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Constitutional Law - Equal Protection - Validity of Texas Public School Financing System

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divided along the same theoretical lines as the Court in *Sorrells* and *Sherman*, would seem to indicate that the Supreme Court has not debated the defense of entrapment for the last time.

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CONSTITUTIONAL LAW—EQUAL PROTECTION—VALIDITY OF TEXAS PUBLIC SCHOOL FINANCING SYSTEM—The United States Supreme Court has held that the Texas public school financing system, based on revenue raised by an ad valorem tax on property within a school district and resulting in substantial disparities in per-pupil expenditures between districts, did not violate the equal protection clause.

San Antonio Independent School District v. Rodriguez, 411 U.S. 1 (1973).

Suit[1] was originally brought in 1968[2] on behalf of Mexican-American public school children and their taxpaying parents who live in the Edgewood Independent School District, challenging the constitutionality of the Texas school financing system under the equal protection clause of the fourteenth amendment.[3]

The plaintiffs stated that the Texas constitution[4] requires the state to support a free public school system and that the state financing system denied them equal educational opportunity.[5] The district court

1. San Antonio Independent School Dist. v. Rodriguez, 337 F. Supp. 280 (W.D. Tex. 1971), *rev'd*, 411 U.S. 1 (1973). The suit was filed as a class action pursuant to FED. R. CIV. P. 23. The plaintiffs also represented all other children throughout Texas who live in school districts with low property valuations.

2. The trial was delayed until 1970 to allow extensive pretrial discovery and completion of a pending Texas legislative investigation as to the need for reform of its public school financing system. 337 F. Supp. at 285 n.11.

3. U.S. CONST. amend. XIV.

4. TEX. CONST. art. 7, § 1. Though the Texas constitution seems to create a right to public education, plaintiffs challenged the existing financing scheme under the federal equal protection clause.

5. The plaintiffs alleged that the Texas school financing system denied them equal educational opportunity in that: (1) it made the quality of education a function of the local school district; (2) it provided students, living in school districts other than Edgewood, with material advantages for education; (3) it provided educational resources which were substantially inferior to those received by children of similar age, aptitude, motivation, and ability in other school districts; (4) it perpetuated marked differences in the quality of educational services; and (5) it discriminated against Mexican-American school children. *See* Parker, *An Attack on the Texas School Financing System: Rodriquez v. San Antonio Independent School District*, 26 Sw. L.J. 608 n.3 (1972).

held[6] that the Texas system discriminates, on the basis of wealth, in the manner in which education is provided for its citizens.[7] Finding that wealth is a suspect classification and education is a fundamental interest, the lower court held that the Texas system could be sustained only if the state could show that it was premised upon some compelling state interest.[8] This, the court concluded, they failed to do.[9] The state appealed and the Supreme Court noted probable jurisdiction.[10]

I. The Texas School Financing System

Funds to support public education in Texas, as in other states,[11] are derived from three sources: local ad valorem property taxes; the federal government; and the state government.[12] Local school districts

6. The district court stayed its mandate for a period of two years ". . . in order to afford the defendants and the Legislature an opportunity to take all steps reasonably feasible to make the school system comply with the applicable law; and without limiting the generality of the foregoing, to reallocate the school funds, and to otherwise restructure the taxing and financing system so that the educational opportunities afforded the children attending Edgewood Independent School District, and the other children of the State of Texas, are not made a function of wealth other than the wealth of the State as a whole, as required by the Equal Protection Clause of Fourteenth Amendment to the United States Constitution." 337 F. Supp. at 286.

7. *Id.* at 282.

8. *Id.* at 282-84.

9. *Id.* at 284. ". . . not only are defendants unable to demonstrate compelling state interests . . . they fail even to establish a reasonable basis for these classifications."

10. 406 U.S. 966 (1972).

11. Hawaii's system of financing public education is completely centralized. *See* Hawaii Rev. Stat. §§ 296-1 to -48 (1968).

12. State governments usually provide some aid to school districts as flat per pupil grants or equalization grants to insure that each district expends a certain minimum amount per pupil. The following brief summary of methods of state aid to local school districts is taken from, Coons, Clune & Sugarman, *Educational Opportunity: A Workable Constitutional Test for State Financial Structures*, 57 Calif. L. Rev. 305 (1969):

> The simplest system of state aid is the *flat grant* where each district receives a specific number of state dollars per unit such as per pupil. The most likely effect of the flat grant is a non-equalizing one in that it neither widens or reduces the gap in per pupil expenditures between rich and poor districts since such are increased by equal amounts. It may have an equalizing effect by reducing the impact of local district wealth differences if the source of such aid is a strong, progressive tax, or if the grant becomes very large. On the other hand, the flat grant may be anti-equalizing or exaggerate wealth differences between districts if the grants are made on the basis of some unit, such as "teachers hired," whereby wealthier districts are capable of providing more of such units.
>
> The *foundation plan*, a second method of state aid to education, is payment of money by the state to bring each district up to a specified minimum level of expenditures provided the district taxes itself at a specified minimum rate. This method is equalizing in one respect, since it can decrease expenditure gaps between districts. However, it cannot totally eliminate such gaps since wealthier districts can finance expenditures beyond the minimum level.
>
> Plans exist in many states which combine the *flat grant* and the *foundation plan*. One plan adds the foundation amount, determined by subtracting the amount raised by a district locally from the state determined minimum guarantee, to the flat grant to arrive at the total state aid. Another combination plan, used in Illinois, Cali-

in Texas are permitted to raise additional revenues through the power of taxation over property located within their boundaries,[13] and the local property tax is important in that statewide it raises some 40 per cent of the funds used for public education.[14] However, the amount of revenue a particular district can raise is dependent upon two factors —the tax rate and amount of taxable property. The tax rate is determined by the property-taxpaying voters of the district.[15] However, the taxable property wealth of the districts, the second factor, restricts their ability to raise funds to support public education.[16] The necessary effect of this local property tax is that it favors property-rich districts and disfavors property-poor districts since the exact same tax rate approved by the voters in two districts may yield amounts which

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fornia, and Minnesota where three important cases challenging educational financing arose [*see* note 55 *infra*], first adds the amount raised locally at the specified tax rate to the flat grant. The sum is subtracted from the guaranteed minimum level per pupil and the district receives the difference plus the flat grant. Thus, if a district is so poor that under the first plan it would receive (in foundation money) an amount equal to the flat grant, it would not receive a flat grant under the second plan. However, districts wealthy enough to receive no foundation aid receive the full flat grant. This second plan is anti-equalizing as it creates wider gaps between rich and poor districts than under a simple foundation plan or first combination plan.

A method which has been called fully equalizing (*i.e.*, eliminating effect of wealth differentials between districts) is the *percentage equalizing plan.* Here, the school district sets its own budget, and the state grant is based upon the relative wealth of the district inversely proportioned to the wealthiest district in the state. Each district is then required to finance the remainder of its budget in order to receive the full grant. Actually, the states using this method have reduced its capability for equalization by various refinements.

Id. at 312-17 (emphasis added).

13. *See* TEX. CONST. art. 7, § 3; TEX. EDUC. CODE §§ 20.01-02 (1972). As a part of the property tax scheme, bonding authority is conferred upon the local school districts to obtain capital for the "construction and equipment of school buildings," TEX. EDUC. CODE § 20.01 (1972), and for the acquisition, construction and maintenance of "gymnasia, stadia, and other recreational facilities," *Id.* §§ 20.21-.22. While such private capital provides an additional source of revenue, it is only temporary in nature since the principal and interest of all bonds must be paid out of the receipts of the local ad valorem property tax, except to the extent that outside revenues derived from the operation of certain facilities, such as gymnasia, are employed to repay the bonds issued thereon. *Id.* §§ 20.01, .04, .22, .25.

14. For the 1970-71 school year, the precise figure was 41.1 per cent. *See* TEXAS RESEARCH LEAGUE, REPORT ON PUBLIC SCHOOL FINANCE PROBLEMS IN TEXAS 13 (1972) [hereinafter cited as TEXAS RESEARCH LEAGUE]. This was cited in Marshall's dissenting opinion, 411 U.S. at 71, 73 nn.2 & 6.

15. *See* TEX. EDUC. CODE § 20.04 (1972). Texas law limits the tax rate for public school maintenance to 1.50 per $100 valuation. *Id.* § 20.02, .04(d). It does not appear that any district now taxes itself at the highest allowed rate, though some poor districts are approaching it. *See* note 18 *infra.*

16. Under Texas law, local districts are allowed to employ different bases of assessment, a fact which introduces a third variable in local funding. *See* TEX. EDUC. CODE § 20.03 (1972). Neither party has suggested this factor is responsible for disparities in revenues available to each district and the Court has admitted as much, 411 U.S. at 46. Data introduced before the lower court to establish the disparities at issue were based upon equalized taxable property values which had been adjusted to correct for different assessment methods. *See* 411 U.S. at 74 n.8 (Marshall, J., dissenting).

are substantially different. The effect of the property tax alone is illustrated by data presented to the district court by appellees.[17] The 10 richest districts studied, each with $100,000 in taxable property per pupil, raised through local efforts an average of $610 per pupil, whereas the four poorest districts studied, with less than $10,000 in taxable property per pupil each, were able to raise only an average of $63 per pupil. This difference in per pupil revenues cannot be explained because of lower tax rates by property-poor districts, as data[18] presented to the lower court indicates that the poorest districts tend to have the highest tax rate while the richest districts tend to have the lowest tax rates. The 10 richest districts studied were able to produce $585 per pupil with an equalized tax rate of 31¢ on $100 of equalized valuation, but the four poorest districts studied, with an equalized rate of 70¢ per $100 of equalized valuation were able to raise only $60 per pupil.[19]

These funding differences are not corrected by other aspects of the Texas financing system. Federal funds are provided to cover 10 per cent of public education costs in Texas.[20] The remaining costs are born by state funds.[21] State aid is distributed under two programs, the Available School Fund[22] and the Minimum Foundation School Program,[23] whose purpose is to provide minimum per pupil expenditure for each local Texas school district.[24] The Minimum Foundation School Program provides funds for three purposes: professional sala-

17. *See* Plaintiffs Exhibit VIII, Table V, based on 1967-68 figures for a sample of 110 districts showing the market value of taxable property in the district and the amount and source of revenue on a per pupil basis. This exhibit was taken from the Policy Institute, Syracuse University Research Corporation, Syracuse, N.Y., and cited as Appendix I to the dissenting opinion of Justice Marshall, 411 U.S. at 134.

18. *See* Plaintiffs Exhibit VIII, Table II, showing the relationship of district wealth to tax effort and tax yield. This exhibit was taken from the Policy Institute, Syracuse University Research Corporation, Syracuse, N.Y., and cited as Appendix II to the dissenting opinion of Justice Marshall, 411 U.S. at 135.

19. *Id.*

20. For the 1970-71 school year, the precise figure was 10.9 per cent. *See* TEXAS RESEARCH LEAGUE, *supra* note 14, at 9.

21. For the 1970-71 school year, the state provided 48 per cent. *Id.*

22. TEX. CONST. art. 7, § 5. The Available School Fund is allocated as a flat grant per pupil in daily attendance and is comprised of revenues from various sources including funds from a state ad-valorem property tax, one fourth of occupational tax collections, annual contributions from general revenues by the legislature and the revenues from the Permanent School Fund. This latter item is a public trust initially endowed with proceeds from the sale of a large quantity of public land. The trust has a vast corpus providing revenues exclusively for public education. *See* TEX. EDUC. CODE § 15.01(6)(c) (1972).

23. *See* TEX. EDUC. CODE §§ 16.01-.975 (1972). Each district's annual share of the Available School Fund is deducted from the monies it is entitled to receive under the Foundation Program. *Id.* §§ 16.71(2), .79.

24. *Id.* § 16.01.

ries, current operating costs, and transportation costs.[25] Eighty per cent of the cost of this program is paid by the state and the remaining twenty per cent is allocated to the local school districts through the Local Fund Assignment.[26] Each district's share of the Fund is determined by an economic index designed to allocate costs inversely to the wealth of the district,[27] which pays its share with revenue derived from local property taxes. The economic index, based on factors other than districts' taxable wealth[28] as a basis for cost allocation, and the standards by which the amount any particular district's share is determined,[29] result in property-poor districts not receiving more state aid than property-rich districts from the program. Comparing Almo Heights and Edgewood school districts with property valuations of $45,095 and $5,429 per pupil respectively, the former received $491 per pupil while the latter received only $365 per pupil in 1970-71.[30]

25. *Id.* §§ 16.301-.316, .45, .51-.63.
26. *Id.* §§ 16.72-.73, .76-.77.
27. *Id.* §§ 16.74-.76.
28. The economic index includes a two step calculation. First, each county's share of the Local Fund assignment is determined based on relative income from manufacturing, mining, and agriculture, its payrolls and its scholastic population. Next each county's share is divided among its school districts on basis of their relative shares of the county's assessable wealth. *Id.* §§ 16.74-.76.
29. The basic element of the Minimum Foundation School Program is the provision of funds for professional salaries. The salary standards set by the state depend upon the educational level and experience of district teachers. The higher these are, the more funds the district will receive for salaries. *Id.* §§ 16.301-.316.
30. Brief for Appellee at 14, San Antonio Independent School Dist. v. Rodriquez, 411 U.S. 1 (1973), where the following table appeared:

District	Equalized Tax Rate 1970 A. 226	Property Value Per Student A. 229	Local Funds Per Student 1969-70 A. 175-184 et seq.	Median Per Capita Income 1969 A. 227	State Funds Per Student (Foundation School Program Funds Minus Local Fund Assignment) 1970-71 Graham Deposition	State Foundation School Program Per Student 1970-71 Graham Deposition
Edgewood	1.05	$ 5,429	37	$ 995	$350	$356
South San	1.00	9,974	97	1,357	351	367
Harlandale	.89	10,463	84	1,453	Not provided	Not provided
SAISD	.76	19,659	160	1,493	361	407
Northside	1.02	20,330	144	2,042	370	401
Northeast	.90	28,317	239	2,618	362	423
Alamo Heights	.85	45,095	412	2,807	393	491

These disparities led the district court to conclude that the system of public school financing violated the equal protection clause.

II. The Supreme Court Opinion

In a five-four opinion, the Supreme Court, through Justice Powell, reversed.[31] In order to apply strict judicial scrutiny under a fourteenth amendment claim (under which the state must bear a heavy burden of justification), classifying legislation must involve a suspect classification[32] or interfere with fundamental constitutional rights.[33] The Supreme Court, therefore, first held that although wealth has been established as a suspect classification,[34] the class of disadvantaged poor cannot herein be identified and that there is not an absolute, rather than a relative, deprivation of education.[35] Citing *Brown v. Board of Education*[36] and the long line of cases affirming the importance of educa-

31. San Antonio Independent School Dist. v. Rodriquez, 411 U.S. 1 (1973).

32. Graham v. Richardson, 403 U.S. 365 (1971); Loving v. Virginia, 388 U.S. 1 (1967); McLaughlin v. Florida, 379 U.S. 184 (1964).

33. Police Dep't v. Mosley, 408 U.S. 92 (1972); Dunn v. Blumenstein, 405 U.S. 330 (1972); Shapiro v. Thompson, 394 U.S. 618 (1969).

34. Rights of indigents to equal treatment in the criminal trial and appellate process. *See* Douglas v. California, 372 U.S. 353 (1963); Griffin v. Illinois, 351 U.S. 12 (1956).

Wealth restrictions placed on right to vote. *See* Goosby v. Osser, 409 U.S. 512 (1973); Bullock v. Carter, 405 U.S. 134 (1972); McDonald v. Board of Election Comm'rs, 394 U.S. 802 (1969); Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966).

35. The Court identifies three possible classes against which the school financing system might be discriminating: (1) "Poor" persons whose incomes fall below some identifiable level of poverty or who might be characterized as functionally "indigent"; (2) those who are relatively poorer than others; or (3) all those who, irrespective of their personal incomes, happen to reside in relatively poorer school districts. 411 U.S. at 19-20.

The Court concluded that since the requirement for wealth discrimination was de facto discrimination against those who, because of their indigency, were totally unable to pay, the first and second classifications fail to meet such criteria. The system has not been shown to operate to the disadvantage of any class definable as indigent or composed of persons with incomes beneath any designated poverty level, nor has an absolute deprivation of the desired benefit occurred. *Id.* at 23.

As to the relationship between the dollar amount of education received by a family's children and the family's wealth, the Court noted the lack of a demonstrated correlation. If such correlation was shown, the Court questioned what level is necessary to conclude the system operates to the disadvantage of the relatively poor and whether such a large, diverse class could claim protection under a suspect classification. *Id.* at 26.

Finally, as to those who happen to live in poorer districts, the class which might include children in all districts except the one which has the most assessable property and spends the most on education, the Court concluded:

> The system of alleged discrimination and the class it defines have none of the traditional indicia of suspectness: the class is not saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process.

Id. at 28.

36. 347 U.S. 483 (1954).

tion,[37] the Court, nevertheless, called on *Dandridge v. Williams*[38] and *Lindsey v. Normet*[39] to reiterate its position that the Court would not create substantive constitutional rights in the name of guaranteeing equal protection of the laws.[40] To uphold education as a fundamental right, it must explicitly or impliedly be guaranteed in the Constitution.

The close relationship of education to other rights and liberties given protection under the constitution was asserted, but as education was a right not explicitly protected, the Court stated that it could not ". . . guarantee to the citizenry the most effective speech or the most informed electoral choice."[41]

After refusing to overturn the Texas public school financing system on a strict scrutiny basis, the Court applied the rational basis test for

37. Wisconsin v. Yoder, 406 U.S. 205, 213, 237, 238-39 (1972); Abington School Dist. v. Schempp, 374 U.S. 203, 230 (1963); Illinois *ex rel.* McCollum v. Board of Educ., 333 U.S. 203, 212 (1948); Pierce v. Society of Sisters, 268 U.S. 510 (1925); Meyer v. Nebraska, 262 U.S. 390 (1923); Interstate Consol. Ry. v. Massachusetts, 207 U.S. 79 (1907).

38. 397 U.S. 471 (1970).

39. 405 U.S. 56 (1972).

40. 411 U.S. at 33.

41. In discussing this point, the Court stated:

> Education, of course, is not among the rights afforded explicit protection under our Federal Constitution. Nor do we find any basis for saying it is implicitly so protected. As we have said, the undisputed importance of education will not alone cause this Court to depart from the usual standard for reviewing a State's social and economic legislation. It is the appellees' contention, however, that education is distinguishable from other services and benefits provided by the State because it bears a peculiarly close relationship to other rights and liberties accorded protection under the Constitution. Specifically, they insist that education is itself a fundamental personal right because it is essential to the effective exercise of First Amendment freedoms and to intelligent utilization of the right to vote. In asserting a nexus between speech and education, appellees urge that the right to speak is meaningless unless the speaker is capable of articulating his thoughts intelligently and persuasively. The "marketplace of ideas" is an empty forum for those lacking basic communicative tools. Likewise, they argue that the corollary right to receive information becomes little more than a hollow privilege when the recipient has not been taught to read, assimilate, and utilize available knowledge.
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> A similar line of reasoning is pursued with respect to the right to vote. Exercise of the franchise, it is contended, cannot be divorced from the educational foundation of the voter. The electoral process, if reality is to conform to the democratic idea, depends on an informed electorate: a voter cannot cast his ballot intelligently unless his reading skills and thought processes have been adequately developed.
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> We need not dispute any of these propositions. The Court has long afforded zealous protection against unjustifiable governmental interference with the individual's rights to speak and to vote. Yet we have never presumed to possess either the ability or the authority to guarantee to the citizenry the most *effective* speech or the most *informed* electoral choice. That these may be desirable goals of a system of freedom of expression and of a representative form of government is not to be doubted. These are indeed goals to be pursued by a people whose thoughts and beliefs are freed from governmental interference. But they are not values to be implemented by judicial intrusion into otherwise legitimate state activities.

Id. at 35-36 (emphasis added).

a fourteenth amendment claim. Under this test the state action must rationally further a legitimate state objective[42] with the legislation in controversy bearing the presumption of validity.[43] The Court concluded that the Texas system assured a basic education for every child while it allows local control of each district's schools.[44]

In his dissenting opinion, Justice Marshall, citing *Bullock v. Carter*,[45] finds no basis for the need to readily identify the disadvantaged class for purposes of equal protection analysis nor any problem in asserting the discrimination between the school children on the basis of taxable property wealth of the districts in which they happen to live.[46] In applying equal protection analysis in each of the two categories of review, strict scrutiny or mere rationality, Marshall states that the Court ". . . has applied a *spectrum* of standards in reviewing discrimination allegedly in violation of the Equal Protection Clause."[47] This is the approach which he previously argued in his dissenting opinion in *Dandridge v. Williams*.[48] Citing the Court's rulings

42. McGinnis v. Royster, 410 U.S. 263, 270 (1973). Williamson v. Lee Optical Inc., 348 U.S. 483, 489 (1955).

43. Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61, 78 (1911).

44. In discussing the problem of a legitimate state purpose, the Court referred to the aims of an educational system and responses to these aims. The Court said:

> The "foundation grant" theory upon which Texas educators based the Gilmer-Aiken bills, was a product of the pioneering work of two New York educational reformers in the 1920's, George D. Strayer and Robert M. Haig. Their efforts were devoted to establishing a means of guaranteeing a minimum statewide educational program without sacrificing the vital element of local participation. The Strayer-Haig thesis represented an accommodation between these two competing forces. As articulated by Professor Coleman:
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> > The history of education since the industrial revolution shows a continual struggle between two forces; the desire by members of society to have educational opportunity for all children, and the desire of each family to provide the best education it can afford for its own children.
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> The Texas system of school finance is responsive to these two forces. While assuring a basic education for every child in the State, it permits and encourages a large measure of participation in and control of each district's schools at the local level.

411 U.S. at 48-49.

45. 405 U.S. 134 (1972). Texas law required a candidate to pay a filing fee as a condition to having his name placed on the primary election ballot. The Supreme Court, affirming the district court decision holding the scheme invalid, concluded:

> . . . the State of Texas has erected a system which utilizes the criterion of ability to pay as a condition to being on the ballot, thus excluding some candidates otherwise qualified and denying an undetermined number of voters the opportunity to vote for candidates of their choice. These salient features of the Texas system are critical to our determination of Constitutional invalidity.

Id. at 149.

46. The lower court concluded that, consistent with the guarantee of equal protection of the laws, "the quality of public education may not be a function of wealth, other than the wealth of the state as a whole." 337 F. Supp. at 284.

47. 411 U.S. at 98-99.

48. 397 U.S. 471, 520-21 (Marshall, J., dissenting).

on interests which have not enjoyed constitutional protection,[49] Marshall disputes that the holding of a fundamental interest, necessary for a strict scrutiny approach, must be explicitly or implicitly guaranteed by the Constitution. As to the determination of what interests are fundamental, Marshall would relate the nonconstitutional interest to rights guaranteed in the Constitution. The nonconstitutional interest, as it *approaches* the specific, guaranteed right, becomes fundamental and is to be scrutinized accordingly.[50]

Recognizing the relationship between education and social and political interests guaranteed in the Constitution, Marshall concludes the fundamental nature of education requires strict scrutiny of the basis for the state's discrimination affecting equality of educational opportunity in Texas. Citing *Harper v. Virginia Board of Elections*[51] and *Griffin v. Illinois*,[52] Marshall disagreed with the requirements (1) that members of a disadvantaged class be completely unable to pay and (2) that they suffer absolute deprivation of a benefit before a valid claim of "wealth discrimination" can be raised.

In dealing with the reasonable basis test, Marshall disputes the use of "local control" within the Texas public school system as a legitimate state objective. In his view the state law regulating everything from textbooks to teacher qualification denies this.[53]

49. The right to vote in state elections, Reynolds v. Sims, 377 U.S. 533 (1964); the right to appeal from a criminal conviction, Griffin v. Illinois, 351 U.S. 12 (1956); the right to procreate, Skinner v. Oklahoma *ex rel.* Williamson, 316 U.S. 535 (1942).

50. On this point, Marshall said:

> The task in every case should be to determine the extent to which constitutionally guaranteed rights are dependent on interests not mentioned in the Constitution. As the nexus between the specific constitutional guarantee and the nonconstitutional interest draws closer, the nonconstitutional interest becomes more fundamental and the degree of judicial scrutiny applied when the interest is infringed on a discriminatory basis must be adjusted accordingly.

411 U.S. at 102-03.

51. 383 U.S. 663 (1966).

52. 351 U.S. 12 (1956).

53. In discussing and disputing the existence of local control within the Texas system, Marshall states:

> The State's interest in local educational control—which certainly includes questions of educational funding—has deep roots in the inherent benefits of community support for public education. Consequently, true state dedication to local control would present, I think, a substantial justification to weigh against simply interdistrict variations in the treatment of a State's school children. But I need not now decide how I might ultimately strike the balance were we confronted with a situation where the State's sincere concern for local control inevitably produced educational inequality. For on this record, it is apparent that the State's purported concern with local control is offered primarily as an excuse rather than as a justification for interdistrict inequality.
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> In Texas statewide laws regulate the most minute details of local public education. For example, the State prescribes required courses. All textbooks must be submitted

III. Prior Litigation of State Public School Financing Systems

Many commentaries have been presented concerning the issue of the constitutionality of public school financing systems,[54] and several recent cases have been decided overturning such systems.[55] In 1968, Chicago students challenged the Illinois financing system on fourteenth amendment grounds in *McInnis v. Shapiro*.[56] Plaintiffs argued that the system, based on ad valorem property taxes within each school district supplemented by a flat state grant and an equalization grant, allowed " . . . wide variations in the expenditures per student from district to district, thereby providing some students with a quality education and depriving others, who have equal or greater educational needs."[57] A three-judge federal court held, in *McInnis*, that the fourteenth amendment does not require that public school expenditures be made only on the basis of pupils' educational needs, and that there were no judicially manageable standards, making the controversy nonjudiciable.[58] The Supreme Court summarily affirmed the decision in *McInnis*.[59] In the following year, in *Burrus v. Wilkerson*,[60] an attack on the Virginia school financing system was rejected. The court relied

for state approval, and only approved textbooks may be used. The State has established the qualifications necessary for teaching in Texas public schools and the procedures for obtaining certification. The State has even legislated on the length of the school day. Texas' own courts have said:

As a result of the acts of the Legislature our school system is not of mere local concern but it is statewide. While a school district is local in territorial limits, it is an integral part of the vast school system which is coextensive with the confines of the State of Texas. Treadway v. Whitney Independent School District, 205 S.W.2d 97, 99 (Tex. Civ. App. 1947).

411 U.S. at 126-27.

54. *See* Comment, *Educational Financing, Equal Protection of the Laws, and the Supreme Court*, 70 Mich. L. Rev. 1324 n.3 (1972).

55. *See* Van Dusartz v. Hatfield, 334 F. Supp. 870 (D. Minn. 1971); Hollins v. Shofstall, Civ. No. C-253652 (Ariz., July 7, 1972); Serrano v. Priest, 5 Cal. 3d 584, 487 P.2d 1241, 96 Cal. Rptr. 601 (1971); Milliken v. Green, 203 N.W.2d 457 (Mich. 1972); Robinson v. Cahill, 118 N.J. Super. 223 (Super. Ct. 1972); Sweetwater County Planning Comm. for the Organization of School Dists. v. Hinkle, 491 P.2d 1234 (Wyo. 1971), *jurisd. relinquished*, 493 P.2d 1050 (Wyo. 1972). There were approximately 23 cases filed in 15 states as of January, 1972. *See* Comment, *The Evolution of Equal Protection—Education, Municipal Services and Wealth*, 7 Harv. Civ. Rights—Civ. Lib. L. Rev. 103, 200 (1972) (appendix)

56. 293 F. Supp. 327 (N.D. Ill. 1968), *aff'd sub nom.* McInnis v. Ogilvie, 394 U.S. 322 (1969).

57. 293 F. Supp. at 329.

58. *Id.* The plaintiffs stressed that the importance of education required the court to scrutinize the financing system more closely than is normally done when state statutes are attacked in other areas. *Id.* at 331. However, the court, citing Supreme Court cases which protect state legislation unless they are "wholly irrelevant to the achievements of the State's objective," upheld the Illinois system. *Id.* at 332, *quoting from* McGowan v. Maryland, 366 U.S. 420, 425-26 (1961).

59. 394 U.S. 322 (1969).

60. 310 F. Supp. 572 (W.D. Va. 1969), *aff'd*, 397 U.S. 44 (1970).

on *McInnis,* which it found "scarcely distinguishable" from the case before it.[61] This decision was affirmed by the Supreme Court.[62]

In *Hargrave v. Kirk*[63] an attack was made, in 1970, on Florida's school financing methods. A statute providing that any county imposing on itself more than a 10 mill ad valorem property tax for educational purposes would not be eligible to receive state funds for support of its public schools was challenged on equal protection grounds. The court held that the statute was not rationally related to any state purpose, and concluded it did not have to consider whether education was a fundamental interest which could not be infringed, even for rational reasons, unless there were some compelling state interest.[64] The court distinguished *McInnis* and *Burrus* on the basis that the instant challenge was *not* to the variations in per pupil expenditures due to differences in property values, and the relief sought was simply an injunction against State officials.[65] On appeal, the Supreme Court vacated the district court's decision on other grounds,[66] but indicated that on remand the lower court should fully develop a factual record before deciding the equal protection claim.[67]

In the leading case of *Serrano v. Priest,*[68] the California Supreme Court, in 1971, overturned the state school financing system, which is based primarily on ad valorem property taxes with wide differences in district revenues, as violating the equal protection clause of the fourteenth amendment. The court concluded that the system "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."[69] Relying on Supreme Court decisions in *Harper* and *McDonald* the California court regarded wealth as a "suspect classification"[70] and held that the state system impermissibly classifies on the basis of wealth. The court also concluded that education was a fundamental interest,[71]

61. 310 F. Supp. at 574.
62. 397 U.S. 44 (1970).
63. 313 F. Supp. 944 (M.D. Fla. 1970), *vacated sub nom.* Askew v. Hargrave, 401 U.S. 476 (1971).
64. 313 F. Supp. at 948.
65. *Id.* at 949.
66. Askew v. Hargrave, 401 U.S. 476 (1971).
67. *Id.* at 479.
68. 5 Cal. 3d 584, 487 P.2d 1241, 96 Cal. Rptr. 601 (1971).
69. *Id.* at 604, 487 P.2d at 1255, 96 Cal. Rptr. at 615.
70. *Id.* at 597, 487 P.2d at 1250, 96 Cal. Rptr. at 610.
71. The court stated that no direct authority supported the argument that education is a fundamental interest. *Id.* at 604, 487 P.2d at 1255, 96 Cal. Rptr. at 615.
However, the court recognized the indispensible role education plays in the modern industrial state because education:

and that no compelling state interest justified such classification.[72] The court distinguished the summary affirmances in the *McInnis* and *Burrus* cases by pointing out that in these cases emphasis was placed on educational needs rather than discrimination on the basis of wealth.[73]

In litigation subsequent to *Serrano*, a school financing system in Minnesota similar to that of California was struck down in *Van Dusartz v. Hatfield*[74] in an opinion based on the *Serrano* rationale. However, in *Spano v. Board of Education of Lakeland Central School District No. 1*,[75] challenging the New York State educational financing system, the court failed to distinguish *McInnis* and *Burrus* and viewed them as controlling.[76] The court, in *Spano*, stated that the Supreme Court would have to finally decide the issue of the constitutionality of educational financing.[77]

IV. The Fourteenth Amendment, Strict Scrutiny Standard of Review and Public School Financing

In certain challenges to legislation under the equal protection clause, the Court has applied a rigid, or "strict scrutiny" test.[78] When this test

(1) is a major determinant of an individual's chances for economic and social success in our competitive society; and
(2) has a unique influence on a child's development as a citizen and his participation in political and community life.

Id. at 605, 487 P.2d 1255-56, 96 Cal. Rptr. 615.

The functions of education in society, the court concluded, compel its treatment as a fundamental interest:

(1) Education is essential in maintaining "free enterprise democracy," *i.e.* individual's opportunity to compete successfully in the economic marketplace is a function of education.
(2) Education is universally relevant. . . . Every person benefits from education.
(3) Public education continues over a lengthly period of life, whereas few government services have such pervasive influences on the recipient.
(4) Education is unmatched in the extent to which it molds the personality of the youth of society.
(5) Education is compulsory not only by the requirements of attendance, but also by assignment to a particular district and school.

Id. at 609-10, 487 P.2d at 1258-59, 96 Cal. Rptr. at 618-19.

72. The court disagreed that the system was needed "to strengthen and encourage local responsibility for control of education." It is still possible to place decision making over school policies in the control of local districts. *Id.* at 610, 487 P.2d at 1260, 96 Cal. Rptr. at 620. Furthermore, poorer districts were now deprived of local control because they were limited as to the amount of money they would raise. *Id.* at 611, 487 P.2d at 1260, 96 Cal. Rptr. at 620.

73. *Id.* at 617, 487 P.2d at 1264-65, 96 Cal. Rptr. at 624-25.

74. 334 F. Supp. 870 (D. Minn. 1971).

75. 328 N.Y.S.2d 229 (Sup. Ct. 1972).

76. *Id.* at 231.

77. *Id.* at 235.

78. This has also been referred to as the, "compelling interest" test or doctrine.

is applied, the burden is placed upon the state to show that the discrimination in issue is necessary to promote a compelling state interest.[79] The test is used when a "suspect classification" or "fundamental interest" is involved. Among the classifications regarded as suspect thus far by the Court are race,[80] national origin[81] and wealth.[82] Among some of the interests regarded as fundamental are voting,[83] procreation,[84] interstate travel[85] and marriage.[86] The Court has adopted a balancing process in applying the strict scrutiny test to such discrimination[87] in that using suspect classification or fundamental interest labels, the Court has not retained such factors as constants.[88] Can or should wealth, with respect to educational financing, be deemed a suspect classification, and can education be deemed a fundamental interest as the court in *Serrano* or the lower court in *Rodriquez* held?

A decision in the area of wealth classification ignored by the school financing cases cited above was that of *James v. Valtierra*.[89] The Supreme Court there refused to overturn, on grounds of equal protection, a provision of the California constitution requiring that the construction of low-rent public housing projects be approved by a majority of voters in a community. The court distinguished *Hunter v. Erick-*

Shapiro v. Thompson, 394 U.S. 618, 658 (1969). *See* Comment, *Developments in the Law—Equal Protection*, 82 HARV. L. REV. 1065, 1076-1132 1969); Comment, *Equal Protection in the Urban Environment: The Right to Equal Municipal Services*, 46 TUL. L. REV. 496, 497-99 (1972).

79. *See* Cipriano v. City of Houma, 395 U.S. 701, 704 (1969); Shapiro v. Thompson, 394 U.S. 618, 634 (1969).

80. *See* Loving v. Virginia, 388 U.S. 1, 11 1967); McLaughlin v. Florida, 379 U.S. 184 (1964); Bolling v. Sharpe, 347 U.S. 497, 499 (1954).

81. *See* Hernandez v. TEXAS, 347 U.S. 475 (1954); Hirabayashi v. United States, (320 U.S. 81, 100 (1943).

82. *See* Harper v. Virginia Bd. of Elections, 383 U.S. 663, 668 (1966); discussion of *Harper* note 94 *infra*.

83. *See* Reynolds v. Sims, 377 U.S. 533 (1964).

84. *See* Skinner v. Oklahoma, 316 U.S. 535 (1942).

85. *See* Shapiro v. Thompson, 394 U.S. 618 (1969).

86. *See* Griswold v. Connecticut, 381 U.S. 479 (1965).

87. *See* Comment, *The Evolution of Equal Protection—Education, Municipal Services and Wealth*, 7 HARV. CIV. RIGHTS–CIV. LIB. L. REV. 103, 105-12 (1972).

88. *Id.* at 105 nn.3 & 4 which stated:

Suspect Classification: Compare Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966) (wealth classifications affecting voting rights invalid), with James v. Valtierra, 402 U.S. 137 (1971) (wealth classification affecting right to housing valid).

Fundamental Interest: Compare Reynolds v. Sims, 377 U.S. 533 (1964) (disproportional representation invalid because of its denial of an effective vote to those under-represented), with Whitcomb v. Chavis, 403 U.S. 124 (1971) (multi-member districts valid despite plaintiffs' demonstration that they denied certain groups effective equal representation). *Compare* Shapiro v. Thompson, 394 U.S. 618 (1969) (state could not condition eligibility for welfare payments on a one year residency requirement), *with* Dandridge v. Williams, 397 U.S. 471 (1970) (state could not limit the amount of welfare any family could receive).

89. 402 U.S. 137 (1971).

son,[90] which invalidated a provision of the Akron, Ohio city charter requiring majority approval of any ordinance regulating real estate on the basis of race, color, religion or national origin. Suggesting that wealth is not a suspect classification,[91] the Court, quoting from *Hunter*, said that "racial classifications are 'constitutionally suspect . . . and subject to the most rigid scrutiny'. . . . They 'bear a far heavier burden of justification' than other classifications."[92] The Court recognized California's history of referring questions to referenda and thereby found no suggestion of racial discrimination in the law.[93] In the line of cases which invalidated state action on the basis of wealth discrimination, it is arguable that the basis for such decisions was the notion that wealth was a condition for access to fundamental rights including access to the criminal process, voting and interstate travel.[94]

Similarly, the decisions on the constitutionality of state public financing systems have largely ignored *Dandridge v. Williams*,[95] which dealt with the challenge of Maryland's administration of the federal Aid to Families with Dependent Children Program.[96] The Court there held that a Maryland regulation, limiting the size of the assistance grant a family could receive, did not deny large family recipients equal protection of the laws. The Court, suggesting reluctance to add to the class of fundamental interests and treating all wealth discrimination as suspect, concluded that ". . . administration of public welfare assistance . . . involves the most basic economic needs of impoverished human beings . . . but we can find no basis for applying a different constitutional standard . . . ." than that applied to business regula-

90. 393 U.S. 385 (1969).

91. *See* Ortwein v. Schwab, 410 U.S. 656, 660 (1973); Comment, *James v. Valtierra: Housing Discrimination by Referendum*, 39 U. CHI. L. REV. 115, 119-29 (1971).

92. 402 U.S. at 141.

93. *Id.*

94. Cases dealing with criminal process are: Tate v. Short, 401 U.S. 395 (1971); Williams v. Illinois, 399 U.S. 235 (1970); Roberts v. LaVallee, 389 U.S. 40 (1967); Anders v. California, 386 U.S. 738 (1967); 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); *In re* Antazo, 3 Cal. 3d 100, 473 P.2d 999, 89 Cal. Rptr. 255 (1970).

A case dealing with voting is Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966). In considering the relevance of wealth as qualification for voting, the Court said:

> Wealth, like race, creed or color, is not germane to one's ability to participate intelligently in the electoral process. Lines drawn on the basis of wealth, or poverty, like those of race, are traditionally disfavored. To introduce wealth or payment of a fee as a measure of a voter's qualifications is to introduce a capricious or irrelevant factor.

Id. at 668. *See* McDonald v. Board of Election Comm'rs, 394 U.S. 802 (1969).

One case dealing with interstate travel is Shapiro v. Thompson, 394 U.S. 618 (1969).

95. 397 U.S. 471 (1970).

96. 42 U.S.C. §§ 601-44 (1956).

tion cases.[97] In *Lindsey v. Normet*,[98] the Court restricted its recognition of additional fundamental interests in deciding that an Oregon statute, requiring tenants appealing from a judgment in a forceable entry suit to post a bond for double the rent due, violated the equal protection clause. In this decision, the Court rejected "the need for decent shelter" or "the right to retain peaceful possession of one's home" as fundamental interests and stated "[w]e do not denigrate the importance of decent, safe and sanitary housing, but the constitution does not provide remedies for every social and economic ill."[99]

This reluctance to extend the concept of "fundamental interests" to additional areas was reflected in the *Rodriquez* decision.[100] In *Johnson v. New York State Education Department*,[101] plaintiffs, mothers of children in the New York School system, challenged New York statutes[102] as creating an arbitrary and invidious classification between children in the upper and lower grades and so violated the equal protection guarantee by requiring children in the lower grades to obtain voter approval to receive free text books.[103] The Second Circuit refused to apply the strict standard of review. Relying upon *Dandridge*, the court stated "[a]lthough education is no doubt an area of fundamental importance, the Supreme Court has made clear its view that in the area of social welfare, the 'compelling state interest' theory does not apply even though basic needs may be involved."[104] The court stated, in a footnote, that "[c]ertainly no one would contend that a student's need for text books is any more fundamental than such items as food and clothing which are provided through welfare grants."[105] In *Parker v. Mandel*,[106] a suit challenging Maryland's public school financing system, the district court, citing *Dandridge*, refused to call

97. 397 U.S. at 485.
98. 405 U.S. 56 (1972).
99. *Id.* at 74.
100. *See* Ordway v. Hargraves, 323 F. Supp. 1155 (D. Mass. 1971). *Compare* Hosier v. Evans, 314 F. Supp. 316 (D. Virg. Is. 1970) (where education was deemed a basic personal right) with Robinson v. Johnson, 352 F. Supp. 848 (D. Mass. 1973) (where the Court refused to conclude education is a fundamental right for purpose of selecting standards of review).
101. 449 F.2d 871 (2d Cir. 1971).
102. N.Y. EDUC. LAW § 701 (McKinney 1969) provides:
The statute authorized local school boards to provide free textbooks to all children in grades seven through twelve residing within the district.
Id. § 703, which provides:
The statute allowed free textbooks to children in grades one through six only if the voters in the district authorized taxes for that purpose.
103. 449 F.2d at 873.
104. *Id.* at 879.
105. *Id.* at n.11.
106. 344 F. Supp. 1068 (D. Md. 1972).

education a fundamental interest. The court concluded, "[t]hat when state statutory programs dealing with education, health or welfare are to be examined under the equal protection clause, there is no essential difference in any of these three vital areas of state concern."[107]

In developing the "fundamental interest" concept, the Supreme Court has recognized the importance of such "interests" to both the individual and society.[108] Exemplary are the areas of procreation and voting. In *Skinner v. Oklahoma*,[109] the Court struck down a state law authorizing sterilization of individuals convicted more than twice of moral turpitude felonies, except for "offenses arising out of the prohibitory laws, revenue acts, embezzlement or political offenses."[110] The strict scrutiny approach was applied because one of the "basic civil rights of man" (marriage and procreation) would be irreparably injured.[111] In *Reynolds v. Sims*,[112] the Court declared the Alabama legislative apportionment in violation of the equal protection guarantee. Though the Court, in *Reynolds*, described procreation and voting as rights, "individual and personal in nature,"[113] the reference to a social interest was evident when the Court said ". . . the right to elect legislators in a free and unimpaired fashion is a bedrock of our political system"[114] and ". . . every citizen has an inalienable right to full and effective participation in the political process of his State's legislative bodies."[115]

These prior holdings, involving "significant" individual and societal interests, have been largely ignored by the Court in *Rodriquez*.

V. Conclusion

The Supreme Court has ruled in an area of major importance. By failing to extend the fundamental interest concept to education the Court has followed its recent line of decisions in the area of social welfare. However, it is difficult to perceive how the interests involved in education are significantly different from those involved in pro-

107. *Id.* at 1077.
108. *See* Comment, *The Evolution of Equal Protection—Education, Municipal Services and Wealth*, 7 Harv. Civ. Rights–Civ. Lib. L. Rev. 103, 115-22 (1972), for an extensive discussion of this concept.
109. 316 U.S. 535 (1942).
110. *Id.* at 537.
111. *Id.* at 541.
112. 377 U.S. 533 (1964).
113. *Id.* at 561-62.
114. *Id.* at 562.
115. *Id.* at 565.

creation and voting. The analysis which found education a fundamental interest in the *Serrano*[116] decision has great support in prior cases, while the *Dandridge-Lindsey* line of cases is arguably limited to purely economic factors in society.[117] The fact that education is a function which the state has assumed from the family should not affect its status as a fundamental interest for purposes of equal protection analysis. The *access to equal representation* is the interest upheld in *Reynolds*, and not the access to the vote itself.

The Court has completely ignored its past practice of holding "fundamental" interests which significantly affect the individual or society. If there is no reasonable basis to distinguish between interests in education and other basic interests such as procreation and voting, then one could conclude the *Rodriquez* decision was perhaps motivated by unarticulated considerations. While conclusions as to what unseen forces moved the Court towards its final position are admittedly speculative, two obvious possibilities come to mind immediately. The Court may have been concerned with the potentially dramatic impact that an affirmance would have had on public school financing throughout the country. Another possibility might be the Court's reluctance to extend the concept of "fundamental interest" so that it would eventually encompass other essential services the state provides.

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116. 5 Cal. 3d 584, 604-10, 487 P.2d 1241, 1255-60, 96 Cal. Rptr. 601, 615-20. *See* note 71 *supra*.

117. *See* Reinstein, *The Welfare Cases: Fundamental Rights, the Poor, and the Burden of Proof in Constitutional Litigation*, 44 TEMP. L.Q. 1, 50 (1970). *See supra* note 87, at 129-30.

In Van Dusartz v. Hatfield, 334 F. Supp. 870 (D. Minn. 1971), the Court said "[o]ne can concede the significance of welfare payments to an indigent and yet accept the result in Dandridge v. Williams where the Court did not face a suspect classification." *Id.* at 875.