COMMENTS

Educational Financing, Equal Protection of the Laws, and the Supreme Court

Recently, state systems of financing public education have been overturned or seriously threatened by several state and federal court cases based on the equal protection clause of the fourteenth amendment. Rodriguez v. San Antonio Independent School District, which invalidated the Texas system of educational financing, will be argued before the Supreme Court next term. This Comment will examine the doctrinal and policy problems that the Court will confront and the alternative solutions that are available to the Court when it con-


siders the constitutionality of the Texas system, which is typical of the educational financing programs that have generated so much recent litigation.

Currently, most states finance public education primarily through taxes assessed on real property within each individual school district. State governments usually provide some aid to school districts in the form of flat, per pupil grants or equalization grants to ensure that each district expends a certain minimum amount per pupil. Nevertheless, large discrepancies among districts in revenue-raising capacity continue to exist due to differences in taxable property values. A wealthy district may raise more revenue than a poorer district while taxing itself at a lower rate. Furthermore, many states

4. Kirp & Yudof, supra note 3, at 143.

5. The following brief summary of the most widely used methods of state aid to local school districts is based on Private Wealth and Public Education, supra note 3, at 63-197, and Educational Opportunity, supra note 3, at 312-17.

The most elementary system for providing state aid is the flat grant. Under this plan each district receives a specified number of dollars per pupil. This method will generally neither reduce nor widen the gap in per pupil expenditures between richer and poorer districts since the per pupil expenditures in each are increased by the same amount. Therefore, full equality will never be achieved simply through flat grants. If the grants are made on the basis of units other than pupils, such as classrooms or teachers, then the gap between districts would be widened since the wealthier districts are capable of providing more of such units.

A second method is known as the foundation plan. Under this system, the local district agrees to tax at a certain minimum rate. The state then provides an amount of money necessary to bring each district up to a specified minimum level of expenditures per pupil or other unit. Although the foundation plan may decrease the gap between districts, it will not eliminate it since the wealthier districts are capable of financing expenditures far in excess of the minimum level.

A number of states have combined the flat grant and the foundation plan. Under one such method, the state determines the foundation amount by subtracting the amount raised by a district through its own effort from a guaranteed minimum amount. This foundation grant is then added to a flat grant to determine the total state aid. Another combination plan is used in Illinois, California, and Minnesota, where three of the most important cases challenging educational financing have arisen. Under this plan, the amount raised locally at the specified tax rate is first added to the flat grant. The sum is then subtracted from the guaranteed minimum level per pupil. The district then receives the difference plus the flat grant. As a result, if a district is so poor that the difference between the amount it raises by itself and the guaranteed minimum level exceeds the amount of the flat grant, then the district will in effect receive no flat grant at all since the amount of the flat grant has actually been subtracted from the guaranteed level along with the amount raised locally. On the other hand, if a district is too wealthy to receive any aid under the foundation plan, it still receives the flat grant. This particular formula produces a wider gap between the wealthier and poorer districts than would have existed under a simple foundation or the first combination plan.

A method which at least has the potential for achieving equality among districts is the percentage equalizing plan. Under this system, the local district sets its own budget. The state grant is based upon the relative wealth (in terms of taxable property) of each district in relation to the wealthiest district in the state. Each district is required to finance locally the remainder of its budget in order to receive the full state grant. In practice, however, the states employing this method have destroyed its potential for equalization through modifications.

6. If district A contained $100,000 worth of taxable property for each student
place a maximum ceiling on the rate at which a district may tax itself. As a result, poorer districts are often prohibited from raising as much revenue as wealthier districts even if they are willing to suffer a steeper tax rate. Thus the amount of financial resources devoted to a child's education is largely dependent upon the taxable wealth of the district in which he lives. These inequities have often been criticized and are currently the subject of constitutional litigation.

I. HISTORY OF CONSTITUTIONAL LITIGATION INVOLVING EDUCATIONAL FINANCING

Judicial scrutiny of inequalities in public education began with Brown v. Board of Education. Initially, the courts focused almost exclusively on inequalities created by racial discrimination. However, in 1968, the Illinois educational financing system was challenged as being in violation of the equal protection clause in McInnis v. Shapiro. The public schools of Illinois were administered by local school districts. As is typically the case, the bulk of revenue for operating schools was raised by ad valorem taxes on property within each individual district. The state supplemented the local revenue by providing a flat, per pupil grant and an equalization grant. The latter consisted of the difference between the sum of the amount per pupil raised within a district plus the flat grant and a 400 dollar foundation level prescribed by the state. Consequently, 1,000 dollars was available to each student in the richest school district in Illinois as opposed to 480 dollars per pupil in the poorest school enrolled in its public schools, while district B contained only $10,000 worth of property for each student, district A could tax itself at 1% and still raise $1000 per pupil, while district B could only raise $500 per pupil by taxing itself at 5%.

7. For example, the Florida legislature enacted a “Millage Rollback Act” providing that any district that taxed itself at a rate in excess of ten mills ad valorem was ineligible for state aid. This legislation was declared unconstitutional by a three-judge district court in Hargrave v. Kirk, 313 F. Supp. 944 (M.D. Fla. 1970), which the Supreme Court vacated and remanded in Askew v. Hargrave, 401 U.S. 476 (1971), with an order to abstain while an action challenging the legislation in the state court proceeded.

8. In California the elementary-school district with the highest per pupil expenditure at the time of the Serrano decision spent $2586 per pupil while the lowest spent only $407. Legislative Analyst, Public School Finance, pt. 5, at 7, cited in Serrano v. Priest, 5 Cal. 3d 584, 594, 487 P.2d 1241, 1247, 96 Cal. Rptr. 601, 607. More astounding still is the reported differential in Texas where the wealthiest district spent $5394 per pupil while the poorest spent $264. Stevens, U.S. Court Upsets Texas School Tax Tied to Property, N.Y. Times, Dec. 25, 1971, at 1, col. 1; at 15, col. 4 [hereinafter Stevens].


12. 293 F. Supp. at 330. See note 5 supra for a more complete explanation of this plan.
A three-judge federal district court held that the Illinois financing system did not deny the complaining students equal protection of the laws. Alternatively, the court concluded that there were no judicially manageable standards for apportioning educational resources on the basis of the individual student's educational needs.

The first constitutional challenge to a state educational financing system ended abruptly when the Supreme Court summarily affirmed the decision in *McInnis*. A year later in *Burrus v. Wilkerson* the Court summarily affirmed the judgment of a three-judge decision that had relied heavily on *McInnis* to support its holding that the Virginia school financing system did not violate equal protection. The Court's summary disposition of *McInnis* and *Burrus* might be interpreted as foreclosing constitutional challenges to educational financing systems. However, the uncertain status of *McInnis* as precedent is demonstrated by the current wave of educational financing litigation that has developed despite *McInnis*.

In the leading case of *Serrano v. Priest*, the California supreme court concluded that *McInnis* did not preclude further constitutional scrutiny of the state's educational financing system. The court acknowledged that a summary affirmance by the United States Supreme Court of the judgment of a three-judge district court is technically an adjudication on the merits. But it noted that such an affirmance, like a denial of certiorari, may merely indicate an attempt to relieve docket pressures. The court further observed that the Supreme Court has sometimes decided a case on grounds contrary to the implications of a summary affirmance of a judgment. The California court emphasized that the Supreme Court apparently does not consider the educational financing issue closed since in *Askew v. Hargrave* the Court remanded a challenge to the Florida school financing system to the district court ordering abstention pending a state court pro-

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15. 293 F. Supp. at 335.
18. 5 Cal. 3d 584, 487 P.2d 1241, 96 Cal. Rptr. 601 (1971).
20. 5 Cal. 3d at 616, 487 P.2d at 1264, 96 Cal. Rptr. at 624, citing Frankfurter & Landis, *The Business of the Supreme Court at October Term, 1929*, 44 Harv. L. Rev. 1, 14 (1930).
21. 5 Cal. 3d at 616 n.35, 487 P.2d at 1264 n.35, 96 Cal. Rptr. at 624 n.35.
ceeding and then a further hearing on the merits. The Supreme Court may have summarily affirmed in *McInnis* because the issues were not clearly defined. The California court also argued that the disposition in *McInnis* rested primarily on the nonjusticiability of the plaintiffs' prayer for equalized fulfillment of students' educational needs, and thus a complaint proposing a different standard for relief is not foreclosed. Finally, the California court reasoned that the Supreme Court seldom makes a final disposition of an important and complex question like educational financing without oral arguments or a written opinion. For these reasons, the court concluded that the constitutionality of educational financing systems similar to the one involved in *McInnis* is still an open question.

Despite the arguments raised in *Serrano*, the Supreme Court may have intended *McInnis* to be dispositive of the constitutional question since the affirmance was a decision on the merits. To allocate judicial resources efficiently, the Court must decide matters of importance in summary opinions. Furthermore, *McInnis* has not been totally ignored by state and federal courts. The recent New York case *Spano v. Board of Education*, which dismissed a challenge to that state's educational financing system, relied on *McInnis* and *Burrus*. The New York court observed that briefs were submitted to the Supreme Court in *McInnis* by the same counsel involved in *Serrano* and inferred that the Court was fully acquainted with the nature of the issues at stake. After considering the *Serrano* attempt to distinguish *McInnis*, the court concluded that it should not speculate on the binding effect of recent Supreme Court decisions. Nevertheless, it is difficult to determine what *McInnis* stands for. If the Supreme Court intends that *McInnis* be interpreted to foreclose constitutional challenges to property tax financing of school systems, it will be necessary for the Court to review another educational financing case in order to lay the issue to rest.

Once past the barrier of *McInnis*, litigation challenging educa-

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23. 5 Cal. 3d at 617 n.37, 487 P.2d at 1265 n.37, 96 Cal. Rptr. at 625 n.37. The Supreme Court's remand in *Hargrave* may not mean that the Court considers the constitutionality of school financing by local property taxes an open issue. The complaint in *Hargrave* challenged the "Millage Rollback Act," which specified a maximum tax rate for school districts, rather than the school financing system as a whole. *See* note 7 supra.

24. 5 Cal. 3d at 617 n.37, 487 P.2d at 1265 n.37, 96 Cal. Rptr. at 625 n.37.

25. 5 Cal. 3d at 617, 487 P.2d at 1265, 96 Cal. Rptr. at 625. The court in *Rodriguez* relied primarily upon this ground for distinguishing *McInnis*. 337 F. Supp. 280, 283-84.

26. 5 Cal. 3d at 617-18, 487 P.2d at 1264-65, 96 Cal. Rptr. at 624-25.

27. 5 Cal. 3d at 618, 487 P.2d at 1265, 96 Cal. Rptr. at 625.


29. — Misc. 2d at —, 328 N.Y.S.2d at 231.

30. — Misc. 2d at —, 328 N.Y.S.2d at 232.

31. — Misc. 2d at —, 328 N.Y.S.2d at 232-33.
tional financing systems proved surprisingly successful. Serrano was the watershed decision. The plaintiffs brought a class action on behalf of all the public school children and their parents in California except those living in the school district that provided the greatest educational opportunity. They alleged that the California school financing system, which relied primarily on local property taxes, violated the equal protection clause since it required the parents of children in relatively poor school districts to "pay a higher tax rate to obtain the same or lesser educational opportunities than those afforded to children in other districts." The California system of educational financing did not vary significantly from the Illinois program challenged in McInnis. Nevertheless, the California supreme court held that the plaintiffs stated a valid cause of action under the equal protection clause and remanded the case to the lower court for trial, reversing the court of appeals' order that had sustained a demurrer on the basis of McInnis.

Subsequently, in Van Dusartz v. Hatfield, a federal district court denied a motion to dismiss a complaint that challenged on equal protection grounds the educational financing system of Minnesota. In Rodriguez v. San Antonio Independent School District, a three-judge federal district court in Texas became the first court to hold that a state system of educational financing was unconstitut-

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32. 5 Cal. 3d at 599, 487 P.2d at 1244, 96 Cal. Rptr. at 604.
33. 5 Cal. 3d at 599-91, 487 P.2d at 1244-45, 96 Cal. Rptr. at 604-05. The plaintiffs sought a declaration that the system was unconstitutional and a court-ordered reallocation of funds. The suit was brought against "state and county officials charged with administering the financing system," including the state treasurer.
35. 5 Cal. 3d at 618-19, 487 P.2d at 1266, 96 Cal. Rptr. at 626.
38. The methods used to finance public education in Texas are not materially
tional under the fourteenth amendment. Since then, a state trial court in New Jersey relied on both the federal and state constitutions to invalidate that state's financing scheme. In addition, courts in Arizona and Wyoming have followed the precedent set by Serrano. Currently, lawsuits challenging educational financing systems under the equal protection clause are pending in courts across the nation. A constitutional question that apparently had suffered a premature death has been revived as a controversial legal issue.

II. THE EQUAL PROTECTION ISSUE

A. Standards of Judicial Scrutiny of Legislation Under the Fourteenth Amendment

Most of the pending challenges to state systems of educational financing are based on the argument that these systems violate the equal protection clause of the fourteenth amendment. The Supreme Court has employed two different standards for reviewing legislation under the equal protection clause. In ordinary cases, including those involving business regulation statutes, the Court has employed a standard of restrained review, sometimes referred to as traditional equal protection. When it applies this standard, the Court only inquires whether there is a rational relationship between the classification established by the statute under scrutiny and a legitimate state

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42. Suits have been filed in Colorado, Illinois, Indiana, Kansas, Maryland, Michigan, Missouri, Ohio, and Wisconsin. See Comment, supra note 3, at 200-13 for a description of the litigation.
objective. While the scope of this inquiry is uncertain, the legislation in controversy clearly bears a presumption of validity.

However, when a classification affects certain "fundamental interests" or is "inherently suspect," the Court applies a much stricter standard of review. Under this standard, the state must first demonstrate that its statutory classification is necessary for the achievement of a "compelling state interest." In addition, it must show that the classification is precisely tailored to further the purpose it is designed to accomplish. Finally, the state must prove that there is no less onerous alternative by which its objective may be achieved. To date, the Court has recognized voting, fair criminal procedure, interstate travel, and procreation as "fundamental interests" that deserve special protection under the fourteenth amendment. Furthermore, it has declared that classifications based on race, ancestry, or alienage are "inherently suspect" and thus subject to scrutiny under the strict standard.

B. Should Current Educational Financing Systems Be Subjected to Strict Scrutiny?

1. The Serrano Rationale

The strict standard of review was first applied in educational financing litigation by the California supreme court in Serrano v. Priest. The court based its decision on its recognition of education as a fundamental interest and, alternatively, on the proposition that discriminations based upon wealth are suspect classifications. The

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57. 5 Cal. 3d at 608-09, 487 P.2d at 1258-59, 96 Cal. Rptr. at 617-18. A thorough analysis of the arguments that education is a fundamental interest can be found in Private Wealth and Public Education, supra note 3, at 339-93, 469-99. See also Silard & White, supra note 3, at 16-20; Kirp, supra note 3, at 612-40; Horowitz, supra note 3, at 1162.
58. 5 Cal. 3d at 597, 567 P.2d at 1250, 96 Cal. Rptr. at 610. For an analysis of the
court conceded that no authority had explicitly recognized education as a fundamental interest.\textsuperscript{59} But it observed that education has an impact on society and the individual comparable to that of voting and fair criminal procedure, both of which had been previously recognized as fundamental interests.\textsuperscript{60} In support of its position, the court relied heavily on policy arguments advanced by the authors of \textit{Private Wealth and Public Education},\textsuperscript{61} Coons, Clune, and Sugarman, who reasoned that education’s role as a means of entry into the mainstream of American society, the universality of its effects, its continuity over a lengthy period of time, its role in molding the individual’s personality, and the fact that it is made compulsory by state law distinguish it as a fundamental interest.\textsuperscript{62}

As authority for the alternative proposition that wealth is a suspect classification, the court cited \textit{Harper v. Virginia Board of Elections},\textsuperscript{63} in which the United States Supreme Court invalidated a Virginia poll tax under the equal protection clause; \textit{Griffin v. Illinois},\textsuperscript{64} in which the Court held that the state must provide an indigent with a transcript on appeal; and \textit{Douglas v. California},\textsuperscript{65} in which the Court held that the state must provide an indigent with counsel on appeal. Language in these cases indicated that the Court disfavored classifications based upon wealth. Concluding that wealth classifications are inherently suspect, the court found that the California financing system discriminated on the basis of wealth since the amount of revenue that a district could raise to support its schools was largely dependent on the wealth of the district in terms of taxable property.\textsuperscript{66} The court observed that the discrimination was two-
fold since the wealthier districts could provide higher educational expenditures with a lower tax rate.67

On the basis of its findings that the California school financing system established a classification that both affected a fundamental interest and was inherently suspect, the court in Serrano subjected the system to strict scrutiny under the equal protection clause.68 The court did not reach the question whether local control over financial decision-making was a compelling state interest since it concluded that the California system of financing public education did not promote local control.69 Consequently, the court concluded that if the plaintiffs could sustain the allegations of their complaint at trial, the California method of financing public education would be declared unconstitutional as a denial of equal protection in violation of the fourteenth amendment.70

The Serrano decision to apply the strict standard of review to classifications affecting education and based upon wealth has been followed by two federal district courts.71 Nevertheless, there is substantial question whether this decision is consistent with the trend in recent Supreme Court equal protection cases. Harper v. Virginia Board of Elections and Shapiro v. Thompson72 suggested that the Supreme Court was willing to extend the strict standard of review into new areas. More recently, however, the Court apparently has become concerned over the potentially expanded application of the strict standard. As a result the Court may be unwilling to recognize any new fundamental interests or suspect classifications or even to adhere to the broader dicta in some of the cases concerning the application of the strict standard.

The Second Circuit recognized the Supreme Court's apparent desire to restrict application of the strict equal protection standard when it decided Johnson v. New York State Education Department.73 Although Johnson did not involve the issue of educational

67. The court noted that the foundation program only partially alleviated the disparities created by variations in district wealth. It also declared that "the ratio of resources to pupils" within a given district was the only significant index of district wealth. The court concluded that simply because a district could raise more money by taxing itself at a higher rate did not alter the fact that the amount of money available for education is dependent upon the wealth of the local property since many districts were too poor to compete with the wealthier districts. 5 Cal. 3d at 600-01, 487 P.2d at 1252, 96 Cal. Rptr. at 612.

68. 5 Cal. 3d at 610-11, 487 P.2d at 1259-60, 96 Cal. Rptr. at 619-20.

69. 5 Cal. 3d at 610-11, 487 P.2d at 1259-60, 96 Cal. Rptr. at 620. See notes 226 & 250 infra.

70. 5 Cal. 3d at 614-15, 487 P.2d at 1263, 96 Cal. Rptr. at 623.


73. 449 F.2d 871 (2d Cir. 1971), cert. granted, 405 U.S. 916 (1972).
financing, it did examine the question of which standard of review is applicable to statutes that establish wealth classifications in the area of public education. Section 701 of the New York Education Laws required local school boards to provide textbooks for all children in grades seven through twelve who resided within the district regardless of whether they attended public or private schools. The plaintiffs, who were mothers of children enrolled in the New York State school system, filed suit on behalf of themselves, their children, and other children similarly situated. They alleged that the textbook statutes created an irrational classification between children in the upper grades and children in the lower grades and violated the equal protection clause by imposing a requirement that those in the lower grades obtain voter approval in order to receive free textbooks. Plaintiffs also alleged that they were deprived of equal educational opportunity because they were too poor to pay the price or the rental fees for the textbooks and were forced to send their children to school without texts. Confronted with the question of which standard of review to apply in reviewing the New York statutes, the court cited the recent Supreme Court case of \textit{Dandridge v. Williams}\footnote{397 U.S. 471 (1970).} for the proposition that "in the area of economics and social welfare, even where such legislation involves 'basic economic needs of impoverished human beings,' 'the Fourteenth Amendment gives the federal courts no power to impose upon the State their views of what constitutes wise economic or social policy.'"\footnote{449 F.2d at 876-77, quoting 397 U.S. at 485, 486.} Concluding that the traditional standard was the appropriate standard of review, the court found that given the finite amount of state resources, the classification created by the textbook statutes was rationally related to the legislative purpose of encouraging the study of upper-grade subjects such as science, mathematics, and foreign languages.\footnote{449 F.2d at 876-78.} The court then cited \textit{James v. Valtierra}\footnote{402 U.S. 137 (1971). For a discussion of Valtierra, see notes 130-37 infra and accompanying text.} as foreclosing the plaintiffs' claims that an unfair burden had been placed on the children in the lower grades to procure voter approval for funding of free texts.\footnote{449 F.2d at 878.} 

\footnote{74. N.Y. Educ. Law § 701 (McKinney 1969).}
\footnote{75. N.Y. Educ. Law § 703 (McKinney 1969). The state provided assistance of ten dollars per pupil toward the purchase of texts.}
\footnote{76. 449 F.2d at 873.}
\footnote{77. 449 F.2d at 880.}
\footnote{78. 397 U.S. 471 (1970).}
\footnote{79. 449 F.2d at 875-77, quoting 397 U.S. at 485, 486.}
\footnote{80. 449 F.2d at 876-78.}
\footnote{81. 402 U.S. 137 (1971). For a discussion of Valtierra, see notes 130-37 infra and accompanying text.}
\footnote{82. 449 F.2d at 878.}
Finally, the appellate court turned its attention to the argument, raised in an amicus brief, that once the state attempts to provide public education it incurs a duty to provide free textbooks as well.\footnote{449 F.2d at 878-80. This argument is based on an analogy to \textit{Griffin v. Illinois} and \textit{Douglas v. California}, in which the Court held that if a state provides an appellate process, it must allow the indigent meaningful access to that process by providing him with a free transcript and free counsel.} After considering the applicability of some of the cases involving fundamental interests as well as those suggesting that wealth might be a suspect classification, the court dismissed this argument with an allusion to \textit{Dandridge}.\footnote{449 F.2d at 879.}

While the New York textbook statutes arguably created a wealth classification that affected access to public education, the Second Circuit in \textit{Johnson} apparently felt that \textit{Dandridge} precluded application of the stricter standard of review.\footnote{In his dissenting opinion, Judge Kaufman expressed some of the same theories that were relied upon in \textit{Serrano} arguing that education is an area of fundamental importance and that the state must demonstrate a compelling interest in order to justify conditioning its exercise upon the payment of money. 449 F.2d at 881-82.} On the other hand, the California supreme court never mentioned \textit{Dandridge} when it held in \textit{Serrano} that the state's school financing system created a classification that warranted strict scrutiny. Clearly, judicial interpretation of \textit{Dandridge} has a critical effect on the standard of equal protection review applicable to discrimination in the area of education.

2. \textit{Does Dandridge Foreclose Recognition of Education as a “Fundamental Interest”?}

\textit{Dandridge} involved a constitutional challenge to a Maryland regulation enacted in connection with the state's participation in the federal program of Aid to Dependent Children. The Court held that the regulation, which placed a maximum limitation on the size of the assistance payment a family was eligible to receive,\footnote{Due to the maximum grant limitation, large families would not be able to receive the amount of assistance defined by the state as necessary to meet their needs. 397 U.S. at 474-75.} did not deny recipients with large families equal protection of the laws. After determining that the strict standard was inapplicable, the Court applied the traditional standard of review and found that the regulation was rationally related to the legitimate state purpose of "encouraging employment and avoiding discrimination between welfare families and the families of the working poor."\footnote{397 U.S. at 486.} The Court observed:

In the area of economics and social welfare, a State does not violate the Equal Protection Clause merely because the classifications made by its laws are imperfect. . . .
The administration of public welfare assistance, by contrast [with business regulation cases], involves the most basic economic needs of impoverished human beings. We recognize the dramatically real factual difference . . . but we can find no basis for applying a different constitutional standard. . . . [T]he Fourteenth Amendment gives the federal courts no power to impose upon the States their views of what constitutes wise economic or social policy.

. . . . [T]he intractable economic, social and even philosophical problems presented by public welfare assistance programs are not the business of this Court. 88

Read broadly, this language is ominous. It could suggest that the strict standard of review is never applicable to classifications with respect to social and economic welfare, including public assistance, housing, education, and ordinary municipal services. 89

However, the holding in Dandridge was directed only at the validity of the Maryland AFDC maximum grant regulation. Therefore, the foreboding language might be characterized as dicta and need not be read as controlling the question of whether education merits stricter judicial protection under the fourteenth amendment. Alternatively, it might be argued that the language in Dandridge was simply not intended to encompass education. Education is an important and unique institution in society, and the Court may not have intended to foreclose independent inquiry into whether it is a fundamental interest.

Thus it appears that there are means by which those who seek to promote education as a fundamental interest can circumvent the language of Dandridge. Nevertheless, the rationale of the opinion raises serious doubts about the recognition of education as a fundamental interest. The statement quoted above seemed to be specifically aimed at rejecting the contention that there is a fundamental

88. 397 U.S. at 485-87.
89. The Supreme Court, 1969 Term, 84 HARY. L. REV. 35, 60 (1970) [hereinafter Supreme Court, 1969 Term]; Schoettle, supra note 5, at 1395.

Arguably, the foreboding language of Dandridge may have been aimed primarily at limiting the increasing amount of "substantive" challenges to public assistance legislation in the judicial branch. See Reinstein, Welfare Cases: Fundamental Rights, the Poor and the Burden of Proof in Constitutional Legislation, 44 TEMP. L.Q. 21, 50 (1970). Only weeks earlier, however, the Court had sustained a significant "procedural" challenge to "welfare" legislation in Goldberg v. Kelly, 397 U.S. 254 (1970). The Dandridge Court might have been less receptive to "substantive" challenges to public assistance legislation, for fear of impeding the plans for totally restructuring the welfare system which were under consideration in the legislative and executive branches of government. See Shapiro v. Thompson, 394 U.S. at 677 (Harlan, J., dissenting); Reinstein, supra, at 50. However, the Court's invalidation of "substantive" limitations on eligibility for public assistance under the equal protection clause in Graham v. Richardson, 403 U.S. 365 (1971), and under the supremacy clause in Townsend v. Swank, 404 U.S. 282 (1971), casts doubt on this theory.
interest in subsistence,\textsuperscript{90} which suggests that the importance of an interest alone is not sufficient to warrant its characterization as fundamental.\textsuperscript{91}

Assuming that the best possible case has been made for the importance of education in our society, it is questionable whether this is sufficient to sustain the proposition that education is a fundamental interest given \textit{Dandridge}'s treatment of subsistence under the equal protection clause. The \textit{Serrano} rationale for giving education exalted status appears to apply with equal force to subsistence benefits.\textsuperscript{92} Subsistence benefits are at least as important to the individual and society as education, even by the \textit{Serrano} court's own terms. First, \textit{Serrano} suggested that education helps maintain "free enterprise democracy" and is the bright hope of the underprivileged to gain entry "into the mainstream of American society."\textsuperscript{93} But nothing, including education, is more important to the poor than the means of daily subsistence, which are often obtained only through public assistance programs.\textsuperscript{94} Children who do not have enough to eat, nor adequate housing or clothing cannot be expected to achieve their academic potential even if they are afforded equal educational opportunity.\textsuperscript{95}

Second, the \textit{Serrano} court maintained that education, unlike other municipal services, is universally relevant because it benefits all members of society. The California supreme court noted that while "'[t]he majority of California families depend on assistance benefits to obtain the very means to subsist—food, shelter, and other necessities of life'" suggested to some commentators that the recognition of a fundamental right to subsistence might be on the horizon. See Michelman, supra note 3, at 46; Reinstein, supra, at 50. Such a conclusion finds additional support in Goldberg v. Kelly, 397 U.S. 254, 264-65 (1970).


\textsuperscript{92} Goldstein, supra note 3, at 540-41.

\textsuperscript{93} 5 Cal. 3d at 609, 487 P.2d at 1259-59, 96 Cal. Rptr. at 618-19.


\textsuperscript{96} 5 Cal. 3d at 609, 487 P.2d at 1259, 96 Cal. Rptr. at 619, quoting \textit{Educational Opportunity}, supra note 3, at 388.
all men to receive those basics that ensure their daily existence. If there are grounds for a distinction between education and subsistence upon this point, it is not because the need for or effects of education are more universal than subsistence, but merely because the state plays a larger role in providing education than it does in providing subsistence benefits. Third, the California court noted that, unlike most other government services, education continues over a lengthy period of time. Certainly welfare benefits are not designed to sustain their recipient indefinitely, but poverty is not a short-term affair. It is conceivable that, as with education, the need for subsistence benefits might continue for an extended period of time.

Fourth, the Court stated that “education is unmatched in the extent to which it molds the personality of the youth of society.” It is arguable, however, that the provision of basic necessities such as adequate food, clothing, and housing has an unparalleled effect on the development of the child. In fact, denial of these essentials may well frustrate efforts to educate the underprivileged. Unrelieved poverty during the early years of a child’s existence may leave a scar on his psyche for the rest of his life. Finally, Serrano argued that “education is so important that the state has made it compulsory.” Subsistence is so important, however, that it is unnecessary for the state to make it compulsory.

The Serrano court, noting that the Supreme Court has characterized the fundamental right of voting as preservative of other rights, implied that education is also a preservative right in the sense that it ensures intelligent political participation in the process that is protected by the right to vote. But the necessities secured by welfare benefits are preservative of life itself or at least of life at the mini-

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97. Brest, supra note 94, at 608.
98. Many more individuals depend on the state for the provision of education than for the provision of subsistence benefits. Yet it would be ironic to grant extra judicial protection to one area of fundamental importance because so many people are affected and deny extra judicial protection to another area equally important to the individual because fewer people are affected. Where many people might be adversely affected, there is at least some potential for eradicating the problem through the political process. But in an area such as subsistence payments, the minority whose rights are affected would have little hope of influencing reform through normal political channels.
99. 5 Cal. 3d at 609, 487 P.2d at 1259, 96 Cal. Rptr. at 619.
100. 5 Cal. 3d at 610, 487 P.2d at 1259, 96 Cal. Rptr. at 619.
101. See authorities cited in note 95 supra.
102. Id.
103. 5 Cal. 3d at 610, 487 P.2d at 1259, 96 Cal. Rptr. at 619. See Horowitz, supra note 3, at 1170.
104. See Goldstein, supra note 3, at 538-40.
mum standard that society considers acceptable. Given the Court's refusal to characterize subsistence as a fundamental interest and the difficulty in distinguishing education from subsistence, it is unlikely that the Court will find a place in the fundamental interest category for education.

Reliance upon Dandridge and the lack of a distinction between education and subsistence apparently convinced the Second Circuit in Johnson not to apply the strict standard of review to New York's textbook statute. As the court pointed out: "Although education is no doubt an area of fundamental importance, the Supreme Court has made clear its view that in the area of social welfare, the 'compelling state interest' theory does not apply even though basic needs may be involved." The court continued in a footnote, "Certainly, no one would contend that a student's need for textbooks is any more fundamental than such items as food and clothing which are provided through welfare grants."

Supreme Court decisions after Dandridge emphasize that the Court intends to restrict its recognition of new fundamental interests. In Lindsey v. Normet, the Court held that a statute that required tenants who sought to appeal from an adverse judgment in a forceable-entry suit to post a bond for double the amount of rent due violated the equal protection clause by discouraging the right to appeal. In reaching its decision, however, the Court rejected the contention that "the need for decent shelter" or "the right to retain peaceful possession of one's home" are fundamental interests and declared, "We do not denigrate the importance of decent, safe and sanitary housing. But the Constitution does not provide judicial remedies for every social and economic ill." Like the right to subsistence, the right to housing compares favorably in importance with education. Thus the California supreme court's rationale for recognizing education as a fundamental interest is not consistent with current equal protection doctrine, represented by Dandridge and Lindsey.

While it is clear that the importance of an interest does not of necessity make it fundamental, the Supreme Court has never firmly defined the characteristics of a "fundamental interest" under the equal protection clause. However, Dandridge suggested a criterion

107. 449 F.2d at 879.
108. 449 F.2d at 879 n.11.
110. 405 U.S. at 74. The rejection of a fundamental right to housing was foreshadowed by the Court's failure to consider this contention in Valtierra. See The Supreme Court, 1970 Term, 85 HARV. L. REV. 40, 130 (1971) [hereinafter Supreme Court, 1970 Term].
111. See Cox, Foreword: Constitutional Adjudication and the Promotion of Human Rights, 89 HARV. L. REV. 91, 91-95 (1966). For a discussion of some of the factors that
that the Court may consider significant in the future. In a footnote, the Court suggested that the “constitutionally protected” nature of the right involved in *Shapiro v. Thompson* may have been the controlling factor in the decision to apply the strict standard of review in that case. In *Lindsey*, the Court emphasized its inability “to perceive in that document [the Constitution] any constitutional guarantee of access to dwellings of a particular quality or any recognition of the right of a tenant to occupy the real property of his landlord beyond the term of his lease. . . .”

There is good reason for attempting to limit the fundamental interest category. Every application of the strict standard of review necessarily involves abandonment of the traditional presumption of validity that the Court normally accords legislation. The Court

the Court has considered in deciding whether to accord special protection to a given interest, see *Supreme Court, 1969 Term*, supra note 89, at 65-66; *Comment, supra* note 3, at 115-22.

112. 397 U.S. at 484 n.16. The theory that fundamental interests must be the subject of independent constitutional protection first appeared in Justice Harlan’s dissent in *Harper* (383 U.S. at 682 n.3) and *Shapiro* (394 U.S. at 661-62) and Justice Stewart’s concurrence in *Shapiro* (394 U.S. at 649). It is not clear what the Court would require in terms of independent constitutional protection. For example, in *Shapiro* the Court held that the right to interstate travel was constitutionally protected but declined “to ascribe the source of this right . . . to a particular constitutional provision.” 394 U.S. at 630. Justice Harlan, who was not satisfied with this analysis, concluded that the right to interstate travel must be found in the due process clause of the fifth amendment. 394 U.S. at 671.

Moreover, it has been suggested that the recognized fundamental interests of voting and fair criminal procedure are not “constitutionally protected.” *Supreme Court, 1969 Term*, supra note 89, at 65; *Reinstein, supra* note 89, at 42. See also *Michelman, supra* note 3, at 17 n.25. For example, in *Griffin v. Illinois*, the Court noted that the states were not constitutionally required to provide an appellate process. 351 U.S. at 18. In *Harper*, the Court declined to link the right to vote in state elections to anything more specific than the equal protection clause, although it intimated that the right might be found in the first amendment. 383 U.S. at 605. Thus it is unlikely that the Court would require that the specific right at issue in a particular case be explicitly protected in the text of the Constitution before it can be considered fundamental. Rather, a general constitutional reference to the area of interest would probably be sufficient. The references to voting in articles I and II and in the twelfth, fourteenth, fifteenth, seventeenth, nineteenth, twenty-fourth, and twenty-sixth amendments would certainly provide sufficient independent constitutional protection for that interest. Likewise, the fifth, sixth, seventh, and eighth amendments should afford constitutional protection to fair criminal procedure. But see *Note, Discriminations Against the Poor and the Fourteenth Amendment*, 81 Harv. L. Rev. 435, 438 (1967). The mere mention of an interest in the Constitution, however, such as the right to contract, does not necessarily render it fundamental.

Surely the Court does not intend to discontinue its practice of strictly scrutinizing classifications that affect criminal procedure and voting. Since *Dandridge*, the Court has reaffirmed the applicability of strict review to criminal procedure cases in *Williams v. Illinois*, 359 U.S. 225 (1970), and *Tate v. Short*, 401 U.S. 395 (1971). Likewise, the Court has continued to apply strict review to voting cases such as *Bullock v. Carter*, 405 U.S. 134 (1972). See *Comment, supra* note 3, at 129-30 for the argument that the “independent constitutional protection” requirement of *Dandridge* is an aberration that will not preclude the recognition of education as a fundamental interest.

113. 405 U.S. at 74.
might limit its stricter scrutiny to classifications in those areas ex-
pressly mentioned in the text of the Constitution, thereby fulfilling
its duties as arbiter of the Constitution and at the same time avoid-
ing an overly broad incursion into the legislative function. The
Court's seemingly ad hoc applications of the strict standard of
review have exposed it to the criticism that it uses the "fundamental
interest" doctrine to impose its own value judgments on the nation.114
The Court may prefer to instill more objectivity and predictability
into the determination of fundamental interests and thereby to
dispel the notion that it decides whether to afford extra judicial
protection to an interest on the basis of the Court's evaluation of
its importance.115 The requirement of "independent constitutional
protection" seems to be the most feasible means for accomplishing
these objectives without abandoning the fundamental interest con-
cept entirely.

If the Court intends such a limitation, education could claim
"fundamental" status only through a strained interpretation of an
"independent constitutional basis," since education is nowhere men-
tioned in the text of the Constitution. Thus, to grant special status
to education would destroy any hope of infusing more objectivity
into the selection of fundamental interests.

There are other reasons for concluding that education will not
be recognized as a fundamental interest by the Supreme Court. Rec-
ognition of education as a fundamental interest would require the
Court to scrutinize carefully a great variety of classifications that
affect access to public education.116 Given the magnitude of public
education systems in our society, the multitude of classifications that
are necessary for their operation, and the differences of opinion sur-
rounding educational decision-making, it may be assumed that appli-
cation of the strict standard of review to all classifications in the area
of public education would result in an undesirable deluge of litiga-
tion. Moreover, even if the Court were willing to scrutinize strictly
discriminations in the area of education, it might refrain from doing
so for fear of opening the floodgates to strict review of classifications
that affect other municipal services.117 Education is undoubtedly

115. Supreme Court, 1970 Term, supra note 110, at 130; Supreme Court, 1969
Term, supra note 89, at 64.
116. But the Court has suggested that the strict standard is not automatically
applicable whenever a classification imposes an incidental burden on a fundamental
interest. Schilb v. Kuchel, 404 U.S. 357, 365 (1971). The same reasoning would dou-
blely apply to education if it were recognized as a fundamental interest. Nevertheless,
the Court would still strictly scrutinize many classifications directly affecting education
that would have created few problems under the traditional test.
117. The California supreme court rejected the argument that the school financing
systems should not be invalidated because this would lead to similar action in respect to
other municipal services. 5 Cal. 3d at 613-14, 487 P.2d at 1282-83, 96 Cal. Rptr. at
more important than most other municipal services, but, arguably, it is no more crucial than police, fire, and sanitation services. The Court may prefer not to weigh the importance of all types of municipal services and select those that are critical enough to merit "special" equal protection. To escape the burden of making fine distinctions, the Court may simply elect to withhold fundamental interest recognition from all municipal services, including education.\footnote{118}

3. \textit{Do Current Educational Financing Systems Create Inherently Suspect Classifications?}

An alternative ground for the California supreme court's decision to scrutinize strictly the state's school financing program was that it created a wealth classification and that such classifications are inherently suspect.\footnote{119} The cases that arguably support the proposition that five policy reasons on which the California supreme court based its recognition of education as a fundamental interest (see notes 92-104 \textit{supra} and accompanying text) provide a means for distinguishing education from other municipal services. See also Comment, \textit{supra} note 3, at 154-64 for a discussion of the significance of \textit{Serrano} to the equalization of other municipal services under the fourteenth amendment.

Nevertheless, some lawyers apparently are convinced that recognition of education as a fundamental interest will spawn effective challenges to unequal provision of all municipal services. Andrews, \textit{Tax 'Revolution' School Ruling Is Seen Changing the Nature of U.S., Cities, Suburbs}, Wall St. J., March 13, 1972, at 1, col. 6; at 10, col. 6 [hereinafter Andrews]:

\begin{quote}
Serrano "opens a very large door," says John Silard, a Washington, D.C., attorney involved in school-tax litigation. For the first time, he says, the courts are requiring "equal protection" in public programs. \ldots{} In his view, this means "a revolution in [public] services." The schools, he predicts, are merely "the first bite at the big apple. Welfare obviously comes next, and I guess health, too."
\end{quote}

\ldots{} Perhaps understandably, the lawyers closest to the Serrano suits play down talk of sweeping revisions in public services. The success of their litigation depends in good part on a painstaking legal theory that education is something special—"a fundamental interest" in constitutional parlance.

\ldots{} Some lawyers predict that if education is accepted as a fundamental interest other public services are bound to follow. But they don't like to say it out loud. "They want this to stick," one attorney says. "You stress that education isn't like garbage. We are playing a game here. You have to [in order] not to frighten the courts away from a proposition that's sound."

Apparently, these lawyers are convinced that Supreme Court Justices do not read \textit{The Wall Street Journal}.

Currently the leading case involving discrimination in the provision of municipal services is Hawkins v. Town of Shaw, 437 F.2d 1286 (1971), in which the Court of Appeals for the Fifth Circuit held that a municipality may not discriminate on the basis of race in the provision of such services as sewage facilities, paved streets, lighting and fire hydrants. See generally Ratner, \textit{Inter-Neighborhood Denials of Equal Protection in the Provision of Municipal Services}, 4 HARV. CIV. RIGHTS-CIV. LIB. L. REV. 1 (1968); Note, \textit{The Right to Equal Municipal Services}, 57 BROOKLYN L. REV. 568 (1971).

\footnote{118. Supreme Court, 1970 Term, \textit{supra} note 110, at 130; Supreme Court, 1969 Term, \textit{supra} note 89, at 70.}

\footnote{119. 5 Cal. 3d at 597-98, 487 P.2d at 1250, 96 Cal. Rptr. at 610.}

For a discussion of whether wealth is or should be a suspect classification, see \textit{Private Wealth and Public Education}, \textit{supra} note 3, at 339-76; Michelman, \textit{supra}
tion that wealth is a suspect classification are primarily concerned with individual rather than collective wealth.\textsuperscript{120} The Serrano court accepted as true on demurrer the plaintiff's allegations that there was a positive correlation between the wealth of the districts in terms of taxable property and the personal wealth of the districts' inhabitants.\textsuperscript{121} This conclusion may be hasty, given the presence of substantial amounts of valuable commercial and industrial property in districts inhabited by the poor.\textsuperscript{122} Thus it is questionable whether the plaintiffs will be able to establish that poor people as such are singled out and victimized by current school financing systems. But the court declared that, regardless of such a correlation, discriminations based upon district wealth were as equally "suspect" as discriminations based upon individual wealth.\textsuperscript{123} The court reasoned that the amount of money spent on a child's education should not depend upon the presence or absence of valuable commercial and industrial property within his school district.\textsuperscript{124} Furthermore, in responding to the contention that this wealth discrimination was unintentional,\textsuperscript{125} the court noted that the governmental action was in large part responsible for the intradistrict disparities in taxable property since the financing system was mandated by the state constitution and statutes, the distribution of valuable property was partially controlled by zoning and land-use ordinances, and the school district

\textsuperscript{120} See Griffin v. Illinois, 351 U.S. 12 (1956); Douglas v. California, 372 U.S. 353 (1963); Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966). It has been suggested that in these cases the effect of the wealth discrimination was total deprivation of the commodities involved since the indigent was too poor to afford a transcript, hire an attorney, or pay the poll tax. In the educational financing situation, the deprivation is only partial since a minimum amount of money is spent on the education of all children. See Kirp & Yudof, supra note 3, at 147 n.3. The Supreme Court might consider this distinction crucial.

\textsuperscript{121} 5 Cal. 3d at 600-01, 487 P.2d at 1252, 96 Cal. Rptr. at 612.


\textsuperscript{123} 5 Cal. 3d at 601, 487 P.2d at 1252, 96 Cal. Rptr. at 612.

\textsuperscript{124} 5 Cal. 3d at 601, 487 P.2d at 1252-53, 96 Cal. Rptr. at 612-13.

\textsuperscript{125} 5 Cal. 3d at 601-03, 487 P.2d at 1253-54, 96 Cal. Rptr. at 613-14. The court declared that it was not necessary that the discrimination be intentional in order to constitute a denial of equal protection. It noted that classifications invalidated by the Supreme Court in Griffin, Douglas, and Harper were not purposefully discriminatory.

Along the same lines, the Serrano court rejected the defendant's analogy that the wealth discriminations were constitutional since they were comparable to de facto segregation. The court emphasized the degree of state action involved and noted that California has declared de facto school segregation unconstitutional. 5 Cal. 3d at 601-04, 487 P.2d at 1253-55, 96 Cal. Rptr. at 613-15.
boundaries were drawn by the government. Given these factors, if the Supreme Court is willing to accept the characterization of wealth as a suspect classification at all, it might be willing to apply the principle to wealth discriminations between districts as well as between individuals.

In concluding that wealth is a suspect classification, the Serrano court quoted the Supreme Court's statement in Harper v. Virginia Board of Elections that "[l]ines drawn on the basis of wealth or property, like those of race . . . , are traditionally disfavored" and the Court's assertion in McDonald v. Board of Election Commissioners that "a careful examination on our part is especially warranted where lines are drawn on the basis of wealth . . . [a factor] which would independently render a classification highly suspect and thereby demand a more exacting judicial scrutiny." The fact remains, however, that every case in which the Court has applied the stricter standard of review to classifications based on "wealth" also involved the fundamental interests of voting or fair criminal procedure; the presence of wealth classifications alone has not yet activated the strict standard of review.

To the contrary, the recent case of James v. Valtierra strongly suggests that wealth is not a suspect classification. In Valtierra, the Court held that the California constitution's provision that low-rent housing projects could not be developed or constructed by the state until "approved by the voters in a local referendum" was not a denial of equal protection of the laws. The Court distinguished Hunter v. Ericksen, which held that an amendment to the Akron, Ohio, City Charter requiring voter approval of any ordinance regulating real estate on the basis of race, creed, color, or national origin violated the equal protection clause. The Court quoted from Hunter the observation that "racial classifications are "constitutionally suspect" . . . and subject to the "most rigid scrutiny." They "bear

126. 5 Cal. 3d at 603, 487 P.2d at 1259-60, 96 Cal. Rptr. 619-20.
127. 5 Cal. 3d at 597, 487 P.2d at 1250, 96 Cal. Rptr. at 610, quoting 383 U.S. at 668. But see Michelman, supra note 3, at 24-25, where it is suggested that Harper is more appropriately interpreted as a statement on voting rights than as a statement on wealth classifications. See also Cox, supra note 111, at 95-96.
129. 5 Cal. 3d at 597, 487 P.2d at 1250, 96 Cal. Rptr. at 610, quoting 394 U.S. at 807. In McDonald, plaintiff alleged that an Illinois statute denied equal protection of the laws to prisoners unable to obtain bail since it did not include them in the category of persons allowed to vote by absentee ballot. After it characterized wealth as a suspect classification, however, the Court held that no classification based upon wealth was involved since the petitioners had not shown that they were denied the right to vote.
130. CAL. CONST. art. XXXIV.
131. 402 U.S. at 143.
132. 402 U.S. at 140-41.
a far heavier burden of justification” than other classifications.”

The Court noted, however, that there was nothing in the record to suggest that the California law was implicitly intended to discriminate against a racial minority. Thus the Court concluded, “The present case could be affirmed only by extending Hunter and this we decline to do.”

In his dissent in Valtierra, Justice Marshall argued that “[t]he article [of the California constitution] explicitly singles out low-income persons to bear its burden. . . . It is . . . an explicit classification on the basis of poverty—a suspect classification which demands exacting judicial scrutiny. . . .” Given the thrust of Justice Marshall’s dissent, the majority’s emphasis on the “suspect classification of race” involved in Hunter, and its stated refusal to extend Hunter, the implication is strong that the Court did not regard a discrimination on the basis of wealth alone as a suspect classification capable of activating the strict standard of review. But since the majority did not directly address this issue, it is presumably still open.

Commentators have suggested, however, that there are critical differences between such previously recognized suspect classifications as race and ancestry and classifications based upon wealth. It is more difficult to identify the poor as a discrete group than it is to identify distinct racial and national minorities. In addition, wealth is a matter of degree, rather than kind. Thus, wealth classifications are less obviously arbitrary than, for example, racial discriminations.

134. 402 U.S. at 141, quoting 393 U.S. at 391-92.
135. 402 U.S. at 141.
136. 402 U.S. at 141.
137. 402 U.S. at 144-45. Justice Marshall observed that by its own terms article XXXIV is applicable only to “any development composed of urban or rural dwellings, apartments or other living accommodations for persons of low income, financed in whole or in part by the Federal Government or a state public body.” Persons of low income are defined as “persons or families who lack the amount of income which is necessary . . . to enable them, without financial assistance, to live in decent, safe and sanitary dwellings, without overcrowding.” 402 U.S. at 143-44.

This is probably the most explicit discrimination based on wealth that the Court is likely to encounter.

138. The Supreme Court has declined the opportunity to characterize wealth as a suspect classification in some recent cases. One example is Boddie v. Connecticut, 401 U.S. 371 (1971). In Boddie, the Court held that it was unconstitutional to condition access to the courts in divorce proceedings on the payment of filing fees. Despite a long line of decisions concerning indigents’ rights in criminal proceedings based on the equal protection as well as the due process clause, the Court limited its holding to due process. The Court attempted to restrict further the sweep of its holding by emphasizing the importance of marriage in our society. 401 U.S. at 376. Both Justices Douglas and Brennan argued, in concurring opinions, that an equal protection rationale would have been more appropriate. 401 U.S. at 383-86, 386-89. Cf. Lindsey v. Normet, 405 U.S. 56 (1972).
139. See Note, 84 Harv. L. Rev. 1645, supra note 119, at 1659. But there are at least some standards for identifying the poor. Id.
140. Id.
Furthermore, poverty, unlike race or ancestry, is a remediable condition. Finally, classifications involving the payment of money are accepted as necessary to our economic system. In view of these differences the Court might not be as willing to review classifications based on wealth as strictly as those based on race, ancestry, or alienage.

It should be noted that the recognition of wealth as a suspect classification would be potentially even more expansive than recognition of education as a fundamental interest. Such a precedent would require the application of the strict standard whenever a plaintiff alleged that a wealthier district was able to provide better police protection, fire protection, park service, or sewage disposal. It would be unnecessary to argue that there is a fundamental interest in these services if the presence of wealth discrimination alone were sufficient to warrant strict scrutiny. Practically any statute that conditions reception of a benefit or avoidance of a burden on payment of a fee or on financial status would be subject to serious challenge. It is unlikely the Court would be willing to adopt this doctrine since it would involve the Court in a series of sweeping economic reforms that could only be characterized as "legislative" in nature.

4. *Does the Combination of Wealth Discrimination in the Area of Education Require the Strict Standard of Review?*

Traditionally, it has been assumed that either a fundamental interest or a suspect criterion is sufficient to warrant application of the strict standard of review to a legislative classification. The propositions that education is a fundamental interest and that wealth classifications are inherently suspect are apparently inconsistent with the current trend in Supreme Court decisions. However, the

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142. *Id.* at 766.
143. But for the argument that the poor deserve extra protection under the equal protection clause due to their lack of political strength, see Michelman, *supra* note 3, at 21; Note, 84 Harv. L. Rev. 1645, *supra* note 119, at 1658-61; *Supreme Court, 1970 Term, supra* note 110, at 128-29.
144. The Court appears to be concerned with restricting the further expansion of the suspect classification category as well as the category of fundamental interests. For example, despite some promising dicta in earlier cases, the Court recently declined to recognize illegitimacy as a suspect classification. Compare *Labine v. Vincent*, 401 U.S. 532 (1971), with *Levy v. Louisiana*, 391 U.S. 68 (1968). *See also* Weber v. Aetna Cas. & Surety Co., 40 U.S.L.W. 4460 (U.S. April 24, 1972).
145. *See* Michelman, *supra* note 3, for the possible distinction between "payment" and "wealth" classifications, and for an alternative approach to protecting the poor under the equal protection clause.
147. Yet another theory might be drawn from the opinion in *Serrano*. The court
California court in *Serrano* may have been justified in applying the strict standard to the state's school financing system due to the existence of a classification that affected education and was based on wealth. The Supreme Court may be less reluctant to extend the strict standard to cases that involve both education and wealth classifications since such an extension would be less expansive than an extension to all cases that involve just one of those factors.

Application of the strict standard to the combination of an important, but nonfundamental, interest and a disfavored, but non-suspect, classification would lend itself to either of two possible interpretations. On the one hand, it might suggest that the Court is recognizing a category of hybrids that will be subjected to strict scrutiny. Or it might suggest that the Court will evaluate the relative importance of the interest at stake and the invidiousness of the classification involved in a given case and adjust the standard of review accordingly. Both of these possibilities are appealing since

suggested that the state may not discriminate on a geographical basis where fundamental rights or suspect classifications are involved. 5 Cal. 3d at 612, 487 P.2d at 1251, 96 Cal. Rptr. at 621. The court first drew support from school closing cases in which the Supreme Court has invalidated efforts to close schools in one part of the state while other schools continued to operate. Griffin v. County School Bd., 377 U.S. 218 (1964); Hall v. St. Helena Parish School Bd., 197 F. Supp. 649 (E.D. La. 1961), affd. mem., 368 U.S. 515 (1962). These cases, however, are distinguishable from the educational financing litigation in that they involved blatant racial discrimination. In addition, the children involved were completely denied the opportunity to attend public schools rather than merely denied equal educational expenditures.

The California supreme court also relied upon the reapportionment cases, especially Reynolds v. Sims, 377 U.S. 533 (1964), to support this proposition. Specifically, the court quoted the Supreme Court's statement in *Reynolds* that "Diluting the weight of votes because of place of residence impairs basic constitutional rights under the Fourteenth Amendment just as much as invidious discrimination based upon factors such as race . . . or economic status . . . .", and concluded that "[i]f a voter's address may not determine the weight to which his ballot is entitled, surely it should not determine the quality of the child's education." 5 Cal. 3d at 613, 487 P.2d at 1262, 96 Cal. Rptr. at 622, quoting 377 U.S. at 566.

For an extensive analysis of the validity of geographical classifications under the equal protection clause, see Horowitz & Neitring, *supra* note 3. See also A. Wise, *supra* note 3, at 171-72. See also *Private Wealth and Public Education*, *supra* note 3, at 350-55 (the geographical discrimination theory is an inappropriate vehicle for challenging educational financing systems under the equal protection clause).

148. It is unclear from the court's opinion in *Serrano* whether it rested its decision on the education-fundamental interest factor, the wealth-suspect criterion factor, or a combination of both. It has been suggested that classifications based upon wealth only require strict review when coupled with a fundamental interest. *Private Wealth and Public Education*, *supra* note 3, at 344; Note, 69 Mich. L. Rev. 833, *supra* note 119, at 347. But as Professor Michelman suggests, *supra* note 3, at 22-23, such an analysis implies that the "classification of wealth" is of little significance since the strict standard of review would apply in any event because of the fundamental interest involved. For example, when voting is at stake, the Court will apply the strict standard of review to classifications based upon factors other than wealth. See, e.g., *Kramer v. Union Free School Dist.*, 395 U.S. 621 (1969).

they would result in a more flexible approach to equal protection questions. However, flexibility necessarily engenders a degree of uncertainty, and this is a factor that the Court would presumably like to minimize in this area.  

Furthermore, strict scrutiny of the combination of wealth discriminations in the area of education would still expand use of the strict standard of review beyond its current perimeters. The Court would burden itself with the complex task of value-balancing that it apparently desires to avoid. For it would eventually have to determine whether wealth classifications that affect other important interests, such as subsistence, housing, and municipal services, warrant strict scrutiny despite the fact that the interests involved are not "fundamental." Therefore, the Serrano doctrine itself will probably receive a great deal of "strict scrutiny" when it is considered by the highest court of the land.

C. School Financing Systems Under the Traditional Equal Protection Standard

Even if the Supreme Court should decide that the strict standard of review is inapplicable to the educational financing litigation, there remains the possibility of invalidating the systems under the traditional equal protection standard. While basing their decisions on the strict standard, federal courts in Van Dusart and Rodriguez have indicated that the states' school financing systems might not withstand analysis under the rational basis test either.

In applying the traditional standard of equal protection, the Court has stated that a classification must have a "'fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike.'" Occasionally, however, the Court has emphasized the laxity of the traditional approach noting that "a statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it' or unless it is "wholly irrelevant to the achievement of the state's objectives." In some instances the Court has subjected legislation to only the most cursory review, accepting purposes of marginal relevance as suf-
sufficient justification for sustaining the classifications.\textsuperscript{158} In other cases, however, the Court has engaged in a more demanding search for a “rational basis” for the legislation in question.\textsuperscript{159} The Court has offered no explanation for these apparent variations in intensity of review under the traditional standard. It may be noted, however, that the Court has been especially lax in those cases involving business regulations,\textsuperscript{160} and this may be the most appropriate approach in these instances. Arguably, the Court exercises a somewhat more demanding review of classifications involving personal, but nonfundamental, interests—such as education or subsistence benefits—under the traditional standard.\textsuperscript{161} The success of the challenge to educational financing under the traditional standard is dependent upon such a conscientious search for a rational basis.

The quest for a rationally related purpose is complicated by the fact that complex legislation often bears many purposes, some of which may be inconsistent. The determination reached under the traditional equal protection standard may be contingent upon what is characterized as a legislative purpose.

Arguably, the dominant purpose of an educational financing method is to create a system of equal educational opportunity.\textsuperscript{162} Indeed, many state constitutions contain clauses that guarantee equal education to all.\textsuperscript{163} Considering the large discrepancies in expenditures among school districts that are engendered by the current systems, it would seem that they are not rationally related to this purpose.\textsuperscript{164} The legitimate purpose of promoting local control over educational spending and decision-making will no doubt be set forth

that denied the rights of intestate succession to illegitimate children who had not been both acknowledged and legitimated. Although the classification was attacked under the equal protection clause, the Court decided the case on the ground that the state legislature had the power to pass laws regulating intestate succession. 401 U.S. at 538. In a footnote the Court acknowledged that it could have found a rational basis for the classification but failed to say why it was not necessary to do so. 401 U.S. at 536 n.6. In a vigorous dissent, Justice Brennan charged that the majority’s refusal to consider the issue in terms of even the restrained standard of review marked a new and unfortunate approach to equal protection. 401 U.S. at 548-50.

\textsuperscript{158} See, e.g., Railway Express Agency, Inc. v. New York, 336 U.S. 106 (1949) (sustaining a New York statute which, as a safety measure, prohibited trucks from carrying advertising except when a product of the truck owner was advertised).

\textsuperscript{159} See, e.g., Eisenstadt v. Baird, 405 U.S. 438 (1972) (invalidating a Massachusetts criminal statute which prohibited the gratuitous distribution of contraceptives).


\textsuperscript{162} Private Wealth and Public Education, supra note 3, at 334.

\textsuperscript{163} Id. The court in Van Dusart commented, “If the State’s objective is a ‘general and uniform system’ of education, as Article VIII, Section I of the Minnesota Constitution declares, it might be wondered whether the means chosen are rationally adapted to that goal.” 384 F. Supp. at 874.

\textsuperscript{164} See Private Wealth and Public Education, supra note 3, at 385.
as a rational basis for the current financing systems. The *McInnis* court accepted this rationale, stressing that it was desirable to allow local districts to choose their own tax rates and select their own priorities as between education and other municipal services. These conclusions may not be controlling in the current litigation before the Court, however, since the court in *McInnis* also grounded its decision upon the lack of judicially manageable standards. Commentators have argued that just as much local control could be obtained under more equalized financing systems.

But under the traditional standard of review, a state is not required to utilize the least onerous method for accomplishing its purpose, thus the existence of a potentially better system would not require the invalidation of the current one. However, it is arguable that current financing systems do not even effectively encourage local control over decision-making since poorer school districts may contain so little taxable wealth that they have no effective means for increasing educational expenditures. As the *Serrano* court noted, "[A]ffluent districts can have their cake and eat it too: they can provide a high quality education for their children while paying lower taxes. Poor districts, by contrast have no cake at all." Thus local control of decision-making may not be a valid justification for the current systems. Nevertheless, the Court could conclude that as long as the state does not place an upper limit on the level at which a district may tax itself, poorer districts can raise additional revenue by taxing themselves at higher rates and thereby retaining a sufficient degree of control over revenue. Thus arguments for invalidating the financing systems under the rational basis test are vulnerable.

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165. 293 F. Supp. at 333.
166. 293 F. Supp. at 335.
167. See *PRIVATE WEALTH AND PUBLIC EDUCATION*, *supra* note 3, at 14-20, 34-35, 306, 432, for the argument that local control over educational decision-making and spending (which they characterize as "subsidiarity") can be achieved under a more equalized system of educational finance. See note 168 *infra* for a description of such a system.
169. The court in *Van Dusartz* doubted whether encouraging local control over decision-making provided a rational basis:

   By its own acts, the State has indicated that it is not primarily interested in local choice in school matters. In fact, rather than reposing in each school district the economic power to fix its own level of per pupil expenditure, the State has so arranged the structure as to guarantee that some districts will spend low (with high taxes) while others will spend high (with low taxes). To promote such an erratic dispersal of privilege and burden on a theory of local control of spending would be quite impossible.

334 F. Supp. at 876.
170. 5 Cal. 3d at 600, 487 P.2d at 1251-52, 96 Cal. Rptr. at 611-12.
171. See *PRIVATE WEALTH AND PUBLIC EDUCATION*, *supra* note 3, at 326-34, for criticism of the traditional standard of review.
Professor Schoettle has suggested a different approach for challenging educational financing systems under the rational basis test.\textsuperscript{172} He argues that financing methods that depend on assessable property within individual school districts require voters in poorer districts to "bear a heavier burden of electoral persuasion" than those in wealthier districts in order to raise similar amounts of revenue for the operation of schools.\textsuperscript{173} Analogizing to \textit{Baker v. Carr}\textsuperscript{174} and other reapportionment decisions, he contends that the financing systems dilute the votes of residents in poorer districts in much the same manner as malapportionment of state legislatures diluted the franchise of voters in more populous districts.\textsuperscript{175} He concludes that the systems violate the equal protection clause since no rational basis can exist for a system which creates such gross disparities in revenue-raising capacity.\textsuperscript{176} Extending this argument to its logical conclusion, he suggests that the Court should nullify financing systems that create large disparities in revenue-raising ability among districts for all municipal services and not simply for education.\textsuperscript{177} This theory has the virtue of invalidating current financing systems without an expansive application of the strict standard of review and without the necessity of establishing a causal relationship between educational expenditures and educational achievement.\textsuperscript{178}

However, this theory is in other respects even broader than the \textit{Serrano} approach. As noted above, the \textit{Serrano} decision to apply the strict standard of review to California’s school financing system can be limited to cases in which a statute creates a wealth classification affecting education. Schoettle’s theory would involve the Court in equal protection scrutiny of wealth classifications with respect to \textit{all} municipal services.

Furthermore, there is some question whether the analogy between school financing legislation and legislative apportionment is appropriate. \textit{Baker} and its progeny involved malapportionment of legislative districts that diluted some citizens’ votes for state legislators, who represent their constituents on the full range of political issues. In contrast, the educational financing cases involve disparity in voting power among groups of citizens on only one issue: the rate at which districts tax themselves on their property. Thus deviation from the "one man-one vote" principle in the educational financing

\textsuperscript{172} Schoettle, \textit{supra} note 3, at 1407-12.
\textsuperscript{173} \textit{Id.} at 1407-09.
\textsuperscript{174} 369 U.S. 186 (1962).
\textsuperscript{175} Schoettle, \textit{supra} note 3, at 1409.
\textsuperscript{176} \textit{Id.} at 1405-06.
\textsuperscript{177} \textit{Id.} at 1412.
\textsuperscript{178} \textit{Id.} at 1411-12.
context does not harm disadvantaged voters as extensively as in the legislative apportionment setting.\textsuperscript{179}

The traditional standard of review may serve as an escape valve for the Supreme Court if it desires to invalidate the controversial educational financing systems without expanding the strict standard of review.

III. Justiciability, Costs of Reform, and the Propriety of a Judicial Solution

A. Justiciability

The decision in \textit{McInnis} rested partially, if not totally, on lack of justiciability, since the court determined that there were no judicially manageable standards for resolution of the litigation.\textsuperscript{180} The plaintiffs asserted that educational expenditures should be apportioned according to the individual student's educational needs.\textsuperscript{181} The three-judge district court concluded that it was incapable of determining what a student's needs were, and consequently that it could not apply the standard for resolution proposed by plaintiffs.\textsuperscript{182}

Plaintiffs in more recent school financing cases have offered a standard that is far narrower and more concrete than the educational needs standard advanced in \textit{McInnis}. In \textit{Rodriguez}, the case currently before the Supreme Court, the plaintiffs convinced the three-judge federal district court to accept the principle of fiscal neutrality as the proper judicial standard for resolution of the controversy.\textsuperscript{183} Simply stated, "fiscal neutrality" means that "the quality of public education may not be a function of wealth other than the wealth of the state [as a whole]."\textsuperscript{184} This standard does not attempt to measure

\textsuperscript{179} For further comment on Schoettle's proposal, see Goldstein, supra note 3, at 542-43; Karst, supra note 3, at 752-54.

\textsuperscript{180} 293 F. Supp. at 335-36. See Baker v. Carr, 339 U.S. 186, 217 (1963); McCloskey, Foreword: The Reapportionment Case, 78 HARV. L. REV. 54 (1962). McCloskey observes, "It seems fairly clear that for Justice Brennan [the author of the Baker opinion] 'the lack of judicially discoverable and manageable standards' is the only reason that might cause the Court to call a question involving state governmental arrangements a political question." Id. at 60 (emphasis original). See also Silard & White, supra note 3, at 23-24.

\textsuperscript{181} 293 F. Supp. at 329.

\textsuperscript{182} 293 F. Supp. at 335-36.

\textsuperscript{183} 337 F. Supp. at 283-84. The court in \textit{Van Dusart} expressly accepted the fiscal neutrality standard. 334 F. Supp. at 872. It has been suggested that the court in \textit{Serrano} impliedly accepted that standard at 5 Cal. 3d at 587, 487 P.2d at 1244, 96 Cal. Rptr. at 604. First Appraisal, supra note 3, at 129 n.3. Professor Wise in School Finance, supra note 3, at 124, notes that \textit{Serrano} can be read as requiring more than mere fiscal neutrality. He suggests that the court's opinion may mean that the quality of a child's education may not be a function of "where [he] lives, what his parental circumstances are, or how highly his neighbors value education."

\textsuperscript{184} Private Wealth and Public Education, supra note 3, at 304. See also First Appraisal, supra note 3, at 111.
such complex concepts as "educational opportunity" or "educational needs," but rather is concerned primarily with equality of revenue-raising capacity. If all school districts within the state can collect substantially equal amounts of revenue per pupil by taxing themselves at the same rate, the neutrality standard is satisfied. The fiscal neutrality standard has the virtue that it allows state legislatures great flexibility in fashioning an alternative system so long as conditions of local wealth are disregarded. Since the standard concep-

185. First Appraisal, supra note 3, at 114.
186. PRIVATE WEALTH AND PUBLIC EDUCATION, supra note 3, at 307. See First Appraisal, supra note 3, at 116, describing five model financing systems that satisfy fiscal neutrality. See also School Finance, supra note 3, at 127-30 ("A Model Legislative Response" to fiscal neutrality, designed for Maryland); Comment, supra note 3, at 187-98.

One means of achieving fiscal neutrality would be for the state to assume the entire burden of financing public education. This alternative has been recommended by The Advisory Commission on Intergovernmental Relations in STATE AID TO LOCAL GOVERNMENT (1969), the Fleischman Commission in New York, the National Educational Finance Project, and Governor Milliken of Michigan in REPORT OF THE GOVERNOR'S COMMISSION ON EDUCATIONAL REFORM (1969). For a consideration of these proposals, see School Finance, supra note 3, at 125-27. See also Silard & White, supra note 3, at 30.

Kirp & Yudof, supra note 3, at 145, emphasize that under the fiscal neutrality standard

[the] legislature could choose to centralize or decentralize either revenue raising or school governance; it could employ a state-wide property tax, an industrial property tax, an income tax; or it could opt for . . . compensatory education programs . . . . A legislature may choose to allocate funds on the basis of the characteristics of the consumers of the service, the children.

Another alternative . . . . is an allocation of funds based on the characteristics of each school district. . . . The number of pupils, the number of schools, the willingness of a district to make a greater or lesser property tax effort . . . and the degree of racial integration within the district could be considered in allocating money. Extra dollars could be distributed to communities where the cost of providing educational services . . . is appreciably higher. Older industrial communities could be compensated for . . . municipal overburden . . . .

A state legislature might decide to make education funds available on the basis of family characteristics. If a family is poor, their poverty could be treated as shorthand for the greater educational requirements of the children in the family. . . .

Thus, the funding remedies which may flow from the Serrano decision are compatible with any legitimate state interest in educational governance. . . .

See PRIVATE WEALTH AND PUBLIC EDUCATION, supra note 3, at 53-55, 200-42, for a detailed analysis of "power equalizing," a system that allegedly satisfies the fiscal neutrality standard and still retains local control. "District power equalizing" allows the state to maintain local districts and even continue to raise school revenue through local property taxes. The state would set a maximum limit on the amount of revenue that a district could spend if it chose to tax itself at a given rate. If the district is unable to raise the specified amount by taxing at the prescribed rate, the state would furnish the difference; and if a district could raise more than the specified amount at a prescribed level, the state would collect and redistribute the excess. Since each district would be free to choose the level at which it would tax itself, the amount of revenue raised within the district would depend upon the district's willingness to tax itself rather than upon its wealth in terms of taxable property.

District power equalizing may not go far enough in equalizing educational expenditures since disparities due to differences in district tax effort may be no more defensible than those due to the district wealth. PRIVATE WEALTH AND PUBLIC EDUCATION, supra note 3, at 256-69; Michelman, supra note 3, at 53-55; Kirp & Yudof, Book Review, supra note 3, at 629. Therefore, it is contended that a "family power equalizing" scheme would be more appropriate. Michelman, supra note 3, at 53. Under this plan,
trates on concrete figures rather than elusive concepts, it appears to be judicially manageable.\textsuperscript{187}

Assuming that the standard of fiscal neutrality is judicially manageable, it may be irrelevant to the goal of achieving educational equality. Critics have suggested that concentration on equality of expenditures or equality of revenue-raising capacity cannot eliminate inequities in existing systems.\textsuperscript{188} Thus, some still maintain that the Court must apply an affirmative, subjective standard such as "equal learning opportunity," "equal educational achievement," or "equal educational resources" if the Court's decision is to have any meaningful effect on education.\textsuperscript{189} It should be apparent, however, that whatever gains in relevancy might result from the more subjective standards must be balanced against the loss in judicial manageability of the objective standard of fiscal neutrality. Given the competing values inherent in an educational system and the inconclusiveness of available data, it is difficult to see how the Court could intelligently select one of the subjective standards as opposed to another and then proceed to sanctify it with constitutional protection.\textsuperscript{190} A sacrifice of some degree of "relevancy" to actual educational problems seems inevitable if the Court intends to intervene at all. The Court would be well advised to stick to the standard of fiscal neutrality, as it promises to be the most manageable of the alternatives.

the significant unit would be the family rather than the school district. The family would choose the rate at which it would tax itself on its income per child. As with district power equalizing, the family would be ensured of receiving a specified amount at a given tax rate. The state would provide schools that offered varying degrees of educational resources. The more that was offered, the higher would be the tuition. The student would attend a school whose offering was commensurate with the tax effort made by his family. It would be up to the child's family to decide what quality level of education the child should receive. Such a plan could be administered through education vouchers. See generally Coons & Sugarman, \textit{Family Choice in Education: A Model State System for Vouchers}, 59 C.A.L. L. Rev. 321 (1971). The educational voucher systems and the legal problems involved are discussed in Areen, \textit{Education Vouchers}, 6 Harv. CIV. R.I.GHTS-CIV. LIB. L. Rev. 466 (1971).

Even those who support family power equalizing concede that it is a radical notion unlikely to gain political acceptance in the near future. \textit{Private Wealth and Public Education}, supra note 3, at 268. Furthermore, as noted by Professors Kirp and Yudof, Book Review, supra note 3, at 625-26, it may be no more reasonable to allow expenditures on a child's education to depend upon the willingness of his family to tax itself than it is to rely on the taxing attitude of his school district. Perhaps a plan that focused only upon the needs of the individual child would be more equitable. However, that is exactly the type of proposal rejected in \textit{McInnis} as unmanageable.

\textsuperscript{187} \textit{Private Wealth and Public Education}, supra note 3, at 13.
\textsuperscript{188} See Silard & White, supra note 3, at 26, 29.
\textsuperscript{189} For an exploration of the different possible standards of measuring educational equality, see A. Wise, supra note 3, at 149-93. See also \textit{Private Wealth and Public Education}, supra note 3, at 204-11.
\textsuperscript{190} See \textit{Private Wealth and Public Education}, supra note 3, at 15. See also Schoettle, supra note 3, at 1306.
Recent data, most significantly the Coleman Report, also raise the issue of whether disparities in educational expenditures bear any relation to disparities in educational opportunity. The Coleman Report is the result of a massive government study of racial segregation as well as the factors influencing educational opportunity and achievement. The results of the study are quite controversial and not easily summarized. Nevertheless, the study suggests that variations in the size of school facilities and faculties have very little effect on educational achievement of students. Since the great bulk of educational revenues are used to pay teachers and provide school facilities, the data may suggest that inequalities in educational expenditures have little effect on the goal of ensuring quality education to all. If it invalidates current educational financing systems, the Court might promote fiscal equity and yet do little to advance educational opportunity.

Nevertheless, the Coleman Report by no means conclusively establishes that disparities in educational expenditures have no effect on educational opportunity. Educators, legislators, and voters apparently assume that higher expenditures will result in better education since they continually increase educational spending. It is arguable that poor districts ought to be able to proceed under the

193. The study concluded that schools bring little influence to bear on a child’s achievement that is independent of his background and general social context; and that this very lack of an independent effect means that the inequalities imposed on children by their home, neighborhood and peer environment are carried along to become the inequalities with which they confront adult life at the end of school. Coleman Report, supra note 191, at 325.
194. It is estimated by The National Center for Educational Statistics, Office of Education, U.S. Dept. of Health, Education, and Welfare, Statistics of Local and Public School Systems, 1967, at 15 (1969), cited by Schoettle, supra note 3, at 1359, that local school districts spend as much as two thirds of their annual budgets to pay teachers. Of course, a minimum amount of expenditures per pupil may be necessary to provide a decent education even if a substantial increase in spending above that amount will not significantly improve the quality of education. Dimond, supra note 3, at 141 n.48. But this minimum amount may be provided in most states since a minimum level of expenditures per pupil is generally guaranteed by the state.
196. See J. Guthrie, G. Kleindorfer, H. Levin, R. Stout, Schools and Inequality 57-84 (1971) for the argument that there is a positive correlation between educational services (hence educational expenditures) and educational achievement. See On Equality of Educational Opportunity (1972) for a recent and largely favorable reassessment of the Coleman Report. For other recent studies assessing the methods and conclusions of the Coleman Report, see Schoettle, supra note 3, at 1387.
same assumption, however dubious, as wealthier districts\textsuperscript{107} and spend the same amount as those districts with no greater tax effort.

"Fiscal neutrality" is a judicially manageable standard by which the Court could redress inequities in educational finance, but given the complex nature of the problem, a decision to overturn the present methods of educational finance may not have a significant effect upon the quality of education. The Court must decide whether the benefits of such a decision in terms of fiscal equity and the possibility of increased educational achievement outweigh the costs of overturning most of the nation’s educational financing systems.

B. Costs of Reform

Another consideration arises from the magnitude of the school financing litigation. Most states depend on local property taxes to finance public education. If the Supreme Court should decide that one of the state systems of financing education violates equal protection, most of the states would be forced to abandon their current systems and adopt acceptable alternatives. The consequences of such a decision would be of enormous magnitude. Nevertheless, the integration and reapportionment decisions illustrate that the Court is willing to attack a problem of immense proportion when it is convinced that critical issues are at stake and that judicial action is necessary.

Before it becomes involved in a problem of the dimensions of school financing, the Court thoroughly considers the legislative as well as the judicial costs. The costs that the Court would impose upon state legislatures by invalidating current educational financing schemes fall into two categories. First, legislatures would have to expend considerable time and effort in developing a constitutionally acceptable scheme for financing public education. Second, it may cost the states far more to operate financing systems that equalize districts’ spending than to operate the current systems.

As in desegregation and reapportionment cases, the burden of producing new financing systems would be on the state legislatures if the Court chose to overturn the current systems.\textsuperscript{108} Given the current popular dissatisfaction with property taxes and with present educational financing systems, most state legislatures may find it necessary to initiate educational financing reforms in the near future with or without an order from the Court. Since alternative school financing schemes have already been proposed, the legislatures would


\textsuperscript{108} In Rodriguez, the court ordered the legislature to restructure the financing system within two years to conform with the concept of fiscal neutrality. 337 F. Supp. at 286.
not have to start from scratch. The cost of devising a new program is not likely to be prohibitive.

On the other hand, the potential costs of operating a new system carry greater weight. It appears that a system of educational finance that equalizes expenditures by districts must inevitably be a more expensive system.\textsuperscript{199} Equality could be achieved either by “leveling” the highest-spending districts down or by “leveling” the lowest-spending districts up.\textsuperscript{200} Those districts capable of supporting a high level of spending will be adamantly opposed to a “leveling down.” Consequently, “leveling up” may be the only politically feasible course of action,\textsuperscript{201} but it would probably require a higher aggregate level of spending on education than the current system.\textsuperscript{202} Whatever system a state adopts to equalize district spending, it is virtually inevitable that the state itself will have to furnish substantially more money for education from the state treasury. In view of the current budgetary difficulties that many states are experiencing as well as the developing taxpayers’ revolt, the necessity for increased state aid to education could create severe problems for state legislatures.

In addition to legislative costs, the Court must also consider the judicial costs of invalidating state educational financing systems in terms of the judicial effort that would be required to supervise a reform plan. Given the already crowded federal dockets, as well as the Court’s enduring commitment to school integration, the Court must decide whether the benefits that may result from judicial reform justify the commitment of judicial resources that may be necessary.

Certainly, it is unlikely that the Court could dispose of the issue with one decision. The variety of existing financing systems and acceptable alternatives would undoubtedly result in the Supreme Court’s hearing an entire line of cases. As with the desegregation and reapportionment cases, the federal district courts would have to maintain continuing jurisdiction to police and eventually ratify state legislative reforms.\textsuperscript{208}

In a large measure, the extent of the judicial commitment would probably depend upon the degree of public resistance to the Court’s

\textsuperscript{199} But see First Appraisal, supra note 3, at 121 n.45.
\textsuperscript{200} See Kurland, supra note 3, at 590-91. See also Kirp & Yudof, supra note 3, at 624-26.
\textsuperscript{201} But see Kurland, supra note 3, at 590.
\textsuperscript{202} Silard & White, supra note 3, at 31-32. A special New York Commission that recently completed a study of educational financing in that state suggested that the state “level up” the poorer districts over a five-year period. It estimated that such a process would cost the state an additional $715 million dollars per year. N.Y. Times, Jan. 29, 1972, at 1, col. 8. Likewise, the proposed model reform of Maryland’s school financing system, School Finance, supra note 3, at 128-29, recommends that the state raise all districts to the level of expenditures by the highest-spending district. It is estimated that this would cost an additional $200 million dollars per year.
decision. If the public accepts the Court's judgment, the Court could probably implement its decree with a reasonable expenditure of time and effort. If public resistance is significant, however, the Court might find itself involved in an enduring struggle to implement its orders. The integration cases well illustrate this point. It is possible that the politically powerful suburban districts would respond negatively to a Supreme Court decision overturning state educational financing schemes out of fear that their well-financed schools would be sacrificed on the altar of general equality. Suburbanites could protect the quality of their schools by insisting that the legislature "level up" poorer schools to equality with those in wealthy districts, although this alternative would certainly involve an increase in taxes. On the whole, however, there is little reason to expect that invalidation of school financing schemes would provoke substantial opposition. Lower court decisions that have invalidated financing systems have been well received by the press and the public, perhaps partially because of a growing dissatisfaction with the property tax. The restructuring of educational financing systems would not be the emotional issue that school integration is. Preliminary responses suggest that the reform of educational financing systems would not result in a division of opinion along ideological lines.

In the event that political opposition does arise, however, the Court would have various remedies available. Commentators have suggested that the Court could excuse students from attendance, order admission in other districts, award monetary compensation, impound and redistribute flat funds, sequester the funds of rich districts, use its contempt power, raise taxes, hire experts to plan a new system, or shut down the school system entirely. It is not clear, however, that the Court would welcome the resort to such harsh

204. See Kurland, supra note 3, at 592-93.
205. Id. at 595.
206. See id. at 591, 598-99.
208. See King, Taxes Bite Deeper, No Relief Foreseen, N.Y. Times, Jan. 31, 1972, at 1, col. 6; The Taxing Question, NEWSWEEK, Jan. 31, 1972, at 49 [hereinafter The Taxing Question].
209. See PRIVATE WEALTH AND PUBLIC EDUCATION, supra note 3, at 454.
211. PRIVATE WEALTH AND PUBLIC EDUCATION, supra note 3, at 448; Silard & White, supra note 3, at 31.
alternatives. If the Court anticipated outright resistance to its decrees, it might prefer to avoid involvement in educational financing litigation altogether.

C. Propriety of a Judicial Solution

Assuming that educational financing systems are in need of reform, the question of who should initiate the reforms arises. In Rodriguez, the Supreme Court must first consider whether it possesses the necessary expertise to resolve the far-reaching policy questions that are inherent in the issue of educational financing reform. The educational financing litigation involves complex issues of both educational and economic policy. As noted above, it is hardly a foregone conclusion that equalization of educational spending by school districts would improve the quality of public education. What is more disturbing, however, is the possibility that reform might actually have a negative effect on the quality of public education.\footnote{212. See First Appraisal, supra note 3, at 114.} If taxpayers resist the tax increases, equalization might result in leveling down the wealthier districts to a median level, which would dilute the quality of the best schools without necessarily improving the worst significantly.\footnote{213. Kurland, supra note 3, at 590-91.} Another possibility is that suburbanites might desert the public schools in favor of private schools if they were convinced that their property tax dollars would be used to improve poorer schools throughout the state rather than their own public schools.\footnote{214. But see Private Wealth and Public Education, supra note 3, at 275.} Consequently, a substantial body of voters might coalesce in an effort to defeat all tax increases aimed at improving the quality of public education.\footnote{215. Kurland, supra note 3, at 59. But see Private Wealth and Public Education, supra note 3, at 276.} In addition to these “political” problems, questions would arise concerning the long-range effect of abandoning the current financing system on the functioning of local government, suburban growth, relocation of industry, centralization of government, increases in the use of sales and income taxes, and exclusionary zoning.\footnote{216. Andrews, supra note 117. For the argument that any adjustment of educational financing methods would necessarily have a significant effect upon the state tax structure as a whole, as well as the financing of all other municipal services, see Dimond, supra note 3, at 136. See also Private Wealth and Public Education, supra note 3, at 280-83. See generally Schoettle, supra note 3, at 388-93 (the Court is not qualified to grant specific remedies in areas where the public budget is involved since it is not competent to make the necessary value judgments concerning what goals the state should pursue and what mixture of spending will best promote the achievement of these goals).}

In terms of expertise, the Court is not the best-qualified institution to analyze these complex issues. The judiciary is quite often a
forum for effective advocacy rather than careful analysis. The Court does not have the fact-finding resources of the legislature, nor does it have the experience in considering questions of educational and economic policy that the legislature has. Finally, the Court does not have the time that the legislature has to devote to extended analysis of the issues. Resolution of the educational financing issue will inevitably involve value judgments of great significance with respect to social, educational, and economic policy. These judgments should be made by a branch of government that is directly representative of the people.

Of course, the details of new school financing plans would be worked out by the legislatures. Nevertheless, by initiating the reforms and setting the basic ground rules, the Court would set in motion a process whose impact on the future of public education and society as a whole would be immense and uncertain. The Court could hardly disavow the consequences of "reforms" that it has initiated. Yet should the reforms turn sour, the Court could not be held politically accountable. Furthermore, if the Court's ideas of equality of educational financing should prove unworkable or counterproductive, the constitutional basis of the reforms would make a change of direction difficult. Thus, the educational financing litigation may be the type of case in which the Court should exercise judicial restraint.

The Court has, however, occasionally undertaken to resolve problems involving major policy issues that might more appropriately have been dealt with by another branch of government. The integration and reapportionment decisions are the two most striking examples. The Court's decisions to intervene in these areas were motivated by necessity. In both instances, legislatures arguably should have initiated reform, but it was clear that legislative reform was politically hazardous and thus unlikely. Given the political composition of many of the state legislatures and the United States Congress, it was quite apparent that desegregation could not be initiated through the normal political channels. In addition, the Court's intervention may have been necessitated by the fact that Plessey v. Ferguson was still available as authority for segregationist legislation. Likewise, malapportioned legislatures were unwilling to re-

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217. Kurland, supra note 3, at 600; Schoettle, supra note 3, at 1896. The district court in Burris v. Wilberson acknowledged the difficulty that the financing cases presented when it commented that "the courts have 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." 810 F. Supp. at 574.

218. See Schoettle, supra note 3, at 1898-99.

219. Cox, supra note 111, at 122.

220. 163 U.S. 537 (1896).
apportion themselves in the absence of external pressure since it was to the political advantage of the parties that controlled the legislatures to resist reapportionment. Once the Court concluded that reforms were of extraordinary importance, that the issues were judicially cognizable, and that there was no hope of resolution through normal political channels, its intervention became imperative.

The Court will probably evaluate the possibilities of educational financing reform by normal political processes. The inequalities created by educational financing systems have existed for quite some time without major legislative reform. This legislative inertia might suggest that there is little hope for change through ordinary political channels. However, it has only been within the past decade that some of the most serious inequities of the financing systems have been recognized, and much of the influential writing on the subject has been done quite recently. Only within the past year have the inequalities of educational financing become an issue of general public concern, and there is always lag time between initial expressions of public solicitude and legislative response.

Currently, the time for substantial legislative reform of educational financing systems is ripe. Popular support for court decisions overturning state financing systems has been encouraging to reformers. The response from the media has been almost entirely favorable, and no significant opposition groups have coalesced. Furthermore, dissatisfaction with the local property tax at the same time that educational financing reform is in its incipiency might well be one of those accidents of history that gives rise to significant change in the status quo. Since half of the school districts are by definition below the state median of taxable wealth and since the vast majority of districts have far less taxable property than the richest districts, it would seem that a substantial percentage of the state's citizens would benefit from a more equitable system of educational financing. Given the current concern for education, when full information

221. Cox, supra note 111, at 122. Undoubtedly other factors prompted judicial intervention in these cases. In the desegregation litigation, it was significant that the primary purpose of the fourteenth amendment was to ensure equality to the Negro. In the reapportionment cases the fact that reforms promised to improve the operation of representative government probably affected the Court's decision to intervene.

222. PRIVATE WEALTH AND PUBLIC EDUCATION, supra note 3, at 292-93.

223. Id. at 46, 65.


225. First Appraisal, supra note 3, at 118. It has also been suggested that owners of commercial and industrial property in the poorer districts might support legislative reform since it might result in a lowering of their tax rates. Id.
about the substantial disparities among districts in educational resources gains currency, the public probably will support reform.\textsuperscript{226}

Significant reform efforts have already been initiated at both the state and national levels. In New York, a commission appointed by the governor recently culminated a two-year study by issuing an extensive report on the need for reforming the State’s educational financing system.\textsuperscript{227} The commission urged that the State assume the task of raising and distributing funds for public education through a uniform state-wide property tax.\textsuperscript{228} The report proposed that the expenditures of wealthier districts be frozen at current levels and that poorer districts be raised to parity with these levels over a five-year period.\textsuperscript{229} The commission report received immediate support from state legislative leaders, although the complexity and the long-range implications of the problem may delay reform for up to five years until the legislature has studied the issue and possible alternative solutions.\textsuperscript{230} If the efforts of New York are emulated throughout the nation, substantial judicial action may prove unnecessary.

Michigan is another state in which the legislative process is reacting to public concern over the inequities in educational financing. While suits challenging the Michigan system of educational financing are pending,\textsuperscript{231} both the Republicans and the Democrats have proposed plans for restructuring the system and are conducting petition campaigns to include their respective plans on the November ballot as proposed constitutional amendments.\textsuperscript{232} The Republican proposal would abolish the property tax as a method of school financing and replace it with an increase in the personal income tax and a value-added sales tax.\textsuperscript{233} The revenue collected would be distributed to local districts in order to retain some form of local control. The Democratic proposal would replace the local property tax with a graduated income tax.\textsuperscript{234} Regardless of whether the Michigan supreme court declares the current financing system unconstitutional, the State is well along the road toward significant reform.

In addition, federal legislative reform is currently being consid-

\textsuperscript{226} A recent poll (California Poll 3241, 1967, cited by Kirp & Yudof, supra note 3, at 147 n.8) determined that 83% of the citizens of California “felt that poor districts should receive as much money per pupil as rich districts.”
\textsuperscript{227} N.Y. Times, Jan. 29, 1972, at 1, col. 8.
\textsuperscript{228} Id.
\textsuperscript{229} Id. at 1, col. 6; at 34, col. 1.
\textsuperscript{230} Id. at 34, cols. 3-4.
\textsuperscript{232} Tschirhart, supra note 210, at 10, col. 1.
\textsuperscript{233} Id.
\textsuperscript{234} Id. at 10, col. 3.
ered. A special commission recently completed a two-year study of educational financing and presented the President with its report. 235 The commission recommended that the state governments assume the major burden of financing public education. 236 It proposed that the federal government offer the states between 4.5 and 7.5 billion dollars over the next five years as an incentive to reform. 237 These proposals are currently being studied by the executive branch, and, notably, President Nixon referred to the problem of educational financing in his state of the Union message. Thus, in the future the federal government may play a larger role in supporting public education. 238 In addition, the President has recently signed a bill which will provide substantial aid to education. 239 In particular, the Act will provide 2 billion dollars in federal funds to grade schools and high schools in districts that are currently involved in desegregation. 240 While this will not alleviate the massive inequalities caused by current educational financing methods, it suggests that in the future the federal government may be willing to assume a substantial share of the cost of ensuring equal educational opportunity. It has also been announced that the President intends to propose legislation that would call for a nationwide value-added sales tax, 241 the proceeds of which would be recycled to the states to help support public education. 242 In exchange for federal funds, the states would agree to repeal some of their current property taxes or extend income tax credits to families that pay such taxes. 243 Senator McGovern has also submitted a proposal that the federal government pay one third of the current costs of educational financing. 244 Clearly, there is a significant chance for major legislative reforms at the national as well as the state level in the not too distant future. 245 Thus, there appears to be no immediate necessity for judicial action on the educational financing problem. Given the complexity of the problem, uncertainty about the efficacy of proposed solutions, and the potentiality of legislative reform, the Supreme Court should probably refrain from intervening in the educational financing controversy at this time.

235. N.Y. Times, March 7, 1972, at 1, col. 8.
236. Id.
237. Id.
238. The Taxing Question, supra note 208, at 48.
240. Id.
242. Id.
243. Id. at 1, col. 1; 22, col. 2.
244. N.Y. Times, Feb. 1, 1972, at 1, col. 1.
245. But see Kirp & Yudof, supra note 3, at 146.
IV. Conclusion

The Supreme Court may have been attempting to exercise judicial restraint when it summarily affirmed the judgments in McInnis and Burrus. Conceivably, these cases are best interpreted as delaying actions designed to channel the issues of educational financing out of the courts and into the legislatures. The reformers continued to litigate, however, and three years after McInnis the constitutional challenge to educational financing systems has returned to the Supreme Court.

The Court is now under pressure to decide the educational financing case on the merits. Since the reform movement has been pursued in the judicial context, the media and the public are focusing on the Court for a definitive resolution of the question. The status of McInnis and Burrus as controlling precedents has been drawn into question and can only be clarified by the Supreme Court. The Court may feel constrained to supply guidance to courts that are hearing school financing cases, especially since some courts that have already decided such cases have apparently ignored the implications of recent Supreme Court opinions by applying the strict equal protection standard to school financing legislation. Finally, the basic posture of the present litigation almost demands a decision on the merits. After McInnis the Supreme Court could avoid directly confronting the issue of the constitutionality of school financing systems by simply summarily affirming judgments, especially since McInnis rested partially on nonjusticiability. Now, however, if the Supreme Court summarily affirms the judgment of Rodriguez v. San Antonio Independent School District, the educational financing case currently on the Court’s docket, it will implicitly approve the Serrano doctrine, on which Rodriguez relied. If the Court disapproves of Serrano, it will be forced to confront the school financing issue on the merits. These factors push the Court toward a full review of Rodriguez.

There are a number of different ways that the Court could deal with Rodriguez. It could affirm the decision and adopt the strict standard of review rationale that has prevailed in the lower courts. Such a decision would be one of the most potentially expansive equal protection decisions of the past decade, and the Court appears to be concerned with restricting the application of the strict standard of review to its current perimeters. Therefore, it seems unlikely that the Court will follow Serrano and abandon the restrictive approach that it established in Dandridge, Valtierra, and Lindsey.

The Court may choose to review the Texas school financing scheme under the rational basis test. How strictly the Court will

246. Schoettle, supra note 3, at 1378.
247. See Andrews, supra note 117; Stevens, supra note 8.
apply the rational basis test is uncertain, and thus the validity of the
financing system in Rodriguez is a close question under this standard.
If the Court is convinced that there is no rational basis for the current
financing systems, that there are manageable and relevant judicial
standards, that the Court has sufficient expertise to adequately resolve
the issues, and that there is no reason to defer to the legislature, the
Court may hold that the Texas school financing system violates the
equal protection clause under the traditional standard of review.

If the Court does not feel disposed to affirm Rodriguez, it need
not reverse immediately. It is generally agreed that existing educa­
tional financing systems are in need of reform. Even if the Court
does not wish to initiate reforms itself, it may be reluctant to reach a
decision that would discourage reform efforts of other branches of
government. The media and the public would read a reversal of
Rodriguez by the Supreme Court as a legitimization of the current
inequitable financing systems, although the Court's decision would
stand only for the conclusion that current systems simply do not
violate the equal protection clause of the Constitution or that re­
forms can more adequately be enacted by legislative bodies. Thus,
reversal of Rodriguez would doubtlessly have an adverse effect on the
progress of school financing reform in the legislatures.

Professor Kalven recently commented in regard to the current
constitutional challenges of the death penalty that "[t]his may be an
instance in which the very existence of constitutional litigation will
prove more significant than its outcome, underscoring the importance
for the dynamics of American political life of the forum provided by
the Court." To a lesser degree the same result might conceivably
occur in the area of educational financing as well: the public may
demand reform despite a Supreme Court reversal of Rodriguez. In
such a case, the courts would have served as a public forum by
focusing attention on an important social problem and thereby
forcing the legislature to perform its function.

Given the uncertain effects of an adverse decision on the cause
of reform, however, the Court may not wish to reverse Rodriguez.
The Court may indeed have on its docket a case of extreme national
importance that it is unwilling to affirm or reverse. In such an event,
the Court could postpone a decision, for as long as two or three years,
by scheduling and rescheduling the case for hearing until it feels a
decision is appropriate. This would allow Congress as well as

249. Kalven, Foreword: Even When a Nation Is at War, 85 HARv. L. REV. 3, 21
(1971).
250. For instance, Brown v. Board of Education initially reached the Court's
docket and was argued in October Term, 1952. It was reargued twice and the
decisions were finally handed down in 1954 and 1955.
state legislatures time to develop measures for reforming educational financing. Delay would not provide much immediate guidance for the courts around the nation that are currently entertaining litigation challenging educational financing systems. However, the Court might be willing to sacrifice this consideration temporarily in the hope that the financing issue would be equitably resolved by means other than judicial intervention.

The difficulty with postponement is that legislatures may defer reform until the Court acts while the Court is waiting for legislatures to go forward. In the event of such a stalemate, the Court should take the initiative and invalidate the Texas financing system on equal protection grounds. But at this point in time, it is simply too early to determine whether judicial action is necessary. 251

The reform of educational financing systems is an idea whose time has arrived. Within the next decade meaningful reform is inevitable. The constitutionality of current financing systems is now before the Supreme Court in Rodriguez. The Serrano rationale may not provide the vehicle for equalizing educational financing throughout the nation considering the Court’s recent trend toward restraint under the equal protection clause. Nor is it clear that immediate judicial action would be in the best interests of reform given the complexity of the problem and the potential for significant legislative and executive initiatives. Nevertheless, the judicial branch has played and will doubtlessly continue to play an important role in educational financing reform. Ultimately, this reform movement may be a model of constructive interaction between the various branches and levels of government in an effort to provide equal protection of the laws.

251. Kurland, supra note 3, at 600.