

NEW JERSEY

ROBINSON v. CAHILL:

THE "THOROUGH AND EFFICIENT" CLAUSE

PAUL L. TRACTENBERG*

INTRODUCTION

On August 30, 1971, the California Supreme Court handed down a decision in *Serrano v. Priest*¹ which was heralded as a crucial breakthrough in education reform.² Although commentators on education had for decades deplored the gross fiscal disparities caused by school finance systems which relied substantially on local district wealth,³ little progress toward eliminating such disparities had been achieved through legislative or administrative channels.⁴ However, with the California Supreme Court's adoption of the principle of fiscal neutrality—"The quality of education may not be a function of wealth other than the wealth of the state as a whole"⁵—new hope was created among school finance reformers.⁶ After *Serrano*, school finance laws in Texas,⁷

*Associate Professor of Law, Rutgers University School of Law; B.A., Wesleyan University; J.D., University of Michigan School of Law; Director, Education Law Center, Inc. For a lengthier treatment of the issues dealt with in this article, see Tractenberg, *Reforming School Finance Through State Constitutions: Robinson v. Cahill Points the Way*, 27 RUTGERS L. REV. 365 (1974). The author served as counsel to the Newark Chapter of the National Association for the Advancement of Colored People and the American Civil Liberties Union of New Jersey, amici in the *Robinson v. Cahill* litigation.

¹ 5 Cal. 3d 584, 487 P.2d 1241, 96 Cal. Rptr. 601 (1971). The court found California's school finance laws to be in violation of the fourteenth amendment of the U.S. Constitution because they discriminated against plaintiffs—students in a district with low property values and their parents. The court utilized a "strict scrutiny" test in determining that the equal protection clause had been violated, rather than a "rational relationship" test, viewing the state's financing scheme as touching upon a "fundamental interest"—education—and as creating a "suspect classification" by conditioning "full entitlement" to education on the "collective affluence" of a child's parents and neighbors. Six of the seven justices concluded that the state had failed to meet its burden of establishing that the financing scheme was necessary to the attainment of any "compelling state interest." See generally *Developments in the Law—Equal Protection*, 82 HARV. L. REV. 1065 (1969).

² See, e.g., TIME, Sept. 13, 1971, at 47, where *Serrano* was called "[p]otentially . . . the most far-reaching court ruling on schooling since *Brown v. Board of Education* in 1954."

Serrano has been one of the most analyzed cases in recent years. For citations to much of this literature, see Note, *A Statistical Analysis of the School Finance Decisions: On Winning Battles and Losing Wars*, 81 YALE L.J. 1303 n.2 (1972). *Serrano* has also been the subject of several symposia. See, e.g., 1972 U. ILL. L.F. 215; 2 YALE REV. L. & SOC. ACTION 108 (1971).

³ See, e.g., J. COONS, W. CLUNE & S. SUGARMAN, PRIVATE WEALTH AND PUBLIC EDUCATION chs. 1, 4 (1970); A. WISE, RICH SCHOOLS, POOR SCHOOLS (1968).

⁴ The New Jersey experience has been relatively typical. Despite repeated efforts to increase the level and equalizing effect of state aid, the state's contribution remains grossly deficient in both respects. See Bole, *A History of State School Support in New Jersey*, in STATE AID TO SCHOOL DISTRICTS STUDY COMMISSION, A STATE SCHOOL SUPPORT PROGRAM FOR NEW JERSEY 16 (1968) [hereinafter cited as BATEMAN REPORT, after the Commission's Chairman].

⁵ J. COONS, W. CLUNE & S. SUGARMAN, *supra* note 3, at 2.

⁶ Despite considerable favorable comment, *Serrano* and its fiscal neutrality theory have also generated a considerable amount of critical comment concerning the implications for educational reform. See, e.g., Carrington, *On Egalitarian Overzeal: A Polemic Against the Local School Property Tax Cases*, 1973 U. ILL. L.F. 232; Goldstein, *Interdistrict Inequalities in School Financing: A Critical*

Minnesota,⁸ Kansas,⁹ New Jersey,¹⁰ Arizona,¹¹ and Michigan¹² were struck down in rapid succession;¹³ and challenges to similar laws were brought in more than thirty other states.¹⁴ Only courts in New York¹⁵ and Indiana¹⁶ sustained their respective school finance statutes.

Due to the conflict created by the post-*Serrano* decisions, most of which were based upon the Federal Constitution, the United States Supreme Court asserted itself as final arbiter in *San Antonio Independent School District v. Rodriguez*.¹⁷ In a 5-4 decision, the Court rejected the *Serrano* rationale, declined to give education the status of a "fundamental right," and refused to find a "suspect classification" because the school finance law relied on districts with disparate tax capacity. It thus bound itself to apply the less stringent rational basis test to the Texas statute. The Court concluded that the state's system represented a rational accommodation of the interest in local fiscal

Analysis of Serrano v. Priest and Its Progeny, 120 U. PA. L. REV. 504 (1972); Kirp & Yudof, *Serrano in the Political Arena*, 2 YALE REV. L. & SOC. ACTION 143 (1971); Moynihan, *Solving the Equal Educational Opportunity Dilemma: Equal Dollars Is Not Equal Opportunity*, 1972 U. ILL. L.F. 259; Note, *A Statistical Analysis of the School Finance Decisions: On Winning Battles and Losing Wars*, 81 YALE L.J. 1303 (1972). Advocates of fiscal neutrality, in turn, began to hit back, especially on the statistical question of whether fiscal neutrality was likely to help or harm "poor" people. For a criticism of the Yale Note, *supra*, see Grubb & Michelson, *Public School Finance in a Post-Serrano World*, 8 HARV. CIV. RIGHTS-CIV. LIB. L. REV. 550 (1973).

⁷ *Rodriguez v. San Antonio Independent School Dist.*, 337 F. Supp. 280 (W.D. Tex. 1971), *rev'd*, 411 U.S. 1 (1973).

⁸ *Van Dusartz v. Hatfield*, 334 F. Supp. 870 (D. Minn. 1971).

⁹ *Caldwell v. Kansas*, Civil No. 50616 (Kan. Dist. Ct., Aug. 30, 1972).

¹⁰ *Robinson v. Cahill*, 118 N.J. Super. 223, 287 A.2d 187 (1972), *modified and aff'd on other grounds*, 62 N.J. 473, 303 A.2d 273 (1973).

¹¹ *Hollins v. Shofstall*, Civil No. C-253652 (Ariz. Super. Ct., June 1, 1972), *rev'd*, 110 Ariz. 88, 515 P.2d 590 (1973).

¹² *Milliken v. Green*, 389 Mich. 1, 203 N.W.2d 457 (1972), *vacated*, 390 Mich. 389, 212 N.W.2d 711 (1973).

¹³ These decisions reflect a variety of combinations of state and federal claims and as a consequence vary in the extent to which they rely on the *Serrano* theory. Thus, the decision in *Van Dusartz v. Hatfield*, 334 F. Supp. 870 (D. Minn. 1971), virtually tracked the *Serrano* opinion. In *Robinson*, the trial judge found state and federal equal protection violations, as well as violations of the state education and tax uniformity clauses. In *Hollins v. Shofstall*, Civil No. C-253652 (Ariz. Super. Ct., June 1, 1972), the court found discrimination against taxpayers in violation of state and federal equal protection mandates, but emphasized that it was not constrained in its finding of a state equal protection violation by federal equal protection precedents. By contrast, *Milliken v. Green*, 389 Mich. 1, 203 N.W.2d 459 (1972), rested primarily on the interplay between the state education and the state equal protection clauses. Also of interest was a Wyoming court's advisory opinion, *Sweetwater County Planning Comm. v. Hinkle*, 491 P.2d 1234 (Wyo. 1971), *juris. relinquished*, 493 P.2d 1050 (Wyo. 1972), which mingled the state tax uniformity clause and the federal equal protection clause.

¹⁴ U.S. OFFICE OF EDUCATION TASK FORCE ON SCHOOL FINANCE, *ANALYSIS OF INTRASTATE SCHOOL FINANCE COURT CASES* (1972). The Lawyers' Committee for Civil Rights Under Law has served as a clearinghouse for information about school finance litigation, and has published periodically a docket of pending cases in its *Committee Reports*. The most recent was in *Committee Report No. 7* (Jan. 1972).

¹⁵ *Spano v. Board of Educ. of Lakeland Cent. School Dist. #1*, 68 Misc. 2d 804, 328 N.Y.S.2d 229 (Sup. Ct. 1972).

¹⁶ *Jenson v. Board of Tax Comm'rs*, 41 U.S.L.W. 2390 (Ind. Cir. Ct. Jan. 15, 1973). The court, applying the rational basis test, held that plaintiffs had failed to meet their burden of proving that the statutory scheme was irrational. *See also Parker v. Mandel*, 344 F. Supp. 1068, 1077, 1080-81 (D. Md. 1972), where the court, in denying a motion to dismiss, held that the rational or reasonable basis test, rather than the strict scrutiny test, would be applied after trial of the issue.

¹⁷ 411 U.S. 1 (1973).

and administrative control of schools and the desire to provide a basic education for each child.¹⁸

Although *Rodriguez* seemed to eliminate one avenue for school finance reform,¹⁹ less than two weeks later a second was suggested by the New Jersey Supreme Court in *Robinson v. Cahill*.²⁰ The court unanimously affirmed a trial court invalidation of the state's school finance statute. Unlike the trial court, however, the supreme court found the case to be inappropriate for decision on federal or state equal protection grounds. Instead, it affirmed solely on the basis of the "thorough and efficient" education clause of the New Jersey constitution.²¹ The primary purpose of this article is to give detailed consideration to *Robinson*, its genesis, its legal theories, its constitutional guidelines, and its implications for New Jersey and possibly for other states.

I

SETTING THE STAGE

The complaint in *Robinson v. Cahill* was filed in the Superior Court of New Jersey on behalf of students, parents, taxpayers, public officials, and public bodies. It urged in thirteen counts the unconstitutionality of the state's system of financing public education.²²

The legal theory advanced by plaintiffs was that the equal protection clauses of the United States and New Jersey Constitutions prohibited the state "from

¹⁸ For an analysis of *Rodriguez*, see Tractenberg, *Reforming School Finance Through State Constitutions: Robinson v. Cahill Points the Way*, 27 RUTGERS L. REV. 365, 373-81 (1974).

¹⁹ There may still be a basis for resort to the federal courts in the following instances: (1) where a high correlation between district and personal poverty may permit plaintiffs to argue that they are functionally or absolutely indigent; (2) where evidence can be marshalled to demonstrate that present inequities result from a history of deliberate economic segregation or other purposeful discrimination; (3) where it can be shown that children in some districts are being denied an "opportunity to acquire the basic minimal skills necessary for the enjoyment of the rights of speech and of full participation in the political process." 411 U.S. at 37. For a discussion of the types of cases which might fit within these categories, see Tractenberg, *supra* note 18, at 382-84. Another conceivable basis for federal court intervention is found in the revitalization of a "sliding scale" test under the equal protection clause. *Id.* at 379 n.75. See also Gunther, *Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1 (1972).

²⁰ 62 N.J. 473, 303 A.2d 273 (1973).

²¹ N.J. CONST. art. VIII, § 4, ¶ 1.

²² At the time the original complaint was filed, the New Jersey financing statute, N.J. STAT. ANN. § 18A:58-1 *et seq.* (Supp. 1973), provided for a traditional "minimum foundation" plan under which the state guaranteed each district that if it raised its local "fair share" of tax dollars, the state would provide the difference between that amount and the minimum foundation level. In New Jersey, that level was \$400, although the statewide average expenditure per pupil in 1969-1970 was \$800.56. See 19 N.J. COMM'R OF EDUC. ANN. REP., FINANCIAL STATISTICS OF SCHOOL DISTRICTS ix (1969-70). Many other states still have minimum foundation plans, with a wide range of foundation levels. A new financing statute amended the New Jersey plan, N.J. STAT. ANN. § 18A:58-1 *et seq.* (Supp. 1973), by converting the minimum foundation program to an "incentive equalization" program, effective July 1, 1971. Law of Oct. 26, 1970, ch. 234, [1970] N.J. Acts 832 [hereinafter cited as the Bateman Act]. The major differences were: (1) the classification of school districts under the Bateman Act into different aid level categories in order to create incentives for districts to improve the quality and scope of educational programs; (2) the introduction of the "weighted pupil" concept to reflect grade level and economic status in the state aid program; and (3) the elimination of a fixed dollar ceiling on state equalization aid. The complaint was amended to reflect the modifications in New Jersey's statutory plan effected by the Bateman Act.

discriminating in favor of children attending public schools in wealthy school districts by distributing the State's educational resources in proportion to the wealth of the respective school districts."²³ The theory—"fiscal neutrality"—and the language of the complaint were strongly reminiscent of *Serrano v. Priest*.

The second count of the original *Robinson* complaint, however, advanced a different argument—that the New Jersey constitution's "thorough and efficient" education clause required the state to afford each child "at least such instruction as is necessary to fit it for the ordinary duties of citizenship" and "to provide the minimum education to all children . . . so that they may be able to read, write and function in a political environment."²⁴ Plaintiffs alleged that the state had failed to do so and, thereby, had violated the education clause of the state constitution and the equal protection clause of the United States Constitution.

The relief plaintiffs sought under this count, however, was contained in the same equal protection prayer appearing in nine other counts of the complaint. By focusing on equal protection arguments, the *Robinson* complaint was in the prevailing mode. Yet it was a mode which had shown no probability of success prior to that time.²⁵ Even the *Serrano* case was then faring poorly.²⁶ It is, therefore, surprising that *Robinson* was filed at all.

But *Robinson*, in its inception, was a political as well as a legal statement. It was a reaction to egregious disparities among school districts in available fiscal resources per pupil, physical plants, and pupil achievement levels. Perhaps even more important, given the plaintiffs' original legal theories, it was a reaction to disparities among taxpayers.

The New Jersey situation was, and still is, far worse than that in most states in terms of state contributions to public education. Nationally, states have been contributing about forty per cent to the total cost of operating the public schools, the federal government approximately seven per cent, and the localities the balance, about fifty-three per cent.²⁷ In New Jersey, however, the state share averaged only about twenty-eight per cent, and the federal share only about five per cent. Thus, the local share has been about sixty-seven per cent.²⁸ Such heavy reliance on municipal and school district tax capacity has served to magnify New Jersey's interdistrict disparities, which are among the largest in the country.²⁹ Moreover, New Jersey's poorer districts invariably labor under

²³ Complaint at First Count, ¶ 15, at 9.

²⁴ Complaint at Second Count, ¶¶ 3 & 5, at 18.

²⁵ United States Supreme Court affirmation of *Burruss v. Wilkerson*, 310 F. Supp. 572 (W.D. Va. 1969), *aff'd mem.*, 397 U.S. 44 (1970), took place on February 24, 1970, just eleven days after the *Robinson* complaint was originally filed.

²⁶ The Superior Court of Los Angeles County upheld defendants' demurrer in an unreported decision, and the court of appeals affirmed that decision on September 1, 1970. *Serrano v. Priest*, 10 Cal. App. 3d 1110, 89 Cal. Rptr. 345 (1970).

²⁷ See U.S. DEPT OF HEALTH, EDUCATION AND WELFARE, DIGEST OF EDUCATIONAL STATISTICS COUNCIL OF STATE GOVERNMENTS, LOCAL SCHOOL EXPENDITURES: 1970 PROJECTIONS 63 (1970).

²⁸ *Robinson v. Cahill*, 118 N.J. Super. at 231, 287 A.2d at 191.

²⁹ The equalized valuation of taxable property per pupil in New Jersey in 1971 ranged from \$3,787 (Winfield Township) to \$919,317 (Rockleigh). (The highest per pupil property values actually were in Teterboro—\$62,598,621—but the total enrollment was one student.) 20 N.J. COMM'R OF EDUC. ANN. REP., FINANCIAL STATISTICS OF SCHOOL DISTRICTS 576 (1971-72). The state average was \$41,529. *Id.* at ix. Some 126 districts, containing 188,887 pupils, had equalized

greater educational problems than other districts. In New Jersey, unlike many other states, urban districts are among the poorer districts.³⁰ Meager local fiscal resources, high municipal overburden (noneducational public service expenditures) in the case of cities,³¹ and generally high education-cost populations, have combined in many districts to cause decrepit school physical plants³² and insufficient funds for current operations.³³ This is so despite far greater tax effort in most "poor" districts than in the "wealthy" or even "average" districts.

Accompanying these fiscal disparities in resources, expenditures, and tax burdens have been disparities in student performance. Until the 1972-1973 school year, New Jersey had no statewide educational testing program, making precise interdistrict comparisons difficult. However, a leading New Jersey educator has testified that about twenty per cent of New Jersey's school districts are furnishing "inadequate education."³⁴ There is substantial evidence that the urban and poor districts are prominent among those performing at low levels.³⁵ The existence of a strong positive correlation be-

valuations per pupil of more than \$60,000; and 149 districts, containing 459,835 pupils, had equalized valuations per pupil of less than \$30,000. *Robinson v. Cahill*, 118 N.J. Super. at 242, 287 A.2d at 197.

³⁰ The following table, drawn from *Robinson v. Cahill*, 118 N.J. Super. at 282-85, 287 A.2d at 218-21, compares the averages of the so-called "Big Six" school districts with the state averages for equalized valuations per pupil, expenditures per pupil, school tax rate, and total tax rate.

	Equalized valuation per pupil, 1971	Current expenditures per pupil 1971-72	Equalized school tax rate, 1971	Equalized total tax rate, 1971
STATE AVERAGE	\$41,026	\$1,009.62	\$2.12	\$3.66
Camden	19,187	843.00	2.57	5.76
Newark	19,815	1,121.00	3.69	6.39
Jersey City	26,786	897.00	2.82	6.40
Trenton	20,724	1,013.00	2.80	6.65
Paterson	23,232	857.00	2.57	5.23
Elizabeth	43,920	1,038.00	1.88	3.81

The current expenditure figures for Newark and Trenton, which slightly exceed the state average, are explained by the relatively large amounts of federal aid received by those districts, by the special state categorical aid received because of a high proportion of handicapped children, and, especially in Newark, by the school tax rate which is approximately 75 per cent higher than the state average.

³¹ See, e.g., J. BERKE & M. KIRST, *FEDERAL AID TO EDUCATION: WHO BENEFITS? WHO GOVERNS?* 8-20 (1972); *URBAN EDUCATION TASK FORCE REPORT* ch. 2 (1970). For an intensive study of urban cost factors in selected states, see B. LEVIN, T. MULLER & C. SANDOVAL, *THE HIGH COST OF EDUCATION IN CITIES* (1973).

³² See, e.g., N.J. URBAN SCHOOLS DEVELOPMENT COUNCIL, *THE STATUS OF EQUAL EDUCATIONAL OPPORTUNITY IN NEW JERSEY'S MODEL CITIES* 112-29 (1968) [hereinafter cited as N.J. MODEL CITIES REPORT]. See also GOVERNOR'S SELECT COMMISSION ON DISORDER, *REPORT FOR ACTION 75* (1968), which reported that Newark's immediate school building needs would require a capital outlay of more than \$250,000,000. Another study at about the same time estimated the cost at \$314,422,000. N.J. MODEL CITIES REPORT 116.

³³ At least three of New Jersey's six largest city school districts (i.e., Elizabeth, Jersey City, and Newark) have threatened to close their schools early in recent years because of an alleged lack of operating funds. In fact, the *Robinson* complaint was filed at about the time the Jersey City school district, one of the plaintiffs, was threatening to close its schools.

³⁴ See *Robinson v. Cahill*, 118 N.J. Super. at 247, 287 A.2d at 199.

³⁵ See, e.g., N.J. MODEL CITIES REPORT 53-56; NEWARK BOARD OF EDUCATION, *REPORT OF CITY-WIDE TESTING PROGRAM OF ELEMENTARY AND SECONDARY SCHOOLS* (1972).

tween expenditures and student performance, however, is an issue about which social scientists, educators, and lawyers still disagree strongly.³⁶

The filing of the *Robinson* complaint must be viewed against this backdrop: a history of manifestly inadequate state efforts to ensure that public education was funded equally and at sufficient levels; the imminent enactment of a widely heralded new school finance statute; and the unwillingness of federal and state courts to overturn other state funding statutes even in light of conceded disparities and inequalities. It is not surprising, therefore, that *Robinson* remained largely inactive for more than a year after its filing. However, after the California Supreme Court rendered its decision in *Serrano*,³⁷ the *Robinson* plaintiffs began to press their case, moving for summary judgment on the strength of *Serrano*.

The *Robinson* litigation shortly thereafter entered another stage when a massive amici curiae brief was submitted on behalf of the Education Committee of the Newark Chapter of the National Association for the Advancement of Colored People and the American Civil Liberties Union of New Jersey. The bulk of the brief focused on the state education clause.³⁸

The brief argued that the clause imposed on the state the obligation to ensure that a "thorough and efficient" education be provided to all children throughout the state, contending that this meant "as complete an education as possible"—that is, one which would produce an educated citizenry. Adequate funding was viewed as essential to such an education. It was argued that the New Jersey school finance statutes, however, had failed to guarantee all districts an adequate level of funding. This argument accurately reflected amici's concern that plaintiffs, predominantly taxpayers, municipal officials, and municipalities, might not regard education of children as their primary interest.

II

THE NEW JERSEY COURTS APPROACH THE ISSUE

The New Jersey courts were confronted with these differing arguments for invalidating the state's school finance laws. The defendants sought to combat the attack mounted by plaintiffs and amici by presenting testimony to the effect that the New Jersey statutes represented "a fair, uniform, reasonable, proper and constitutional exercise of legislative authority"; that any fiscal

³⁶ The enactment of the Bateman Act in 1970, and the report which led to it, seemed premised on such a correlation. The Act, which became effective about a year and a half after the original *Robinson* complaint was filed, represented an effort to bring New Jersey up to the national average for state contributions to public education. See BATEMAN REPORT, *supra* note 4, at vii. It was the latest in a series of New Jersey school financing statutes which appeared promising but which never succeeded in maintaining a substantial level of state funding or in meaningfully equalizing interdistrict fiscal disparities. *Id.* at 11-21.

³⁷ 5 Cal. 3d 584, 487 P.2d 1241, 96 Cal. Rptr. 601 (1971), *rev'g* 10 Cal. App. 2d 1110, 89 Cal. Rptr. 345 (1970).

³⁸ A major reason for this focus was concern about the limitations inherent in the fiscal neutrality approach to school finance reform. That theory simply asserts that the state may not use the wealth of individual districts in developing a school finance scheme. Thus it assures neither minimum levels of educational funding nor funding commensurate with educational needs. An education clause with a quality standard, such as New Jersey's "thorough and efficient," arguably can provide the legal basis for more than simple "fiscal neutrality."

or other disparities among districts were "innocuous in origin and . . . judicially irremediable by-products of a legitimate effort to provide a thorough and efficient system of free public schools"; that differences in the quality of education provided by districts resulted from "a host of factors, both tangible and intangible"; and that, to the extent that more funds were desirable for urban school districts, the legislative and executive branches were already attempting to deal with the matter.³⁹

At the time that the *Robinson* case was before the trial court, an ever increasing number of courts, federal and state, had accepted the *Serrano* theory.⁴⁰ It was, therefore, not surprising that the trial court held the New Jersey statutes unconstitutional principally under federal and state equal protection clauses.

The court found evidence of substantial fiscal disparities among New Jersey's approximately 600 school districts, of a direct relationship between property values and expenditures per pupil, and of an inverse relationship between expenditures and local tax rates.⁴¹ On the basis of this evidence, the court concluded that differential resources and spending adversely affected the quality of education provided by poor districts.⁴² Next, the court proceeded to examine the Bateman Act,⁴³ ruling that, despite its avowed purpose of increasing state aid to certain deprived districts and of reducing disparities caused by district property wealth variations, the Act had failed to equalize such interdistrict disparities to a significant degree.⁴⁴ The court held that the failure of the Bateman Act to redress these disparities violated the federal and state equal protection rights of taxpayers and students of poor districts;⁴⁵ and that, at its then low level of funding, the Act was also not ensuring all students of

³⁹ Rider to Pretrial Mem., ¶ 4 (filed May 11, 1973), App. of Defendants-Appellants at 39.

⁴⁰ On December 23, 1971, a three-judge federal district court found for the plaintiff in *Rodriguez v. San Antonio Independent School Dist.*, 337 F. Supp. 280 (W.D. Tex. 1971); and on January 16, 1972, an Arizona superior court denied defendants' motion to dismiss in *Hollins v. Shofstall*, Civil No. C-253652 (Ariz. Super. Ct., June 1, 1972).

⁴¹ See Appendix A to the trial court's original opinion, 118 N.J. Super. at 282-85, 287 A.2d at 218-21, for the highest, lowest, and a representative sample of intermediate wealth and expenditure school districts in each of New Jersey's twenty-one counties. See also Figure 1, *id.* at 239, 287 A.2d at 195, for a graphic demonstration of the relationships between valuations and expenditures, and between expenditures and school taxes, for one relatively wealthy and one relatively poor district in each of eight counties.

⁴² The trial court recognized that there were reasons for expenditure disparities which bore no connection to educational quality, such as area cost-of-living differentials and varying proportions of children with special educational needs. It also noted the "qualified doubts about the dollar-input-output relation." *Id.* at 253, 287 A.2d at 203. Nevertheless, the court concluded that the weight of evidence before it showed a "correlation between educational expenditures and pupil achievement over and above the influence of family and other environmental factors." *Id.* at 254, 287 A.2d at 203. Consequently, "a large number of New Jersey children [in poor districts were] not getting an adequate education." *Id.* at 257, 287 A.2d at 205.

⁴³ See note 22 *supra*.

⁴⁴ The court gave four reasons for this conclusion: (1) equalization occurred only up to the level of the statutorily guaranteed equalized valuations (an amount substantially below the state's average equalized valuation), 118 N.J. Super. at 244, 287 A.2d at 198; (2) no "pre-funding" was provided to facilitate the movement of poor districts upward through the Bateman Act's categories to "comprehensive" district status, which would have provided higher levels of state aid, *id.* at 265, 287 A.2d at 209; (3) the substantial minimum support and save-harmless aid provisions were inconsistent with equalization, *id.* at 272-73, 287 A.2d at 212-13; (4) no provision was made in the statute for municipal overburden, *id.* at 273, 287 A.2d at 213.

⁴⁵ The court's approach was vintage *Serrano*, up to a point, with findings that education was

the "thorough and efficient system of free public schools" guaranteed them by the state constitution.⁴⁶ For these reasons, the court established two broad remedial goals: (1) to raise education "to a 'thorough' level in all districts where deficiencies exist,"⁴⁷ and (2) to equalize "the tax burden in support of these purposes."⁴⁸ To reach these goals it required the state to "finance a 'thorough and efficient' system of education out of state revenues raised by levies imposed uniformly on taxpayers of the same class."⁴⁹

Despite these conclusions, the court recognized that the legislature would require time to restructure the school finance statutes. Therefore, continued operation of the school system under the pertinent state statutes was permitted "unless and until specific operations under them are enjoined by the court."⁵⁰ The first such injunction could occur on January 1, 1973, if the legislature had not enacted a "non-discriminatory system of taxation"⁵¹ by that date; in that event, the opinion and judgment provided for enjoining the distribution of state funds to any school district as minimum aid or save-harmless payments. Instead, those state funds would be used to increase the guaranteed valuations and, thereby, to enhance the equalizing effect of the Bateman Act. Aside from this possibility, the trial court indicated its intention not to enjoin operations prior to January 1, 1974. But at that time the court might enjoin any school system funding operations if it deemed such action necessary. However, the considerable pressure exerted on the legislature to act by January 1, 1973 was removed when the state sought and gained a stay of the trial court's judgment "until further Order of the [Supreme] Court."⁵²

a "fundamental interest," that district wealth was a "suspect classification," and that there was no "compelling state interest" to justify the financing system. *Id.* at 275-76, 287 A.2d at 214. Indeed, the court expressed doubt about whether the finance system could even meet the less stringent "rational basis" test. *Id.* at 276, 287 A.2d at 214. Concerned about justiciable standards in the school finance area and, implicitly at least, about distinguishing education from other important municipal services, however, the court limited its equal protection holding to the raising and expenditure of the funds necessary for the constitutionally mandated "thorough" education. *See id.* at 277, 287 A.2d at 215. The court refused to decide whether, if sufficient funds were provided to all districts for such an education, additional locally-raised funds might be permitted. *Id.* at 278 n.21, 287 A.2d at 216 n.21. Permitting such unlimited local "leeway" or "topping off" would almost inevitably defeat effective equalization of tax burden and educational expenditures.

⁴⁶ According to the trial court, the guaranteed "thorough" education was one marked by "completeness and attention to detail. It means more than simply adequate or minimal." *Id.* at 268, 287 A.2d at 211. This level of education was not being provided to all students in New Jersey by partial funding of the Bateman Act, *id.* at 269, 287 A.2d at 211, but probably would be with a "fully funded" Act. Moreover, the constitutional mandate was not intended either to require the state to fund education completely out of its general revenue, *id.* at 267, 287 A.2d at 210, or to preclude local districts from raising amounts in addition to the state share and thereby augmenting the constitutionally mandated level of education. Thus, under the state education clause, the court struck down only the minimum support and save-harmless aid provisions of the Bateman Act, since it could find "no legitimate legislative purpose in giving rich districts 'state aid'" when other districts were underfinanced. *Id.* at 270, 287 A.2d at 211.

⁴⁷ *Id.* at 281, 287 A.2d at 217.

⁴⁸ *Id.*

⁴⁹ *Id.* at 280, 287 A.2d at 217. The court found that the goal of a "thorough and efficient" education had already been sufficiently defined and that the State Board and State Commissioner of Education had ample statutory authority to enforce this mandate.

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² On September 11, 1972, the supreme court filed its order granting the motion for stay,

III

THE NEW JERSEY SUPREME COURT DECISION

Despite the trend set by *Serrano* and its progeny, at oral argument before the New Jersey Supreme Court on January 9, 1973, Chief Justice Joseph Weintraub and other members of the court expressed misgivings about the implications of utilizing equal protection principles in the school finance area, a concern which was ultimately reflected in the court's decision. Two weeks after the United States Supreme Court decided *Rodriguez*, the New Jersey Supreme Court released the *Robinson* opinion. The timing and form of the opinion suggested that the New Jersey court was well aware of the psychological, as well as doctrinal, impact of its opinion on the movement to reform school finance laws through litigation.

Chief Justice Weintraub, writing for a unanimous court, paid little attention to the factual matters which had dominated the trial court's opinion. He accepted "the trial court's findings of fact with respect to the existing disparities in expenditures per pupil"⁵³ based upon the district of residence;⁵⁴ found it clear "that State aid [did] not operate substantially to equalize the sums available per pupil";⁵⁵ and stated, in conclusory terms and without citation, that although equality of dollar input would not assure equality of educational results because of "individual and group disadvantages" and "local conditions," "the quality of educational opportunity does depend in substantial measure upon the number of dollars invested."⁵⁶

Having generally accepted the trial court's factual findings, the supreme court also accepted its determination of unconstitutionality, though on different theoretical bases. The trial court had treated the federal and state equal protection provisions as equally invalidating the Bateman Act because of its reliance on disparate local school district wealth. The supreme court perceived significant distinctions concerning the reach of the respective clauses in this area. Under neither provision, however, was it prepared to strike down the statute, reversing the trial court's holding of unconstitutionality under the federal equal protection clause on the basis of *Rodriguez*.⁵⁷

and denying plaintiffs' application for oral argument of the motion and plaintiffs' motion to advance the appeal on the calendar.

⁵³ 62 N.J. at 481, 303 A.2d at 277.

⁵⁴ *Id.*, 303 A.2d at 276-77.

⁵⁵ *Id.*, 303 A.2d at 277.

⁵⁶ *Id.* The court largely ignored the disarray among social scientists and courts on this "cost-quality" issue. Compare J. COLEMAN, EQUALITY OF EDUCATIONAL OPPORTUNITY (1966), with J. GUTHRIE, G. KLEINDORFER, H. LEVIN, & R. STOUT, SCHOOLS AND INEQUALITY (1971). See also *Rodriguez*, 411 U.S. at 42-43; ON EQUALITY OF EDUCATIONAL OPPORTUNITY (F. Mosteller & D. Moynihan eds. 1972); Yudof, *Equal Educational Opportunity and the Courts*, 51 TEXAS L. REV. 411, 422-34 (1973). By focusing on educational opportunity, rather than educational results, the court may have sought to avoid a head-on meeting with the difficult social science problems of relating input to output. This assumes, however, that the court did not consider educational opportunity an output standard. For discussion of this point, see text accompanying notes 86-95 *infra*. Or the court may have satisfied itself by the simple fact that the legislature had acted on the premise that educational expenditures were linked to quality when it provided state equalizing aid to poor districts.

⁵⁷ The court found that there was no reason to "believe the [United States Supreme Court] majority would [have found] a federal constitutional flaw in the case before us." 62 N.J. at 489.

Although *Rodriguez* arguably left the court with little maneuvering room in its interpretation of the Federal Constitution, the state constitution's equal protection clause⁵⁸ was another matter. The court has refused to treat that clause as coextensive with the federal clause,⁵⁹ or as requiring the same judicial approach.⁶⁰ Moreover, concern with the requirements of federalism, which limits federal courts in their application of the Federal Constitution to state actions, was absent; the state constitution, therefore, could have been construed to establish more demanding requirements.⁶¹ Despite these factors, the court chose not to decide *Robinson* on the basis of the state equal protection clause.⁶²

The trial court had used the tax uniformity provision of the New Jersey constitution⁶³ to buttress its conclusion that "the 'equality' provisions of the State and Federal Constitutions preclude[d] taxing the same class of property at different rates."⁶⁴ But nowhere did it state explicitly that the clause, by itself, would have invalidated the Bateman Act. The supreme court rejected any such implication. Although the tax uniformity clause was added to the constitution in 1875, the same year as the education clause, the court found that it "was not addressed to the subject of public education."⁶⁵ Moreover, it "was not intended to say that a State function may not be delegated to local government to be met by local taxation."⁶⁶ The tax clause did require that "if the State decides to handle a service at State level and to do so on the basis of a property tax, it must tax all taxable property in the State rather than

303 A.2d at 281. The court's conclusion about the extension of *Rodriguez* was probably correct. However, the court implied that it would have reached the same result under the Federal Constitution even before the Supreme Court's decision in *Rodriguez*. *Id.* at 486, 303 A.2d at 279.

⁵⁸ N.J. CONST. art I, ¶ 1. Although this provision does not refer to "equal protection of the laws," it has been construed to include the functional equivalent of such a clause. *See, e.g.,* Bailey v. Engelman, 56 N.J. 54, 55, 264 A.2d 442 (1970).

⁵⁹ 62 N.J. at 490-92, 303 A.2d at 282. Many state judiciaries have treated federal court construction of the U.S. Constitution as dispositive of the meaning of their state constitutional counterparts. However, some state judiciaries, notably those of New Jersey and California, have sought to retain their independence. *See, e.g.,* Jenkins v. Township of Morris School Dist., 58 N.J. 483, 279 A.2d 619 (1971), where the New Jersey Supreme Court found that the Commissioner of Education had implied power to regionalize school districts to achieve racial balance; Booker v. Board of Educ., 45 N.J. 161, 212 A.2d 1 (1965), where the court held that the state equal protection clause affirmatively required racial balance among public school pupils.

⁶⁰ 62 N.J. at 491-92, 303 A.2d at 282.

⁶¹ *Id.* at 490, 303 A.2d at 282.

⁶² *Id.* at 492, 500-01, 303 A.2d at 283, 287. The court was able more easily to avoid deciding the impact of the state equal protection clause on the Bateman Act because of its conclusions regarding the education clause. *See* text accompanying notes 68-71 *infra*. However, its refusal to apply the former clause was tantamount to a negative determination on the issues of (1) equalization of taxpayer burdens, and (2) equalization of educational expenditures above the level for a "thorough and efficient" education. The court hesitated to decide *Robinson* on the basis of the state equal protection clause, largely because of the rigidity it perceived in an equal protection solution to school finance inequities and the difficulty of separating education from other "essential" governmental services. 62 N.J. at 492-501, 303 A.2d at 283-87. For a detailed discussion of the court's approach to the state equal protection clause and the implications for future finance reform litigation, see Tractenberg, *supra* note 18, at 403-14.

⁶³ N.J. CONST. art VIII, § 1, ¶ 1(a).

⁶⁴ 118 N.J. Super. at 277, 287 A.2d at 215.

⁶⁵ 62 N.J. at 502, 303 A.2d at 288.

⁶⁶ *Id.*

only property in a part of the State.”⁶⁷ Thus, the supreme court rejected arguments under the explicit “equality” provisions of the state constitution—the equal protection and tax uniformity clauses—that education had to be funded either by a state tax or by a tax which was administered locally but which fell equally on taxpayers throughout the state.

The court’s final inquiry was whether the 1875 education amendments⁶⁸ restricted legislative discretion to charge local governments with responsibility for funding public school systems. The court reached an equivocal conclusion on this question. On the one hand, it found no outright prohibition against such assignment of responsibility; on the other, it struck down the Bateman Act as incompatible with the state constitution’s thorough and efficient system of free public schools mandate, and expressed doubt about whether continued reliance upon local taxation would enable the state to meet that mandate.

Ironically, having refused to find any “equality” requirement concerning taxpayers or students in the express equality provisions of the state or Federal Constitutions, the court construed the education clause as embodying such a requirement as to students. The court concluded that the education clause required the state to provide all its children with an equal opportunity to attain a thorough and efficient education. The Bateman Act, not being visibly designed for the discharge of that mandate, was held unconstitutional.

The court’s approach had been to seek answers to questions on four levels: (1) what was meant by a “thorough and efficient” educational system, who was obligated to provide such a system, who was entitled to benefit from it, how could one measure whether it was being provided, and what responses had to be made if it was not being provided; (2) what was an “equal educational opportunity” to obtain such an education and how did it relate to the “thorough and efficient” education mandate; (3) where did school financing become involved in this problem; and (4) had the Bateman Act met the constitutional requirements?

The 1875 constitutional amendment which added the education clause was clearly intended to make education free to all, and to impose ultimate responsibility upon the state. According to the court, “[t]he obligation being the State’s to maintain and support a thorough and efficient system of free public schools, the State must meet that obligation itself or if it chooses to enlist local government it must do so in terms which will fulfill that obligation.”⁶⁹

The court expanded upon the state’s responsibility under this clause later

⁶⁷ *Id.* at 502-03, 303 A.2d at 288.

⁶⁸ In addition to the “thorough and efficient” clause, N.J. CONST. art. VIII, § 4, ¶ 1, the court treated as an education amendment the provision prohibiting “private, local or special laws” in “enumerated cases,” which included “[p]roviding for the management and control of free public schools.” *Id.* art. IV, § 7, ¶ 9. The court never addressed itself, however, to the separate impact of the latter provision, as had several early education cases in New Jersey. *See, e.g.,* *Riccio v. Hoboken*, 69 N.J.L. 649, 661, 55 A. 1109, 1113 (Ct. Err. & App. 1903); *Landis v. Ashworth*, 57 N.J. 509, 31 A. 1017 (1895). In these cases the courts had recognized that a school law could be unconstitutional as special or local legislation if districts with different characteristics were grouped in the same class and were treated in the same way, or if the *effect* of the law were special or local. There are several arguments for the invalidity of the Bateman Act along these lines. *See* Tractenberg, *supra* note 18, at 415 n.253.

⁶⁹ 62 N.J. at 509, 303 A.2d at 292.

in its opinion. The state was required to "define in some discernible way the educational obligation,"⁷⁰ and, if it chose to act through local government, it would have to compel school districts to meet the constitutional command. Moreover, the state would have to compensate for local failures.⁷¹ Quite properly, the court left to the state's education authorities, or to the legislature, the task of giving detailed content to the words "thorough and efficient." It did, however, provide some significant guidelines.

First, it suggested that the meaning was a relative one, changing with the needs of the times. As an example, the court contrasted the 1970's with the 1890's, when only elementary school education was provided, and stated that "[t]oday, a system of public education which did not offer high school education would hardly be thorough and efficient."⁷²

Second, the court suggested that the standard should be calibrated against the demands of the post-schooling world. "The Constitution's guarantee," said the court, "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."⁷³

Third, the court implied that "thorough and efficient" education might not be the best possible education, quoting *Landis v. Ashworth*⁷⁴ with approval.

Nor can I think that the constitution requires the legislature to provide the same means of instruction for every child in the state. A scheme to accomplish that result would compel either the abandonment of all public schools designed for the higher education of youth [high schools] or the establishment of such schools in every section of the state. . . . Neither of these consequences was contemplated by the amendment of 1875. Its purpose was to impose on the legislature a duty of providing for a thorough and efficient system of free schools, capable of affording to every child such instruction as is necessary to fit it for the ordinary duties of citizenship; and such provision our school laws would make, if properly executed, with the view of securing the common rights of all before tendering peculiar advantages to any. But, beyond this constitutional obligation, there still exists the power of the legislature to provide, either directly or indirectly, in its discretion, for the further instruction of youth in such branches of learning as, though not essential, are yet conducive to the public service. On this power, I think, rest the laws under which special opportunities for education at public expense are enjoyed.⁷⁵

The *Landis* approach suggests that "thorough and efficient" education is the equivalent of basic or adequate education. The court in

⁷⁰ *Id.* at 519, 303 A.2d at 297.

⁷¹ *Id.* At points, the court addressed itself explicitly to local district responsibility for raising funds. As delegates of broad operating responsibility for the public schools, however, local districts could be held equally accountable for the discharge of other duties related to providing education. The court recognized this potential:

A system of instruction in any district of the State which is not thorough and efficient falls short of the constitutional command. *Whatever the reason for the violation*, the obligation is the State's to rectify it. If local government fails, the State government must compel it to act, and if the local government cannot carry the burden, the State must itself meet its continuing obligation.

Id. at 513, 303 A.2d at 293 (emphasis added).

⁷² *Id.* at 515, 303 A.2d at 295.

⁷³ *Id.*

⁷⁴ 57 N.J.L. 509, 31 A. 1017 (1895).

⁷⁵ *Id.* at 512, 31 A. at 1018, quoted in 62 N.J. at 514-15, 303 A.2d at 294-95.

that case used words such as "ordinary," "common," and "essential" to characterize the state's obligation under the education clause. Its interpretation is at odds, however, with the current literal meaning of "thorough and efficient." "Thorough" means complete and with attention to detail, not basic or adequate.⁷⁶ This was the precise conclusion reached by the trial court in *Robinson*. The New Jersey Supreme Court, while not addressing the issue explicitly, appeared to reject the trial court's finding, returning to *Landis*: "Nor do we say that if the State assumes the cost of providing the constitutionally mandated education, it may not authorize local government to go further. . . ."⁷⁷ However, even if the court did not believe "thorough" education was the most complete education possible, the standard it established was high, and required significant upgrading in many New Jersey school districts.

Meeting the needs of a rapidly changing and highly sophisticated industrial society requires strikingly different kinds of skills and knowledge than might have prepared individuals for relatively unskilled labor. Virtually all employment projections show that to be "competitors in the labor market," individuals increasingly must be professionals, white collar employees, or skilled laborers.⁷⁸ While some skills can be learned on the job, technological explosions and social forces affecting the job market are producing progressively higher entry-level educational background and skill requirements. The worker of tomorrow is likely to have to understand computer systems, automated

⁷⁶ Arguably, there can be no education better than a "complete" education. Translated into modern educational terms, thorough education might require the maximization of individual students' potential. This was essentially the approach proposed by former Commissioner of Education Carl L. Marburger as the basis of the Bateman Act criteria. See also BATEMAN REPORT, *supra* note 4, at 38. Still to be considered, however, is the meaning to be ascribed to "efficient." The trial court referred primarily to "thorough education" throughout its opinion. But "efficient" should not be viewed as superfluous. "Efficiency" looks to the effectiveness with which resources are applied to achieve a certain end result. Thus, the New Jersey education clause mandate could be met fully only if a "thorough" education were provided to all the state's children by effective use of resources. This has provided support for the argument that "topping off" or "local leeway" runs afoul of the education clause mandate because spending more than necessary for a "thorough" education would not be "efficient." A more substantial argument is that the efficiency of the public schools must be determined from a broad perspective. If the goal of public education is to produce informed and productive citizens able to meet the demands of modern industrial society, educational efficiency must be measured by society-wide standards. For example, efficiency should be measured in terms of such economic indicators as income, productivity, standard of living, and employment, which show a positive correlation with educational attainment. See 1971 U.S. STATISTICAL ABSTRACTS. Efficiency of the public schools should also be judged in terms of the cost of dealing with their "failures," manifested by rising crime rates, drug addiction levels, and welfare rolls. (Here, too, a correlation with inadequate education and high drop-out rates has been found to exist.) See, e.g., GOVERNOR'S SELECT COMMISSION ON CIVIL DISORDER, REPORT FOR ACTION (1968). Better schools will not eliminate criminality; they should, however, enhance opportunities for economically and psychologically rewarding employment and for more informed civic participation. For some of the studies illuminating these conclusions, see C. BREMBECK, SOCIAL FOUNDATIONS OF EDUCATION (1971); A. HALSEY, J. FLOUD & C. ANDERSON, EDUCATION, ECONOMY AND SOCIETY (1963); R. HAVIGHURST & B. NEUGARTEN, SOCIETY AND EDUCATION (1962); J. NELSON & F. BESAG, SOCIOLOGICAL PERSPECTIVES IN EDUCATION (1970); P. SEXTON, EDUCATION AND INCOME: INEQUALITY OF OPPORTUNITY IN OUR PUBLIC SCHOOLS (1961). *But cf.* C. JENCKS, INEQUALITY (1972).

⁷⁷ 62 N.J. at 520, 303 A.2d at 298.

⁷⁸ See, e.g., D. MICHAEL, THE NEXT GENERATION (1965); Miller, *The Outlook of Working-Class Youth*, in BLUE-COLLAR WORLD 122 (A. Shostak & W. Gomberg eds. 1964); Rice, *Employment and Occupations in the Seventies*, 23 EDUCATIONAL LEADERSHIP 230 (1965).

programs and facilities, and cybernetic actions of business and government.⁷⁹

A fourth guideline concerning the New Jersey Supreme Court's interpretation of a "thorough and efficient" educational system also comes from its endorsement of the *Landis* approach. In that case, the court suggested that before an education superior to "thorough" could be provided anywhere in the state, every child must have been receiving a "thorough" education.⁸⁰

Assuming that with the court's guidelines a workable definition of "thorough and efficient" education can be developed, crucial questions remain to be addressed under the education clause: who is entitled to assert an alleged violation of the clause; on what grounds can such an assertion be made; what response must the state make if a violation is established?

In *Robinson*, plaintiffs (taxpayers, students, parents, public officials, and public bodies) maintained that each had constitutional rights which could be asserted under the education clause. The court rejected the taxpayer claims, finding that "it cannot be said the 1875 amendments were intended to insure statewide equality among taxpayers."⁸¹ The court's acceptance of student claims under the education clause seemed as complete as its rejection of taxpayers' claims. It expressed no concern about construing that clause to provide students with justiciable rights in *Robinson*. How far the court is likely to extend that principle is somewhat less clear, however.⁸² The logic of its approach would suggest that a student could raise a justiciable issue by arguing that he or she had been denied a thorough and efficient education by failure of the state, the local school district, or even the particular school or teacher.

Justiciability does not resolve the issue of the grounds which would support an assertion that the "thorough and efficient" mandate had not been met. The court could have responded to that question in a number of ways: by focusing directly on input,⁸³ output,⁸⁴ process,⁸⁵ or some combination of

⁷⁹ See D. MICHAEL, *supra* note 78.

⁸⁰ In *Landis*, the court said that "the common rights of all [must be secured] before tendering peculiar advantages to any." 57 N.J.L. at 512, 31 A. at 1018. But the court did not find it inappropriate for secondary schools to be provided to some students because it concluded that elementary education, at that time, constituted a "thorough" education. The school laws, "if properly executed," would have provided an elementary education to all children. In *Robinson*, the court concluded that some children were not receiving a "thorough" education under existing school laws. If its constitutional theory were followed to a logical conclusion, then the "peculiar advantages" available to some students would have to be withdrawn until the "common rights" of all children were secured. See text accompanying notes 86-90 *infra*.

⁸¹ 62 N.J. at 513, 303 A.2d at 294.

⁸² A participant in the 1947 Constitutional Convention, which carried forward the 1875 education clause, informally expressed the view that the intent of the Convention was not to create a justiciable issue whenever a student alleged that he or she had been denied a "thorough and efficient" education. Rather, the clause was intended as a mandate to the legislature to take necessary action. The implication, presumably, was that the legislature, and not the courts, should determine finally whether the mandate had been met. Some states have construed their education clauses in this manner. Others, including New Jersey, have vested ultimate power in the judiciary to determine the sufficiency of legislative action.

⁸³ "Input" refers to the tangible resources of school systems: physical plant, personnel, materials and equipment, curriculum, and perhaps, ultimately, dollars. Measurement of most such input elements seems objective. Age, condition, and size of buildings; existence of specialized facilities; education and experience levels of personnel; pupil-staff ratios; quality and modernity of materials and equipment; scope and diversity of curriculum—all lend themselves to straightforward comparisons from district to district and against a statewide standard. The relative ease with which

these. However, the court chose to adopt "equal educational opportunity" as its standard. It said that when the education clause was passed

an equal educational opportunity for children was precisely in mind. The mandate that there be maintained and supported a "thorough and efficient system of free public schools for the instruction of all the children in the State between the ages of five and eighteen years" can have no other import. Whether the State acts directly or imposes the role upon local government, the end product must be what the Constitution commands.⁸⁶

The phrase "equal educational opportunity" is not free of ambiguity, however.⁸⁷ "Opportunity" may, at first blush, seem essentially input-oriented, or at most oriented toward a combination of input and process. The literal definition is somewhat different: "a combination of circumstances facilitating a certain action . . . ; an advantageous circumstance or combination of circumstances . . . ; a time, place or condition favoring advancement or progress."⁸⁸ This imparts an idea of output; it is opportunity to achieve a certain result. The quality of the opportunity, therefore, can be judged only in light of its likelihood of facilitating the desired result. The court recognized this when it defined the quality of the educational opportunity guaranteed by the education clause as that "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."⁸⁹

This approach may have permitted the court to avoid the rigidities of a standard based exclusively on either input or output.⁹⁰ The test should be whether the educational input and process available to students throughout the state were likely to permit them to achieve the desired outcome—the capacity to function as productive citizens. Equality of opportunity thus would seem to embody a relative concept of input and process revolving about a fixed

comparisons of these factors can be made and the relative certainty of the results have led many legislators and educational administrators—and some courts—to seize upon input as the measure of a school system's quality.

⁸⁴ "Output" refers to educational results or outcomes, which, in turn, are usually thought to be measured by educational achievement tests. Employment data and entry into advanced education are other common output yardsticks. Practical problems of relying upon output data to measure "thorough and efficient" education abound, however. See, e.g., Yudof, *supra* note 56, at 65. See also note 87 *infra*. The validity of standardized tests is being brought increasingly into question, especially as they relate to members of minority groups. See, e.g., P. TRACTENBERG, *TESTING THE TEACHER* ch. 6 (1973).

⁸⁵ "Process" refers to the dynamics of the educational program. Rather than focusing upon output or input, it looks to the atmosphere in which learning takes place and the interrelationships among administrators, teachers, and students. It is probably the hardest of the aspects to evaluate objectively.

⁸⁶ 62 N.J. at 513, 303 A.2d at 294.

⁸⁷ See Wise, *San Antonio and Robinson and the Future of Legal Challenges to Public School Finance*, 82 *SCHOOL REV.* 1 (1973). Wise suggests that of nine identified meanings of equality of educational opportunity, the New Jersey Supreme Court employed at least five in *Robinson*. He expressed his preference for a combination of two—a program of equal dollars per pupil modified to permit additional dollar input for underachieving children. He rejected the educational outputs approach primarily because of its tendency, in his view, to take "a giant step toward a state system of education." *Id.* at 25. He also saw practical and political problems in achieving a statewide consensus about educational objectives and in translating such objectives into costs for individual children.

⁸⁸ WEBSTER'S NEW INTERNATIONAL DICTIONARY 1583 (3d ed. 1961).

⁸⁹ 62 N.J. at 515, 303 A.2d at 295.

⁹⁰ In *Robinson*, the court did use dollar input as its criterion, but this should not be understood to exclude other possible criteria. See note 96 *infra* and accompanying text.

output requirement.⁹¹ Additionally, differential educational resources or programming should be required to the extent they can be proven reasonably essential to the requisite educational opportunity.⁹²

The court's treatment of this point left some question, however, as to whether the differential, or additional, input was mandatory or permissive.⁹³ The court's tentativeness may be explained not by uncertainty as to whether differential input was required for some children as a matter of constitutional mandate, but by justifiable reluctance to specify the particular children so entitled.⁹⁴ The court said that this determination was properly left, in the first instance, to the State Education Department and/or the legislature.⁹⁵

The court's statement also introduced another element central to its decision—the relationship between the education clause and school funding.

⁹¹ This approach does create certain problems, however. Aside from the difficulty of measuring output and correlating it to input and process, it may not be possible to treat the output requirement as fixed for all children. For example, under present conditions a child with severe physical, mental, or emotional handicaps may simply be unable to become a "competitor in the labor market," regardless of the "educational opportunity" provided. Yet that child is equally entitled to a "thorough and efficient" education. This would suggest the need for a modification of the fixed output requirement to permit variations in such cases. On the other hand, such a modification might foster incrementalism. If physical, mental, or emotional handicaps must be considered, should cultural, social, or economic factors be considered as well? Should intelligence differences within the "normal" range be considered? Education systems may be moving in the direction of creating individual pupil output goals against which performance is periodically measured and on the basis of which individualized programming is developed, but it is unfamiliar and uncomfortable terrain for the courts. The short-term answer for litigators may be that incrementalism must be resisted. Plaintiffs must argue that: (1) demonstration of manifestly inadequate educational outcomes should constitute prima facie evidence of inadequate educational opportunity, and (2) in such cases defendant school systems have the burden of establishing either that particular children or classes of children have in fact been given an educational opportunity reasonably calculated to permit them to meet the fixed output requirement, or that they need not be given such an opportunity because of their handicaps.

⁹² Generally, federal courts confronted with this kind of issue have taken the approach that the burden of proof should initially be on plaintiff students to demonstrate their need. Compare the lower court decision in *Lau v. Nichols*, 483 F.2d 791 (9th Cir. 1973) (equal protection does not require that non-English speaking Chinese students be provided with bilingual compensatory education in English), with *Serna v. Portales Municipal Schools*, 351 F. Supp. 1279 (D.N.M. 1972) (equal protection violated where school district's bilingual program for Spanish-speaking students was held insufficient in view of poor test results). The United States Supreme Court reversed the court of appeals in *Lau*, but solely on the basis of Title VI of the Civil Rights Act of 1964. 414 U.S. 563 (1974).

⁹³ 62 N.J. at 520, 303 A.2d at 297-98.

⁹⁴ The court may have been mindful of the difficulty experienced by federal courts when confronted with the "educational needs" standard in earlier school finance cases. See, e.g., *Burruss v. Wilkerson*, 310 F. Supp. 572 (W.D. Va. 1969), *aff'd mem.*, 397 U.S. 44 (1970); *McInnes v. Shapiro*, 293 F. Supp. 327 (N.D. Ill. 1968), *aff'd mem. sub nom.*, *McInnes v. Ogilvie*, 394 U.S. 322 (1969). Arguably, though, the problem should be less bothersome in a case turning on the state education clause rather than on an equal protection clause. The former imposes an affirmative obligation on the state to provide for the education of all its children and establishes an explicit educational quality standard which must be met. The latter, on the other hand, has generally been construed to create a negative restraint—barring states from improperly treating classes of persons differently—and it has no explicit quality standard. Its focus on *equality* rather than quality of treatment may justify greater concern about a judicial determination that unequal treatment in the form of dollar input is required.

⁹⁵ There are already many examples of legislatively and administratively determined educational input differentials. The most prominent in New Jersey is the program for "handicapped" children under which the state reimburses local districts for fifty per cent of their costs up to \$4,000. See N.J. STAT. ANN. §§ 18A:46-1 *et seq.* (1968); N.J. ADM. CODE 6:28-1.1 *et seq.* (1973).

That the clause was located in the article of the New Jersey constitution dealing with taxation and finance, and that it spoke of "maintenance and support" of the public education system, were evidence of a substantial nexus. The court, however, dealt more explicitly with the issue. Having previously accepted the proposition that dollar input directly affected the quality of educational opportunity, the court chose to adopt dollar input as its criterion because it was "plainly relevant and because we have been shown no other viable criterion for measuring compliance with the constitutional mandate."⁹⁶

Thus, the court tested the Bateman Act against the criterion of dollar input. Given the wide range of educational expenditures from district to district, the court immediately concluded "[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."⁹⁷ The court further concluded that the Bateman Act was "not visibly geared to the [constitutional] mandate."⁹⁸ The central problem for the court was the manner in which fiscal responsibility was delegated to local districts. The state had established no minimum dollar input level which would have ensured that all school districts met the constitutional mandate. Moreover, "the State has never spelled out the content of the educational opportunity the Constitution requires. Without some such prescription, it is even more difficult to understand how the tax burden can be left to local initiative with any hope that statewide equality of educational opportunity will emerge."⁹⁹

A third problem was the extent of reliance on local school district resources. Looking back to the 1871 school funding statute, the court found it had embraced a statewide tax as the principal source of funds, "because it was found that local taxation could not be expected to yield equal educational opportunity."¹⁰⁰ But "[s]ince then the State has returned the tax burden to local school districts to the point where at the time of the trial the State was meeting but 28% of the current operating expenses. There is no more evidence today than there was a hundred years ago that this approach

⁹⁶ 62 N.J. at 515-16, 303 A.2d at 295. For other possible criteria for determining equality of educational opportunity, see A. Wise, *supra* note 3, at 143-59. In a suit challenging a school finance statute, the only germane criteria would seem to be those involving the distribution, or perhaps the raising, of funds. The court's decision to use dollar input was, therefore, understandable.

⁹⁷ 62 N.J. at 516, 303 A.2d at 295.

⁹⁸ *Id.* The court reiterated this conclusion at least five times, in only slightly different ways, in the last six pages of its opinion. Illustratively, the court said: "On its face the statutory scheme has no apparent relation to the mandate for equal educational opportunity," *id.* at 516, 303 A.2d at 296. The references to the Bateman Act sound very much as if, in equal protection terminology, the court found no rational basis for the statute. Were it not for the court's concern about the inevitable extension of an equal protection holding to all other governmental services, the references might suggest how it would have decided the case under the state equal protection clause. On the other hand, in applying the equal protection clause the court could conceivably measure the rationality of the means chosen against different objectives or justifications than under the education clause. See note 62 *supra*.

⁹⁹ 62 N.J. at 516, 303 A.2d at 295.

¹⁰⁰ *Id.*

will succeed."¹⁰¹ The low percentage of state aid was attributable in part to the fact that the Bateman Act had been only partially funded. The court, however, saw "no basis for a finding that the 1970 Act, even if fully funded, would satisfy the constitutional obligation of the State."¹⁰² Its crucial problem, then, was to determine the appropriate remedies.

The court's only explicit statements as to remedies were that "relief must be prospective,"¹⁰³ and that since "some period of time will be needed to establish another statutory system, obligations hereafter incurred pursuant to existing statutes will be valid in accordance with the terms of the statutes."¹⁰⁴ Otherwise, the court sought the further views of the parties as to the content of the judgment.¹⁰⁵

After another full oral argument during which the parties and amici urged a range of views, the court rendered a brief per curiam opinion in which it refrained from ruling on the question of judicial power to redistribute appropriated funds, gave the legislature until December 31, 1974, to enact constitutionally sufficient legislation which would be effective by July 1, 1975, and retained jurisdiction so that "[a]ny party may move for appropriate relief before or after December 31, 1974, if new circumstances so warrant."¹⁰⁶

The court has thus deferred deciding the difficult issues raised by the parties and by the trial court's opinion. No decision may be tantamount to a negative decision, however. The advantages of an advance specification of the sanctions which will attach if the legislature fails to act within the stipulated time are twofold: (1) added pressure would be brought to bear on the legislature to act (at least if the sanctions are meaningful); and (2) by order of the court the school finance system would be brought into greater conformity with the constitutional mandate on an interim basis. The alternative which is likely to flow from the court's approach is that, should the legislature fail to meet the timetable, the court will thereafter have to decide what sanctions to impose or what adjustments can, and should, be made in the school finance system.¹⁰⁷

¹⁰¹ *Id.*, 303 A.2d at 295-96.

¹⁰² *Id.* at 519, 303 A.2d at 297. Presumably, this conclusion was based upon the view that the deficiency could not be cured simply by pumping more state funds into a formula "not demonstrably designed to guarantee that local effort plus the State aid" would yield the constitutionally mandated educational opportunity. *Id.*

¹⁰³ *Id.* at 520, 303 A.2d at 298.

¹⁰⁴ *Id.* at 520-21, 303 A.2d at 298.

¹⁰⁵ The court specifically sought further argument about "whether the judiciary may, as the trial court did with respect to the 'minimum support aid' and the save-harmless provision of the 1970 Act, . . . order that moneys appropriated by the Legislature to implement the 1970 Act shall be distributed upon terms other than the legislated ones." *Id.* at 521, 303 A.2d at 298. See note 44 *supra*.

¹⁰⁶ 63 N.J. 196, 306 A.2d 65, 66 (1973).

¹⁰⁷ A range of possibilities exist for the parties and the court. First, the court might be asked to require the appropriation of sufficient funds to permit all districts to provide the equal educational opportunity commanded by the education clause. Second, the court might be asked to reallocate funds already appropriated in a manner more consistent with the constitutional mandate. Third, the court might be asked to prohibit the appropriation and expenditure of funds within certain districts or for certain purposes.

These alternatives pose descending degrees of difficulty. Because the appropriation of funds has always been regarded as a central legislative function, a state court mandate of specific appropriation action would raise difficult questions regarding the separation of powers doctrine.

As a practical matter, because this process probably will begin after January 1, 1975, any adjustments may have to await the 1976-1977 school year.¹⁰⁸ Children throughout the state who have been denied a thorough and efficient system of free public schools due to unequal and inadequate expenditures will suffer the irretrievable loss of yet another school year.

CONCLUSION

Robinson has been greeted both with acclaim and foreboding by New Jersey residents, depending upon their geographic locations, their socioeconomic positions, and their views about public education. Most agree, however, that the decision is likely to lead to fundamental changes in school financing, in public education generally, and perhaps even in the structure of state and local government.¹⁰⁹

The legislative and executive branches have begun the complex process of responding to the court's mandate of a new school finance law for New Jersey. Their response must be shaped to reflect the following constitutional guidelines which the court articulated: (1) the state must spell out "the content of the educational opportunity the Constitution requires";¹¹⁰ (2) the state must ensure that the required educational opportunity is provided equally to all children

However, once the legislature has appropriated funds for the operation of the public education system, and the issue is how those funds should be allocated among the school districts, a state court should be freer to fashion remedies. The court can surely bar the distribution and use of funds, in whole or in part, under an unconstitutional statute. The more difficult question is whether the court can permit the statute to continue to operate in part, barring the use of some funds for the statutory purposes, and can also affirmatively order the redistribution and use of those appropriated funds for purposes it determines to be constitutionally required. This is the question the New Jersey Supreme Court twice had before it and twice refused to answer (after the trial court had explicitly ordered such redistribution).

It may not be necessary, however, for the court to reach the difficult questions involved in affirmatively ordering a specific appropriation or redistribution of already appropriated funds. The more traditional judicial remedy of negative relief—an injunction against continuation of unconstitutional acts—may be sufficient in this case. The court could, for example, focus on the unconstitutionality of the school financing statute while still applying considerable pressure on the legislature to achieve a longer-term solution to the problem of fiscal inequality by enjoining distribution of minimum aid and save-harmless funds to each school district in the state whose average expenditures per weighted pupil for the 1974-1975 school year (excluding expenditures of federal funds) exceeded the statewide average of expenditures for the same school year by at least the amount of minimum aid and save-harmless funds received by such district during that school year. A similar approach could be utilized for capital aid, and, if the court could obtain jurisdiction, it might limit the amounts which high-spending districts could raise locally for educational purposes.

¹⁰⁸ Under the New Jersey education laws, the budget process for the school year beginning July 1 starts by November 15 of the prior year, when the Commissioner of Education must estimate the total amount of state aid necessary and the amounts to be payable to each county and school district during the succeeding school year. N.J. STAT. ANN. § 18A:58-13 (1973). Each board of education must prepare its budget in January or February, and the local fiscal processes are largely completed by the end of February. See *id.* §§ 18A:22-7 *et seq.*

¹⁰⁹ The history of school finance in New Jersey, however, provides support for the skeptics who believe *Robinson* will not result in drastic changes. Legislative unwillingness to appropriate sufficient funds, political deference to educational home rule, and the need to pacify suburban interests by increasing state aid to their districts have diminished the actual impact of the most progressive-sounding programs. See BATEMAN REPORT, *supra* note 4, at 11-21.

¹¹⁰ 62 N.J. at 516, 303 A.2d at 295. The State Education Department has developed a proposed definition. Its proposal will be the subject of public debate and, ultimately, legislative scrutiny.

in the state;¹¹¹ (3) the state must provide a mechanism by which the educational opportunity being afforded can be assessed;¹¹² and (4) the state must ensure that appropriate corrective action is taken if it appears that certain school districts are not providing the required educational opportunity.¹¹³

A wide array of possible legislative and administrative approaches will have to be considered in New Jersey in light of *Robinson* and its constitutional guidelines. Insofar as consideration of a new school finance law is concerned, the permutations and combinations will be increased by the fact that alternatives to both revenue-raising and revenue-distribution may have to be encompassed. There are, however, many precedents to consider. The more prominent possibilities fall into four general categories: (1) recommendations of national or state study commissions; (2) amendments to existing New Jersey legislation; (3) legislative bills already introduced in New Jersey; and (4) school finance statutes recently enacted in other states.¹¹⁴

¹¹¹ Given the court's emphasis on dollar input, the state must guarantee that all districts expend the amounts determined to be necessary for the required educational opportunity. The court questioned whether continued substantial reliance on locally-raised revenues could permit the state to meet its constitutional obligation, but stopped short of mandating a school finance system based on a statewide tax.

¹¹² In defining the constitutionally mandated educational opportunity, and in establishing the correlative dollar input, the state will be moving into largely uncharted territory. Assumptions will have to be made both about the educational outputs demonstrating capability for effective citizenship and competition in the labor market, and about the educational inputs and process reasonably likely to produce those outputs in all children. Moreover, the conceptions of the level of educational outputs guaranteed by the education clause will themselves surely change. It is inconceivable, therefore, that a new statutory plan could be sensitive to the education clause's command, as the court defined it, without an evaluation component to test the above assumptions and refine them based on experience, and to update the plan as society changes. The need for such a component was made explicit in the trial court's opinion, 118 N.J. Super. at 281, 287 A.2d at 217, and was at least implicit in the supreme court's opinion. After the trial court's opinion was filed, the State Education Department developed and began to implement a statewide pupil assessment program which may provide the basis for the evaluation implicitly required by the court's construction of the education clause. For information regarding this program, see Tractenberg, *supra* note 18, at 433 n.320.

¹¹³ A variety of enforcement techniques are available. The most common is the withholding of state aid, *see, e.g.*, N.J. STAT. ANN. § 18A:33-2 (Supp. 1973), but that would almost certainly be inappropriate in most situations. Indeed, providing additional state funds, or requiring the district to raise additional local funds, might at times be a more appropriate response. Aside from the issue of the adequacy of funds and the proper state response to it, however, there are conceivable educational shortcomings which might require a range of state corrective action. Local districts might, for example, use available funds in an inefficient or improper manner, or might fail to comply with state law or regulations or with their own regulations or policies. State responses to such situations might include issuance by the state education authorities of an order to the particular school district specifying the corrective action to be taken. If the district failed to comply, the state could seek to enforce its order by: (1) obtaining a court order which embodied the terms of its order, *see, e.g.*, 42 U.S.C. § 2000(e)-(9)(b) (1970) (pertaining to the Equal Employment Opportunity Commission); (2) removing recalcitrant board of education members or professional staff, *see, e.g.*, N.Y. EDUC. LAW § 2590-1(1)(b) (McKinney 1970); (3) assuming operating responsibility for the district until deficiencies were corrected or until the local board of education or professional staff provided sufficient evidence of their willingness and ability to carry out the required corrective action, *see, e.g., id.* § 2590-1(1)(a). A totally different state response would be to free the school district from a variety of state constraints, such as teacher certification and class size restrictions, in order to permit the district to attempt to improve its educational program by innovative techniques.

¹¹⁴ For a discussion of each of those categories and the constitutional issues which may be raised by particular proposals, see Tractenberg, *supra* note 18, at 434-56.

Applying the *Robinson* guidelines to these alternatives results in a striking congruence of the following elements of an equitable and constitutional school finance law: (1) greater state assumption of education costs; (2) leveling up of low-spending districts to an expenditure level determined to be sufficient to permit them to provide a thorough and efficient system of free public schools; (3) limited, and probably power equalized,¹¹⁵ local add-ons; (4) recognition of educational need in the allocation of resources by weighting pupils who require higher cost programs¹¹⁶ or by categorical aid programs; (5) recognition of higher urban costs (and other area cost-of-living differences); (6) an effective evaluation system; and (7) preservation of local control to the extent consistent with the overriding need to equalize educational opportunity and with the state's constitutional obligation to ensure, by appropriate corrective measures, that a thorough and efficient education system is actually being provided for all children.¹¹⁷

The New Jersey Supreme Court's decision in *Robinson* should provide the impetus for long-overdue reform of educational finance, education itself, and perhaps ultimately, of the way in which the entire range of governmental services are provided. At least, by its willingness to begin entertaining issues of fundamental importance to the structure of state and local government, the court has created a powerful inducement for responsible legislative and executive action. One can only hope that legislators in New Jersey and other states will seize the initiative from the courts and develop the lasting and comprehensive reform which they are best constituted to provide.

¹¹⁵ "District power equalization" is a plan which has as its goal discarding property wealth as a component for determining a district's expenditure level. Under such a plan, local tax rates are the sole determinant of a district's expenditures. If the state's guaranteed expenditure level for the tax rate selected cannot be met because local property values are too low, the state must supply the difference. Conversely, if the tax levy produces more than that guaranteed by the state, the state takes the surplus. See J. COONS, W. CLUNE & S. SUGARMAN, *supra* note 3, at 240-42.

¹¹⁶ For example, a vocational student might be counted as 1.5 students for state aid distribution purposes, meaning that the per pupil revenue for such students will be one and a half times that for regular students.

¹¹⁷ See Berke, *The Recent Adventures of State School Finance: A Saga of Rocketships and Glider Planes*, 82 SCHOOL REV. 183 (1974).