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CURRENT TRENDS IN SCHOOL FINANCE REFORM LITIGATION: A COMMENTARY

BETSY LEVIN*

I. INTRODUCTION

The early seventies witnessed a frenetic period of litigation to overturn those state school finance systems which produced wealth-related disparities in per pupil spending among districts within a state. Litigation also stimulated and, in some cases, forced state legislatures to pass new school finance laws. This period of judicial activity began in late 1971 when the California Supreme Court, in *Serrano v. Priest*,[1] held that it was a violation of the equal protection clause of the fourteenth amendment to the United States Constitution for the quality of a child's education to be "a function of the wealth of his parents and neighbors."[2] For eighteen months, school finance systems in state after state were challenged on the basis of the "fiscal neutrality" theory which the *Serrano* court had articulated. This theory proved to be a successful litigation strategy until the Supreme Court's decision in *San Antonio Independent School District v. Rodriguez*[3] in the spring of 1973, holding that a school finance system which produced relative differences in educational opportunities among school districts did not violate the equal protection clause of the fourteenth amendment.

Thus the litigative efforts to challenge school finance systems under the fourteenth amendment ground to a halt. However, a new phase of school finance reform litigation, based on state constitutional provisions, began when the New Jersey Supreme Court handed down its decision in *Robinson*

* Professor of Law, Duke University. A.B. 1956, Bryn Mawr College; L.L.B. 1966, Yale University. The research for this paper was supported by a grant from the Ford Foundation.

1. 5 Cal. 3d 584, 487 P.2d 1241, 96 Cal. Rptr. 601 (1971).
2. *Id.* at 589, 487 P.2d at 1244, 96 Cal. Rptr. at 604.
3. 411 U.S. 1 (1973).

v. Cahill[4] less than a month after *Rodriguez* was decided. The *Robinson* court held that New Jersey's school financing system violated that provision of the state constitution which commands the legislature to provide a "thorough and efficient system of free public schools."[5] The message was conveyed that even though the federal courts were closed, state courts offered an alternative forum for school finance reform litigation.

This commentary focuses on the issue of the continuing vitality of the school finance reform movement, inquiring first into those cases which have attempted to transfer the fiscal neutrality theory from the federal equal protection clause to various state constitutional provisions. Other factors, such as diminished state fiscal surpluses, declining enrollments, pressures for property tax relief and increased demands for funds for certain types of "disadvantaged" pupil populations are also examined to assess their impact on finance reform efforts. Finally, the effect of the legal "backlash"—challenges brought by those school districts which did not benefit by the reforms enacted in the early seventies—is evaluated. Although the development of an increasing variety of judicial definitions of "equal educational opportunity" is discussed, no attempt will be made to answer the far more difficult question of its ultimate significance. This development may simply reflect the fact that the issue of school finance reform has become increasingly complex and less "judicially manageable." On the other hand, the increase in court decisions which merely require minimum rather than equal levels of education may mark a general societal retreat from the objective of equality of educational opportunity for all, signaling an end to the egalitarianism of the sixties and a movement toward libertarianism.

II. FROM *SERRANO* TO *RODRIGUEZ*[6] AND THE FEDERAL CONSTITUTION

In the late sixties, the school finance laws of Illinois[7] and Virginia[8]

4. 62 N.J. 473, 303 A.2d 273, *cert. denied*, 414 U.S. 976 (1973).

5. 62 N.J. at 509, 303 A.2d at 292.

6. The issues raised by *Serrano* and *Rodriguez* have been written about extensively and will not be reworked here. *See, e.g.*, *Symposium*, 38 LAW & CONTEMP. PROB. 293 (1974), *reprinted in* FUTURE DIRECTIONS FOR SCHOOL FINANCE REFORM (B. Levin ed. 1974); Carrington, *Financing the American Dream: Equality and School Taxes*, 73 COLUM. L. REV. 1227 (1973); Karst, Serrano v. Priest: *A State Court's Responsibilities and Opportunities in the Development of Federal Constitutional Law*, 60 CAL. L. REV. 720 (1972).

7. McInnis v. Shapiro, 293 F. Supp. 327 (N.D. Ill. 1968), *aff'd sub nom. mem.*, McInnis v. Ogilvie, 394 U.S. 322 (1969). In Illinois, as in every state except Hawaii, local school districts had been delegated the authority by the state legislature to raise funds for education by levying a property tax on property within the school district, although the legislature had enacted a maximum tax rate which the districts could not exceed. The state guaranteed a minimum of $400 per pupil. School districts which raised less than that at a predetermined tax rate (or computational tax rate), because of their low property values, received sufficient funds from

were challenged as violative of the equal protection clause of the fourteenth amendment. Neither suit was successful, because the courts, having construed the plaintiffs' claims as seeking a system which provided resources on the basis of educational "need," felt there were no manageable standards for a court to determine such "need."[9] Following these early defeats, school finance reform lawyers developed a legal theory that seemed easier for courts to grasp—one which would not involve the judiciary in the complexities of affirmatively requiring that expenditures be made in a certain manner or amount.[10] This theory, first articulated in *Serrano*, became known as the "fiscal neutrality" theory, since it focused on freeing the tie between the level of expenditures and district property wealth.

Because of the early success of this litigative strategy, suits were filed in nearly two-thirds of the states and between 1971 and 1973 nine decisions were handed down.[11] Nearly all of these decisions followed the reasoning of

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the state to make up the difference between what the district raised and the state-guaranteed minimum. Those districts with high property values could raise substantially more than the $400 per pupil guaranteed by the state "foundation plan," at the same or even lower tax rate than districts with low property values. 293 F. Supp. at 330. Since the fiscal capacity (per pupil property values) of the individual districts varied substantially, per pupil expenditures also varied—between $480 and $1,000. *Id.* Although the court conceded that the quality of education might vary similarly, that was a matter to be addressed by the state legislature rather than the courts.

8. Burruss v. Wilkerson, 310 F. Supp. 572 (W.D. Va. 1969), *aff'd mem.*, 397 U.S. 44 (1970).

9. The plaintiffs in *McInnis* asserted that state statutes which permitted disparities in per pupil expenditures violated their fourteenth amendment rights to equal protection and due process, since students from districts with high property values received a good education while those from other property districts, "who [had] equal or greater educational need" were deprived of such an education. 293 F. Supp. at 329. The court conceded that there was a presumption that "students receiving a $1000 education are better educated than those acquiring a $600 schooling," *id.* at 331, but declared that there were "no 'discoverable and manageable standards' by which a court [could] determine when the Constitution is satisfied and when it is violated." *Id.* at 335. The plaintiffs had demanded that "expenditures be made only on the basis of pupils' educational needs without regard to the financial strength of local school districts." The alternative—"equal dollars for each student"—was also dismissed by the court as inappropriate. *Id.* at 336. In the *Burruss* case, the plaintiffs had urged that educational resources should be related to varying levels of "educational needs." 310 F. Supp. at 573. The court, relying on *McInnis*, rejected the plaintiffs' claim and suggested that they seek legislative relief. The court noted that it had "neither the knowledge, nor the means, nor the power to tailor the public moneys to fit the varying needs of these students throughout the state." *Id.* at 574.

10. *See* J. COONS, W. CLUNE & S. SUGARMAN, PRIVATE WEALTH AND PUBLIC EDUCATION 2 (1970).

11. *See* Parker v. Mandel, 344 F. Supp. 1068 (D. Md. 1972); Rodriguez v. San Antonio Indep. School Dist., 337 F. Supp. 280 (W.D. Tex. 1971), *rev'd*, 411 U.S. 1 (1973); Van Dusartz v. Hatfield, 334 F. Supp. 870 (D. Minn. 1971); Hollins v. Shofstall, Civ. No. C-253652 (Ariz. Super. Ct., June 1, 1972), *rev'd*, 110 Ariz. 88, 515 P.2d 590 (1973); Caldwell v. Kansas, Civ. No. 50616 (Johnson County Dist. Ct., Kan., Aug. 30, 1972); Milliken v. Green, 389 Mich. 1, 203 N.W.2d 457 (1972), *vacated*, 390 Mich. 389, 212 N.W.2d 711 (1973); Robinson v. Cahill, 118

Serrano and relied on the fourteenth amendment. This period of intense judicial activity was brought up short, however, by the Supreme Court decision in *Rodriguez*. In that case, the majority of the Court found that Texas' system of financing schools did not discriminate against any class of persons considered "suspect" since the case dealt with property-poor school districts, not poor persons.[12] The Court distinguished earlier cases in which wealth classifications had been declared invalid on the ground that they had involved discrimination on the basis of *personal* wealth.[13] Secondly, the Court pointed out that the wealth discrimination complained of in *Rodriguez* did not cause an absolute deprivation but merely produced a relative difference in the quality of education.[14]

The majority further held that education is not a fundamental right, since it is neither explicitly nor implicitly guaranteed by the Constitution.[15] With neither a suspect classification nor a fundamental right involved, there was no basis on which to invoke the strict scrutiny test of the equal protection clause.[16] The Court therefore turned to the rational basis standard of equal protection and found that the Texas system of school financing rationally furthered a legitimate state purpose: to encourage "a large measure of participation in the control of each district's schools at the local level."[17]

III. FISCAL NEUTRALITY AND STATE CONSTITUTIONS

After *Rodriguez*, reform-minded advocates began to turn to the state courts. *Robinson*, which had struck down the New Jersey school finance

N.J. Super. 223, 287 A.2d 187 (1972), *supplemented in* 119 N.J. Super. 40, 289 A.2d 569 (1972), *aff'd as modified*, 62 N.J. 473, 303 A.2d 273 (1973); Spano v. Board of Educ. of Lakeland Cent. School Dist. No. 1, 68 Misc. 2d 804, 328 N.Y.S.2d 229 (Sup. Ct. 1972); Sweetwater County Planning Comm. v. Hinkle, 491 P.2d 1234 (Wyo. 1971), *juris. relinquished*, 493 P.2d 1050 (Wyo. 1972).

12. 411 U.S. at 28. The Court suggested that there were three ways of looking at the class discriminated against: (1) children from families whose incomes are below some designated poverty line; (2) children from families whose incomes are low relative to others; (3) children who, regardless of their family's income, reside in low property wealth districts. *Id.* at 19-20. The Court's analysis of its earlier wealth discrimination cases indicated that they had concerned only those who "were completely unable to pay for some desired benefit, and as a consequence . . . sustained an absolute deprivation of a meaningful opportunity to enjoy that benefit." *Id.* The Court found that there was no showing that the Texas school finance system "operates to the peculiar disadvantage of any class fairly definable as indigent, or as composed of persons whose incomes are beneath any designated poverty level." *Id.* at 22-23. The Court also found no evidence that the "poorest people" were "concentrated" in the poorest districts. *Id.*

13. *See, e.g.*, Douglas v. California, 372 U.S. 353 (1963); Griffin v. Illinois, 351 U.S. 12 (1956).

14. 411 U.S. at 23.

15. *Id.* at 35.

16. *Id.* at 40.

17. *Id.* at 49.

law as in violation of the state constitution, provided some optimism despite the Supreme Court's decision in *Rodriguez*. In turning to the state courts, some plaintiffs challenged their state's school finance system on the ground that it violated the state constitutional provision which guarantees a free public education to children residing in the state.[18] Other plaintiffs turned to their state's equivalent of the equal protection clause as the basis for declaring their school finance laws unconstitutional.

A. *State Education Clause Litigation.*

In *Robinson*, the New Jersey Supreme Court overturned the state's school finance scheme on the ground that it violated the state's constitutional command to the legislature to provide a "thorough and efficient system of free public schools."[19] In construing this constitutional provision, the court stated that "the Constitution's guarantee must be understood to embrace that educational opportunity which is needed in the contemporary setting to equip a child for his role as a citizen and as a competitor in the labor market."[20] The court then held that there was no relationship between the

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18. Almost all state constitutions contain an express provision guaranteeing a free public education, although the language varies from state to state. Eight states mandate a "thorough and efficient" system of free public schools. MD. CONST. art. VIII, § 1; MINN. CONST. art. VIII, § 3; N.J. CONST. art. VIII, § 4, ¶ 1; OHIO CONST. art. VI, § 2; PA. CONST. art. III, § 14; S.D. CONST. art. VIII, § 15; W. VA. CONST. art. XII, § 1; WYO. CONST. art. VII, § 9; *see* OFFICE OF EDUCATION, U.S. DEPT. OF HEALTH, EDUCATION AND WELFARE, STATE CONSTITUTIONAL PROVISIONS AND SELECTED LEGAL MATERIALS RELATING TO PUBLIC SCHOOL FINANCE (DHEW Pub. No. (OE) 73-00002, 1973).

Another seven states use *either* "thorough" *or* "efficient." ARK. CONST. art. XIV, § 1 (efficient); COLO. CONST. art. IX, § 2 (thorough); DEL. CONST. art. X, § 1 (efficient); IDAHO CONST. art. IX, § 1 (thorough); ILL. CONST. art. X, § 1 (efficient); KY. CONST. § 183 (efficient); TEX. CONST. art. VII, § 1 (efficient); *see* OFFICE OF EDUCATION, *supra* at 6.

Eight states mandate a "general and uniform" public school system. ARIZ. CONST. art. XI, § 1; IDAHO CONST. art. IX, § 1; IND. CONST. art. VIII, § 1; MINN. CONST. art. VIII, § 1; N.C. CONST. art. IX, § 2(1); OR. CONST. art. VII, § 3; S.D. CONST. art. VIII, § 1; WASH. CONST. art. IX, § 2; *see* OFFICE OF EDUCATION, *supra* at 6.

Ten states guarantee *either* a "general" *or* a "uniform" system. ARK. CONST. art. XIV, § 1 (general); COLO. CONST. art. IX, § 2 (uniform); DEL. CONST. art. X, § 1 (general); FLA. CONST. art. IX, § 1 (uniform); KAN. CONST. art. VI, § 2 (uniform); NEV. CONST. art. XI, § 2 (uniform); N.M. CONST. art. XII, § 1 (uniform); N.D. CONST. art. VIII, § 148 (uniform); UTAH CONST. art. X, § 1 (uniform); WYO. CONST. art. VII, § 1 (uniform); *see* OFFICE OF EDUCATION, *supra* at 6.

Many states use more than one of these descriptive phrases. *See, e.g.*, Idaho: "[I]t shall be the duty of the legislature of Idaho to establish and maintain a *general*, *uniform* and *thorough* system of public, free common schools," IDAHO CONST. art. IX, § 1 (emphasis added).

The remaining states have education clauses more limited in nature, such as those which mandate the provision of a "system of common schools" or "a public educational system." *See, e.g.*, CAL. CONST. art. IX, § 5; IOWA CONST. art. IX, 2d § 7; LA. CONST. Art. XII, § 1; N.Y. CONST. art. XI, § 1.

19. N.J. CONST. art. VIII, § 4, ¶ 1.

20. 62 N.J. at 515, 303 A.2d at 295. Subsequently, the legislature enacted the Public School Education Act, N.J. STAT. ANN. § 18A:7A-1 to -33 (West Supp. 1977), which defined a "thorough and efficient system of free public schools" as one which "provide[s] to all children

educational needs of school districts and their tax bases.[21] It concluded that because New Jersey's system of financing education relied heavily on local revenue, resulting in substantial disparities in per pupil expenditures, the system failed to fulfill the mandate of the constitution.[22]

In *Seattle School District No. 1 v. Washington*,[23] a state trial court in Washington also found that state's system of financing education in violation of the state's constitutionally mandated duty to make "ample provision

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in New Jersey, regardless of socioeconomic status or geographic location, the educational opportunity which will prepare them to function politically, economically and socially in a democratic society." *Id.* § 18A:7A-4. The legislative definition is substantially similar to the standard suggested by the state supreme court in *Robinson I*, and was affirmed by that court on the assumption that the legislature would provide sufficient funding to support such an education. Robinson v. Cahill, 69 N.J. 449, 464, 355 A.2d 129, 136 (1976) (*Robinson V*). When the New Jersey legislature failed to fund the 1975 Act, the court enjoined the expenditure of *any* funds for the support of public schools until the act was fully funded for the school year 1976-77. Robinson v. Cahill, 70 N.J. 155, 160, 358 A.2d 457, 459 (1976) (*Robinson VI*).

21. In view of the state system's heavy reliance on the local property tax, and the wide disparities in assessed valuation of taxable property per pupil, the result of the state financing scheme was substantial inter-district inequalities in per pupil expenditures. From this, the court concluded that

> [t]he constitutional mandate could not be said to be satisfied unless we were to suppose the unlikely proposition that the lowest level of dollar performance happens to coincide with the constitutional mandate and that all efforts beyond the lowest level are attributable to local decisions to do more than the State was obliged to do.

62 N.J. at 516, 303 A.2d at 295.

22. In a recent Connecticut case, the court held, as an alternative ground of decision, that the legislature's constitutional requirement to enact "appropriate" legislation to provide free public education was not met by the school financing statute. Horton v. Meskill, 172 Conn. 615, 376 A.2d 359 (1977). In that case, the court found that the heavy reliance on the local property tax to support education (70 percent of the educational dollar is raised locally, 20 to 25 percent comes from the state, and 5 percent from the federal government), because of the wide disparities in taxable property per pupil among the school districts in the state of Connecticut, results in the property-rich towns having much higher per pupil expenditures at lower tax rates than the property-poor districts can afford even at much higher tax rates. In contrast to most states, Connecticut does not even have a "foundation plan" which offsets to a *limited* extent differences in property values. State aid in Connecticut is distributed on the basis of a flat grant per pupil regardless of differences among districts in property wealth. Thus the court held that school finance legislation which relies

> primarily on a local property tax base without regard to the disparity in the financial ability of the towns to finance an educational program and with no significant equalizing state support, is not "appropriate legislation" (article eight, § 1) to implement the requirement that the state provide a substantially equal educational opportunity to its youth in its free public elementary and secondary schools.

Id. at 649, 376 A.2d at 374-75.

23. Civ. No. 53950 (Thurston County Super. Ct., Wash., Jan. 14, 1977). The factual situation in *Seattle School District* indicated that in order to meet statutory and regulatory standards for education, the Seattle School District had to resort to annual referendums, "special excess levies," to provide approximately one-third of its funds. By failing to provide the school district with adequate funds to meet the educational requirements, the State compelled the school district to rely on the voters within the district to make up the difference; but the voters exhibited an "increasing tendency" to avoid the additional tax burden. *Id.*, slip op. at 4. See note 59 *infra*.

for the education of all children residing within its borders."[24] Here the court was less concerned with relative differences in per pupil expenditures among school districts than with the question of whether the state fulfilled its constitutional duty to provide students in Seattle with "a basic program of education"[25] without the district's having to resort to voter-approved "special excess levies."[26] The case has been appealed to the state supreme court.

B. *State Equal Protection Clause Litigation.*

Since *Rodriguez* had eliminated the *federal* equal protection clause as a basis for holding California's financing system unconstitutional, the trial court, on remand of *Serrano*, held that education was a fundamental right under the *state* constitution, requiring the state to show a compelling interest in order to permit this right to be conditioned on district wealth.[27] The inability of the state to meet this burden resulted in the school finance system being declared in violation of the California Constitution's equal protection clause. This holding was affirmed by the California Supreme Court in *Serrano II*.[28] The state supreme court rejected the argument that "the *Rodriguez* approach to assessing 'fundamentalness' in affected rights

24. WASH. CONST. art. IX, § 1.

25. *Seattle School District*, slip op. at 28.

26. *Id.*, slip op. at 24-25. Board of Educ. of Cincinnati v. Walter, No. A7662725 (Hamilton County C.P. Ct., Ohio, Nov. 28, 1977), raises a similar issue—whether the state can delegate its duty to provide education to local voter choice. The city of Cincinnati, like the city of Seattle, has been unable to pass a tax referendum. The trial court held that the General Assembly of the State of Ohio has a constitutional duty to provide such additional funds as are necessary when a school district is unable to raise sufficient revenue from property tax levies to finance a "thorough and efficient" school system. *Id.*, slip op. at 358.

27. Serrano v. Priest, No. 938,254 (Los Angeles County Super. Ct., Cal., Apr. 10, 1974), *aff'd*, 18 Cal. 3d 728, 557 P.2d 929, 135 Cal. Rptr. 345 (1977).

28. Serrano v. Priest, 18 Cal. 3d 728, 557 P.2d 929, 135 Cal. Rptr. 345 (1977). The state supreme court pointed out that although California's equal protection provisions are "substantially the equivalent of" the equal protection clause of the fourteenth amendment to the United States Constitution they "are possessed of an independent vitality which, in a given case, may demand an analysis different from that which would obtain if only the federal standard were applicable." *Id.* at 764, 557 P.2d at 950, 135 Cal. Rptr. at 366. Then, quoting from People v. Longhill, 14 Cal. 3d 943, 951 n.4, 538 P.2d 753, 758 n.4, 123 Cal. Rptr. 297, 302 n.4 (1975), the court said:

> [D]ecisions of the United States Supreme Court defining fundamental rights are persuasive authority to be afforded respectful consideration, but are to be followed by California courts only when they provide no less individual protection than is guaranteed by California law.

18 Cal. 3d at 764, 557 P.2d at 950, 135 Cal. Rptr. at 366. The court also pointed out that while considerations of federalism may have been one basis for the Supreme Court's decision in *Rodriguez*,

> [t]he constraints of federalism, so necessary to the proper functioning of our unique system of national government are not applicable to this court in its determination of whether our own state's public school financing system runs afoul of state constitutional provisions.

Id. at 766-67, 557 P.2d at 952, 135 Cal. Rptr. at 368.

[explicitly or implicitly guaranteed by the federal Constitution] is applied by analogy to the state sphere."[29] In the view of the California Supreme Court, "those individual rights and liberties which lie at the core of our free and representative form of government, are properly considered 'fundamental,'"[30] and education clearly fit into this category.

The Connecticut Supreme Court also held that its state's equal protection clause was violated by the existing school financing scheme in *Horton v. Meskill*.[31] It determined that education is a fundamental right guaranteed by the Connecticut Constitution within the meanings of both the test adopted by the United States Supreme Court in *Rodriguez* (a right explicitly mentioned in the Constitution) and the test adopted by the California Supreme Court in *Serrano II* (an individual right which lies at the core of our form of government).[32] As in *Serrano II*, the court required "strict judicial scrutiny" of the financing plan. Since the state's objective of local control could be achieved by less onerous means, the plan's interference with the fundamental right to education could not be justified.

An Ohio court has held in *Board of Education of Cincinnati v. Walter*[33] that since the state constitution guarantees the right of school age children to attend school in a "thorough and efficient system of common schools," the discriminations among school children created by the state system of financing education impair a fundamental interest. Evaluated under either the strict scrutiny test or the more deferential test of equal protection, the system could not stand since the court concluded that neither a compelling state interest nor a rational basis could be found which would support the existing discrimination against school children.[34]

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29. 18 Cal. 3d at 766-67, 557 P.2d at 952, 135 Cal. Rptr. at 368.

> Suffice it to say that we are constrained no more by inclination than by authority to gauge the importance of rights and interests affected by the legislative classifications wholly through determining the extent to which they are "explicitly or implicitly guaranteed" . . . by the terms of our compendious, comprehensive, and distinctly mutable state Constitution.

Id.

30. *Id.* at 767-68, 557 P.2d at 952, 135 Cal. Rptr. at 368.

31. 172 Conn. 615, 642-46, 376 A.2d 359, 372-73 (1977). See note 22 *supra*.

32. *Id.* at 643-46, 376 A.2d at 372-73.

33. No. A7662725 (Hamilton County C.P. Ct., Ohio, Nov. 28, 1977).

34. *Id.*, slip op. at 375-81.

In denying the Colorado State Board of Education's motion to dismiss an action challenging the constitutionality of that state's school finance system, a Colorado district court held that education was an *explicitly* guaranteed fundamental right, since the constitution mandated—and has since 1876—that the legislature establish and maintain a "thorough and uniform system of free public schools." Lujan v. Colorado State Bd. of Educ., Civ. No. C-73688, slip op. at 20-22 (Denver County Dist. Ct., Colo., Dec. 12, 1977). However, the court went on to note that there is such a close relationship in Colorado "between public education and other rights traditionally recognized as basic and essential to citizenship"—for example, the right to vote and to effectively participate in the political process—that education would be a fundamental right *implicitly* guaranteed by the Colorado constitution if it were *not* expressly provided for in the constitution. *Id.*, slip op. at 22-27.

The conclusion drawn from a review of the litigation under state education and equal protection clauses is that despite the *Robinson* victory, school finance reform litigation has moved slowly and fitfully with almost as many steps backwards as forwards. Since 1973, only three successful attacks on inequitable school finance systems have relied upon the education clauses of their state constitutions.[35] In addition to *Serrano*, which on remand reaffirmed that California's school finance scheme was in violation of the equal protection clause of the California Constitution, two states have used their state's equal protection clause only as an *alternate* ground for decision.[36] Thus, only five states, including New Jersey, are now under court order to revise their systems of financing education and appeals are still pending in two of these decisions. By contrast, the state supreme courts of three states have found that despite substantial disparities among districts in per pupil expenditures, their state school financing schemes violated neither the education clause nor the equal protection clause of their constitutions.[37]

C. *Varying Definitions of Equal Educational Opportunity.*

In the post-*Serrano*, pre-*Rodriguez* period, equal educational opportunity was defined by the school finance cases as the equalization of fiscal capacity (property tax base)[38] or, even more simply, the equalization of per pupil expenditures.[39] A review of the more recent school finance decisions, however, reveals great variation as to what constitutes equal educational opportunity. These differences are not unexpected considering that neither the constitutional provisions on which the challenges to the school finance laws are based nor their prior history of judicial interpretation is identical in every state. Some courts have defined equal educational opportunity in terms of equalizing inputs—that is, dollars or the educational resources those dollars purchase—while other courts have focused on equalizing pupil achievement, an output standard. Still other courts have moved toward establishing minimum, rather than equal, levels of education (whether measured by inputs or outputs).

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35. *Horton; Cincinnati; Seattle School District.*

A Colorado state trial court, in Lujan v. Colorado State Bd. of Educ., Civ. No. C-73688 (Denver County Dist. Ct., Colo., Dec. 12, 1977), has recently declared, in denying a motion to dismiss a challenge to that state's system of financing education, that plaintiffs had stated a claim for relief under that provision of the Colorado constitution which provides for the establishment and maintenance of a "thorough and uniform system of public schools throughout the state." COLO. CONST. art. IX, § 2. See note 34 *supra*.

36. *Horton; Cincinnati.*

37. Thompson v. Engelking, 96 Idaho 793, 537 P.2d 635 (1975); Olsen v. Oregon, 276 Or. 9, 554 P.2d 139 (1976); Northshore v. Kinnear, 84 Wash. 2d 685, 530 P.2d 178 (1974).

38. *See, e.g., Serrano*, 5 Cal. 3d at 598-99, 487 P.2d at 1250, 96 Cal. Rptr. at 610.

39. Rodriguez v. San Antonio Indep. School Dist., 337 F. Supp. 280, 284 (W.D. Tex. 1971), *rev'd*, 411 U.S. 1 (1973).

A review of the differences in the definition of equal educational opportunity suggests the problem courts are having in applying the fiscal neutrality theory. The simplistic approach allowed for an easily understood and readily grasped standard for measuring the constitutional inadequacies of state school finance laws, but ignored the complexities and variations of state conditions.

1. *Equal Inputs.* The New Jersey and California courts arrived at differing definitions of the equal educational opportunity which the legislature is required to provide under their respective state constitutions. For the California trial court in *Serrano*, expenditure differences reflect the degree of opportunity provided by the educational system. Its standard is based on inputs: the state must "provide for a uniformity and equality of treatment to all the pupils of the State," meaning that "the state may not . . . permit . . . significant disparities in expenditures between school districts . . . ."[40] The court said that the disparities must be reduced to "amounts considerably less than $100 per pupil."[41] No relationship between inputs and outcomes must be shown. The *Serrano* trial court thus indicated that the level—the "adequacy"—of the educational offering is constitutionally irrelevant; it is the "quality" of the educational program *relative to* other districts that is the issue.[42]

On appeal, the California Supreme Court also focused on expenditure disparities, and adopted the "school-district offerings" standard rather than the "pupil achievement" standard to measure the "quality" of education existing in each school district.[43] Thus, where there are wide disparities in expenditure levels among school districts, there will be wide disparities in the quality of educational programs and opportunities among those districts. This does not mean that absolutely equal dollar inputs will be required, however. "Although an equal expenditure level per pupil in every district is not educationally sound or desirable because of differing educational needs, equality of educational opportunity requires that all school districts possess an equal ability in terms of revenue to provide students with substantially equal opportunities for learning."[44]

The problem with an inputs standard—as many have noted[45]—is that there is little undisputed empirical evidence as to the relationship between

40. Serrano v. Priest, Civ. No. 938,254, slip op. at 51 (Los Angeles County Super. Ct., Cal., Apr. 10, 1974), *aff'd*, 18 Cal. 3d 728, 557 P.2d 929, 135 Cal. Rptr. 345 (1977).

41. Civ. No. 938,254, slip op. at 102.

42. *Id.*, slip op. at 59.

43. *Serrano II*, 18 Cal. 3d at 747-48, 557 P.2d at 939, 135 Cal. Rptr. at 355.

44. *Id.*

45. *See, e.g.*, C. JENCKS, INEQUALITY 8, 24, 27, 37-38 (1974); U.S. OFFICE OF EDUCATION, U.S. DEPT. OF HEALTH, EDUCATION AND WELFARE, EQUALITY OF EDUCATIONAL OPPORTUNITY

input disparities and educational consequences. Moreover, an equality of inputs standard is too rigid a standard. The cost of providing educational services differs among school districts within a state. In particular, urban areas have to pay more for teachers of equivalent education and experience, for site acquisitions and school construction, and for security than do rural areas. Similarly, some districts have a higher concentration of children with special educational needs which may require more and different kinds of resources. The application of an equal inputs standard which fails to recognize these variations may actually result in unequal inputs.

The California Supreme Court, in *Serrano II*, did suggest an alternative to California's present unconstitutional school finance scheme that is not strictly an equal inputs standard—school district power equalization.[46] Under a district power equalization formula, a district may spend at a chosen level per pupil, regardless of its property wealth, by levying the school tax rate pegged by state statute to that chosen level of expenditure. Per pupil spending levels are "wealth-free" since the level of spending is unrelated to the actual revenue generated in a particular district when the chosen tax rate is applied to the district's property base. Since district power equalization is a state aid program that equalizes the *ability* of each school district to raise dollars for education, but leaves to local district choice the level of tax *effort*, expenditure disparities could remain quite large. Thus the opinion sets forth two seemingly conflicting standards—one requiring the narrowing of per pupil expenditure differences among districts and the other permitting expenditure disparities—no matter how large—as long as they are not a function of district wealth. This "taxpayer equity" standard is discussed in more detail below.

2. *Equal Outputs*. At first blush, the *Robinson* case appears to define equal educational opportunity as the attainment of equal pupil achievement levels. The New Jersey Supreme Court, in holding that the state legislature is constitutionally compelled to provide a "thorough and efficient" education, stated that the "thorough and efficient" education guaranteed by the state constitution is "that educational opportunity which is needed in the contemporary setting to equip a child for his role as a citizen and as a competitor in the labor market."[47]

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312 (OE-38001, 1966) (the Coleman Report); Hanushek & Kain, *On the Value of Equality of Education Opportunity as a Guide to Public Policy*, in ON EQUALITY OF EDUCATIONAL OPPORTUNITY (F. Mosteller & D. Moynihan eds. 1972); McDermott & Klein, *The Cost-Quality Debate in School Finance Litigation: Do Dollars Make a Difference?*, 38 LAW & CONTEMP. PROB. 415, 419-20 (1974), *reprinted in* FUTURE DIRECTIONS FOR SCHOOL FINANCE REFORM 117, 121-22 (B. Levin ed. 1974). *See also Rodriguez*, 411 U.S. at 43.

46. 18 Cal. 3d at 747, 557 P.2d at 939, 135 Cal. Rptr. at 355.

47. 62 N.J. at 515, 303 A.2d at 295.

The difficulty with the outputs standard as a *constitutional* requirement is that empirical research is not yet able to tell us what levels or kinds of inputs are necessary to produce a certain output—particularly when children come to the learning process with very different backgrounds and characteristics. To produce a given level of pupil achievement, for example, students of low socioeconomic status, students with limited English-language ability, and mentally retarded pupils may not only need *more* resources than the average pupil but may also need different kinds of resources. It is not clear whether the *Robinson* standard can be read to mean that differential educational resources would be required to the extent they are essential to the requisite educational outcome.[48] If *Robinson* is really suggesting that a "needs" differential is constitutionally *required*, then the case seems to have come full circle to the standard of educational opportunity sought (but not obtained) by plaintiffs in *McInnis v. Shapiro*[49]—that "expenditures be made only on the basis of pupils' *educational needs* without regard to the financial strength of local school districts."[50] This approach was rejected in *McInnis* because it provided "no 'discoverable and manageable standards' by which a court [could] determine when the Constitution is satisfied and when it is violated."[51]

3. *Minimal Adequacy*. When analyzed more closely, however, the *Robinson* standard is really one of *minimum* pupil achievement levels. The New Jersey Supreme Court said that a "thorough and efficient" education need not be equal across the state: "we do not say that if the State assumes the cost of providing the constitutionally mandated education, it may not authorize local government to go further . . . ."[52] This constitutional requirement that the state provide a *minimally* adequate education to all districts is not unlike the standard suggested by the United States Supreme Court in its dicta in *Rodriguez*, when it noted that the plaintiffs could not succeed because they were unable to show that the Texas school finance system "fail[ed] to provide each child with an opportunity to acquire the

48. *Id.*

The New Jersey State Legislature has responded by defining a "thorough and efficient education" in terms of outputs—for example, the instruction necessary to bring about a certain level of proficiency in basic reading and arithmetic skills. N.J. STAT. ANN. § 18A:7A-5 (West Supp. 1977). Moreover, the students identified as in need—those who fail to demonstrate the minimum skills proficiencies when tested—are to be provided with remedial help. *Id.* § 18A:7A-14.

49. 293 F. Supp. 327 (N.D. Ill. 1968), *aff'd sub nom. mem.*, McInnis v. Ogilvie, 394 U.S. 322 (1969). See note 9 *supra*.

50. 293 F. Supp. at 336 (emphasis added).

51. *Id.* at 335 (citation omitted).

52. *Robinson*, 62 N.J. at 515, 303 A.2d at 295.

basic minimal skills necessary for the enjoyment of the rights of speech and of full participation in the political process."[53]

Seattle School District also suggests a mandated minimum or basic level of education standard, although the language focuses solely on inputs rather than pupil outcomes. In that case, the trial court indicated that it was not at all concerned with expenditure disparities. The state's "paramount duty," under its mandate to make "ample provision for the education of all children residing within its borders,"[54] was to guarantee sufficient funds to support a "basic education"[55] without relying on excess local levies. Excess levies

> may only be required or utilized to fund programs, activities and support services of the district which the state is *not required* to fund. In other words, if the taxpayers in a district desire to offer an "enriched" program, that is, one which goes beyond that required by the constitution, then they may be required to fund the same.[56]

Thus, once the state fulfills its duty of supplying every district with a basic education, expenditure disparities resulting from local choice constitutionally may exist, even if they are a direct consequence of district wealth.[57]

An Ohio court adopted a similar stance. The fact that a large number of school districts in Ohio were unable, because of inadequate resources, to meet the *minimum* standards set by the State Board of Education (in the areas of pupil-teacher ratios, textbooks and the like) was evidence that the General Assembly had *not* met its constitutional duty to maintain a "thorough and efficient system of common schools." However, the Ohio trial court indicated that once the state provided "a general education of high quality" to all school districts, variations in local tax effort among the districts may permissibly result in differences in educational offerings above that level.[58] In contrast to *Seattle School District*, however, differences in expenditure levels above the base level may not be *wealth*-related.

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53. 411 U.S. at 37 (emphasis added). Several recent suits, relying on an "educational malpractice" theory, have contended that there is a right to a minimum level of education. *See, e.g.*, Peter W. v. San Francisco Unified School Dist., 60 Cal. App. 3d 814, 131 Cal. Rptr. 854 (1976).

54. WASH. CONST. art. IX, § 1.

55. *See Seattle School District*, slip op. at 36-51.

56. *Id.*, slip op. at 24 (emphasis in original).

57. The Washington state legislature has recently adopted a definition of "basic education" in an attempt to comply with the court's order. The act, known as the Basic Education Act of 1977, requires the state to provide "fully sufficient" funding for the programs and services specified in the act. 1977 Wash. Laws, ch. 359. Foreign languages are *excluded* from the definition of basic education, but (along with traffic safety) are left to district discretion—meaning local funds. For a more detailed description of the act, see notes 82-87 *infra* and accompanying text. The act clearly defines basic education in terms of inputs rather than outputs, in contrast to the New Jersey act. See note 48 *supra*.

58. *Cincinnati*, slip op. at 390.

Some of the unsuccessful challenges to school finance systems which produced substantial disparities among districts in per pupil expenditures resulted in decisions which seemed to advocate a similar theory. In *Northshore v. Kinnear*,[59] the Washington Supreme Court held that the constitutional mandate to establish a "general and uniform system of public schools"[60] meant merely that the system should be

> one in which every child in the state has free access to certain minimum and reasonably standardized educational and instructional facilities and opportunities to at least the 12th grade—a system administered with that degree of uniformity which enables a child to transfer from one district to another within the same grade . . . and with access by each student . . . to acquire those skills . . . that are reasonably understood to be fundamental and basic to a sound education.[61]

Similarly, the Oregon Supreme Court, in rejecting a challenge to that state's system of financing schools, declared that "uniform" as used in its constitution could not be interpreted to mean that "the amounts available for providing educational opportunities in every district must approach equality."[62] The constitutional provision is satisfied if the state "provides for a *minimum* of educational opportunities in the district and permits the districts to exercise local control over what they desire, and can furnish, over the minimum."[63]

Under this approach equal educational opportunity becomes whatever the state determines are basic *inputs*— which could mean no kindergarten programs, no art or music programs, no science or language programs, or even no secondary school programs. Above and beyond a basic or minimum program, the level of a child's education will be determined by district wealth and effort. The California court's approach is quite different from this "minimal adequacy" test. Even after the state had provided a basic or adequate educational program in all districts, the California Supreme Court would allow school districts to opt for an "enriched" program from local revenues only if the revenue base were "power equalized."[64] If tax capacity is not equalized, then spending differences among districts of more than $100 per pupil are not constitutionally permissible even if the state were to

59. 84 Wash. 2d 685, 530 P.2d 178 (1974). This case and the issues it raises are treated at length in Andersen, Northshore School District v. Kinnear: *The "General and Uniform" and "Ample Provision" Clauses*, 38 LAW & CONTEMP. PROB. 366 (1974), *reprinted in* FUTURE DIRECTIONS FOR SCHOOL FINANCE REFORM 68 (B. Levin ed. 1974); Andersen, *School Finance in Washington—The* Northshore *Litigation and Beyond*, 50 WASH. L. REV. 853 (1975).

60. WASH. CONST. art. IX, § 2.

61. 84 Wash. 2d at 729, 530 P.2d at 202. See also the discussion of California's education clause in *Serrano*, 5 Cal. 3d at 595-96, 487 P.2d at 1248-49, 96 Cal. Rptr. at 608-09.

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

63. *Id.* at 27, 554 P.2d at 148 (emphasis added).

64. See text accompanying note 46 *supra*.

fully fund a program of "basic education." On the other hand, the California court's approach, relying as it does on the equal protection rather than the education clause, seems not to require the state to provide any particular amount of education—even one that rises to the level of "minimally adequate"—as long as what is provided is not wealth-related.

4. *Taxpayer Equity*. Yet another definition of equal educational opportunity—which is neither an input nor an output standard—was suggested by the California courts. The California Supreme Court's fiscal neutrality principle, as articulated in *Serrano*, implies that the state is constitutionally required to equalize tax burdens in addition to (or instead of) focusing on the equalization of expenditures. "Taxpayer equity" is defined as freeing the tie between "capacity"—the district's per pupil property values, and "effort"—the district's tax rate. On remand, the trial court stated that to be constitutional, the state's school financing system must provide for uniformity and equality of treatment to all pupils and that

> [u]niformity and equality of treatment of pupils also mean that parent-taxpayers of children in some school districts may not be required to pay significantly higher tax rates than parent-taxpayers in other school districts in order for the former's children to receive the same or a lower quality of education than that received by the latter's children.[65]

And in *Serrano II*, as noted earlier, the state supreme court suggests that one acceptable method of financing education "which would not produce wealth-related spending disparities" is school district power equalizing, which permits districts to choose different per pupil spending levels, "but for each level of expenditure chosen the tax effort would be the same for each school district choosing such level whether it be a high-wealth or a low-wealth district."[66] Clearly this standard of equal educational opportunity is concerned more with insuring taxpayer equity and district "choice" rather than equalizing either educational inputs or outcomes for all children in the state. Although under such a system, a district's expenditure level will be determined *only* by its taxing effort and not also by its property wealth, the level of expenditures for a child's education is still dependent upon where he lives—the difference being that disparities in expenditures are related to the preferences of local voters rather than district wealth.[67] By contrast, the New Jersey court, in *Robinson*, expressly rejected the concept that there was any constitutionally required "equality"

65. Serrano v. Priest, Civ. No. 938,254, slip op. at 52 (Los Angeles County Super. Ct., Cal., Apr. 10, 1974), *aff'd*, 18 Cal. 3d 728, 557 P.2d 929, 135 Cal. Rptr. 345 (1977).

66. *Serrano II*, 18 Cal. 3d at 747, 557 P.2d at 939, 135 Cal. Rptr. at 355. See text accompanying note 46 *supra*.

67. *See, e.g.*, Levin, *Alternatives to the Present System of School Finance: Their Problems and Prospects*, 61 GEO. L.J. 879, 920-21 (1973).

where taxpayers of different school districts were concerned.[68] Similarly, the Ohio district court in *Cincinnati* has emphatically rejected that requirement. Equalizing the taxing capacity of school districts rather than equalizing the educational opportunities of school children was found to be constitutionally unacceptable. "In the matter of education, the obligation of the General Assembly extends to the school children, not to the taxpayers. Education, not tax equity, is guaranteed by the Ohio Constitution."[69]

Thus the school finance cases have produced varied definitions of equal educational opportunity, none of which are free of problems. They are either easily attainable (theoretically, not politically) but ignore the complexities of the real world system; or are not capable of being implemented on the basis of present-day knowledge; or have abandoned any concern for equality for a theory of *minimum* adequacy; or have little to do with education and children.

D. *The Trend to "Special Interest" Cases.*

In part because of the inability of the fiscal neutrality theory to deal with some of the special problems which exist in certain types of school districts, there has been a movement toward litigating these special interests directly. Thus, although litigation efforts are continuing under state equal protection or education clauses,[70] more recent litigation is seeking to insure that "special needs" or "interests" are properly protected in a state's school finance system. The initial legislative reforms that were proposed in the wake of *Serrano* and its progeny failed to take into account the financing problems of certain types of school districts—primarily large urban districts. The "fiscal neutrality" or wealth-free standard, devised in response to a system in which low property values correlated with low per pupil expenditures, failed to recognize the peculiar fiscal problems of central city schools. These problems stem not from low property values but from higher costs for

68. 62 N.J. at 502-03, 303 A.2d at 288.

69. *Cincinnati*, slip op. at 380.

70. *See, e.g.*, Alma School Dist. No. 30 v. DuPree, No. 77-406 (Pulaski County Chancery Ct., Ark., filed Jan. 28, 1977) ("general" and "efficient" and the federal equal protection clause); Lujan v. Colorado State Bd. of Educ., C.A. No. C-73688 (Denver County Dist. Ct., Colo., Dec. 12, 1977, denial of motion to dismiss) ("thorough and uniform" and federal and state equal protection clauses); Thomas v. Stewart, No. 8275 (Polk County Super. Ct., Ga., filed Dec. 19, 1974) (state uniform taxation clause and state equal protection and education clauses); Board of Educ., Levittown v. Nyquist, No. 8208/74 (Nassau County Sup. Ct., N.Y. filed 1974) (state equal protection and education clauses); Pauley v. Kelly, No. 75-1268 (Kanawha County Super. Ct., W. Va., June 14, 1977) ("thorough and efficient" and state equal protection clauses) (defendants' motion to dismiss granted; plaintiffs have apealed to the West Virginia Supreme Court of Appeals). All of these cases are described in Lawyers' Comm. for Civil Rights Under Law, Update On State-Wide School Finance Cases (Feb. 1978).

both education and other public services.[71] The result, therefore, has been an attempt to have such problems considered by courts as part of any case challenging the constitutionality of a state's school financing system.

One suit which has raised a number of the problems faced by urban school districts is *Board of Education, Levittown v. Nyquist*.[72] The case was initially brought by a low-wealth suburban school district as a *Serrano*-type case. However, in an attempt to draw the court's attention to their particular problems, the four largest cities in New York state[73] have intervened. The problems which these cities face are typical of those of many cities so that an examination of the issues presented is appropriate. The *Levittown* intervenors have argued that the "equalization" provisions of the state school finance scheme bear no "fair and substantial relation" to the objective of equalization of the capacity of school districts to finance education, since the provisions regard per pupil property wealth as the only measure of school fiscal capacity.

1. *Cost Differentials*. The first contention of the intervenors is that urban districts, because of higher prices or wage rates, have to spend more per pupil than rural or suburban school districts to provide a comparable educational program.[74] This price-wage differential reflects area "labor market" differences and the fact that cities generally have a higher proportion of professional staff with advanced degrees and years of experience. Site acquisition costs and the costs per square foot of constructing school facilities are also substantially higher in cities than in suburban and rural areas, as are the costs of plant maintenance and security.[75]

This issue was also confronted in *Seattle School District*. The court there refused to reach the issue of whether an "urban factor" must be included in any school finance formula, suggesting that it was an argument that should be made to the legislature and not the court.[76] However, the court implicitly accepted a "cost differentials" principle which would take into account the wage-price differences central cities often have to pay to provide the same educational offering which the typical student receives in a suburban or rural school district. The Washington state trial court suggested that, in the absence of a legislative definition, the "basic education" which the state constitutionally is required to provide could be determined by one

71. *See generally* B. LEVIN, T. MULLER & C. SANDOVAL, THE HIGH COST OF EDUCATION IN CITIES (1973).

72. No. 8208/74 (Nassau County Sup. Ct., N.Y., filed 1974).

73. The four cities involved are New York, Rochester, Buffalo and Syracuse.

74. Post-trial Review of the Evidence for Plaintiffs-Intervenors, Board of Educ., Levittown v. Nyquist, No. 8208/74, at 50-59 (Nassau County Sup. Ct., N.Y., filed 1974).

75. *See* B. LEVIN, et al., *supra* note 71.

76. *Seattle School District*, slip op. at 52 n.16A.

of three possible methods, each of which had to take into account what to the court were the most significant factors in terms of quantitative inputs: staffing ratios and salaries.[77]

The first method, the "collective wisdom" approach, involved "costing out" for Seattle "the statewide average per pupil deployment of certified and classified staff and nonsalary related costs for the maintenance and operation of the common school program for a normal range student"[78] (a ratio of 20:1 pupils to certified employees). An alternative method was to "cost out" for Seattle what is presently *required* by state statutes and rules and regulations of the State Board of Education.[79] The court found that under this approach, the basic education requirements for Seattle for 1975-76 would have cost $58.6 million. However, under the state foundation level guarantee of $480 per weighted pupil, Seattle had available to it only $47.3 million, and would have to rely on locally-voted levies to raise the difference.[80] The third method, somewhat similar to the second, was to "cost out" for Seattle the state's accreditation standards,[81] which included a 25:1 pupil-teacher ratio. Under each of these approaches, it would cost considerably less per pupil to provide the same quantum of education in rural school districts than it would in large urban school districts because of the wage-price differentials. A school finance formula which included adjustments for such staff characteristics as years of experience, advanced degrees and higher salaries for equivalent education and experience levels would provide more money per pupil to urban areas for the same level of educational services than rural and suburban areas.

The Washington state legislature has recently adopted a definition of "basic education" in an attempt to comply with the court decision.[82] The

77. *Id.*, slip op. at 48.

78. *Id.*, slip op. at 53.

79. *Id.*, slip op. at 54-55. Among the kinds of things that are included in the state requirements that are "costed out" are the requirement that students have no less than 180 days of instruction per school year; that grades 1-6 are to provide instruction in the skills of literacy and computation in accordance with a curriculum which includes spelling, reading, composition and literature, penmanship, arithmetic and the like; and that grades 7-12 are to provide instruction in history, geography, civics, economics, foreign language, physical education and so on. The ratio of students to certificated personnel is not to exceed 30:1 and there must be adequate provision for the health, safety and housing of students. *Id.*, slip op. at 55-56. Elements that are *excluded* include pre-school and kindergarten programs, transportation and adult education. *Id.*, slip op. at 56.

80. *Id.*, slip op. at 59.

81. In "costing out" the accreditation standards, the basic educational requirements for 1975-76 amount to $572.8 million, excluding kindergarten. *Id.*, slip op. at 69. Again, the court noted that this is considerably more than the amount that Seattle had for the 1975-76 school year. *Id.*, slip op. at 70.

82. The Basic Education Act, 1977 Wash. Laws ch. 359.

act, after setting out general goals and objectives,[83] prescribes the proportions of "basic skills"[84] and "work skills"[85] of the curriculum that each district must offer, and the minimum number of hours of instruction for each area. The act further specifies that the state must provide "fully sufficient" funding for the programs and services prescribed in the act.[86] Staffing ratios are to be part of the distribution formula,[87] computed on the basis of the district's actual average salary plus fringe benefits.

In the *Cincinnati* case, the Ohio trial court found that "the large urban, inner city districts have unique and special problems and substantial extra costs which the non-urban districts do not have."[88] The court noted the high expenditures incurred by the Cincinnati School District for the repair of damage caused by vandalism, and for plant and student security. The court also documented the staff and curriculum reductions and curtailments and the high pupil-teacher ratios in the Cincinnati and other large city school districts in Ohio, and the deteriorating condition of the physical facilities, in part due to the cutbacks in custodial staff and the termination of preventive maintenance programs.[89] Thus, clearly endorsing the principle of a cost differentials factor, the court held that in order to comply with the state

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83. The goal of the act is

> to provide students with the opportunity to achieve those skills which are generally recognized as requisite to learning. Those skills shall include the ability:
> (1) To distinguish, interpret and make use of words, numbers and other symbols, including sound, colors, shapes and textures;
> (2) To organize words and other symbols into acceptable verbal and nonverbal forms of expression, and numbers into their appropriate functions;
> (3) To perform intellectual functions such as problem solving, decision making, goal setting, selecting, planning, predicting, experimenting, ordering and evaluating; and
> (4) To use various muscles necessary for coordinating physical and mental functions.

Id. § 2.

84. "Basic skills" consist of "reading/language arts, mathematics, social studies, science, music, art, health and physical education." *Id.* § 3(2)(a).

85. "Work skills" consist of "industrial arts, home and family life education, business and office education, distributive education, agricultural education, health occupations education, vocational education, trade and industrial education, technical education and career education." *Id.* § 3(1)(b).

86. "Basic education shall be considered to be fully funded by those amounts of dollars appropriated by the legislature . . . to fund those program requirements identified [above]." *Id.* § 4.

87. The distribution formula must

> provide appropriate recognition of the following costs among the various districts within the state:
> (1) Certificated staff and their related costs;
> (2) Classified staff and their related costs;
> (3) Nonsalary costs; and
> (4) Extraordinary costs of remote and necessary schools and small high schools.

Id. § 5. Additional urban costs may (not "must") be funded by the state legislature through categorical programs. *Id.* § 7.

88. *Cincinnati*, slip op. at 117.

89. *Id.*, slip op. at 95-110.

constitution's "thorough and efficient" clause and equal protection clause, any system for financing education in Ohio must include as one of its criteria adequate compensation for the special costs of urban districts.[90]

2. *Municipal Overburden.* The second contention of the *Levittown* intervenors is that their districts are incapacitated by heavy "municipal overburden."[91] The term "municipal overburden" refers to the noneducational public services which central cities must support out of the property tax, such as police and fire protection or health and welfare services. It is argued that the comparatively high percentage of the property tax allocated for those noneducation services acts as a constraint on the tax rate levied for education. Most suburban and rural school districts are not so heavily burdened by these noneducational expenses, permitting most of the property tax revenues to be allocated to the schools. The concept of municipal overburden has been the object of much discussion, and one significant question is whether this concept should be recognized in the school finance formula or whether it should be dealt with by other legislation and not entangled with the issues of school finance reform.

The *Serrano II* court wrestled with the municipal overburden question and decided that it was irrelevant. There, however, the issue was raised by the *defendants* in opposing the "fiscal neutrality" principle sought by the plaintiffs.[92] The court found that the incidence of "municipal overburden" (as well as "cost differentials" and "pupil needs differentials") is not limited to any particular level of per pupil property wealth. A system which ties

> a district's ability to respond to its educational needs and desires to its taxable wealth per ADA [average daily attendance], clearly discriminates among equally beleaguered urban districts from the point of view of their respective capacities to bring educational benefits to the students resident within their borders.[93]

The court further noted that under a fiscally neutral system, the ability of a school district to meet its peculiar problems would not depend on its taxable wealth.[94]

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90. *Id.*, slip op. at 389.

91. Post-Trial Review of the Evidence for Plaintiffs-Intervenors, Board of Educ., Levittown v. Nyquist, *supra* note 74, at 12-41.

92. *Serrano II*, 18 Cal. 3d at 753-61, 557 P.2d at 943-47, 135 Cal. Rptr. at 359-63.

93. *Id.* at 758-59, 557 P.2d at 946, 135 Cal. Rptr. at 362. The court illustrated this by comparing the problems of the Los Angeles School District, which has relatively low per pupil property values, with those of San Francisco where property values are quite high. *Id.* at 758 n.37, 557 P.2d at 946 n.37, 135 Cal. Rptr. at 362 n.37.

94. *Id.* at 758-59, 557 P.2d at 946, 135 Cal. Rptr. at 362.

By contrast, the Ohio trial court in *Cincinnati* found as a fact that urban school districts have a "disproportionate non-school governmental cost" compared to suburban school districts,[95] and that this "municipal overburden" is so great that the property taxpayers of those districts "are unable to withstand the financial strain of supporting educational costs to the extent that educational interests require."[96]

3. *"Needs" Differentials.* In addition to claiming that they are burdened both by higher costs for equivalent educational services and by higher costs for noneducational public services than other districts, the *Levittown* city intervenors also contended that they have a higher proportion than other types of districts of those students that require greater than average educational resources—such as the handicapped, the educationally disadvantaged, and the student with limited English-language skills.[97]

If this last contention is to be a successful litigation strategy, it must avoid the pitfalls encountered by the early school finance suits. In *McInnis*, for example, it had been argued that expenditures must be on the basis of pupils' *educational needs* without regard to the fiscal capacity of local school districts. Even if this were required by the fourteenth amendment, the court declared, there were no judicially manageable standards for determining when the constitution was satisfied and when it was violated.[98] The *Levittown* intervenors have attempted to avoid this problem by showing that the high concentration of urban poverty in the inner cities results in a high proportion of children suffering from such "education overburdens" as impaired learning readiness, impaired mental, emotional and physical health, mental retardation and other learning disabilities, and English-language difficulties. The intervenors then showed that specific programs or services have been successful in overcoming these problems, but that because of inadequate resources these programs and services have had to be curtailed.[99]

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95. *Cincinnati*, slip op. at 191.

96. *Id.*, slip op. at 356. The court emphasized that this is evidence of the unfairness of the system to school children but that no legal rights of taxpayers have been violated. *Id.*

97. Post-Trial Review of the Evidence for Plaintiffs-Intervenors, Board of Educ., Levittown v. Nyquist, *supra* note 74, at 70-153.

98. 293 F. Supp. at 335-36 (dictum).

99. By way of example, the intervenors point to the impact of Follow Through, an experimental federal program of compensatory education, which provides services to children in kindergarten through the third grade at an annual additional cost of $840 per pupil in New York City. Evidence was introduced that those children in the program improved significantly. Post-Trial Review of the Evidence for Plaintiffs-Intervenors, Board of Educ., Levittown v. Nyquist, *supra* note 74, at 97. The intervenors concluded that this program shows that

> although . . . compensating for impaired learning readiness is quite feasible, the effort to do so for the enormous numbers of readiness-impaired children in the cities faces

An educational "needs" differential has also been sought through other education reform litigation. The underlying question is whether equality of educational opportunity requires school districts to provide "compensatory" education according to the needs of educationally disadvantaged children. Although no court has specifically held that an educationally disadvantaged child is *constitutionally* entitled to compensatory education,[100] this issue is implicit in a number of cases involving both the physically and mentally handicapped and the "linguistically handicapped."

Several of the cases concerning physically and mentally handicapped students have sought education "appropriate to the needs" of such students, but have reached conflicting conclusions. Some have held that there is no constitutional right to a certain level of special education,[101] while others have found that school authorities are required by the United States Constitution to provide education appropriate to the learning capacities of the handicapped students.[102]

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formidable obstacles. The common elements of effective programs are individualization, small classes, intensive support services, in-service training, and encouragement of parental involvement . . . all of which require many additional and trained personnel and [sic] the cities cannot afford.

Id. 98. The intervenors give many similar examples of successful programs for dealing with various "education overburdens" which have been discontinued for lack of funds. *See id.* 108, 110, 133, 134, 142-43. In the *Cincinnati* case, the court held that a constitutional system for financing education must compensate urban districts for their special needs, including the costs of vocational and special education programs which exceed the categorical grants provided by the state. Slip op. at 118-19, 288-90.

100. *But cf.* Hobson v. Hansen, 269 F. Supp. 401 (D.D.C. 1967). In that case, the court held that where black children are denied an integrated education, whether because of the density of residential segregation or for other reasons, the school system is constitutionally required to provide compensatory education "sufficient at least to overcome the detriment of segregation and thus provide, as nearly as possible, equal educational opportunity to all schoolchildren." *Id.* at 515.

101. *See, e.g.*, New York State Ass'n for Retarded Children v. Rockefeller, 357 F. Supp. 752 (E.D.N.Y. 1973).

102. *See, e.g.*, Fialkowski v. Shapp, 405 F. Supp. 946 (E.D. Pa. 1975). *Cf.* Frederick L. v. Thomas, 408 F. Supp. 832 (E.D. Pa. 1976) (failure to provide special instruction aimed at the learning handicaps of learning disabled children might violate the equal protection clause under a "strict rationality" construction).

The law is clearer regarding those handicapped children who are totally excluded from public education, although no such case has yet been before the Supreme Court. *See, e.g.*, Lebanks v. Spears, 60 F.R.D. 135 (E.D. La. 1973) (consent decree); Mills v. Board of Educ., 348 F. Supp. 866 (D.D.C. 1972) (decided on statutory as well as constitutional grounds); Pennsylvania Ass'n for Retarded Children (PARC) v. Pennsylvania, 343 F. Supp. 279 (E.D. Pa. 1972) (consent decree). All three of these cases were decided on federal equal protection grounds before the *Rodriguez* decision was handed down by the United States Supreme Court. Since that case was decided, a federal district court in Ohio has upheld a state statute excluding children from the public schools who are "incapable of profiting substantially by further instruction," relying on the reasoning of *Rodriguez*. Cuyahoga County Ass'n for Retarded Children & Adults v. Essex, 411 F. Supp. 46 (N.D. Ohio 1976).

Some education reformers have argued that the "linguistically handicapped" (students of limited English-speaking ability), receiving an education intended for the typical English-speaking pupil, are also functionally excluded from an education when they are compelled to sit in a classroom in which they cannot communicate. This, they have argued, is a violation of the equal protection clause.[103] When this question reached the Supreme Court in *Lau v. Nichols*,[104] however, the Court avoided the constitutional issue. Although the majority stated that teaching non-English-speaking students exclusively in English deprives them of "any meaningful education," the decision relied solely on section 601 of the Civil Rights Act of 1964 and the implementing regulations,[105] which the Court interpreted as requiring those school districts which received federal funds to provide assistance to students with English-language deficiencies. Thus the question of whether there is a *constitutional* right to have the school system affirmatively rectify the language deficiencies of non-English-speaking children has not been resolved by the Supreme Court or even by the lower courts. In the remedial phase of the Denver school desegregation case of *Keyes v. School District No. 1*,[106] for example, the Tenth Circuit, although acknowledging that some minimal quantity of education may be a fundamental right, held that Hispanic students were not "entitled under the fourteenth amendment to an educational experience tailored to their unique cultural and developmental needs."[107]

In general, courts seem reluctant to find a constitutional violation where a school system has failed to meet the *relative* educational needs of different kinds of students. The principle of educational "need" differentials has been easier to grasp in the context of devising a remedy to an established constitutional violation such as segregated schools or where it can be shown that children have been totally excluded from a public

103. Roos, *The Potential Impact of* Rodriguez *on Other School Reform Litigation*, 38 LAW & CONTEMP. PROB. 566, 573 (1974), *reprinted in* FUTURE DIRECTIONS FOR SCHOOL FINANCE REFORM 268, 275 (B. Levin ed. 1974).

104. 414 U.S. 563 (1974).

105. 42 U.S.C. § 2000d (1970); 35 Fed. Reg. 11,595 (1970).

106. 521 F.2d 465 (10th Cir. 1975), *cert. denied*, 423 U.S. 1066 (1976). The district court had ordered school authorities to implement, on a pilot basis, a plan based on the theory that the poor school performance of minority children results from the fact that most school systems, since they are geared to meeting the needs of middle-class Anglo children, fail to meet the different needs of poor minority children. 521 F.2d at 480. The circuit court found that this comprehensive bilingual-bicultural program could be justified neither on the ground that it is essential to effectuate meaningful segregation in the schools nor on the ground that it is an appropriate remedy for the inferior education which minority children in Denver received. *Id.* at 481-82. Hence, although the Hispanic children were entitled to an opportunity to acquire proficiency in the English language, they were not entitled to a remedy requiring the school district to adapt to their cultural and economic needs. *Id.* at 483.

107. 521 F.2d at 482.

education. It is harder for courts to deal with the principle as a constitutional right in and of itself—that a certain amount of education, which amount will vary depending upon the category of pupil under consideration, is in itself a constitutional right to be provided by school authorities regardless of cost.[108]

There is as yet no clear statement from the Supreme Court of the United States that school authorities are *constitutionally* compelled to affirmatively overcome deficiencies not of their own making—whether these "deficieneies" are of language, poverty, birth and disease or, in the case of the school finance suits, geographic location. It is likely, however, that following the example of the school finance reform litigation, suits seeking to compel "appropriate education" according to the needs of different categories of students will be brought on state rather than federal constitutional grounds. Even when such cases are brought on state constitutional grounds, however, the primary concern will be the difficulty plaintiffs would have convincing courts that there are "judicially manageable standards." Nevertheless, these "education need" suits illustrate the pressures that are likely to be brought to bear on any school finance reform effort—that it recognize the needs of certain high cost students as part of the litigative strategy or the remedy.

4. *Income Differentials.* One court has raised the question of income differentials in the context of a school financing scheme which relies on local tax *effort* even where property wealth is equalized. In the *Cincinnati* case, local tax effort was found to be closely related to the ability of a district's residents to pay property taxes to support education, which, of course, is strongly related to family income.[109] In other words, the disparities in educational offerings are due to disparities in income wealth as well as property wealth. Thus a district power equalizing provision which did not equalize income disparities would very likely be held unconstitutional by that court.[110]

E. *Fiscal Neutrality: A Flexible Approach.*

It appears that school finance reform litigation based on the education and equal protection clauses of state constitutions will continue. However,

108. Several actions have recently been filed which will test this theory in the area of bilingual education. These cases do not allege that Hispanic students are effectively foreclosed from any meaningful education; rather they argue that the programs provided are inadequate to enable them to participate equally in the learning process with other children in the school system. *See* Ramos v. Gaines, C.A. No. H-76-38 (D. Conn., filed Jan. 26, 1976) (summarized in 9 CLEARINGHOUSE REV. 778 (1976)); Rios v. Read, No. 75 C 296 (E.D.N.Y., filed Feb. 25, 1975) (9 CLEARINGHOUSE REV. 114 (1975)); Lopez v. Thomas, C.A. No. 75-14 (E.D. Pa., Jan. 6, 1975) (8 CLEARINGHOUSE REV. 735 (1976)). These cases are concerned with the adequacy of the response of school authorities to the Supreme Court's decision in Lau v. Nichols, 414 U.S. 563 (1974), so they are grounded in Title VI of the Civil Rights Act rather than the constitution.

109. *Cincinnati*, slip op. at 287.

110. *Id.*, slip op. at 386, 389.

as efforts increase to introduce into the litigation the special needs of cities or of certain target pupil populations—such as the physically and mentally handicapped and the students of limited English-speaking ability—a variety of constitutional standards or theories will be required. The "fiscal neutrality" theory in *Serrano* was a negative standard which merely said that educational opportunities could not be a function of local school district *property* wealth. This standard has subsequently been broadened: educational opportunities may not be a function of local school district fiscal capacity, which in the case of cities, means that fiscal capacity must reflect municipal and education overburden as well as property wealth.[111] Still another negative standard that is being put forward states that educational opportunities may not be a function of the whims and preferences of school district voters, meaning that the level of expenditures in any district cannot depend on the willingness of local school district voters to approve tax levies.[112] Finally, there are those cases which have argued for the application of an "affirmative duty" or "education need" standard. This standard differs from the fiscal neutrality principle in that it requires the state to provide a certain educational "floor" to be guaranteed by the state, whereas the fiscal neutrality standard would permit a system which maintained expenditure disparities as long as those disparities were based on local voter choice.[113] The "needs" standard, in its ultimate form, requires additional resources for pupils with special needs, the level of expenditures being appropriate for the needs of each category of pupil.

Not only is a single legal theory—fiscal neutrality—no longer appropriate for challenging the constitutionality of school finance systems of every state, but also no one approach is appropriate to remedy the inequities uncovered in the various court cases. For example, equalizing school district fiscal capacity by using fiscal measures which take into account the higher cost of education in cities would also help suburban districts but not rural districts.[114] On the other hand, the use of a per pupil or per capita income

111. *See, e.g., Cincinnati*; Post-Trial Review of the Evidence for Plaintiffs-Intervenors, Board of Educ., Levittown v. Nyquist, *supra* note 74. The *Cincinnati* case further suggests that educational opportunities may not be a function of local school district *family income* as well as property wealth. Slip op. at 386.

112. *See, e.g., Cincinnati; Seattle School District*. The *Cincinnati* case articulated the standard as follows:

> The quality of a child's education must not be a function of *any* factor irrelevant to that child's *educational needs*, such as the property wealth or income wealth of his school district or of the willingness of the voters of his district to pass tax levies or bond issues.

Slip op. at 389 (emphasis added).

113. *See, e.g. Serrano II*, 18 Cal. 3d at 747, 557 P.2d at 939, 135 Cal. Rptr. at 355 (endorsing district power equalizing as one possible constitutional alternative).

114. The Florida legislature has attempted to deal with the problem of cost differentials by including an adjustment based on cost-of-living differences among districts as part of its

measure to determine fiscal capacity rather than per pupil property values would help rural areas but not cities. Use of such an income measure, however, prevents districts with high income but low property values from obtaining an undue advantage from a district power equalizing provision.[115] An alternative approach is to use a "circuit-breaker" provision[116] to provide tax relief to low income homeowners or renters residing in any type of district. This will help both rural and urban districts.

The "costing out" of state requirements for each type of district as a measure of that "basic education" which a state must provide[117] will take into account the "cost differentials" problem of cities, the problem of "diseconomies of scale" which small rural districts often face, and the problem of those districts which have insufficient revenues because of low property wealth or the unwillingness of local voters to approve property tax levies. On the other hand, a cost differentials standard also has its difficulties. Adjustments which reflect the actual teacher education-experience characteristics of a school district rest upon the assumption that teachers with advanced degrees and/or experience are not an educational benefit but a fixed cost because of the tenure system. If the contrary assumption is made—that is, that higher education and experience levels reflect quantitative differences in educational resources—then rural, rather than urban, areas should be given additional funds to enable those districts to attract teachers with more education and experience. Similarly, accounting for the higher salaries of urban area teachers with equivalent education and experience levels may reflect cost-of-living differences which are beyond the control of school officials or may reflect the weak collective bargaining stance of the urban school board. There are also political problems, since the application of such a standard would allocate more funds to suburbs as well as central cities, and away from rural areas.

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recently enacted school aid formula. FLA. STAT. ANN. § 236.081(3) (West Supp. 1977). The use of this cost-of-living index has benefitted urban areas—with increases in aid from 7 to 10 percent, although the cost of living is not identical to the cost of education. Callahan & Wilken, *State School Finance Reform in the 1970's*, in SCHOOL FINANCE REFORM: A LEGISLATOR'S HANDBOOK 7 (J. Callahan & W. Wilken eds. 1976).

115. *See Cincinnati*, discussed at text accompanying notes 109-10 *supra*.

116. A "circuit-breaker" tax relief provision cuts in when the property tax burden reaches a percentage of family income that the state considers excessive. The excess is recovered by the taxpayer either through credit against his state income tax liability or as a direct cash refund if he has no state income tax liability. ADVISORY COMMISSION ON INTERGOVERNMENTAL RELATIONS, BIG BREAKTHROUGH FOR CIRCUIT-BREAKER 3 (ACIR Information Bull. No. 73-2, 1973). For examples of such legislation, see MICH. COMP. LAWS ANN. § 206.520 (Cum. Supp. 1977); MINN. STAT. ANN. § 273.012 (West Cum. Supp. 1977); OR. REV. STAT. § 310.640 (1975); WIS. STAT. ANN. §§ 79.10(3), 79.17 (West Cum. Supp. 1977).

117. *See Seattle School District*, slip op. at 54-56, discussed at notes 79, 81, 83-87 *supra* and text accompanying notes 76-87.

Taking into account the higher cost of students with special needs—either by weighting the basic aid per pupil formula by a factor representing the additional resources needed for each type of pupil[118] or by providing categorical aid programs[119]—can help both cities and rural areas which have higher proportions of disadvantaged youth than suburban districts. Pupil-weighting systems insure that funds that are allocated for special needs and programs are equalized. Such systems have another advantage over categorical programs in that districts heavily burdened by students requiring higher cost programs are not subject to the annual appropriations compromises in state legislatures. But a weighted pupil formula raises a number of problems as well. There is as yet no adequate way to derive the various cost factors to be applied since the evidence regarding the nature and amount of resources necessary to have a measurable impact on pupil performance is limited and mixed. On the other hand, the advantage of categorical programs is that legislators can more readily insure that the additional funds are actually spent on the target pupil populations rather than dispersed throughout the district as general funds.[120] The categorical allocation process, however—except where the state fully funds the excess costs of the categorical program—often results in levels of expenditure that are directly related to the property wealth of a district.[121]

118. Florida has 26 programs, and a cost factor is assigned according to the relative cost of educating a student in each of the programs. FLA. STAT. ANN. § 236.081(1) (West 1977). The range is from a cost factor of 1.0 for grades 4 through 9 to a cost factor of 15.0 for hospital and home bound instruction. For example, Florida uses a cost factor of 4.0 for deaf students, meaning that the base student cost ($755 for 1975-76) is multiplied by 4.0 for each deaf student in a school district for a total of $3020 for each such student. In its initial reform legislation, Florida weighted the base student cost by 0.05 for each disadvantaged student. This was subsequently repealed, 1974 Fla. Laws ch. 74-227, § 3, and aid for compensatory programs is now provided via a supplement added to the base student cost for each disadvantaged student. FLA. STAT. ANN. § 236.081(2) (West 1977).

Minnesota employs two factors to provide additional resources for disadvantaged children. First, a child from a family receiving Aid to Dependent Children is counted as 1.5 pupil units. MINN. STAT. ANN. § 124.17(4) (West Cum. Supp. 1977). Second, in school districts in which such children exceed five percent of the total actual pupil units, each such pupil is counted as an additional one-tenth of a pupil unit for each percent of concentration over five percent. *Id.* § 124.17(5). *See generally* Leppert, Huxel, Garms & Fuller, *Pupil Weighting Formulas in School Finance Reforms*, in SCHOOL FINANCE REFORM: A LEGISLATOR'S HANDBOOK 12 (J. Callahan & W. Wilken eds. 1976).

119. Many more states have adopted this route than have adopted the "weighted pupil" formula strategy. California has taken this approach, apportioning funds for compensatory programs based on district need, as determined by an index of three factors: the proportion of limited English-speaking students, of family poverty and of pupil transiency. CAL. EDUC. CODE § 54000 (West Supp. 1976).

120. But see FLA. STAT. ANN. § 237.34 (West Supp. 1977), which attempts to insure that 80 percent of funds generated by the weightings are spent in the school with the appropriate pupils by requiring that expenditures for each program be reported on a school-by-school basis.

121. See Unified School Dist. No. 229 v. Kansas (Shawnee County Dist. Ct., Kan., filed Dec. 21, 1976), in which plaintiffs alleged that state aid for categorical programs (transporta-

In summary, the development of varying legal standards, based on different definitions of equal educational opportunity, means that the legal remedies that are developed will be tailored to the specific characteristics of individual states. Moreover, no single remedy is likely to be adequate; rather, some combination of remedies will be necessary, the particular combination addressing the types of fiscal inequities that are most prevalent in a state's school finance system.

IV. SCHOOL FINANCE REFORM AND COUNTERVAILING PRESSURES

Between 1971 and 1975 there was a significant amount of school finance reform activity in the state legislatures. During this period, major reform legislation, bringing about substantial equality in the raising and distribution of education revenues, was passed in a number of states—some under pressure of litigation and some to head off litigation.[122] While a significant number of states continue to consider and enact reform measures, the pace of reform and the extent to which such legislation lessens the disparities in per pupil expenditures may have diminished.

A. *The* Rodriguez *Spillover Effect.*

Although some legal challenges to school finance systems continued to percolate through the state courts, the *Rodriguez* decision slowed the momentum and took much of the pressure off state legislatures. Moreover, the receptivity of state courts to a school finance reform suit was considerably less uniform than it had been in the wake of *Serrano*. Many state courts are reluctant to outpace the United States Supreme Court, which had refused to find that relative differences among districts in per pupil spending was a denial of equal protection to those students in low-spending districts. The desire to preserve "local control"[123] and the pervasive view that there is little demonstrable correlation between per pupil expenditures and the quality of education[124] combine to deter many state court judges from striking out into the uncharted area of fiscal and educational policy.

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tion, special education and vocational education) is not "power equalized" and hence fails to take into consideration the ability of individual districts to finance such services, in violation of the Kansas Constitution. *See also Cincinnati.*

122. The reform legislation enacted in the years immediately following *Serrano* is discussed in Grubb, *The First Round of Legislative Reforms in the Post-*Serrano *World*, 38 LAW & CONTEMP. PROB. 459 (1974), *reprinted in* FUTURE DIRECTIONS FOR SCHOOL FINANCE REFORM 161 (B. Levin ed. 1974).

123. In several recent cases, the Supreme Court has suggested that local control or local autonomy in public education is a very substantial interest. *See, e.g.*, Milliken v. Bradley, 418 U.S. 717, 741-42 (1974); Keyes v. School Dist. No. 1, 413 U.S. 189, 246 (1973) (Powell, J., concurring in part, dissenting in part); *Rodriguez*, 411 U.S. at 49-50; Wright v. Council of the City of Emporia, 407 U.S. 451, 478 (1972) (Burger, C.J., dissenting—local control is of "overriding importance").

124. *See Rodriguez*, 411 U.S. at 42-43.

There are only five states[125] which are under a court mandate to reform their school finance systems. These victories for reform occurred over a period of four years. This is in sharp contrast with the pre-*Rodriguez* progress when seven states fell under court order to revise their school financing systems within an eighteen month period.[126]

B. *Fiscal Pressures.*

The costs of implementing court orders extending education to those previously excluded from a public education, either actually or functionally—such as the mentally and physically handicapped or those of limited English-speaking ability—have clearly had an impact on the availability of resources for general fiscal equalization. These suits, in establishing the right—constitutional or statutory—to an "appropriate" education for children with special needs, may even rob resources from the regular program under the present funding scheme. As one court said, in ordering suitable education to be provided previously unserved or inadequately served handicapped students:

> [T]he District of Columbia's interest in educating the excluded children clearly must outweigh its interest in preserving its financial resources. If sufficient funds are not available to finance all of the services and programs that are needed and desirable in the system then the available funds must be expended equitably in such a manner that no child is entirely excluded from a publicly supported education consistent with his needs and ability to benefit therefrom. The inadequacies of the . . . [District of Columbia school system] whether occasioned by insufficient funding or administrative inefficiency, certainly cannot be permitted to bear more heavily on the "exceptional" or handicapped child than on the normal child.[127]

In addition to the court suits on behalf of those with special education needs, the increasing pressure on state legislatures by handicapped and bilingual student interest groups for substantial categorical aid programs[128]

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125. These states are California, Connecticut, New Jersey, Ohio and Washington. In the latter two states, the lower court decisions are being appealed.

126. See note 11 *supra* and accompanying text.

127. Mills v. Board of Educ., 348 F. Supp. 866, 876 (D.D.C. 1972). In *Mills*, defendant school district conceded that it was under an affirmative duty to provide handicapped plaintiffs and persons in their class with a publicly supported education tailored to their needs and had failed to do so. The defendant argued, however, that diverting funds specifically appropriated for other educational services to improve special educational services would violate an act of Congress and would be inequitable to children outside plaintiffs' class. *Id.* at 871-75. The court rejected this defense.

128. *See, e.g.*, CAL. EDUC. CODE §§ 5767-5767.18 (West 1977) (bilingual program); CAL. EDUC. CODE §§ 6801-6896 (West 1977) (handicapped program); MICH. STAT. ANN. § 388.1141a (1972) (bilingual program); N.M. STAT. ANN. § 77-23-2 (1973) (bilingual program). *See also* Education for All Handicapped Children Act of 1975, § 2, 20 U.S.C. §§ 1401-1426 (Supp. V 1975).

has also reduced the available monies for general fiscal equalization. Moreover, these categorical programs are in themselves often anti-equalizing—with wealthier districts able to qualify for more such aid than poorer districts—and thus efforts to reform school finance can be undercut. As a result, those seeking state categorical aid programs and state compliance with the extensive requirements of such federal laws as the Education for All Handicapped Children Act[129] may be on a collision course with those seeking general school finance reform.

Another reason for the limited nature of current school finance reform efforts is the disappearance of the state fiscal surpluses which had existed in 1972-73,[130] in combination with the expanding cost of education and the demands of other public services on state revenues. Declining enrollment is still another factor having an impact on school finance reform. The bonuses provided districts experiencing substantial losses in enrollment may offset equalization efforts, since many of the districts affected are small, high-wealth districts.[131]

C. *"Backlash" Litigation.*

Finally, the spate of "backlash" litigation—legal challenges to the new school finance reforms enacted by some states—has affected the reform movement in those and perhaps in other states. Many of these reforms are quite controversial, in particular, maximum tax rates[132] or revenue levels,[133] ceilings on the annual rate of increase in per pupil expenditure levels,[134] changes in the measures of district wealth,[135] and district power equalizing formulas.[136] Some of these are now under fire in the courts.

1. *District Power Equalizing Provisions.* Under a "pure" district power equalizing formula,[137] the state "recaptures" revenues raised in excess of the predetermined spending level and distributes the excess (together with additional state funds, if necessary) to poorer school districts

129. 20 U.S.C. §§ 1401-1426 (Supp. V 1975).

130. *See* Levin, *School Finance Reform in a Post-*Rodriguez *World*, in NATIONAL ORGANIZATION ON LEGAL PROBLEMS OF EDUC., CONTEMPORARY LEGAL PROBLEMS IN EDUC. 156, 172 (1975).

131. Education Commission of the States, The Fiscal Impacts of Declining Enrollments 9, 15 (1976).

132. *See, e.g.*, ILL. ANN. STAT. ch. 122, § 18-8 (Smith-Hurd Supp. 1977); UTAH CODE ANN. § 53-7-24 (Supp. 1977).

133. *See, e.g.*, COLO. REV. STAT. §§ 22-50-106 to -108 (Cum. Supp. 1976); KAN. STAT. ANN. §§ 72-7055 & -7065 (Cum. Supp. 1976).

134. *See, e.g.*, CAL. EDUC. CODE §§ 42232, 42238 & 42244 (West 1977); KAN. STAT. ANN. § 72-7055 (Cum. Supp. 1976).

135. *See, e.g.*, KAN. STAT. ANN. §§ 72-7040 to -7042 (Cum. Supp. 1976).

136. *See, e.g.*, ME. REV. STAT. tit. 20, §§ 3742-3748 (Supp. 1976); WIS. STAT. ANN. §§ 121.02-.08 (West Supp. 1977).

137. See text accompanying note 46 *supra*.

where, because of low property values, the selected tax rates cannot generate sufficient revenues to meet the predetermined per pupil expenditure levels.[138] Under Montana's new school finance legislation, enacted in 1972, each school district is guaranteed eighty percent of the "maximum general fund budget" (the foundation program), financed through a required forty mill property tax.[139] Montana's legislation does have a "recapture" provision, since a district having sufficiently high property values that the forty mill tax raises more per pupil than the state guarantee must remit the excess revenues to the state, which are then redistributed to those areas where a forty mill tax rate does not generate the state-guaranteed amount.[140]

In *Woodahl v. Straub*,[141] wealthy school districts challenged Montana's new school finance reform law on the ground that they were being taxed "for the exclusive use and benefit of others," inasmuch as they would have to remit substantial sums to the state for the support of other school districts.[142] The plaintiffs alleged that this violated the Montana Constitution which requires the legislature to "fully fund" the school system.[143] They further alleged that the new law, by discriminating against the taxpayers of wealthy areas, violated the equal protection clause of the fourteenth amendment of the Federal Constitution.[144]

The Montana Supreme Court held, however, that the forty mill tax was, in effect, a statewide uniform property tax levied for a public purpose in accord with the Montana Constitution,[145] rather than a tax levied on one district for the benefit of another, and therefore did not violate the Montana Constitution. The legislature could carry out its mandate to "fully fund" the state's share of the cost of basic education by using a statewide property tax rather than income and sales taxes.[146] The fact that some areas did not receive benefits directly proportional to the amount contributed was not, according to the court, a valid objection to a tax which benefits the state as a whole.[147]

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138. Under some of the newly enacted school finance reform laws, the bulk of school revenues is distributed through foundation or flat grant formulas, the power equalized portion constituting only an optional "add-on." Moreover, the power equalized portion of the school finance formula often is not in its "pure" form—that is, the revenues that wealthier districts raise in excess of that guaranteed by the state at the chosen tax rates are not subject to "recapture" by the state. *See, e.g.*, CAL. EDUC. CODE §§ 20906.1-.4 (West Supp. 1977).

139. MONT. REV. CODES ANN. §§ 75-6906,-6912 & -6913 (Supp. 1977).

140. *Id.*

141. 164 Mont. 141, 520 P.2d 776 (1974).

142. *Id.* at 147, 520 P.2d at 779.

143. *Id.* at 147, 520 P.2d at 778. *See* MONT. CONST. art. X, § 1.

144. 164 Mont. at 147, 520 P.2d at 778.

145. "Taxes shall be levied by general laws for public purposes." MONT. CONST. art. VIII, § 1.

146. 164 Mont. at 148-49, 520 P.2d at 780.

147. *Id.* at 151, 520 P.2d at 781.

By contrast, the Wisconsin Supreme Court in *Buse v. Smith*[148] found the "negative-aid" provisions of that state's newly enacted school finance law to be in violation of the uniform taxation provision of the Wisconsin Constitution.[149] Wisconsin had adopted a district power equalization factor based on the taxable property wealth located within each school district. Those districts in which the per pupil property values exceeded the state guaranteed valuation were required to pay a portion of their property tax revenues into the state general fund for redistribution to other school districts. Thus the formula is designed to insure equal tax dollars for education from equal tax effort, regardless of the disparity in tax base.

Taxpayers and parents residing in negative-aid districts (the "recapture" districts) brought suit challenging the negative-aid provisions of the newly enacted school finance formula. The plurality opinion held that even assuming that equal educational opportunity—a fundamental right under the Wisconsin Constitution—requires equal dollars per pupil or equalization of the power to raise revenues, "if the means chosen to accomplish that end violates other provisions of the constitution, it must be held invalid."[150] "Local control" was elevated to the level of a constitutional right, the court declaring that the constitution preserves the right of local districts "to provide educational opportunities over and above those required by the state and they retain the power to raise and spend revenue . . . ."[151]

The court, not very convincingly, reasoned that even if the funds raised through the negative-aid provision were for a state-wide purpose, such as education, the tax was a local tax if levied directly by a political subdivision of the state.[152] Although the state could levy a statewide property tax to support education, the taxes involved in the new legislation were local taxes since whether the tax is a state or a local tax depends on the entity that levies the tax and not the purpose for which the tax was levied. The court found that the uniformity rule requires that "local" taxes be spent in the taxing jurisdiction—that is, the school district, and that the "state cannot compel one school district to levy and collect a tax for the direct benefit of other school districts, or for the sole benefit of the state . . .,"[153] without violating the uniformity rule of taxation in Wisconsin's constitution.[154] The

148. 74 Wis. 2d 550, 247 N.W.2d 141 (1976).

149. WIS. CONST. art. VIII, § 1.

150. 74 Wis. 2d at 567-68, 247 N.W.2d at 149.

151. *Id.* at 572, 247 N.W.2d at 151.

152. *Id.* at 573, 247 N.W.2d at 152. The concurring opinion argued that the negative-aid provision was a state tax, but the result was the same as if it were a local tax.

153. *Id.* at 579, 247 N.W.2d at 155.

154. WIS. CONST. art. VIII, § 1. The dissent had by far the more convincing argument. As long as the state does not impose a tax on one local government—rather than all local governments—for state purposes, the statutory provisions in question should be upheld. 74

same result could have been reached under a statewide property tax, according to the court, *without* running afoul of the constitution. Yet such a scheme would have been more restrictive of "local control," which the court found to be a constitutional right. As one commentator has pointed out, the Wisconsin court has put the state "into a circle of contradictory constitutional limitations on legislative options to equalize education opportunity."[155] The court indicated that education is a fundamental right and thus a wealth-related school financing scheme challenged under the state equal protection clause would be subject to strict scrutiny. On the other hand, a district power equalizing statute which sought to free the tie between expenditures and wealth would also violate the state constitution, even though it would provide a measure of local control in that districts could choose their desired level of expenditure. In addition, full state funding, without local leeway, would violate the constitutional right of local districts "to provide educational opportunities over and above those required by the state."[156]

What is the likelihood that other district power equalizing statutes—particularly those with "recapture" provisions—will be successfully challenged as violating a state's "uniformity of taxation" clause in its constitution? First, there are several types of "uniformity clauses," subject to varying interpretations. One commentator has found that there are nine

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Wis. 2d at 594-95, 247 N.W.2d at 162. Moreover, "[a] local government raising funds for a state purpose does not violate the uniformity clause or public purpose doctrine—if it can be shown that the unit also has an interest in the state purpose." *Id.*

The dissent thus concludes that "school districts, as a matter of constitutional law, [do not] have an absolute, unqualified right to the full revenues raised by the property tax within their districts." *Id.* at 599, 247 N.W.2d at 164.

155. Note, *State Constitutional Restrictions on School Finance Reform*: Buse v. Smith, 90 HARV. L. REV. 1528, 1538 (1977).

156. Buse v. Smith, 74 Wis. 2d at 572, 247 N.W. 2d at 151.

Maine's power equalizing provision, which provided for full "recapture" of excess revenues, *see* ME. REV. STAT. ANN. tit. 20, §§ 3711-3713 (Supp. 1973), repealed by 1975 Me. Acts, ch. 660, was also challenged. Boothbay v. Longley, No. 75-918 (Kennebec Super. Ct., Me., filed July 18, 1975). Under the school financing statute, a uniform school property tax rate was applied statewide. The revenues raised were then distributed by the state to school districts in such a way that high property wealth districts actually received less revenue than they generated. The statute limits the amount these districts can spend to the amount spent in the preceding year. High property wealth districts attacked this scheme, alleging that it was an unconstitutional delegation of legislative power in violation of the state constitution, as well as in violation of the equal protection and due process clauses of the fourteenth amendment to the United States Constitution and equivalent provisions in Maine's constitution. However, after the suit was filed, the legislature amended the school finance law, revising its "recapture" provision. ME. REV. STAT. ANN. tit. 20, §§ 3742-3753 (Supp. 1976). In November, 1977, the statewide property tax was repealed by referendum so that it is possible that the suit may never be prosecuted. Lawyers' Comm. for Civil Rights Under Law, *supra* note 70, at 10-11.

different types of uniformity clauses,[157] while at least three states have no uniformity clause at all.[158] In addition to variations in constitutional phraseology, there are differences among the courts of the various states as to how restrictively the uniformity clause is to be interpreted. Some courts regard the uniformity requirement as more restrictive than the equal protection provisions of the federal and state constitutions while others regard them as virtually synonymous.[159] Unlike Wisconsin, most courts, however, consider that the uniformity rule applies only to the raising of taxes and not to the distribution of the proceeds.[160]

2. *District Income as a Measure of District Wealth.* In Kansas, following *Caldwell v. State*,[161] a *Serrano*-type decision in 1972 which ruled that the existing method of financing schools in the state was unconstitutional, the state legislature enacted a new school financing scheme.[162] This

157. W. NEWHOUSE, CONSTITUTIONAL UNIFORMITY AND EQUALITY IN STATE TAXATION 9-11 (1959).

158. The three states are Connecticut, Iowa and New York.

159. Note, *Taxation-Uniformity Requirements*, 38 KY. L.J. 503, 521 (1950). *See, e.g.*, Buse v. Smith, 74 Wis. 2d 550, 575, 247 N.W.2d 141, 153 (1976) (citing Knowlton v. Supervisors of Rock County, 9 Wis. 378, 420-21 (1895)); Sweetwater County Planning Comm. for Org. of School Dist. v. Hinkle, 491 P.2d 1234, 1236-37 (Wyo. 1971).

160. *See, e.g.*, Sawyer v. Gilmore, 109 Me. 169, 83 A. 673 (1912). That case involved a uniform tax with a differential distribution of the proceeds of the tax. The statute under challenge imposed a uniform statewide property tax on all property in the state, but distributed the proceeds differentially. Unorganized townships received none of the proceeds, while cities, towns and plantations received aid under a formula which provided that one-third of the funds were to be distributed in accordance with the number of pupils and two-thirds in accordance with property values—thus benefiting those cities and towns with high property values more than those with low property values. *Id.* at 178, 83 A. at 677. With regard to the question of whether unorganized townships could be excluded from the distribution scheme although their properties were taxed along with all other property in the state, the court declared:

> The fundamental question is this: Is the purpose for which the tax is assessed a public purpose. . . . In order that taxation may be equal and uniform in the constitutional sense, it is not necessary that the benefits arising therefrom should be enjoyed by all the people in equal degree, nor that each one of the people should participate in each particular benefit.

Id. at 176, 83 A. at 676. In sum, "inequality of assessment is necessarily fatal, inequality of distribution is not, provided the purpose be the public welfare." *Id.* at 178, 83 A. at 677.

161. No. 50616 (Johnson County Dist. Ct., Kan., Aug. 30, 1972).

162. KAN. STAT. ANN. § 72-7030 to -7080 (Supp. 1976). The *Caldwell* plaintiffs and cross-claimants thereupon filed a joint motion requesting a ruling that the newly enacted School District Equalization Act did *not* violate constitutional guarantees. In a memorandum decision, the trial court judge held that the new financing system "place[s] the state in a fiscally neutral stance with regard to local school districts and [does] not arbitrarily cause the quality of a child's education to be a function of the wealth of his parents and neighbors." *Caldwell*, slip op. at 2.

In March of 1973, the Supreme Court decided *Rodriguez*. In July, when the *Caldwell* plaintiffs again came before the Kansas district court, the judge distinguished *Caldwell* from *Rodriguez* on the basis of the difference in factual and legal circumstances present in the two cases. Although Texas had a similar "tax lid" provision, that tax lid did "not restrict increases in expenditures nearly to the extent the Kansas tax lid did." *Id.*, slip op. at 3. In Texas, state

legislation was then challenged in *Knowles v. State*[163] by plaintiffs from districts which, under the measure of "district wealth" established by the statute, received zero state equalization aid. The plaintiffs objected to the fact that the district power equalization formula defined "district wealth" to include taxable *income* although it is not subject to tax by school districts,[164] and the fact that the real property values are adjusted by the application of *county* urban and rural sales ratios—which generally discriminates against districts in predominantly rural areas. These features, together with the imposition of a budget limitation freezing the relative inequalities existing at the time the law was enacted, were held, as to the individual plaintiff taxpayers, to violate both the equal protection clause of the fourteenth amendment to the United States Constitution and section 1 of the Kansas Bill of Rights inasmuch as there was no rational basis for the classification "in the receipt of such benefits from, and imposition of burdens to support, the educational interests of the State."[165] The act was further held to violate the provisions of the Kansas Constitution relating to uniform taxation and the uniform operation of state laws, in its distribution of state funds.[166] The legislation was amended and the case has since been remanded to the trial court by the state supreme court for consideration of the amended law's actual effect on plaintiff districts.[167]

law placed a ceiling of $1.50 per $100 assessed valuation on the tax rate, but the Edgewood School District, in which the plaintiffs resided, did not tax at a rate that approached that ceiling. San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1, 12 (1973). By contrast, the repealed Kansas law had provided that no district could budget more than 105 percent of the amount budgeted for the previous school year or in the 1969-70 school year, whichever was greater. 1970 Kan. Sess. Laws ch. 402, § 12 (repealed 1973). In addition, tax levies could not exceed those levied for the base year of 1969-70. 1970 Kan. Sess. Laws ch. 401, § 2 (repealed 1973). Secondly, Texas' system for determining the amount of state aid to which districts were entitled was a function of the wealth of each district whereas the Kansas system for determining the level of state aid which a school district was to receive was based on an economic index computed on a countywide basis. "State aid to counties bore no rational relationship to the actual needs of individual districts . . . ." *Caldwell*, slip op. at 3. Lastly, the *Caldwell* court compared the variation in per pupil expenditures for each state and noted that the variations were much more extreme in Kansas than in Texas. The judge thus held to his decision that there was an identifiable suspect class under the Kansas system. *Id.*, slip op. at 4. Furthermore, since the *Caldwell* challenge was based on the equal protection clauses of the Kansas constitution as well as the federal constitution, the state constitution with its more explicit language regarding education allowed the court to maintain its position that education is a fundamental right in Kansas. *Id.* Thus, the *Caldwell* decision was unaffected by the United States Supreme Court's decision in *Rodriguez*.

163. No. 8319 (Chautauqua County Dist. Ct., Kan., Feb. 25, 1975). Another complaint recently filed also challenges the use of taxable income as a measure of district wealth. *See* Complaint at 3, Unified School Dist. No. 229 v. Kansas (Shawnee County Dist. Ct., Kan., filed Dec. 1977).

164. *Knowles*, slip op. at 31.

165. *Id.*, Conclusions of Law at 2.

166. *Id.*, Conclusions of Law at 5.

167. Judgment was entered in February of 1975 but was not to be effective until July 1975 so as to allow the Kansas legislature an opportunity to amend the act. *Id.*, slip op. at 2-3. After the

3. *Cost Differentials.* In Florida in *District School Board of Bay County v. Department of Education*,[168] forty-three school districts filed suit challenging the use of certain factors in determining the cost-of-living differential as violative of the Florida Constitution. Prior to 1974, the state board of education recommended to the legislature the cost-of-living factors which the legislature was to use to determine the district cost differentials.[169] The provision referring to the state board's recommendations was eliminated in 1974.[170] In 1976, a standardized formula for computing district cost differentials, based on the Florida Price Level Index, was adopted.[171] However, the plaintiff districts sought indemnification for lost revenues for the period during which the challenged factors were used. In the final consent judgment, the court commended the use of cost-of-living differentials as a step toward the achievement of the state constitutional mandate to provide a "uniform system of free public schools."[172]

4. *The Avoidance of Full Compliance.* Because of pressures at the state level for categorical assistance to such groups as the physically and mentally handicapped, the diminution of state fiscal surpluses which were available to state legislators in the early seventies, together with the expanding cost of education and the demands of other public services on state

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legislature amended various sections of the law, the trial court dismissed the case as moot. Knowles v. State Bd. of Educ., 219 Kan. 271, 274, 547 P.2d 699, 702 (1976). Plaintiffs appealed to the Kansas Supreme Court, which noted that significant changes had occurred in the legislation which could have a substantial impact on the effect of the act, including a decrease in the number of school districts not receiving any state aid. *Id.* at 276-77, 547 P.2d at 703-04. The state supreme court therefore reversed the district court's decision to dismiss the case as moot and remanded. The state supreme court, citing *Rodriguez*, noted that

> the present case is one where the presumption of constitutionality which attends every legislative act can be overcome only by the most explicit demonstration that the method of classification and the payments made results in a hostile and oppressive discrimination against particular persons and classes.

Id. at 278, 547 P.2d at 704.

The Kansas School District Equalization Act has been further amended, causing plaintiffs to file a supplemental amended petition on February 11, 1977, alleging that in spite of the changes brought about by the recent amendments, the Kansas legislature had failed to correct the inequalities and deficiencies alleged to exist in the original *Knowles* complaint. Supplemental Amended Petition, Knowles v. State Bd. of Educ., No. 8319 (Chautauqua County Dist. Ct., Kan., filed Feb. 11, 1977). Moreover, the plaintiffs contended that the so-called improvements had created additional arbitrary classifications. The plaintiffs maintained, therefore, that since the recent amendments had not had a healing effect on the 1973 Act, the original conclusion of the Chautauqua County District Court—that the Kansas School District Equalization Act was in violation of the Bill of Rights and Constitution of the state of Kansas and of the fourteenth amendment of the United States Constitution—should remain in effect. *Id.*

168. No. 73-1747 (Leon County Cir. Ct., Fla.) (final consent judgment, June 2, 1977).

169. 1973 Fla. Laws ch. 73-345, § 2.

170. 1974 Fla. Laws ch. 74-227, § 3.

171. 1976 Fla. Laws ch. 76-259, § 2.

172. *Bay County*, Final Consent Judgment at 6.

revenues, the increase in districts experiencing declining enrollment and political pressures from wealthier districts, legislatures have often enacted school finance laws which were not in compliance with the court decisions. The statutes were not fully funded or were loaded down with save-harmless clauses, permissive voter overrides of expenditure or tax rate limitations, bonuses for declining enrollment districts and other devices for protecting the status quo. Thus, in addition to the spate of "backlash" litigation directed against newly enacted reforms—brought largely by those districts which had benefited under the previous system—some of the plaintiffs who had successfully challenged the old school finance mechanisms have returned to court to challenge the *new* school finance laws for failing to comply fully with the constitutional standard as articulated by the courts.

The history of the *Robinson* litigation in New Jersey convincingly illustrates the problem. As a result of plaintiff's repeated returns to court, there are six *Robinson* opinions. In *Robinson V*,[173] the court found the legislature's definition of a "thorough and efficient" education, enacted as part of the Public School Education Act of 1975,[174] constitutionally acceptable, but emphasized that without adequate funds, the 1975 Act was *not* in compliance with the constitutional mandate. When the legislature failed to fully fund the Act, the New Jersey Supreme Court ordered the schools closed until an adequate revenue-raising measure was passed.[175]

California has a similar—though not as complex—history of plaintiffs seeking to challenge newly enacted legislation as less than what the constitution requires. When *Serrano* was remanded for trial, the lower court reviewed the legislation enacted in response to the state supreme court's initial decision and determined that it failed to meet the constitutional standard articulated by the higher court. The failure of the newly-enacted legislation to pass constitutional muster was affirmed in *Serrano II*, largely because substantial wealth-related disparities in per pupil spending would continue to exist under the new legislation. The state supreme court emphasized that the major feature of the reform which served to perpetuate the inequities was

> the continued availability of voted tax overrides which, while providing more affluent districts with a ready means for meeting what they conceive as legitimate and proper educational objectives, will be recognized by the poorer districts, unable to support the passage of such overrides in order to meet equally desired objectives, as but a new and more invidious aspect of that "cruel illusion" which we found to be inherent in the former system.[176]

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173. 69 N.J. 449, 355 A.2d 129 (1976).
174. N.J. STAT. ANN. § 7A-5 (West 1975).
175. Robinson v. Cahill, 70 N.J. 155, 358 A.2d 457 (1976) (*Robinson VI*).
176. 18 Cal. 3d at 767, 557 P.2d at 953, 135 Cal. Rptr. at 369.

The court thus found that the California public school financing system *still* made the educational opportunity available to students a function of the taxable wealth of the districts in which they lived.[177]

The California legislature made another pass at reform, adopting Assembly Bill 65 (AB 65) in September, 1977.[178] The plaintiffs subsequently petitioned the California Supreme Court seeking invalidation of those features of AB 65 thought to be out of compliance with *Serrano II*.[179] The plaintiffs alleged that the retention of such features as the permissive tax overrides[180] and the basic aid grant of $120 per pupil[181] (reduced from $125 under the previous financing scheme) would perpetuate wealth-related disparities between districts of greater than $100 per pupil.[182] The supreme court, however, rather than ruling on the petition as an original matter, has sent plaintiffs back to the trial court.[183]

V. CONCLUSION

Legal challenges to inequitable school finance systems, based on state constitutional provisions, will undoubtedly continue, spurred on by the recent success of such litigation as *Horton* in Connecticut. The relatively simple "fiscal neutrality" theory which, after *Serrano*, became the sole legal strategy for school finance reform in the early seventies, still persists. But a wider variety of legal theories for challenging the constitutionality of state school finance systems has been developed, and these theories will be increasingly relied upon in future litigation. And as efforts increase to introduce into the litigation the special needs of cities or of certain target pupil populations—such as the physically and mentally handicapped and students of limited English-speaking ability—it will be necessary to deal with the question of whether there are "judicially manageable" standards.

177. *Cf.* Thomas v. Stewart, No. 8725 (Polk County Super. Ct., Ga., filed Dec. 19, 1974). Plaintiffs challenged the existing school financing mechanism as being in violation of the state constitutional provision imposing a "primary obligation" on the state to provide an adequate education for all citizens. GA. CONST. art. VIII, § 1, para. 1. After the complaint had been filed, the legislature passed a law which included a district power equalizing provision, designed to eliminate the disparities in expenditures among districts resulting from differences in district property wealth. The DPE provision was not made operative, however, so the plaintiffs have returned to court contending that without the provision, the new law produces the same inequities as existed under the old law. For a description of the case, see Lawyers' Comm. for Civil Rights Under Law, *supra* note 70, at 7.

178. 1977 Cal. Legis. Serv. ch. 894 (West).

179. Serrano v. Unruh, No. L.A. 30398 (Sup. Ct. Cal., filed Dec. 27, 1977).

180. 1977 Cal. Legis. Serv. ch. 894, § 19 (West).

181. *Id.* § 32.

182. Petition for Writ of Mandate, Serrano v. Unruh, No. L.A. 30398, at 4-6 (Sup. Ct. Cal., filed Dec. 27, 1977).

183. Telephone communication with John E. McDermott, attorney for petitioners (Jan. 25, 1978).

This question is brought sharply into focus as the emphasis in both school finance suits and non-finance education litigation shifts from a standard which requires the government to stop discriminating against certain groups to one which requires the government affirmatively to overcome the "deficiencies" of such groups, whether or not these deficiencies were "caused" by actions of the government. There are also likely to be differing interpretations of equal educational opportunity resulting in a tension between those who espouse an egalitarian viewpoint and those who adopt a more libertarian viewpoint.

Because of these unresolved tensions, as well as the many fiscal and political factors that have been outlined militating against school finance reform, the progress of school finance reform litigation is likely to be at a slower pace than before and with mixed chances for success. Where legal challenges *are* successful, the remedies that are developed are likely to be less simplistic than in the past and more tailored to the specific characteristics of individual states. Moreover, no single remedy is likely to be applied; rather, some combination of remedies will be implemented, the particular combination addressing the types of fiscal inequities that are most prevalent in a state's school finance system.