suspect class supports this interpretation. While many of the decisions invalidating classifications drawn upon race also involved fundamental interests,[116] there has been no judicial hesitation to strike down such a classification even in the absence of an intrusion upon a fundamental interest.[117] But, as has been previously noted, "the Equal Protection Clause was largely a product of the desire to eradicate legal distinction founded

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111. 394 U.S. 802 (1969). The Court found it unnecessary to apply strict scrutiny to an absentee ballot law because the provisions were not drawn on the basis of wealth or race and the fundamental right to vote had not been impaired.

112. *Id.* at 807 (emphasis added), *quoted in Serrano*, 5 Cal. 3d at 597, 487 P.2d at 1249, 96 Cal. Rptr. at 609.

113. 394 U.S. 618, 655 (1969).

114. *Id.* at 658 (emphasis added).

115. For example, the court states, "On the other hand, in cases involving 'suspect classifications' *or* touching on 'fundamental interests', the court has . . . [subjected] the classification to strict scrutiny." 5 Cal. 3d at 597, 487 P.2d at 1249, 96 Cal. Rptr. at 609, *quoting* Westbrook v. Mihaly, 2 Cal. 3d 765, 784-85, 471 P.2d 487, 500, 87 Cal. Rptr. 839, 852 (1970), *vacated and remanded on other grounds*, 403 U.S. 915 (1971) (emphasis added). And later the court speaks of plaintiffs' "fundamental interest" argument as an "additional dimension." *Id.* at 604, 487 P.2d at 1255, 96 Cal. Rptr at 615.

116. *See, e.g.*, Loving v. Virginia, 388 U.S. 1, 12 (1967) ("Marriage is one of the 'basic civil rights of man,' fundamental to our very existence and survival."); Strauder v. West Virginia, 100 U.S. 303 (1880).

117. *See, e.g.*, McLaughlin v. Florida, 379 U.S. 184 (1964) (invalidating a criminal statute prohibiting cohabitation by interracial unmarried couples).

upon race."[118] Is a classification based on wealth as egregious as one based upon race? If so, such a classification by itself, without the support of a fundamental interest, will require the close scrutiny of the court. A second look at the cases involving suspect classifications based upon wealth reveals, however, that such an interest has always been involved when the court found a denial of equal protection. At times the classifications denied fundamental criminal rights by creating a class of defendants who, due to their economic condition, were unable to afford certain requisites of a proper defense.[119] Fundamental criminal rights were also involved when sentencing provisions based upon wealth were invalidated.[120] And the classification created by the requirement of a poll tax denies the constitutionally guaranteed franchise.[121]

The *Serrano* court recognized the distinction previously made between classifications based on race vis-à-vis those drawn on wealth: *"Until the present time* wealth classifications have been invalidated only in conjunction with a limited number of fundamental interests—rights of defendants in criminal cases and voting rights."[122] This recognition implies that the court now intends to invalidate classifications based upon wealth even in the absence of a fundamental interest. The implications of such a conclusion, particularly in light of the court's recognition that past decisions have not necessarily involved purposeful discrimination, but rather " 'unintentional' classifications whose impact simply fell more heavily on the poor,"[123] are far reaching

118. Shapiro v. Thompson, 394 U.S. at 659 (Harlan, J., dissenting).

119. Douglas v. California, 372 U.S. 353 (1963); Smith v. Bennett, 365 U.S. 708 (1961); Burns v. Ohio, 360 U.S. 252 (1959); Griffin v. Illinois, 351 U.S. 12 (1956).

120. Tate v. Short, 401 U.S. 395 (1971); Williams v. Illinois, 399 U.S. 235 (1970).

121. Harper v. Virginia Board of Elections, 383 U.S. 663 (1971).

122. 5 Cal. 3d at 604, 487 P.2d at 1255, 96 Cal. Rptr. at 615 (emphasis added and citations omitted).

123. The defendants argued that even if the financing system does classify by wealth, there is no constitutional infirmity involved because there is no allegation of intentional discrimination. 5 Cal. 3d at 601, 487 P.2d at 1253, 96 Cal. Rptr. at 613. The court responded that prior decisions have involved "unintentional" classifications whose impact simply fell more heavily on the poor. *Id.* at 602, 487 P.2d at 1253, 96 Cal. Rptr. at 613. *See, e.g.*, Harper v. Board of Elections, 383 U.S. 663 (1966); Douglas v. California, 372 U.S. 353 (1963); Griffin v. Illinois, 351 U.S. 12 (1956). The court also rejected the defendants' argument that only de facto discrimination is involved; the school funding scheme is mandated in every detail by the California Constitution and statutes. See text accompanying notes 14-30 *supra*. And even if the financing scheme is merely de facto, the discrimination cannot be justified by analogy to de facto segregation since the California Supreme Court has ruled that de facto segregation is invalid. *See* Jackson v. Pasadena City School Dist., 59 Cal. 2d 876, 382 P.2d 878, 31 Cal. Rptr. 606 (1963).

indeed. Such an interpretation would require the state to take affirmative action to eliminate differences in the quality of garbage, police, fire protection and every other local service funded by local property taxes, which is precisely what Justice Harlan so vigorously protested was not required by the equal protection clause in his dissenting opinion in *Douglas v. California.*[124] However, such a reading of *Serrano* appears to be overly broad for at least three reasons.

First, the same California Supreme Court forcefully rejected such a conclusion only five months earlier in *Wood v. Public Utilities Commission*[125] where customers of Pacific Telephone and Telegraph Company and Pacific Gas and Electric Company challenged the validity of the utility companies' credit policies. Under these rules,[126] clearly drawn on the basis of economic status, only certain customers were required to make initial deposits with the companies before receiving service. While recognizing that the services supplied by the utilities were "vital interests,"[127] the court rejected the application of the compelling state interest test to determine the validity of the credit rules: "In the field of economic regulation equal protection ordinarily requires only that there be a reasonable relationship between the classifications drawn and the purpose for which they are made."[128] Here lies the crux of the problem in applying the compelling interest rule to wealth classifications: in the absence of a recognized fundamental interest, the effect of the state's classification inevitably amounts to no more than economic regulation in which the traditional reasonable relationship test prevails.

Second, if the intent of the court was to establish wealth as a suspect classification capable of invoking close judicial scrutiny without the potential forfeiture of a basic right, it was unnecessary to specifically identify education as a fundamental interest. Such an interpretation reduces the extensive discussion[129] of education as a fundamental in-

124. See text accompanying notes 68-69 *supra.*

125. 4 Cal. 3d 288, 481 P.2d 823, 93 Cal. Rptr. 455 (1971).

126. Petitioners specifically took issue with three credit rules which excepted from the requirement of a deposit or other proof of credit (1) persons owning real property, (2) persons continuously employed by the same employer for two or more years, and (3) other persons able to establish credit "to the satisfaction" of the company including private pensioners, employees of large corporations, and professionals. *Id.* at 294, 481 P.2d at 826, 93 Cal. Rptr. at 458.

127. *Id.* at 295, 481 P.2d at 827, 93 Cal. Rptr. at 459.

128. *Id.* at 294, 481 P.2d at 826, 93 Cal. Rptr. at 458.

129. Over five pages of the court's opinion were devoted to establishing education as a fundamental interest. *See* 5 Cal. 3d at 604-10, 487 P.2d at 1255-59, 96 Cal. Rptr. at 615-19.

terest to the level of dictum. The court's opinion would then have been complete after the finding of a classification which discriminates on the basis of wealth.

Third, the court expressly rejected the argument that if the relative wealth of school districts may not determine the quality of public education, the same reasoning must be applied to all governmental entities in respect to every other tax supported service. The court recognized that it is the uniqueness of education which singles it out among government services[130] and requires the state to "respond to the command of the equal protection clause."[131] Thus, it seems logical to conclude that the finding of a fundamental interest is still necessary when seeking to subject classifications drawn on wealth to the compelling state interest test.

The *Serrano* court's apparent willingness to recognize an interest as fundamental evidences an important expansion of the equal protection doctrine. The significance of such a designation is demonstrated in *Reynolds v. Sims*[132] where state legislative apportionment plans were declared unconstitutional because they violated the Equal Protection Clause. Despite the absence of a suspect classification the *rationality* of the state's plans was not enough to satisfy the constitutional requirement since the relative value of the fundamental voting right was threatened. Thus, unlike the suspect wealth classification which has always had the accompanying support of the supposedly *alternate* fact situation capable of invoking close scrutiny (fundamental interest), the mere designation of a right as fundamental was sufficient in itself to require the showing of a compelling state interest. It therefore follows that while finding the school financing scheme to be classified on the basis of wealth is not enough by itself to escape judgment by the traditional test, the specification of education (or any other interest) as a fundamental right independently invokes the compelling interest rule when that interest is impaired. In short, the test is an "either/or" criterion when dealing with a fundamental interest or a racial classification; but when the suspect classification is wealth the necessity still exists to find an infringement upon a fundamental interest.

The specification of education as fundamental carries implications beyond the *Serrano* decision. It appears that any state imposed clas-

130. See note 142 *infra* for those characteristics of education which render it "unique."

131. 5 Cal. 3d at 614, 487 P.2d at 1263, 96 Cal. Rptr. at 623.

132. 377 U.S. 533 (1964).

sification that tends to discriminate between persons by depriving them of equal educational opportunities must be justified by showing a compelling state interest. *In Shapiro v. Thompson*[133] the United States Supreme Court found a state law which required a person to live in a state for at least one year before he qualified for welfare to be unconstitutional. Some families, solely because of the period of time they lived in the state, were denied welfare assistance. The Court's decision was based on the statute's violation of the Equal Protection Clause which prohibits a state not having a compelling justification from impairing a citizen's fundamental interest in interstate travel.[134]

> Since the classification here touches on the fundamental right of interstate movement, its constitutionality must be judged by the stricter standard of whether it promotes a compelling state interest. Under this standard, the waiting-period requirement clearly violates the Equal Protection Clause.[135]

By juxtaposing the *Shapiro* and *Serrano* decisions, it appears that the California State College tuition provision for non-resident students violates the Equal Protection Clause of the Fourteenth Amendment. California requires any "non-resident" student attending a state college to be charged a minimum of $360 per year tuition, while "resident" students attending the same state college are to be charged a maximum of $25 per year.[136] A resident student is defined as "any person who has been a bona fide resident of the state for more than one year immediately preceding the residence determination date."[137] With this definition of residency it seems clear that, as in *Shapiro,*[138] the California statute creates two classes of residents "indistinguishable from each other except that one is composed of residents who have resided a year or more, and the second of residents who have resided less than a year. . . ."[139] And as a result of the *Serrano* decision declaring education to be fun-

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133. 394 U.S. 618 (1969).

134. See note 94 *supra.*

135. 394 U.S. at 638.

136. CAL. EDUC. CODE ANN. § 23754 (West Supp. 1971) (tuition for nonresident students) and *id.* § 23753 (tuition for resident students).

137. *Id.* § 23756.

138. Chief Justice Warren foresaw such a possibility in his dissenting opinion to *Shapiro*:

> The Court's decision reveals only the top of the iceberg. Lurking beneath are the multitude of situations in which States have imposed residence requirements including eligibility to vote, to engage in certain professions or occupations or to *attend a state-supported university.* Although the Court takes pains to avoid acknowledging the ramifications of its decision, its implications cannot be ignored. 394 U.S. at 655 (emphasis added).

139. 394 U.S. at 627.

damental, the statute directly affects and impairs a fundamental interest—education. An argument by the state that its valid interest in preserving the fiscal integrity of its programs justifies the classification would be no more effective than the same argument proved to be in *Shapiro*.[140] The only escape from a conclusion of infirmity[141] would be to interpret *Serrano* as merely designating elementary and secondary education as fundamental, leaving the right to a college education as perhaps desirable but less than fundamental in nature.[142]

140. In *Shapiro* the Court said:

> We imply no view of the validity of waiting-period *or* residence requirements determining eligibility to vote, eligibility for tuition-free education, to obtain a license to practice a profession, to hunt or fish, and so forth. Such requirements *may promote compelling state interests* on the one hand, or, on the other, may not be penalties upon the exercise of the *constitutional right of interstate travel.* 394 U.S. at 638 n.21 (emphasis added).

With regard to the assertion that such requirements may not be penalties upon the exercise of interstate travel see note 141 *infra.* The *Shapiro* Court held the state's interest in its fiscal integrity could not justify its residency requirements for welfare payments:

> We recognize that a State has a valid interest in preserving the fiscal integrity of its programs. It may legitimately attempt to limit its expenditures, whether for public assistance, public education, or any other program. But a state may not accomplish such a purpose by invidious distinctions between classes of its citizens. *Id.* at 633.

It would seem that a state could no more claim an interest in preserving its fiscal integrity as a justification for an "invidious discrimination" with respect to the fundamental interest in education than it can with respect to the fundamental interest in interstate travel.

141. The California Court of Appeal considered the constitutionality of student residency requirements in light of the *Shapiro* decision in Kirk v. Regents of Univ. of Cal., 273 Cal. App. 2d 430, 78 Cal. Rptr. 260 (1969), *appeal dismissed,* 396 U.S. 554 (1970). The court concluded there was no encroachment on the right to interstate travel when a state imposes residency requirements for education. *Id.* at 441, 78 Cal. Rptr. at 267. Unlike the residency requirement for welfare benefits which served to deprive potential recipients of food, clothing, and shelter, thereby erecting an almost inexorable barrier to interstate travel, the residency requirement prerequisite to lower college tuition fees did not deter any appreciable number of persons from moving into the state. *Id.* at 440, 78 Cal. Rptr. at 266. Since there was no deprivation of a fundamental interest, the court applied the traditional equal protection test and found a rational relationship between the state's residency requirement and its legitimate objective of preserving its fiscal integrity. *Id.* at 444, 78 Cal. Rptr. at 269. Since *Serrano* establishes education as a fundamental interest, it is no longer necessary to demonstrate that the tuition residency requirement deprives individuals of their fundamental interest in interstate travel; merely showing that the higher tuition fee imposed on residents living in the state for less than one year serves to deprive certain such residents of their fundamental interest in education should be sufficient to invoke the compelling state interest test.

142. Such an interpretation may be warranted. One of the factors by which the court distinguished education from other government furnished services was its compulsory nature "not only in the requirement of attendance but also by assignment to a particular district and school." 5 Cal. 3d at 610, 487 P.2d at 1259, 96 Cal. Rptr. at 619. On the other hand, Justice Sullivan specified four distinguishing characteristics of

Equally important as its recognition of education as a fundamental interest is the court's refusal to shut the door to a like argument with respect to other government services. While rejecting the view that there can be no inequality in *any* government services, Justice Sullivan refused to express a view as to which particular services might be considered fundamental. Since the designation of a governmental service as a fundamental interest invokes the rather formidable compelling state interest test, the plaintiff who can convince the court that his particular interest is comparable to the franchise, the right to an education, or criminal procedural rights will have taken a significant step toward the invalidation of any law permitting discrimination in the quality of service furnished. The burden will be on the defendant to demonstrate a state interest compelling the discriminatory classifications. Therefore, it becomes important to identify those governmental services which might possibly be considered as fundamental by the California Supreme Court.

Most judicial considerations of discrimination with respect to government-furnished facilities have been in the context of racial discrimination.[143] When the racial discrimination is removed from these cases all that remains is the interest in some minor prerogative.[144] On the other hand, local government does supply such services as fire protection, police protection and garbage disposal which are more crucial to

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education which are equally descriptive of college education as well as elementary and secondary education: (1) education is essential in maintaining "Free Enterprise Democracy;" (2) education is universally relevant; (3) education continues over a lengthy period of life; and (4) education is unmatched in the extent to which it molds the personality of the youth of society. *Id.* at 609-10, 487 P.2d at 1258-59, 96 Cal. Rptr. at 618-19.

143. *See, e.g.*, Muir v. Louisville Park Theatrical Ass'n, 347 U.S. 971 (1954) (invalidating racial segregation in an amphitheatre in a public park); City of St. Petersburg v. Alsup, 238 F.2d 830 (5th Cir. 1956), *cert. denied*, 353 U.S. 922 (1957) (invalidating racial discrimination at municipal swimming pools); Holmes v. City of Atlanta, 223 F.2d 93 (5th Cir. 1955), *remanded per curiam*, 350 U.S. 879 (1955) (invalidating racial segregation at municipal golf courses); Dawson v. Mayor & City Council of Baltimore, 220 F.2d 386 (4th Cir. 1955), *aff'd per curiam*, 350 U.S. 877 (1955) (invalidating racial segregation at public beaches); Beal v. Holcombe, 193 F.2d 384 (5th Cir. 1951), *cert. denied*, 347 U.S. 974 (1954) (invalidating racial segregation in public parks); Banks v. Housing Authority of San Francisco, 120 Cal. App. 2d 1, 260 P.2d 668 (1953), *cert. denied*, 347 U.S. 974 (1954) (invalidating racial segregation in public housing).

144. One possible exception is presented in Banks v. Housing Authority of San Francisco, 120 Cal. App. 2d 1, 260 P.2d 668, *cert. denied*, 347 U.S. 974 (1954) where the somewhat more significant interest in low cost housing was involved. The decision rested entirely upon the racial discrimination and the court failed to discuss the nature of the impaired interest.

the well-being of the individual. Possibly these services are potential fundamental interests. The *Serrano* court attempted to head off this so called "equal sewer" problem[145] by carefully distinguishing education, in terms of its continuing impact upon the populace, from other governmental services.[146] But at the same time the court took notice[147] of *Hawkins v. Town of Shaw, Mississippi*[148] wherein the United States Court of Appeals for the Fifth Circuit placed the town of Shaw under an affirmative duty to equalize such services as street paving and lighting, sanitation, surface water drainage, water mains and fire hydrants. While the *Hawkins* decision was based upon intentional racial discrimination, the federal district court intimated that wealth discrimination in the provision of city services might also be invalid.[149] The wealth allegation, however, was dropped on appeal and the Fifth Circuit Court never actually ruled on the question.[150] Arguably, the California Supreme Court was indicating a willingness to invalidate a taxing system which allows the provision of unequal services of the type involved in *Hawkins*. Such a decision is more likely to rest upon a designation of such services as fundamental rather than the finding of a suspect wealth classification.[151]

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145. *See* Coons, Clune & Sugarman, *Educational Opportunity: A Workable Constitutional Test for State Financial Structures*, 57 CALIF. L. REV. 305 (1969). These commentators discuss what they call the "equal sewer problem" saying:

> If the equal protection clause eliminates relative wealth as a determinant of the quality of public education, by what warrant will wealth continue to determine the quality of other public services? If the distinction between education and all other services is merely that of sheer importance of the service at stake, shall we prefer being educated to being alive? Police, firemen, and sewers protect our most precious possessions, yet the quality of their service, like that of education, is tied securely to the standard of community affluence. In the years ahead the Court will be asked repeatedly to remove wealth determinants (and probably other non-egalitarian influences) from all public services. It is possible to imagine such a result. *Id.* at 386.

They conclude that education is distinguishable from other public services, using the same criteria as are used by the California Supreme Court. See note 142 *supra*.

146. See note 142 *supra*.

147. 5 Cal. 3d at 614 n.31, 487 P.2d at 1262-63 n.31, 96 Cal. Rptr. at 622-23 n.31.

148. 437 F.2d 1286 (5th Cir. 1971).

149. The areas receiving inferior services were predominately inhabited by racial minorities. These same inhabitants were probably also low income families. Thus, discrimination was based upon both race and wealth. *See id.* at 1288.

150. *Id.* at 1287 n.1.

151. As in *Serrano* there would probably be a finding of both a suspect wealth classification and a fundamental interest in the particular service. Again, the problem would be to determine if the wealth classification or the finding of the fundamental interest was the controlling factor in invoking the compelling state interest test. For the reasons discussed above (see text accompanying notes 120-26 *supra*) it is more likely that the finding of the fundamental interest would be the controlling element.

A related problem is determining the exact limits of the fundamental interest in education. The *Serrano* decision deals with a policy *directly* affecting the quality of education, i.e., school district expenditures. There are, however, many government expenditures which *indirectly* affect the quality of education. For example, it is arguable that healthy children are better able to learn than unhealthy children and therefore government expenditures for health clinics affect the fundamental interest in education; and, it can be argued that the state must equalize the quality of housing if it can be shown children living in $50,000 houses have a greater opportunity to learn than children living in low cost apartments. Defining the exact limits of the fundamental interest in education is significant because the criteria by which the court distinguishes education from other governmental services are rather strict.[152] Thus, while these criteria might bar health care (or any other governmental service) from fundamental interest characterization, the compelling state interest rule could be invoked if this service was demonstrated to be a part of the already accepted fundamental interest in education.

With *Serrano,* the California Supreme Court has enlarged the scope of the Equal Protection Clause beyond the broad judicial boundaries established by the United States Supreme Court. The question therefore remains whether such expansion leaves the California decision vulnerable to subsequent review in the United States Supreme Court. The California court appeared little bothered by the defendants' assertion that the United States Supreme Court's summary affirmance of *McInnis v. Shapiro,*[153] which sustained a similar school financing plan in Illinois, foreclosed an independent examination of the issues involved.[154] Justice Sullivan noted that since *McInnis* reached the Supreme Court by appeal from a three-judge federal court, review was not discretionary.[155] While in these circumstances a summary affirmance is formally a decision on the merits, the significance of such summary dispositions is often unclear where, as in *McInnis,* the Court cites no cases as authority.[156] Additionally, *McInnis* was decided on a different issue than that

152. See note 141 *supra.*

153. 293 F. Supp. 327, *aff'd mem. sub nom.* McInnis v. Ogilvie, 394 U.S. 322 (1969). See text accompanying notes 43-45 *supra.*

154. 5 Cal. 3d at 616, 487 P.2d at 1264, 96 Cal. Rptr. at 624.

155. *Id.*

156. The California Supreme Court here relies upon a statement from Currie, *The Three-Judge District Court in Constitutional Litigation,* 32 U. CHI. L. REV. 1, 74 n.365 (1964): "It has often been observed that the dismissal of an appeal, technically an adjudication on the merits, is in practice often the substantial equivalent of a

presented in *Serrano*. While the *Serrano* plaintiffs based their attack on a "wealth discrimination" theory,[157] the *McInnis* court felt the plaintiffs' assertion that "educational needs" were the proper standard for measuring school financing to be so nebulous as to render the issue nonjusticiable for lack of "discoverable and manageable standards."[158] Justice Sullivan concluded in *Serrano*: "In this context, a Supreme Court affirmance can hardly be considered dispositive of the significant and complex constitutional questions presented here."[159]

This attempt by the California Supreme Court to devalue the Supreme Court's summary affirmance of *McInnis* appears tangential to a more basic question. Even if the *McInnis* plaintiffs had framed their pleadings to allege a wealth discrimination and the United States Supreme Court had affirmed with a written opinion, it would appear that

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denial of certiorari." While in *McInnis* the Court affirmed rather than dismissed the appeal, Currie's statement is nevertheless applicable since, due to historical factors, the United States Supreme Court will affirm an appeal from a federal court but will dismiss an appeal from a state court for want of a substantial federal question. 5 Cal. 3d at 616 n.34, 487 P.2d at 1264 n.34, 96 Cal. Rptr. at 624 n.34. *But see* Spano v. Board of Educ., noted in 40 U.S.L.W. 2475 (Feb. 1, 1972). There, the New York Supreme Court for Westchester County sustained the New York State system of school financing through local property taxes against attacks that such a system discriminated on the basis of wealth and denied plaintiff school children a fundamental interest in education. In so holding, the court felt controlled by the United States Supreme Court's affirmance of *McInnis*. Deeming *Serrano*'s contrary conclusion a mere rationalization, the *Spano* court opined:

> To endeavor to extract revelatory, arcane insights from the bare bones of these two affirmances—with dissents—is to indulge in a form of judicial augury. The abiding judicial realities are that these very challenges [in *Serrano* and *Spano*] have recently been twice reviewed [in *McInnis* and Burrus v. Wilkerson, 377 U.S. 44 (1970)] and rejected by the Court. It is not within the competence of a nisi prius state court to presume to explain the Supreme Court's unexpressed thinking; its conclusions and holdings are sufficient unto themselves. Judicial notice is taken that the U.S. Supreme Court is quite capable of expounding its views when so inclined; also, that learned court does not require pronouncements from intermediary surrogates. *Id.*

157. 5 Cal. 3d at 590 n.1, 487 P.2d at 1244-45 n.1, 96 Cal. Rptr. at 604-05 n.1.

158. 293 F. Supp. at 335. The significance of *McInnis* was also questioned by Coons, Clune & Sugarman, *Educational Opportunity: A Workable Constitutional Test for State Financial Structures*, 57 CALIF. L. REV. 305, 308-10 (1969):

> The meaning of *McInnis v. Shapiro* is ambiguous; but the case hardly seems another *Plessy v. Ferguson*. Probably but a temporary setback, it was the predictable consequence of an effort to force the Court to precipitous and decisive action upon a novel and complex issue for which neither it nor the parties were ready. . . . [T]he plaintiffs' virtual absence of intelligible theory left the district court bewildered. Given the pace and character of the litigation, confusion of court and parties may have been inevitable, foreordaining the summary disposition of the appeal. The Supreme Court could not have been eager to consider an issue of this magnitude on such a record. Concededly its per curiam affirmance is formally a decision on the merits, but it need not imply the Court's permanent withdrawal from the field. It is probably most significant as an admonition to the protagonists to clarify the options before again invoking the Court's aid.

159. 5 Cal. 3d at 617, 487 P.2d at 1265, 96 Cal. Rptr. at 625.

the *Serrano* decision rests on an adequate and independent state ground. If so, the United States Supreme Court is lacking in jurisdiction to hear the case. This basic principle was stated by Justice Jackson in *Herb v. Pitcairn*:[160]

> This Court from the time of its foundation has adhered to the principle that it will not review judgments of state courts that rest on adequate and independent state grounds. . . . The reason is so obvious that it has rarely been thought to warrant statement. It is found in the partitioning of power between the state and federal judicial systems and in the limitations of our own jurisdiction. . . . [I]f the same judgment would be rendered by the state court after we corrected its views of federal laws, our review could amount to nothing more than an advisory opinion.[161]

The application of this principle is demonstrated in *Fox Film Corp. v. Muller*[162] where a state court dismissed a contract suit on the grounds that (1) a concededly invalid arbitration clause in the contract was inseparable from the rest of the agreement and voided the entire contract, and (2) that the contract violated a federal antitrust statute. The United States Supreme Court dismissed the case for want of jurisdiction due to the existence of adequate and independent state grounds:

> [W]here the judgment of a state court rests upon two grounds, one of which is federal and the other non-federal in character, our jurisdiction fails if the non-federal ground is independent of the federal ground and adequate to support the judgment.[163]

In the *Serrano* opinion, virtually the entire discussion of the plaintiffs' equal protection argument was framed in terms of federal equal protection. However, it is crucial to note that (1) the plaintiffs also alleged a violation of the California constitution,[164] and (2) the California Supreme Court specifically stated: "[O]ur analysis of plaintiffs' federal equal protection contention is *also applicable* to their claim under these *state constitutional provisions*".[165] Since the California constitution is both an *independent* and *adequate* state ground supporting the decision regardless of a possible reversal on the federal constitutional

160. 324 U.S. 117 (1945). It was unclear to the Court whether the state decision was based upon a state or federal ground. Thus, the case was continued so as to allow the parties to obtain a certification from the state court making clear the basis for its decision.

161. *Id.* at 125-26.

162. 296 U.S. 207 (1935).

163. *Id.* at 210.

164. See note 6 *supra.*

165. 5 Cal. 3d at 596 n.11, 487 P.2d at 1249 n.11, 96 Cal. Rptr. at 609 n.11 (emphasis added).

issue, the United States Supreme Court would appear to be lacking in jurisdiction to review the *Serrano* decision. Further, if it is unclear to the federal court whether the *Serrano* decision rested upon state or federal grounds, then it is unlikely that the Court would review the federal issue.[166]

Serrano has clearly expanded the compelling state interest test. Because the decision seems to rest upon independent and adequate state grounds, it is unlikely the United States Supreme Court will intervene. If narrowly interpreted, the decision prohibits the state from financing public elementary and secondary education by a tax scheme based upon the valuation of real property within the school district. The broadest interpretation of *Serrano* would invalidate any state statute or policy which *either* intended to discriminate by classifying individuals according to wealth *or* touched upon a fundamental interest. Such a broad interpretation prohibits the state from any form of economic regulation which treats different groups of people in a dissimilar manner solely because of their economic status. More significantly, it requires affirmative[167] state action to eliminate the economic disparities of its citizens. In light of the judicial background of the suspect wealth classification as well as the practical consequences of such a ruling, it is unlikely the court intends to subject a state statute to the compelling interest test in the absence of a fundamental interest. However, the California Supreme Court does indicate a willingness to expand the scope of those interests which it will consider as fundamental. The designation of education as such an interest is one indication of this policy. In addition, the court implied that there exist other governmental services which could be considered fundamental in nature.[168]

Such an interpretation maintains the traditional equal protection rule with regard to those statutes which are in reality nothing more than economic regulation. In such a case a rational relationship between the statute and the state's objective is likely to be sufficient to satisfy the

166. *See* Minnesota v. National Tea Co., 309 U.S. 551 (1940). There, the Minnesota court had discussed the state as well as the Federal Constitution in invalidating a tax statute. The Supreme Court found considerable uncertainty concerning the precise grounds for the decision and thus refused to review the federal question asserted to be presented. The Court remanded the case so the federal question might be dissected out or the federal questions clearly separated.

167. See text accompanying notes 123-24 *supra.*

168. This implication arises from both the court's refusal to rule out all other government services as fundamental interests (5 Cal. 3d at 614, 487 P.2d at 1262-63, 96 Cal. Rptr. at 622-23) and its notice (with apparent approval) of Hawkins v. Town of Shaw, Mississippi, 437 F.2d 1286 (5th Cir. 1971).

Equal Protection Clause. At the same time it allows the court to recognize new fundamental interests on an ad hoc basis and to subject state policies affecting these interests to close judicial scrutiny. In those instances where a wealth classification exists which results in the deprivation or erosion of a fundamental interest, the state must show a compelling interest which justifies its policy.

James E. Durbin