THE RIGHT TO EQUAL EDUCATIONAL OPPORTUNITY: *SERRANO* AND ITS PROGENY

I. INTRODUCTION

Today, education is essential for societal success, if not survival. It has become the primary prerequisite for individual advancement in the increasingly complex society in which the individual finds himself. In *Brown v. Board of Education*,[1] the United States Supreme Court recognized the vital importance of education[2] and held the fourteenth amendment to require that admission to public schools must be offered to all pupils on an equal basis, regardless of race.

However, not all the problems inherent in the achievement of equal educational opportunity were resolved by the *Brown* decision. In recent years, it has persistently been claimed that inequalities in per pupil expenditure between school districts within a state result in a substantial deprivation of educational opportunity to those students upon whose education less money is spent.[3] These inequalities in per pupil expenditure stem from the educational finance systems employed by the states. Except for Hawaii, each state divides its educational system into a number of local school districts through which a substantial portion of district educational revenue is raised by local property taxation.[4] The problem is that some districts have per capita tax bases far smaller than those of other districts and, consequently, are not capable of as great a tax yield for educational purposes. The net result is that school children in poorer districts have less money spent on their education than do those pupils in richer districts. Hence, they are arguably being offered inferior educational opportunity.

In *Serrano v. Priest*,[5] the California Supreme Court addressed itself to the problem of unequal interdistrict educational expenditure as a prime factor in the creation of unequal interdistrict educational opportunity. Employing the compelling state interest test, the court held the fourteenth amendment equal protection clause to require that educational opportunity be offered to all public school students on an equal basis, regardless of the wealth of the individual district in which the student resides.[6] Specifically, the court held that since the local property tax segment of the California school tax structure was the genesis of unequal educational spending, it violated the equal protection clause.

Several courts have subsequently rendered carbon copy holdings.[7] Each court, after indicating the structural similarity between the challenged mechanism of school finance and that of California, employed the *Serrano* rationale to invalidate that portion of the state school funding scheme based on local property taxation. Therefore, this Note will discuss the *Serrano* decision as both the seminal and the typical judicial holding in the area of educational fiscal neutrality.

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1 347 U.S. 483 (1954).

2 "In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms." Id. at 493.

3 See note 46 infra.

4 See note 20 infra. And see Hawaii Rev. Laws §§ 296-2, 298-2 (1968).

5 5Cal. 3d 584, 487 P.2d 1241, 96 Cal. Rptr. 601 (1971) (hereinafter *Serrano*).

6 See note 55 infra.

7 Rodriguez v. San Antonio Independent School Dist., 40 U.S.L.W. 2398 (W.D. Tex. Dec. 23, 1971), (3 judge district court); Van Dusartz v. Hatfield, 334F. Supp. 870 (D. Minn. 1971); Robinson v. Cahill, (Super. Ct. Jan. 19, 1972), in 95 N.J.L.J. No. 4, p. 1, col. 2.

The *Serrano* decision has implications far beyond its relatively narrow holding. First, the holding itself poses questions delving into the very core of the structure of educational administration and finance in America. Second, the court's rationale could portend expansion in equal protection law and must be viewed in terms of its potential future application. This Note will both evaluate the potential impact of the *Serrano* holding on educational administration and finance and critically analyze the equal protection rationale on which *Serrano* is based.

II. ADMINISTRATION AND FINANCE IN AMERICAN PUBLIC EDUCATION: THE BACKGROUND OF THE PROBLEM

A. Administration

In the tri-level hierarchy of American government, public education has traditionally been considered a proper function of state, rather than national[8] or local, government.[9] One court has declared that the state function of maintaining an educational system "is of such importance that the state is in fact charged with the *duty* to further and protect the public school system."[10] Accordingly, within the scope of the state's police power,[11] the state legislature theoretically possesses plenary power in relation to matters of state educational policy,[12] subject only to the limitations imposed on legislative power by the state constitution[13] and the Constitution of the United States.[14]

Practically, however, the complexity and diversity of local and regional needs within a state make it an almost impossible task for the state legislature to devise an

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[8] E.g., Cooper v. Aaron, 358 U.S. 1, 19 (1958); Gong Lum v. Rice, 275 U.S. 78, 85 (1927).

[9] "In the United States, public education ... is universally recognized as a public or government function of the state." Thompson v. Bd. of Ed., 20 N.J. Super. 419, at 422, 90 A.2d 63, at 64 (1952). Accord, e.g., Runyon v. Commonwealth, 393 S.W.2d 877 (Ky. 1965), cert. denied, 384 U.S. 906 (1966); Edmonds School Dist. No. 15 v. City of Mountlake Terrace, 77 Wash.2d 609, 465 P.2d 177 (1970); City of Morgantown v. Ducker, 153 W.Va. 121, 168 S.E. 2d 298 (1969).

[10] Sims v. Colfax Community School Dist., 307 F. Supp. 485, 487 (S.D. Iowa 1970) (emphasis added).

[11] In legal theory, the purpose of public education is not to benefit the participating individual as such but to promote the general intelligence and ability of the state citizenry "for the protection and welfare of the state itself." Bissel v. Davison, 65 Conn. 183, 191, 32 A.348, 349 (1894). Accord, Scown v. Czarnecki, 264 Ill. 305, 106 N.E. 276 (1914); Leeper v. State, 103 Tenn. 500, 53 S.W. 962 (1899).

[12] "The Legislature has the right and power to determine how the educational system of the state shall be administered and carried out. The method is *entirely* up to the Legislature as to organization and administration." Cottongim v. Congleton, 245 Ill. 387, 395, 199 N.E.2d 96, 100 (1964) (emphasis added). Accord, e.g., Alexander v. Thompson, 313 F. Supp. 1389 (C.D. Cal. 1970); Kosmicki v. Kowalski, 184 Neb. 639, 171 N.W.2d 172 (1969); Tryon Dependent School Dist. No. 125 v. Carrier, 474 P.2d 131 (Okla. 1970).

[13] The state has absolute sovereignty in areas of legitimate state concern except for the limitations self-imposed by the state constitution. Fletcher v. Peck, 10 U.S. (6 Cranch) 87 (1810). Education is such an area. See, e.g., Alexander v. Thompson, 313 F. Supp. 1389 (C.D. Cal 1970); Hall v. City of Taft, 47 Cal.2d 177, 302 P.2d 574 (1956); People ex rel. Raymond Community High School v. Bartlett, 304 Ill. 283, 136 N.E. 654 (1922).

[14] State power in areas of legitimate state concern, such as education, is also restricted by the limitations on governmental power within the Federal Constitution imposed by the fourteenth amendment and by the fourteenth amendment itself. Although the concept of state action is inextricably woven into any application of fourteenth amendment restrictions on the states, it may be ignored in the area of public education since education is clearly a function of the state and therefore any action in the field of public education constitutes state action. See, e.g., Tinker v. Des Moines School District, 393 U.S. 503 (1969) (Freedom of speech); Epperson v. Arkansas 393 U.S. 97 (1968) (establishment clause); Brown v. Board of Education, 347 U.S. 483 (1954) (Equal Protection of the Laws). Cf. Duncan v. Louisiana, 391 U.S. 145 (1968) (selective incorporation theory).

educationally sound uniform plan which effectively integrates local needs and desires into a comprehensive statewide scheme. Therefore, state legislatures have compromised by delegating their administrative authority over school matters, within broad legislative guidelines, to local school districts.[15] The legislature has plenary power "in the creation and control of school districts, and may if it thinks proper, modify or withdraw any of their powers or destroy such school districts without the consent of the legal voters or even over their protests."[16] Furthermore, since school districts are state agencies, school district property is state property. Accordingly, the state may divide, apportion or dispose of school district property, debts and credits as it sees fit, subject, of course, to any constitutional limitations.[17]

In effect, district school boards, functioning as state administrative agencies, exercise delegated state authority to formulate educational policy for their respective districts.[18] Among the state powers usually delegated to school boards are the power to decide questions of local district financing and the concurrent power to levy a local tax in order to satisfy the school district's financial needs.[19]

B. Finance

American public school funds are raised principally from two major sources of revenue, state distribution of state funds and locally levied district property taxes.[20] For reasons of spatial economy, the California system will be discussed in detail as a reasonably typical example of a state mechanism for financing public education in which interdistrict inequalities are inherent.[21]

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[15] It is settled that the states possess the power to delegate administrative authority relating to public education. E.g., State ex rel. Walsh v. Hine, 59 Conn. 50, 21 A. 1024 (1890); State ex. rel. Clark v. Haworth, 122 Ind. 462, 23 N.E. 946 (1890); City of Louisville v. Commonwealth, 134 Ky. 488, 121 S.W. 411 (1909).

[16] Kosmicki v. Kowalski, 184 Neb. 639, 641, 171 N.W.2d 172, 174 (1969). Accord, e.g., Attorney Gen. ex rel. Kies v. Lowrey, 199 U.S. 233 (1905); United States v. Bd. of School Comm'rs., 332 F. Supp. 665 (S.D. Ind. 1971); Tryon Dependent School District v. Carrier, 474 P.2d 131 (Okla. 1970). cf. Hunter v. City of Pittsburgh, 207 U.S. 161 (1907).

[17] E.g., Attorney Gen. ex rel. Kies v. Lowrey, 199 U.S. 233 (1905); People ex rel. Raymond Community High School v. Bartlett, 304 Ill. 283, 136 N.E. 654 (1922); School Dist. of Mexico Mo. No. 59 v. Maple Grove School Dist. No. 56, 359 S.W.2d 743 (Mo. 1962). cf. Laramie Co. v. Albany Co., 92 U.S. 307 (1875).

[18] The school district as a state agency only has such power as is expressly or impliedly granted to it by the legislature. See, e.g., Casmalia School Dist. v. Bd. of Supervisors, 180 Cal. App.2d 332, 4 Cal. Rptr. 656 (1960); Edmonds School Dist. No. 15 v. City of Montlake Terrace, 77 Wash.2d 609, 465 P.2d 177 (1970).

[19] E.g., State ex rel. Harned v. Meador, 153 Tenn. 634, 284 S.W. 890 (1926); State ex rel. Harbach v. Mayor of City of Milwaukee, 189 Wis. 84, 206 N.W. 210 (1925); c.f. Gordon v. Cornes, 47 N.Y. 608 (1872); Miller v. Childers, 107 Okla. 57, 238 P.204 (1924).

[20] In 1970-71, the national average percentage of public educational revenue obtained from state and local sources was 91.3 per cent. Local revenue contributed 50.6 per cent of the funds devoted to public education with a high of 86.2 per cent in New Hampshire and a low of 12.8 per cent in Alaska. State contributions to public educational expenditure average 40.7 per cent with a high of 71.2 per cent in Delaware and a low of 9.6 per cent in New Hampshire. Federal funds make up the remaining 8.7 per cent varying from a high of 22.6 per cent in Wyoming to a low of 2.1 per cent in Connecticut. The figures are obtained from averaging the figures appearing in N.Y.Times, Jan. 10, 1972, § E (Annual Educ. Rev.), at 2, col. 2-6, omitting those of Hawaii. Hawaii was omitted because its unique single district structure makes it non-indicative of the problem with which this Note deals.

[21] In 1970-71, in California, the proportion of local funds, 59.8 per cent, was slightly higher while the proportion of state funds, 35.2 per cent and of federal funds, 5.1 per cent were slightly lower than average. Id.

1. The Local Taxation Segment

In California, over 90 per cent of public school funds comes from two basic sources: local district real property taxes and aid from the state school fund.[22] But the major portion of school revenue is raised through the local real property tax.[23] The local governing body of the district is authorized by the legislature "to levy taxes on the real property within a school district at a rate necessary to meet the district's annual education budget."[24] The amount of revenue thus collected by the local board is dependent upon two factors: tax rate and district tax base. In other words, revenue collected equals tax base multiplied by the tax rate.

Since the tax rate employed is adopted annually by the separate decision of each individual district, it is primarily a function of the willingness of the district's population to tax themselves in order to satisfy the district's educational financial needs. However, a district's tax base consists of the assessed value of all taxable real property situated within its boundaries and consequently, is wholly dependent upon district wealth.[25] Obviously, tax bases inevitably vary greatly within the state. For example, assessed real property valuation per public school student in California varied from a high of $952,156 per child in one district to a low of $103 per child in another, amounting to a ratio of approximately 10,000 to 1.[26] Accordingly, the district possessing the smallest tax base even if electing to tax at a rate of 100 per cent, can appropriate only slightly more than the district with the largest tax base, taxing at the rate of a mere .1 per cent. Assuming, therefore, equal desire on the part of each district to provide quality education for its children, the revenue available for school use from the local property tax is wholly[27] a function of the district's taxable wealth (i.e. tax base).[28]

2. The State Aid Segment

State aid, on the other hand, is distributed principally to guarantee that minimal educational standards are maintained throughout the state. Therefore, state distribution of school funds is, in part, inversely dependent upon the adequacy of the district's available school revenue resources and, consequently, varies greatly from district to district.

In California, state aid is primarily the product of two separate programs.[29] Through its Foundation Program, California attempts to supplement the funds provided

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[22] Serrano v. Priest, 5 Cal.3d 584,592, 487 P.2d 1241, 1246, 96 Cal. Rptr. 601, 606 (1971). "California educational revenues for the fiscal year 1968-69 came from the following sources: local property taxes, 55.7 per cent; state aid, 35.5 per cent; federal funds, 6.1 per cent; miscellaneous sources, 2.7 per cent." Id. at 591 n.2, 487 P.2d at 1246 n.2, 96 Cal. Rptr. at 606 n.2.

[23] Id. at 592, 487 P.2d at 1246, 96 Cal. Rptr. at 606 (1971).

[24] Id. at 592, 487 P.2d at 1246, 96 Cal. Rptr. at 606. See generally California Education Code §§20, 701 et seq. (West 1959) (hereinafter Ed. Code).

[25] For the statutory authority to levy local educational taxes, comparable to that in California, in the three states for which rulings similar to *Serrano* have been rendered, see Minn. Stat. Ann. §§ 123.11-.12, 123.35, 123.56, 124.02, 124.04 (1959); N.J. Stat. Ann. §§ 18A:22-14–18A:22-48 (1968); Tex. Rev. Civ. Stat. art. 2724-2726, 2784-2802(1965).

[26] Serrano v. Priest, 5 Cal. 3d 584, 592,487 P.2d 1241, 1246, 96 Cal. Rptr. 601, 606 (1070).

[27] This assumes that an equivalent financial burden is being placed on each municipality from the provision of other necessary municipal services.

[28] For a statistical study reaching a similar conclusion for Wayne County (Detroit) Michigan, see Bronder, Detroit Metropolitan School Finances–The Revenue Problem, 19 Nat'l Tax J. 399 (1966).

[29] In the three states for which rulings similar to *Serrano* have been rendered, state aid is also made up of two major components. One component of state aid consists of flat per pupil grants to each individual district while the other component attempts to compensate through variable grants those poorer districts which require additional funding to satisfy district educational needs. For the former, see Minn. Stat. Ann. §§ 124.08, 124.09, 124.14 (1959); N.J. Stat. Ann. §§18A:58-3, 18A:58-4, 18A:58-23, 18A:58-24 (1968); Tex. Rev. civ. Stat. art. 2665, 2685 (1965). For the latter, see Minn. Stat. Ann. §§ 124.21, 124.36-124.47 (1960); N.J. Stat. Ann. §§ 18A:58-5, 18A:58-33 (1970), amending N.J. Stat. Ann. §§18A:58-5, 18A:58-33 (1968); Tex. Rev. Civ. Stat. art. 2922 (1965).

locally for education in order to insure a "minimum amount of guranteed support to all districts."[30] The program consits of two segments, "basic state aid"[31] a flat grant to the district of $125 per student regardless of district wealth or available district tax funds and "equalization aid," a per pupil sliding grant to the district, inversely proportional to district wealth, which guarantees to the poorer districts a basic minimum revenue.[32] The Supplemental State Aid Program additionally subsidizes the poorer school districts if a sufficiently poor district is willing to impose on itself a sufficiently high school tax burden.[33]

Both "equalization aid" and "supplemental aid" operate to lessen the wide variations in available local tax revenue for education between rich and poor districts by granting additional state aid to the poorer districts. Nonetheless, wide divergencies remain among the individual districts in available funds for school use and, correspondingly, in per pupil educational expenditure.[34] Furthermore, "basic aid" functions as a counter-egalitarian force since it allows richer districts to lower their tax rates by an amount corresponding to the flat grants, while the poorer districts must still tax themselves as much as possible in order to provide adequate educational opportunity for their children.[35] In sum, although the various state aid programs help to alleviate the economic disparities inherent in unequal tax bases, wide differences in the amount of revenue available to rich and poor[36] school districts continue to exist. These wide differences in available funds for educational expenditure were claimed by the plaintiffs in *Serrano* to be violative of the equal protection clause.

III. THE PRELUDE TO *SERRANO*

The probable relationship between the level of educational funding and the quality of educational opportunity has long been postulated.[37] Consequently, inequalities in educational expenditure generating such theoretical unequal educational quality within state school systems, have been frequently challenged under the equal protection clause. Since the presence of state action has been clearest in the area of state aid to education,[38] the earliest equal protection challenges were brought against the unequal distribution of state school aid as opposed to the inequalities generated by the local property tax system.

Equal protection challenges to the distributive inequalities of state school aid,

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[30] Ed. Code §§17, 300.

[31] Ed. Code §§17, 751, 17, 801.

[32] "Equalization aid" computes hypothetical district tax revenue using a tax rate of 1 per cent (elementary) or .8 per cent (high) and the district's actual tax base and taking into account "basic state aid." Then, it subtracts the sum from the foundation plan educational minimums, multiplied by the number of students in attendance and gives the district that amount. Ed. Code §§ 17, 702, 17, 901, 17, 902.

[33] Additional funds are granted each district in which the tax rate is sufficiently high and the tax base is sufficiently low, on a flat grant per student basis. Ed. Code §§ 17, 920-17, 926.

[34] Serrano v. Priest, 5 Cal.3d 584, 594, 487 P.2d 1241, 1247, 96 Cal. Rptr. 601, 607 (1971). "[T] he state grants are inadequate to offset the inequalities inherent in a financing system based on widely varying local tax bases." Id. at 594, 487 P.2d at 1248, 96 Cal. Rptr. at 608.

[35] For a more detailed discussion of the effect which various types of state aid programs have on school district financing equality, see generally Coons, Clune & Sugarman, Educational Opportunity: A Workable Constitutional Test for State Financed Structures, 57 Calif. L. Rev. 305 (1969).

[36] Although this Note, like *Serrano*, uses the terms "rich" and "poor," it must be remembered that the same type of educational inequalities exist between poor and middle income groups and between rich and middle income groups.

[37] See, e.g., A. Wise, Rich Schools Poor Schools (1968); Coons, Clune, & Sugarman, supra note 35; Horowitz, Unseparate but Unequal– The Emerging Fourteenth Amendment Issue in Public School Education, 13 U.C.L.A. L. Rev. 1147 (1966); Kurland, Equal Educational Opportunity: The Limit of Constitutional Jurisprudence Undefined, 35 U. Chi. L. Rev. 583 (1968).

[38] Compare Hess v. Mullaney, 213 F.2d 635, (9th Cir.), cert. denied, 348 U.S. 836 (1954) (challenge to state aid segment; merits reached without any state action problem) with Burruss v. Wilkerson, 310 F. Supp. 572 (W.D. Va. 1969), aff'd mem., 397 U.S. 44 (1970) (challenge to the local tax segment; dismissed due to the absence of state action). See note 56 infra.

inherent in its purpose, have been easily disposed of by the courts. It has been generally held that the state may tax for education and that so long as the tax is levied uniformly and public welfare is considered in its distribution, the fact that state aid is "distributed unequally among the different districts . . . does not render it invalid."[39] The unequivocal nature of such court holdings forced advocates of equal educational spending to look to the local segment of the state's educational finance system for the possibility of a more successful attack. However, before effective relief could be obtained through judicial challenges to the financial inequalities inherent in the local segment of the school financing structure, it was necessary to develop a consistent doctrinal framework upon which to base the demand for equal educational expenditure. Not until 1967 was such a theory successfully expounded.

In 1967, the District of Columbia district court held, in *Hobson v. Hansen*,[40] that unequal intradistrict distribution of available funds by a district school board, on the basis of racial or economic classification of school population violates the equal protection clause. The court stated that:

> [i]f the situation were one involving racial imbalance but in some facility other than the public schools, or unequal educational opportunity but without any Negro or poverty aspects (e.g. unequal schools all within an economically homogeneous white suburb), it might be pardonable to uphold the practice on a minimal showing of rational basis. But the fusion of these two elements in public schools irresistably calls for additional justification.[41]

The court advanced the "doctrine of equal educational opportunity—the Equal Protection Clause in its application to public school education,"[42] to guarantee the fair and equal distribution of all available district school funds to all schools within the district.

In other words, the equal protection clause was held to dictate that a school district may not discriminate on an economic or racial basis in the allocation of educational resources within the district unless a compelling state interest can be demonstrated for the discrimination. Thereafter in 1971, the *Hobson* court, to enforce its original opinion, ordered that, absent a compelling state interest, per pupil expenditure could not deviate by more than five per cent among schools within the district.[43]

Subsequent to *Hobson*, other courts have held equal protection to require substantial equality of intradistrict per pupil educational expenditure.[44] However, such cases rest primarily, if not exclusively, on the grounds of racial, rather than economic, discrimination.[45]

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[39] Dean v. Coddlington, 81 S.D. 140, 146, 131 N.W.2d 700, 703 (1964). Accord, e.g., Hess v. Mullaney, 213 F.2d 635, (9th Cir.), cert denied, 348 U.S. 836 (1954); Ingram v. Payton, 222 Ga. 503, 150 S.E.2d 825 (1966); Sawyer v. Gilmore, 109 Me. 169, 83 A. 673 (1912); Miller v. Kornes, 107 Ohio St. 287, 140 N.E. 773 (1923). Cf. Allied Stores of Ohio Inc. v. Bowers, 358 U.S. 522 (1959), which held that "the states have the attributes of sovereign powers in devising their fiscal systems to ensure revenue and foster their local interests." Id. at 526; General American Tank Car Corporation v. Day, 270 U.S. 367 (1926), in which the court stated, "[w]e are not concerned with the particular method adopted by Louisiana of allocating the tax between the state and its political subdivisions. That is a matter within the competency of the state legislature." Id. at 372.

[40] 269 F. Supp. 401 (D.D.C. 1967), aff'd sub nom. Smuck v. Hobson, 408 F.2d 175 (D.C. Cir. 1969).

[41] Id. at 508.

[42] Id. at 438.

[43] Hobson v. Hansen, 327 F. Supp. 844 (D.D.C. 1971), aff'd sub nom. Smuck v. Hobson, 408 F.2d 175 (D.C. Cir. 1969).

[44] E.g., Kelly v. Public School Dist. No. 22, 378 F.2d 483, 499 (8th Cir. 1967); United States v. Jefferson County Bd. of Educ., 372 F.2d 836, 871 (5th Cir. 1966), aff'd en banc, 380 F.2d 385 (5th Cir. 1967), cert. denied, Bd. of Educ. v. United States, 389 U.S. 840 (1967); United States v. Plaquemines Parish School Bd., 291 F. Supp. 841, 849 (E.D.La. 1967), modified, 415 F.2d 817 (5th Cir. 1969); Lee v. Macon County Bd. of Educ., 267 F. Supp. 458, 484 (M.D. Ala.), aff'd sub nom. Wallace v. United States, 389 U.S. 215 (1967).

[45] However, "in February 1970, the United States Office of Education announced that it would require every school district in the nation to demonstrate that it was putting equal resources

Nonetheless, *Hobson* supplied a doctrinal framework on which challenges to unequal interdistrict educational expenditure stemming from disparate district tax valuations could be based. All that was necessary was to expand the constitutional requirement of intradistrict equal educational opportunity to apply to interdistrict inequalities in expenditure as well. *Hobson* set the constitutional stage for a successful challenge to the local tax segment of state education financing mechanisms.

Prior to *Serrano,* no system of locally based taxation, incorporated within a scheme of school district finance, had ever been successfully challenged, although several attempts had been made in other states by suits brought on similar equal protection grounds.[46]

In *Hargrave v. Kirk,*[47] the constitutional merits of an equal protection argument based on the *Hobson* framework were reached for the first time. The plaintiffs challenged a Florida statute which operated to impose an upper limit on the permissible school property tax rate[48] such that the amount of funds potentially available from the local school tax was directly proportional to district wealth.[49] The complainants contested county variation in per pupil expenditure stemming from "the unequal impediment placed on [them] by the state [operative statutory maximum tax rate] because [they] are poor" and not the variations stemming from relative county wealth.[50] For example, Bradford, the poorest county, utilizing the maximum rate could tax itself only $52 per student while Charlotte County, the richest, could tax itself $725 per student.[51] The court held the statute violative of equal protection[52] since wealth classification is not rationally related to the availability of public educational opportunity.[53]

The United States Supreme Court vacated the judgment on procedural grounds, in *Askew v. Hargrave,*[54] without reaching the constitutional issues. Such a procedural dismissal was consistent with the earlier judicial holdings on the question as evidenced by *McInnis v. Shapiro*[55] and *Burruss v. Wilkerson.*[56] Nevertheless, the lower court's

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into all of its schools before it would be eligible to receive supplementary federal funds for disadvantaged children." Cooper, State Takeover of Education Financing, 24 Nat'l Tax J. 337, 356 (1971), quoting from Walker, Major Impacts on the Property Tax, Tax Policy, Tax Institute of America, March, 1961. The implementation of such a standard would encompass both racial and economic discrimination in intradistrict educational finance.

[46] See, e.g., Askew v. Hargrave, 401 U.S. 476 (1971); Burruss v. Wilkerson, 310 F. Supp. 572 (W.D. Va. 1969), aff'd mem., 397 U.S. 44 (1970); McInnis v. Shapiro, 293 F. Supp. 327 (N.D. Ill. 1968), aff'd mem. sub nom. McInnis v. Ogilvie, 394 U.S. 322 (1969).

[47] 313 F. Supp. 944 (M.D. Fla. 1970) (3 judge district court), vacated on other grounds sub. nom. Askew v. Hargrave, 401 U.S. 476 (1971).

[48] The Florida Millage Rollback Act, Fla. Stat. Ann. § 236.251 (Supp. 1970), provided that any county imposing on itself more than a ten mils ad valorem property tax for school use would not be eligible for state support of its public education system.

[49] "[T] he Act prevents the poor counties from providing *from their own taxes* the same support for public education which the wealthy counties are able to provide." 313 F. Supp. 944, 947 (M.D. Fla. 1970) (3 judge district court), vacated on other grounds sub nom. Askew v. Hargrave, 401 U.S. 476 (1971).

[50] Id. at 949. Furthermore, the court felt that the complaint amounted to a charge not that the state permitted the board to spend less but that, in effect, it required it to spend less. Id. On the other hand, in *Serrano,* the complaints challenged the variations in per pupil expenditure which did stem from variations in district wealth. Therefore, it seems probable that the *Hargrave* court would have ruled against the *Serrano* complaint.

[51] Id. at 947.

[52] The *Hargrave* court used the traditional equal protection test to invalidate the statute while the court in *Serrano* employed the compelling state interest test. This distinction may explain why the *Hargrave* court would probably have ruled differently on the *Serrano* complaint since although use of local taxation is not so irrational as to violate the traditional equal protection test, it is not so essential to state welfare as to be justified under the compelling state intest test.

[53] "[T] here is no rational basis for the distinction [between rich and poor counties] which the legislature has drawn . . .." 313 F. Supp. at 948.

[54] 401 U.S. 476 (1971). The Supreme Court vacated the judgment of the district court on the dual procedural grounds that (1) plaintiffs had failed to exhaust available state remedies prior to initiating the federal suit, and (2) the pleadings were insufficient to support summary judgment.

[55] 293 F. Supp. 327 (N.D. Ill. 1968), aff'd mem. sub nom. McInnis v. Ogilvie, 394 U.S. 322 (1969).

willingness to reach the constitutional merits in *Hargrave*, signified that the judiciary was finally prepared to decide the equal protection issue when presented to it in an appropriate case.

IV. *SERRANO* AND ITS PROGENY: INTERDISTRICT EQUALITY.

In *Serrano*, the *Hobson* standard of equal educational opportunity was extended to apply to interdistrict school finance within a state for the first time. The *Serrano* court held that a state may not discriminate on the basis of district wealth in the allocation of available educational resources among the various districts within the state, absent a compelling state interest.[57]

In their original complaint, plaintiffs alleged that "[a]s a direct result of the [school] financing scheme . . . substantial disparities in the quality and extent of availability of educational opportunities exist and are perpetuated among the several school districts of the State."[58] This, they alleged, was due to the fact that districts with small tax bases are not able to collect and spend as much money per student for public education as districts with larger tax valuations. Furthermore, plaintiffs, claiming to represent a class of all state public school children and all their parents who also paid local property taxes (except for those who resided in the district with the largest tax base), alleged direct injury from the California school funding scheme.[59] They

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In *McInnis*, the plaintiffs claimed that unequal tax bases in the various Illinois school districts permitted wide interdistrict variation in per student educational expenditure, resulting in gross inequalities in educational opportunity among the districts. The complaint was dismissed for failure to state a cause of action. The court held that the absence of judicially manageable standards made the controversy non justiciable and that public school expenditure was not required to be made solely on the basis of student educational need by the fourteenth amendment. The court stated that:

> "[N]o cause of action is stated for two principle reasons: (1) the Fourteenth Amendment does not require that public school expenditure be made only on the basis of a pupil's educational needs, and (2) the lack of judicially manageable standards made this controversy non justicable." Id. at 329. Despite the subject's non justicability, the court went on to the merits to hold the Illinois public school financing scheme constitutional under the traditional equal protection standards, stating that "[u] nequal educational expenditures per student, based upon the variable property values and tax rates of local school districts do not amount to invidious discrimination."

Id. at 336.

[56] 310 F. Supp. 572 (W.D. Va. 1969), aff'd mem., 397 U.S. 44 (1970). The *Burruss* court held that it lacked jurisdiction to enforce interdistrict financial equality since the inequalities in available funds did not result from state action but stemmed from county inability to obtain locally the money necessary to supplement the state's contribution. Accordingly, the suit was dismissed.

[57] The *Serrano* decision might conceivably be interpreted by some as a more narrow negative holding. Such an interpretation would limit *Serrano* to simply holding that as presently constituted, the California school financing system is unconstitutional. This position, however, would seem untenable in view of both the specific language of *Serrano* and the court's use of the per pupil standard of educational equality. See note 70 infra. Furthermore, even if such a narrow holding had actually been intended, the decisions in Van Dusartz v. Hatfield, 334 F. Supp. 870 (D. Minn. 1971), Rodriguez v. San Antonio Independent School Dist., 40 U.S.L.W. 2398 (W.D. Tex. Dec. 23, 1971), and Robinson v. Cahill, (Super. Ct. Jan. 19, 1972), in 95 N.J.L.J., No. 4, p.1, col.2, leave little doubt that the courts are declining to follow it, in favor of the more extensive interpretation emphasized in the text. See notes 65-69 infra and accompanying text.

[58] Serrano v. Priest, 5 Cal.3d 584, 590, 487 P.2d 1241, 1244, 96 Cal. Rptr. 601, 604 (1971).

[59] Id. at 589-90, 487 P.2d at 1244, 96 Cal. Rptr. at 604. For example, note the comparisons between three school districts in Los Angeles County where plaintiffs reside.

District	Per Pupil Tax Base (1968-69)	Per Pupil Expenditure (1968-69)
Baldwin	$ 3,706	$ 577.49
Pasadena	$13,706	$ 840.19
Beverly Hills	$50,885	$1,231.72

Id. at 594, 487 P.2d at 1248, 96 Cal. Rptr. at 608.

claimed that their district's schools offered inferior educational opportunities in comparison with those offered by other districts within the state because of their district's smaller tax base.[60] Accordingly, they sought a declaration that the existing school financing system was unconstitutional and also sought an order for the reallocation of any remaining state school funds so as to remedy the existing economic disparities.[61] The trial court dismissed the complaint, upon the state's demurrer, for failure to state a cause of action.

On appeal, the California Supreme Court reversed. The court held that if the inequalities in district wealth as reflected in school revenue from local property taxes could be demonstrated to generate wide disparities in available funds for district educational purposes and if such disparities could be shown to create substantial inequalities in interdistrict educational opportunity within the state, the continued use of local property taxes in school district financing, absent a compelling state interest, would constitute unjustified classification by wealth in violation of the equal protection clause.[62] In short, the court held that if plaintiffs could prove the allegations contained in their complaint, a cause of action would lie and accordingly remanded the case for factual findings.[63]

Since *Serrano,* four other courts have dealt with the identical problem of partial school district financing through local property taxes.[64] Three have followed *Serrano's* lead.

In Van Dusartz v. Hatfield,[65] a federal district court invalidated the local property tax portion of the Minnesota educational financing system. Pointing out the similarity of structure between the educational finance systems employed by Minnesota and California, the court expressly based its decision on the holding in *Serrano,* dubbing it the doctrine of "fiscal neutrality."

The court employed the compelling state interest test to conclude that "a system . . . which makes spending per pupil a function of the school district's wealth violates the equal protection guarantee."[66]

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[60] Id. at 589-90, 487 P.2d at 1244, 96 Cal. Rptr. at 604.

[61] Id. at 591, 487 P.2d at 1245, 96 Cal. Rptr. at 605.

[62] "[D] iscrimination on the basis of district wealth is . . . invalid . . . . To allot more education dollars to the children of one district than to those of another merely because of the fortuitous presence of . . . [taxable] property is to make the quality of a child's education dependent upon the location of private commercial and industrial establishments." Id. at 601, 487 P.2d at 1252-53, 96 Cal. Rptr. at 612-13.

Although the court based its opinion on the equal protection clause, it pointed out that the concurrent application of California Const. art. I §§ 11, 21, would also operate to invalidate the school financing mechanism. 5 Cal.3d at 596 n.11, 487 P.2d at 1249 n.11, 96 Cal. Rptr. at 609 n.11. The court stated: "We have construed these provisions as 'substantially the equivalent' of the equal protection clause of the Fourteenth Amendment to the federal Constitution. Consequently, our analysis of plaintiff's equal protection contention is also applicable to their claim under these state constitutional provisions." Id. Nonetheless, the decision deals with exclusively, and is based upon, the federal constitutional provision.

[63] For the seminal statement of the theory of "equal education opportunity" as applied to "inter district" school finance within the state, see A. Wise, supra note 37.

[64] It is interesting to note the figures for the five states in question.

(1969-70)

State	Per Pupil Expenditure			Percentage of School Revenue by Source		
	High	District Low	Difference	Local	State	Federal
California	$2,414	$569	$1,845	59.8	35.2	5.1
Minnesota	$ 903	$370	$ 533	51.9	43.4	4.6
New Jersey	$1,485	$400	$1,085	69.2	25.9	4.9
New York	$1,889	$669	$1,200	47.2	47.9	4.3
Texas	$5,334	$264	$5,070	40.7	49.3	10.0

Based on figures in N.Y. Times, Jan. 10,1972, § E (Annual Educ. Rev.), at 2, Col. 2-6.

[65] 334 F. Supp. 870 (D. Minn. 1971).

[66] Id. at 872.

In *Rodriguez v. San Antonio Independent School District*,[67] another federal district court, mirroring the rationale of *Van Dusartz* and *Serrano*, invalidated the local property tax portion of the Texas public education financing structure. Using the terminology of *Van Dusartz*, the court defined the doctrine of "fiscal neutrality" as the principle that "the quality of public education may not be a function of wealth, other than the wealth of the state as a whole."[68] The New Jersey Superior Court has also rendered an analogous decision.[69]

However, in *Spano v. Board of Education*,[70] the Westchester County New York Supreme Court upheld the constitutionality of a similar school financing scheme, largely on procedural grounds. The court, although aware of "the inequities of existing modalities for financing public school education."[71] exercised judicial restraint, declaring that the changes sought were not within its authority but "within the territorial imperative of the Legislature or, under certain circumstances of the United States Supreme Court."[72] The Supreme Court's memorandum affirmances of the dismissals in *Burruss*[73] and *McInnis*[74] were, for the court, conclusive on the subject. Accordingly, the court granted defendants' motion to dismiss.

V. THE *SERRANO* HOLDING: IMPACT ON EDUCATION

The holding of *Serrano* and its progeny, if followed to its logical conclusion, could portend a far greater metamorphosis of the administration and finance of American education than its relative narrowness would seem to indicate.[75]

A. Educational Administration: Mandated Limitations

In terms of educational administration, *Serrano* imposes restrictions on both general state power and the permissible scope of its delegation. Clearly, the state legislature no longer possesses plenary power in relation to state educational policy. The *Serrano* holding, carried to its logical conclusion, requires that any exercise of state power in the area of public education which necessitates expenditure of government funds, must be made on a uniform state-wide basis so that the mandated

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67 40 U.S.L.W. 2398 (W.D. Tex. Dec. 23, 1971).
68 Id. at 2399.
69 Robinson v. Cahill (Super. Ct. Jan. 19, 1972), in 95 N.J.L.J. No. 4, p.1, col. 2.
70 (Sup. Ct. Jan. 23, 1972), in 167 N.Y.L.J. No. 16, p. 21, col. 2.
71 Id.
72 Id.
73 Burruss v. Wilkerson, 310 F. Supp. 572 (W.D. Va. 1969), aff'd mem., 397 U.S. 44 (1970).
74 McInnis v. Shapiro, 293 F.Supp. 327 (N.D. Ill. 1968), aff'd mem. sub nom. McInnis v. Ogilvie, 394 U.S. 322 (1969).
75 *Serrano* may also create constitutional problems of equality of educational opportunity in regard to state relations with private and parochial schools. A state may neither constitutionally require public school attendance without permitting the alternative educational opportunity of private school, Pierce v. Society of Sisters, 268 U.S. 510 (1925), nor forbid the establishment of a private school unless it can be shown that such institution is "in some way inimical to the public safety, the public health, or the public morals." Columbia Trust Co. v. Lincoln Institute, 138 Ky. 804, 811, 129 S.W. 113, 115 (1910). Cf. Meyer v. Nebraska, 262 U.S. 390 (1923). Yet while students may not constitutionally be barred from attending private schools, the state nonetheless owes them the duty of equal educational opportunity. The constitutional doctrine of *Serrano* could be extended to require public aid to private schools where necessary to maintain equal educational opportunity for private school students. Of course, the establishment clause requires a wall of separation between the state and religion, including parochial education. McCollum v. Board of Educ., 333 U.S. 203 (1948); Everson v. Board of Educ., 330 U.S. 1 (1947). But see Board of Educ. v. Allen, 392 U.S. 236 (1968); Cochran v. La. State Bd. of Educ., 281 U.S. 370 (1930). However, it seems clear that the mere exercise of one's religion through parochial school attendance ought not to excuse the state from a constitutionally mandated duty owed to the individual. See Sherbert v. Verner, 374 U.S. 398 (1963); Abington School Dist. v. Schempp, 374 U.S. 203, 303 (1963) (Brennan, J., concurring). Therefore, the constitutional duty of equal educational opportunity posited by *Serrano* may possibly require a re-evaluation of state aid to parochial education.

interdistrict equality of per pupil expenditure will not be unbalanced. In effect, *Serrano* implies a prohibition of special laws[76] requiring financial outlay related to public education. The *Serrano* holding therefore could be applied to require that, absent a compelling state interest, a state may only provide for educational expenditure through general legislation which allocates substantially equal funds to every school district on a per pupil basis.[77]

Serrano may also limit the extent to which administrative authority may be delegated to local school boards without the imposition of legislative restrictions on the grant. The usual delegation to the local board of authority over matters of district finance and the concurrent power to levy a local tax in order to satisfy the district's financial requirements must now be closely circumscribed. Delegation of the power to determine the amount of local educational expenditure may no longer be operationally based on district variations in taxable property valuations. Therefore, *Serrano* directly forbids the use of uncompensated[78] local taxation to finance local school districts. Furthermore, if state compensated local taxation is employed by the state, the permissible local tax rates would have to be severely limited in accordance with state ability to afford the additional costs of financial compensation.[79] Since the economic realities of state finance will probably dictate a low level of educational expenditure,[80] school districts will undoubtedly elect to spend the maximum, transforming the permissible maximum into the operational minimum. Therefore, whether the state resorts to compensated local taxation or full state assumption of educational financing, the state legislature rather than the individual district will have to determine the maximum amount of per pupil expenditure for the district on a uniform state-wide basis and real local initiative in educational financing will no longer exist.

In addition, the state-imposed limitation on permissible district expenditure will correspondingly limit the district's delegated authority to design local educational

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76 An act constitutes special legislation if "from its inherent force and scope, [it] must necessarily produce a local and not a general result." In Re Cleveland, 51 N.J.L. 319, 323, 18 A. 67, 68 (1889). However, "if an act [is] framed for a general purpose and is calculated to effect that end," such a statute constitutes general legislation because it has equal statewide applicability. Id. For the distinction between special legislation and general legislation, see generally Hubbard, Special Legislation for Municipalities, 18 Harv. L. Rev. 588 (1905).

77 California Const. art. I, § 11, which the court stated would likewise invalidate the school tax structure, *Serrano*, 5 Cal. 3d at 596 n.11, 487 P.2d at 1249 n.11, 96 Cal. Rptr. at 609 n.11, is a constitutional prohibition against special legislation.

78 In a state compensatory program, the state distributes aid to the individual districts in order to compensate them for differences in local tax revenue stemming from variations in district tax base so that the net effect would be to make revenue a sole function of tax rate. Therefore, while each district is free to formulate its own budget, the state nonetheless subsidizes the district in inverse proportion to relative district wealth in order to create equality of interdistrict spending power. See Coons, Clune, & Sugarman, supra note 35, at 316.

79 Even without the marked increase in educational expenditure which compensatory state aid would necessarily generate, educational costs have been spiralling at an alarming rate. From 1947 through 1967, a continuous expansion in per pupil expenditure has occurred to the extent of 7 per cent per annum. Bradford, Malt, & Oates, The Rising Cost of Local Public Services: Some Evidence and Reflections, 22 Nat'l Tax J. 185, 193 (1969).

Current Costs Per Pupil Day in U.S. Public Schools

1920	$ .33	1960	$1.13
1940	.50	1963	2.42
1950	1.18	1965	2.70
1955	1.51	1967	3.15

Id. at 190. (figures taken from Table III).

80 While the costs of education rise greatly each year, state and local tax bases are relatively fixed. At the same time, taxpayers, especially those without children, are showing marked resistance to increased educational expenditure and are in many cases demanding cutbacks in educational spending. See generally Benson, Woes of Public Schools, N.Y.Times, Jan. 10, 1972, § E (Annual Educ. Rev.), at 2, col. 5, and Gansberg, Taxpayer Revolt Raises A Dilemma, Id. at 4, col. 1.

policy. Since all policy decisions will have to be made subject to the state limitation on district expenditure level and considering the high cost of providing basic educational services, the individual districts will be left with little money with which to formulate district educational policy.

B. Educational Financing: Mandated Equality

Serrano's probable impact is clearest in the area of educational finance. *Serrano* implies that the state must provide inherently equal educational opportunity for all its inhabitants. The decision attempts to ensure equal access to educational opportunity by guaranteeing that each school district has equal funds available for its educational needs, in proportion to the number of students within the district.[81]

Serrano requires that public education may not be financed through uncompensated locally based taxation since the amount of revenue generated by such a tax is directly dependent on district wealth as measured by the district tax base. Consequently, public education will have to be financed either through complete funding by the state[82] or, if some form of local taxation is retained, through compensatory state programs.[83] Whatever method of school finance the state may elect to adopt, that method must ensure substantially equal interdistrict availability of school funds in proportion to the size of district student population.[84]

In theory, *Serrano* ought to guarantee equal accessibility for all individuals to a *quality* education. However, in practice, *Serrano's* effect will be dependent on two major factors.

First, how will the mandated equality be achieved? Equality may be achieved either by raising the lower district expenditure levels or by lowering the higher ones. A cost-conscious legislature, faced with the dilemma of rapidly rising state expenses coupled with relatively fixed state revenues, could easily decide to balance the budget by the simple expedient of lowering the state-wide level of educational expenditure.[85] Even beyond legislative penny pinching, a poorer state may be forced to lower education expenditure levels out of economic necessity. Therefore, the ultimate impact

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81 "The only meaningful measure of a district's wealth in the present context is not the absolute value of its property but the ratio of its resources to pupils because it is the latter figure which determines how much the district can devote to educating each of its student." Serrano v. Priest, 5 Cal.3d 584, 599, 487 P.2d 1241, 1251, 96 Cal. Rptr. 601, 611 (1971). Use of the per pupil expenditure figure as the measure of equality of educational opportunity has led to nicknaming the *Serrano* holding as the "One Scholar, One Dollar" principle. See Spano v. Board of Educ. (Sup. Ct. Jan. 23, 1972), 167 N.Y.L.J. No. 16, p.21, col. 2.

82 See Silard and White, Intrastate Inequalities in Public Education: The Case for Judicial Relief Under the Equal Protection Clause, 1970 Wis. L. Rev. 7 (1970). "[T] he several alternative remedies are not fungible when measured against a constitutional standard requiring not only elimination of the local wealth factor but also the providing of equal learning opportunity. In our view, only full state assumption of school funding assures that goal."
Id. at 30.

See Cooper, supra note 45, at 348-51, for a discussion of the consequences of full state assumption of school finance. Although Cooper acknowledges that either full state compensation or full state funding could achieve the desired educational results, he concludes that the avenue of full state assumption of educational finance holds greater promise.

Id. at 351.

The system presently closest to full state assumption of the costs of public education is that of Hawaii. In Hawaii, the whole state constitutes a single school district with the state contributing 89.4 per cent of the necessary funds and local revenue a mere 2.9 per cent. N.Y.Times, Jan. 10, 1972, § E (Annual Educ. Rev.), at 2, col. 2.

83 See note 78 supra.

84 Of course, once the revenue reaches the individual districts it must also be distributed among the district's individual schools on an equal per pupil basis under the *Hobson* doctrine. See text accompanying notes 40-43 supra.

85 "[M] ost school finance experts are convinced that the problems of fiscal inadequacy and inequity will not be resolved unless the Federal Government substantially increases its contribution - now 8 per cent of public school revenues - and acts as a guarantor of equitable spending . . . . . ." Farber, Budget Crises Spur Reappraisal of Basic Goals, N.Y. Times, Jan. 10, 1972, § E (Annual Educ. Rev.), at 24, col. 4.

of *Serrano* may be equality of mediocrity rather than equal quality education. Accordingly, one authority has suggested that educational quality rather than equality ought to be the goal and that the quality levels of both high and low expenditure schools ought to be raised.[86] Nonetheless, some method must be found to achieve equality of educational opportunity on a quality level if the *Serrano* holding is to be discharged in substance as well as form. Genuinely equal educational opportunity for all is only possible through the maintenance of a high quality public school system, since the rich will always be able to afford private education while the poor will not.

Second, equality of what? Equality in per pupil expenditure per se is not the answer. Costs of supplies, facilities, maintenance, and minimum teacher salaries vary greatly from district to district. This variance makes any standard of per se monetary equality educationally meaningless. Equality in the mere physical amount of educational resources provided does not seem to be the answer either. The use of such an arbitrary standard ignores the inherent differences in individual district needs and interests and fails to take into account the fact that it requires greater effort and expenditure to reach the disadvantaged student than his wealthier counterpart.[87] Furthermore, absolute uniformity of educational resources would foreclose the possibility of the educational experimentation necessary for the development of new and more effective educational techniques.[88]

Perhaps educational need is the key to the problem.[89] The real goal ought to be guaranteeing that each district receives adequate funds to ensure that the educational needs of each student will be equally satisfied.[90] The standard of equality of need fulfillment affords substantially equivalent educational "opportunity" to each student while, at the same time, leaving individual districts the leeway necessary for effective educational experimentation and the satisfaction of special local needs.[91] The standard of equal per pupil expenditure does not.

Whatever measure of substantive equality is eventually applied by the courts to the *Serrano* holding, some type of dual pupose financing mechanism would seem to be necessary if *Serrano's* educational goals are to be effectuated. Primarily, the solution would seem to entail either the creation of school districts with equal tax bases, equalization of inequalities in available revenue stemming from disparities in district tax bases through compensatory state grants, or direct state funding through a uniform statewide levy.[92] Any of these schemes would achieve the primary purpose of

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[86] Kurland, supra note 37.

See Also Address by President Nixon, March 16, 1972, N.Y. Times, March 17, 1972, at 22, col. 1.

[87] For a discussion of the special educational problems of disadvantaged students which require extra educational effort and expenditure to be overcome, see Hobson v. Hansen, 269 F. Supp. 401, 480-84 (D.D.C. 1967), aff'd sub nom. Smuck v. Hobson, 408 F.2d 175 (D.C. Cir. 1969).

[88] See Moynihan, Can Courts and Money Do It?, N.Y. Times, Jan. 10, 1972, § E (Annual Educ. Rev.), at 1, col. 3, for the suggestion that the *Serrano* decision was based on the principle of fairness and that the *Serrano* court was essentially ignorant on matters of educational policy.

[89] But see McInnis v. Shapiro, 293 F. Supp. 327, 329 (N.D. Ill. 1968), aff'd mem. sub nom. McInnis v. Ogilvie, 394 U.S. 322 (1969), where the court held an alleged controversy based on educational need to be void of judicially manageable standards, and therefore non justiciable. However, the basic *McInnis* and *Serrano* complaints differ little, other than in the standard by which educational equality is measured. Faced with the *McInnis* complaint, the *Serrano* court would probably have ruled for plaintiffs, either equating equality of educational need to equality of per pupil expenditure or dealing affirmatively with a need standard. Cf. Baker v. Carr, 369 U.S. 186 (1962).

[90] For a discussion of a suggested state compensatory aid program based on equality of per pupil expenditure weighted on the basis of educational need, see Cooper, supra note 45, at 346-48.

[91] Of course, use of such a standard envisions a sufficiently high level of educational expenditure so that each student's educational needs may be adequately satisfied. A lesser level of funding will create additional problems in the area of priorities in need fulfillment.

[92] See Horowitz & Neitring, Equal Protection Aspects of Inequalities in Public Education and Public Assistance Programs From Place to Place Within a State, 15 U.C.L.A. L. Rev. 787, 810 (1968).

interdistrict financial equality on a per pupil basis throughout the state. Additionally, some sort of supplementary aid program would be necessary to guarantee the achievment of the second requisite purpose: satisfaction of the special educational needs of the disadvantaged districts.[93] Effectively combined, two such funding programs would coalesce into the type of educational funding mechanism capable of achieving substantial statewide equality of educational opportunity.

No matter how the individual state may decide to accomodate itself to the dictates of *Serrano* as to educational finance, one result is inescapable. An increasingly heavy economic burden will be placed on the state.[94] However, despite the increased demand that state financial resources be committed to education if uniform quality is to be maintained, the states themselves are undergoing periods of economic crisis and many lack the necessary funds to guarantee quality equal educational opportunity.[95] The adoption of *Serrano* may have the net effect of preventing any state (especially the poorer states) from providing *any* quality public education without serious contraction of other state financed services.

On a practical level, the solution is obvious. The federal government must assume a larger share of the financial burden of public education. The precedent for federal aid to education is well established.[96] Federal aid to education was first provided in the Northwest Ordinances of 1785 and 1787, four years prior to the adoption of the Constitution[97] and since then, Congress has passed some 200 laws giving federal assistance to education.[98] Furthermore, most of the practical justifications for state takeover of educational finance from the individual districts reinforce the argument for federal assumption of the cost of educational finance. The federal government has greater economic resources than the state and, much as the state tax base is better suited to provide adequate uniform educational funds than that of the individual district, the federal tax base is better suited than that of the state.[99] Also, the cost of funding through federal taxation has been shown to be less than that of any other method of taxation.[100] Finally, the existence of a well educated populace is as vital to the interests of the federal government as it is to those of the state.

At present, federal aid averages by state, 8.7 per cent of the amount spent on education.[101] Federal aid is of two types. The first is straight aid to the state or district to accomplish some specific purpose. The second type consists of federal equalization grants-in-aid. Such grants are made to individual states or districts where "national policy considerations . . . require . . . [that] the distribution of Federal grants among the states take account of the relative inequalities in the fiscal capacities of the states (together with their local governments) in such a way as to facilitate the

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93 Providing for the special educational needs of disadvantaged students might well constitute a sufficiently compelling state interest to justify additional educational expenditure beyond the basic per pupil expenditure level. But see Moynihan, supra note 88, at 24.

94 See note 79 supra.

95 This problem has long been recognized. In the Education Message of President Kennedy on February 20, 1961, he declared, regarding state financial inability to provide uniform quality education: "These problems are common to all states. They are particularly severe in those states which lack the financial resources to provide a better education, regardless of their own efforts." He suggested increased federal aid as the solution. Tiedt, The Role of the Federal Government in Education, 171 (1966).

96 "The history of federal involvement in education spans approximately 180 years." Id. at 11.

97 Id. at 15-16.

98 Id. at 37. For a summary of major federal aid to education legislation, see Id. at 195-98.

99 "Only the federal government . . . has the tax machinery for collecting the money needed to support education. The local revenues on which school expenditures depend can no longer bear the increased cost of education." Id. at 36. Property taxes, from which most school finances are raised, prove especially inflexible and do not fluctuate with the increased financial needs of schools. Id.

100 Id. at 38.

101 N.Y. Times, Jan. 10, 1922, § E (Annual Educ. Rev.), at 2, col. 2-6.

achievement of a more uniform level of minimum program standards in all states."[102]

The impact of *Serrano* on federal aid to education, other than focusing national attention on the need, will probably be heavy, although indirect. More money will have to be allocated by the federal government to compensate the states for the increased economic burden *Serrano* places upon them. Increased funding will probably take the form of equalization grants[103] so as to guarantee minimal adequacy of per pupil expenditure on a nationwide basis.[104] Such grants would ensure the poorer states equal accessibility to adequate funds to achieve substantially equal educational opportunity throughout the state. President Nixon has recently presented to Congress the proposed Equal Educational Opportunities Act of 1972 stating that the act "would concentrate Federal school aid funds on the areas of greatest educational need. That would mean directing over two and a half billion dollars in the next year mainly towards improving the education of children from poor families."[105] Thus, the initial impact of the *Serrano* decision and the national concern with regard to educational finance generated by *Serrano* on federal school aid has already been evidenced.

An analogous problem which *Serrano* does not touch upon is the inequality in educational funding which exists between the states, a problem which only the federal government is capable of solving. Conditioning the quality of an individual's education on the wealth of the state in which he resides is no more rational than conditioning the quality of his education on the wealth of the district in which he resides. Hopefully, the federal government will voluntarily choose to remedy this situation through federal aid programs designed to equalize per pupil educational expenditure among the states at least at a minimal level. If not, some other means ought to be found for preventing quality education from becoming a monopoly of the richer states.

VI. EQUAL PROTECTION OF THE LAWS: THE *SERRANO* RATIONALE.

A. Introduction: Equal Protection Theory

That classification which produces differentiation and results in corresponding inequalities and which is the unavoidable by-product of the legislative process is clearly comprehended by the equal protection clause.[106] However, by carefully monitoring the legislative and administrative classification processes, the equal protection clause operates to minimize the inequalities inherent in classification itself and attempts to provide "equal justice for poor and rich, weak and powerful alike."[107] "Orthodox equal protection doctrine can be encapsulated in a single rule: government action

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[102] Advisory Comm'n on Intergovernmental Relations, The Role of Equalization in Federal Grants, 73 (1964).

For example, in 1972, under Title I of the Elementary and Secondary Education Act of 1965, one billion dollars was provided for the education of disadvantaged children in the form of equalization aid. N.Y. Times, March 17, 1972, at 1, col. 8.

[103] Theoretically, the increased federal aid could constitutionally take the form of full federal assumption of educational finance. Cohen, Federal Takeover of Welfare and Income Maintenance Programs: Their Financing and Administration, 24 Nat'l Tax J. 331 (1971) and Bradford, Malt & Oates, supra note 79, at 201 (suggestion for full federal assumption of welfare costs).

[104] In 1964, the Advisory Commission on Intergovernmental Relations had recommended that as far as possible federal equalization grants in aid should be used to provide a reasonable uniform level of minimum program performance in every state. Advisory Comm'n on Intergovernmental Relations, supra note 102, at 77 (1964).

[105] Address of President Nixon, March 16, 1972, N.Y. Times, March 17, 1972, at 22, col. 2.

[106] "Equal protection decisions recognize that a state can't function without classifying its citizens for various purposes and treating them differently from others." Note, Developments in the Law - Equal Protection, 82 Harv. L. Rev. 1065, 1076 (1969).

[107] Griffin v. Illinois, 351 U.S. 12, 16 (1956).

which without justification imposes unequal burdens or awards unequal benefits is unconstitutional."[108]

Traditionally, the question posed with respect to a classification's validity under the equal protection clause has been: is it a rational classification reasonably related to a proper legislative purpose and one in which all persons similarly situated are treated equally?[109] The traditional "rational basis" equal protection test permits wide legislative discretion in the classification process and accordingly, and does not disqualify any classification unless no state of facts can be reasonably conceived which would justify the classification.[110] Furthermore, under the rational basis test, the classification is vested with a presumption of validity and the burden of demonstrating that the classification is without any reasonable basis in fact rests on the challenger.[111] Clearly, few legislative classifications could be considered so arbitrary as to raise serious doubts of their constitutionality under the traditional equal protection test.[112]

Although the Supreme Court still generally applies the rational basis test to classifications in the area of fiscal and regulatory legislation,[113] the Court has in recent years, applied a stricter standard in cases of "suspect" classifications and classifications deemed restrictive of "fundamental rights."[114]

Classifications are constitutionally suspect when based on factors such as race,[115] ancestry,[116] alienage,[117] or wealth,[118] because classifications based on such criteria are " 'in most circumstances irrelevant' to any constitutionally acceptable legislative purpose."[119]

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[108] Hobson v. Hansen, 269 F. Supp. 401, 497 (D.D.C. 1967), aff'd sub nom. Smuck v. Hobson, 408 F.2d 175 (D.C. Cir. 1969).

[109] "[T] he classification must be reasonable, not arbitrary and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike." F.S. Royster Guano Co. v. Virginia, 253 U.S. 412, 415 (1920). Accord, e.g., Williamson v. Lee Optical Company, 348 U.S. 483 (1955); Railway Express Agency, Inc. v. New York, 336 U.S. 106 (1949). For the classic study of traditional equal protection theory, see Tussman & tenBroek, The Equal Protection of the Laws, 37 Calif. L. Rev. 341 (1949).

[110] Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61, 78 (1911). Accord, e.g., McGowan v. Maryland, 366 U.S. 420 (1961); Morey v. Doud, 354 U.S. 457 (1957).

[111] The classification's assailant "must carry the burden of showing that it does not rest upon any reasonable basis, but is essentially arbitrary." Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61, 79 (1911).

[112] One commentator has suggested that the Supreme Court has, in fact, almost abondoned the review of challenged classifications under the rational basis test. See Tussman & tenBroek, supra note 109, at 372.

[113] Dandridge v. Williams, 397 U.S. 471, 485 (1970). Accord, e.g., Bastardo v. Warren, 332 F. Supp. 501 (W.D. Wis. 1971). "[T] he right to a minimum wage is not so 'fundamental' as to require application of the 'strict' standard." Id. at 503; Starns v. Malkerson, 326 F. Supp. 234, 237 (D. Minn. 1970); Grier v. Bowker, 314 F. Supp. 624, 628 (S.D.N.Y. 1970).

[114] For a general analysis of the stricter equal protection standards, see Note, Developments in the Law - Equal Protection, supra note 106. For a less favorable analysis of the stricter standards, see Shapiro v. Thompson, 394 U.S. 618, 655 (1969) (Harlan, J., dissenting).

[115] "Classifications based solely upon race . . . are . . . constitutionally suspect." Bolling v. Sharpe, 347 U.S. 497, 499 (1954). Accord, e.g., Hunter v. Erickson, 393 U.S. 385, 392 (1969).

[116] Hernandez v. Texas, 347 U.S. 475, 479 (1954); Korematsu v. United States, 323 U.S. 214, 216 (1944); Hirabayashi v. United States, 320 U.S. 81, 100 (1943).

[117] Takahashi v. Fish and Game Comm'n, 334 U.S. 410, 419-20 (1948). Accord, Leger v. Sailer, 321 F. Supp. 250, 252 (E.D. Pa. 1970), aff'd sub nom. Graham v. Richardson, 403 U.S. 365 (1961); Hosier v. Evans, 314 F. Supp. 316, 320 (D. St. Croix 1970).

[118] "Lines drawn on the basis of wealth or property, like those of race are traditionally disfavored" and hence constitutionally suspect. Harper v. Virginia Bd. of Elections, 383 U.S. 663, 668 (1966) (poll tax). Accord, McDonald v. Board of Election Comm'rs, 394 U.S. 802, 807 (1969).

[119] McLaughlin v. Florida, 379 U.S. 184, 192 (1964). Accord, Harper v. Virginia Bd. of Elections, 383 U.S. 663, 668 (1966).

Although the Court has yet to define exactly what constitutes a "fundamental right,"[120] certain "fundamental rights" have been found and protected, under the stricter modern equal protection standards, from unwarranted governmental interference through classifications restricting their exercise in the areas of access to the criminal process for the purpose of self-vindication,[121] voting,[122] freedom of choice in marriage and procreation,[123] and freedom of travel.[124]

Where suspect classifications or fundamental rights are involved, classifications are "subject to the 'most rigid scrutiny'."[125] Not only must the traditional criteria of reasonableness and proper legislative purpose be met, but in addition, the state must demonstrate that the classification is necessary for the advancement of a compelling state interest.[126] Use of the compelling state interest test by any court imposes a far greater burden on the state to have the challenged legislative enactment sustained as constitutional.

B. Serrano: The Equal Protection Problem

A real problem arises, however, when a law within the bounds of legislative discretion and reasonable on its face, unintentionally operates to discriminate against non-suspect classifications outside the sacred circle of fundamental rights. Although clearly constitutional under the traditional equal protection tests, such legislation might nonetheless fall awry of the compelling state interest test. The problem arises concretely in relation to de facto classification by wealth in local school district financing, the very situation faced by the California Supreme Court in *Serrano*.

Under traditional equal protection standards, the *Serrano* complaint would raise little doubt of the constitutionality of the California school finance system. Classification through geographical decentralization by district is a rational method for the state to ensure that adequate public education, directly responsive to local needs and desires, will be provided throughout the state,[127] while the formation of a state system of public education is clearly a proper legislative function.[128] Nor does such

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120 It has been suggested that the determination of what rights are fundamental may be made by analogy to the selective incorporation doctrine. See Note, Developments in the Law - Equal Protection, supra note 106, at 1130.

121 Anders v. California, 386 U.S. 738 (1967); Douglas v. California, 372 U.S. 353 (1963); Griffin v. Illinois, 351 U.S. 12 (1956).

122 "Undoubtedly, the right of suffrage is a fundamental matter in a free and democratic society." Reynolds v. Sims, 377 U.S. 533, 561-62 (1964). "[T] he political franchise of voting . . . [is] a fundamental political right because preservative of all rights." Yick Wo v. Hopkins, 118 U.S. 356, 370 (1886). Accord, e.g., Cipriano v. City of Houma, 395 U.S. 701 (1969); Kramer v. Union Free School Dist. No. 15, 395 U.S. 621 (1969). See Carrington v. Rash, 380 U.S. 89 (1965).

123 Marriage and procreation are among "the basic civil rights of man," Skinner v. Oklahoma, 316 U.S. 535, 541 (1942), and are "fundamental to the very existence and survival of the race." Id. Accord, Loving v. Virginia, 388 U.S. 1, 12 (1967). And see Boddie v. Connecticut, 401 U.S. 371 (1971).

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

125 McLaughlin v. Florida, 379 U.S. 184, 192 (1964). Accord, e.g., Hunter v. Erickson, 393 U.S. 385, 392 (1969); Bolling v. Sharpe, 347 U.S. 497, 499 (1954); Korematsu v. United States, 323 U.S. 214, 216 (1944).

126 Kramer v. Union Free School Dist. No. 15, 395 U.S. 621, 627 (1969); Shapiro v. Thompson, 394 U.S. 618, 634 (1969); Williams v. Rhodes, 393 U.S. 23, 31 (1968); Loving v. Virginia, 388 U.S. 1, 14 (1967); Carrington v. Rash, 380 U.S. 89 (1965); McLaughlin v. Florida, 379 U.S. 184, 196 (1964).

127 Here, Hargrave v. Kirk, 313 F. Supp. 944 (M.D. Fla. 1970), vacated on other grounds sub nom. Askew v. Hargrave, 401 U.S. 476 (1971), does not lead to a contrary finding of irrationality. In *Hargrave*, it was the operative statutory maximum tax rate which led to the holding of unconstitutionality. In *Serrano*, no such rate restrictive provision was challenged or in fact seems to exist. Instead, the same factors which led the court in McInnis v. Shapiro, 293 F. Supp. 327 (N.D. Ill. 1968), aff'd mem. sub. nom. McInnis v. Ogilvie, 394 U.S. 322 (1969), to hold that the "Illinois scheme for financing public education reflects a rational policy consistent with the mandate of the Illinois constitution" would be controlling. Id. at 336.

128 See note 12 supra.

classification generate unequal treatment within the classes established.[129] All districts within the statewide system are governed by uniform statutory operational procedures and restrictions, while all individuals residing within the same geographic district are offered the identical educational opportunity in district schools. Therefore, in order to establish a cause of action under the equal protection clause, the court in *Serrano* was obliged to apply the compelling state interest test.

Under the compelling state interest test, all that would be required to be demonstrated in order to establish a cause of action would be a showing of glaring classificational inequalities causing injury to a specific class, coupled with an available alternative method of satisfying the state goals without continued discrimination.

Any school financing method based to a large extent on district real property values classifies according to district wealth and inherently operates to discriminate against the poorer districts. Furthermore, the avowed legislative purpose of maintaining an adequate public school system responsive to the local communities it services is realistically unrelated to the type of funding mechanism employed.[130] The same state objective should be constitutionally achievable through a less discriminatory alternate financing scheme.[131] However, the final criterion of injury to a specific class is perhaps the most difficult to prove.

In *Serrano,* the plaintiffs alleged that the amount of educational expenditure is directly proportional to the quality of educational opportunity received by the student and that those students who receive inferior educational opportunities are injured due to their residence in a "poor" school district.[132]

Procedurally, the allegation was held to be sufficient to establish the injury because "for purposes of testing the sufficiency of a complaint against a general demurrer, . . . [the court] . . . must take its allegations to be true."[133] Although the court recognized that "there is considerable controversy among educators over the relative impact of educational spending and environmental influences on school achievement,"[134] it nonetheless noted "that the several courts which have considered contentions similar to the defendants' (that educational opportunity is not directly related to educational expenditure) have uniformly rejected the."[135] However, the

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[129] Of course, there are inequalities generated between the various districts but "[t]he Equal Protection Clause relates to equality between persons as such rather than between areas." Salsburg v. Maryland, 346 U.S. 545, 551 (1954), and "[t]erritorial uniformity is not a constitutional requisite." Id. at 552. Accord, Ocampo v. United States, 234 U.S. 91 (1914) (local court systems); Rippey v. Texas, 193 U.S. 504 (1904) (local liquor option laws as in *Salsburg*). But see Gray v. Sanders, 372 U.S. 368 (1963).

[130] "But even assuming arguendo that local administrative control may be a compelling state interest, the present financial system cannot be considered necessary to further this interest. No matter how the state decides to finance its system of public education, it can still leave this decision-making power in the hands of local districts." 5 Cal.3d. at 610, 487 P.2d at 1260, 96 Cal. Rptr. at 620.

[131] For a discussion of the various available alternative school financing mechanisms, see Silard & White, supra note 82.

[132] 5 Cal.3d. at 590, 487 P.2d at 1244, 96 Cal. Rptr. at 604.

[133] Id. at 601 n.16, 487 P.2d at 1253 n.16, 96 Cal. Rptr. at 613 n.16.

[134] Id. For example, see U.S. Office of Educ., Equality of Educational Opportunity (Coleman Report) (1966). "It appears that variations in the facilities and curriculums (sic) of the schools account for relatively little variation in pupil achievement insofar as this is measured by standard tests . . . . It is known that socioeconomic factors bear a strong relation to academic achievement. When these factors are statistically controlled, however, it appears that differences between schools account for only a small fraction of differences in pupil achievement." Id. at 21-22. Accord, Moynihan, supra note 88, at 1, col. 5.

[135] 5 Cal.3d at 601 n.16, 487 P.2d at 1253 n.16, 96 Cal. Rptr. at 613 n.16, citing McInnis v. Shapiro, 293 F. Supp. 327, 331 (N.D. Ill. 1968), aff'd mem. sub. nom. McInnis v. Ogilvie, 394 U.S. 322 (1969); Hargrave v. Kirk, 313 F. Supp. 944, 947 (M.D. Fla. 1970), vacated on other grounds sub. nom. Askew v. Hargrave, 401 U.S. 476 (1971); Hobson v. Hansen, 269 F. Supp. 401, 438 (D.D.C. 1967), aff'd sub. nom. Smuck v. Hobson, 408 F.2d 175 (D.C. Cir. 1969). It is interesting to note that the Minnesota Federal District Court circumvented the problem of proving that per pupil expenditure level is directly proportional to the availability of educational opportunity by declaring that "to do otherwise, would be to hold that in these wealthy districts where the per

question of actual injury was one of the major issues remanded for judicial determination.[136]

While the *Serrano* claim was justifiable under the compelling state interest test, no action would lie under the traditional equal protection standards. Therefore, the court had to develop a rationale which justified its application of the compelling state interest test to the *Serrano* complaint.

C. The Serrano Rationale: The Equal Protection Solution

To justify its use of the compelling state interest test, the *Serrano* court advanced two Alternative theories (1) wealth as a suspect classification, and (2) education as a fundamental interest.[137]

1. Wealth as a Suspect Classification

The court declared that lines drawn on the basis of wealth or property are traditionally disfavored and accordingly, that such classifications are inherently suspect mandating close judicial scrutiny.[138] Although prior to *Serrano,* classifications based on wealth[139] had only been invalidated in connection with the protection of certain fundamental interests such as the rights of criminal defendants,[140] the right to

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pupil expenditure is higher . . . , the school boards are merely wasting the taxpayer's money." Van Dusartz v. Hatfield, 334 F. Supp. 870, 874 (D. Minn. 1971).

[136] If, on remand the lower court decides that the complainants have failed to substantiate their claim of injury, the *Serrano* court will be faced with an interesting problem on any subsequent appeal.

Although many would agree on a visceral level with the statement that the amount of educational expenditure is directly related to the quality of available educational opportunity, such a relationship is perhaps not capable of empirical proof. In relation to questions of proof, "educational opportunity" is measured by the comparison of standard educational achievement test results with school per pupil expenditure. It is especially difficult however, to show a direct correlation between fiscal input and educational output because so many socioeconomic factors intervene. Accordingly, it is not surprising that most sociological and educational studies have failed to discover any meaningful relationship whatsoever. See note 111 supra. Therefore, any court considering this issue of proof will find itself faced with a dilemma, suspended between moral certainty on the one hand and the limitations of formal proof on the other.

In Brown v. Board of Education, 347 U.S. 483 (1954), the Supreme Court was faced with a similar problem. There, the United States Supreme Court was also presented with allegations of an injury which was seemingly incapable of quantitative substantiation. The court resolved its dilemma by holding that segregated "educational facilities are inherently unequal." Id. at 495. It is submitted that a similar solution might be desirable in the *Serrano* situation. Absolute certainty on the question of proof of injury ought not to be required.

[137] Conceivably, *Serrano* may also be read as requiring both wealth classification and the deprivation of a fundamental right for invalidation under the fourteenth amendment. However, this interpretation is untenable for two reasons. First, to reach the above conclusion the specific language of the *Serrano* decision must be ignored. Second, the California Supreme Court has, in the past, stated that the presence of either of the above named factors is sufficient to require application of the compelling state interest test. E.g., San Francisco Unified School Dist. v. Johnson, 3 Cal.3d 937, 479 P.2d 669, 92 Cal. Rptr. 309 (1971) (education as fundamental interest); In re Antazo, 3 Cal.3d 100, 473 P.2d 999, 89 Cal. Rptr. 255 (1970) (wealth as a suspect classification). Furthermore, the cases which have followed *Serrano,* Van Dusartz v. Hatfield, 334 F. Supp. 870 (D. Minn. 1971), Rodriguez v. San Antonio Independent School Dist., 40 U.S.L.W. 2398 (W.D. Tex. Dec. 23, 1971), and Robinson v. Cahill, (Super. Ct. Jan. 19, 1972) in 95 N.J.L.J. No. 4, p.1, col. 1, have all interpreted *Serrano* as positing two alternative and distinguishable rationales.

[138] 5 Cal.3d at 597, 487 P.2d at 1250, 96 Cal. Rptr. at 610.

[139] A classification may be either directly based on wealth such as a statute which only allows "property tax holders" to vote in certain special elections, Cipriano v. City of Houma, 395 U.S. 701 (1969), or operationally (by its effects) based on wealth such as a poll tax, Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966). Either type of classification may be considered to classify on the basis of wealth for equal protection purposes.

[140] "Our decisions for more than a decade now have made clear that differences in access to the instruments [court transcripts] needed to vindicate legal rights when based upon the financial situation of the defendant, are repugnant to the constitution." Roberts v. LaVallee, 389 U.S. 40,

vote,[141] and freedom of choice in marriage,[142] the court in *Serrano*, held wealth classifications to be suspect per se.[143] Since it was "irrefutable" that the California school finance system classified on the basis of district wealth, the court saw fit to apply the compelling state interest test.[144]

The problem with holding wealth classifications per se suspect is that most municipal and many state governmental services classify by wealth in the sense that the California school finance system does. Such services are either to some degree dependent on local taxation or supported through some type of fee arrangement. If all wealth classifications are per se suspect regardless of the nature of the interest involved, all such classifications are reviewable under the compelling state interest test.[145] Therefore, by implication, the *Serrano* rationale subjects the majority of state and local governmental services to the severe restrictions of the modern equal protection standards.[146] Since the viable alternative of full state assumption of governmental funding always exists,[147] few such services in their present form could survive the stricter test despite the fact that the interests involved may not be fundamental. On a practical level the entire spectrum of non-federal government services could be disrupted and chaos could ensue.

Any governmental function performed by a municipal corporation which is financed, at least in part, by local taxes is constitutionally vulnerable under the per se suspect concept of classification by district wealth.[148] The employment of even a

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42 (1967). "[T]here can be no equal justice where the kind of appeal a man enjoys [in a criminal case] depends on the amount of money he has." Douglas v. California, 372 U.S. 353, 355 (1963). Nor may a state "foreclose indigents to any phase of . . . [the criminal appellate procedure] . . . because of their poverty." Burns v. Ohio, 360 U.S. 252, 257 (1959). Accord, Tate v. Short, 401 U.S. 395 (1971); Williams v. Illinois, 399 U.S. 235 (1970); Anders v. California, 386 U.S. 738 (1967); Smith v. Bennet, 365 U.S. 708 (1961); Griffin v. Illinois, 351 U.S. 12 (1956); In re Antazo, 3 Cal.3d 100, 473 P.2d 999, 89 Cal. Rptr. 255 (1970).

141 "Voter qualifications have no relation to wealth or to paying or not paying . . . any . . . tax." Harper v. State Board of Elections, 383 U.S. 663, 666 (1966). Accord, Cipriano v. City of Houma, 395 U.S. 701 (1969); Kramer v. Union Free School Dist. No. 15, 395 U.S. 621 (1969); Harman v. Forssenius, 380 U.S. 528 (1965).

142 "[G]iven the basic position of the marriage relationship in this society's hierarchy of values . . . [a state is prohibited] . . . from denying solely because of inability to pay, access to its courts to individuals who seek judicial dissolution of their marriage." Boddie v. Connecticut, 401 U.S. 371, 374 (1971). Cf. City of New York v. Wyman, 66 Misc.2d 402, 321 N.Y.S.2d 695 (Sup. Ct. 1971) (abortion to poor may not be denied through refusal to pay for abortions out of Medicaid).

143 5 Cal.3d at 597, 487 P.2d at 1250, 96 Cal. Rptr. at 610.

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

145 As applied to wealth classification, the traditional equal protection test poses the question: is wealth classification a reasonable means to achieve a legitimate state purpose? The test is concerned with the state's power to achieve its goal by whatever method the state may choose, provided the method chosen is reasonably related to the state pupose. On the other hand, the compelling state interest test requires that no viable alternate method exist by which the state may accomplish its goal, if the method being employed entails wealth classification injurious to some group. Therefore, the compelling state interest test is concerned with the quality of the effects of the means employed, independent of their aptness for the achievement of the state goal in question.

146 "[T]he right ... not to be subjected to racial discrimination in government programs is one which the courts will protect." Norwalk CORE v. Norwalk Redevelopment Agency, 395 F.2d 920, 927 (2d Cir. 1968). *Serrano* extends this right to de facto wealth discrimination.

147 It would seem that the existence of any viable alternative method to achieve the goal would preclude the possibility that the present method is necessary to the achievement of any compelling state interest. See Kramer v. Union Free School Dist. No. 15, 395 U.S. 621 (1969); Carrington v. Rash, 380 U.S. 89 (1965); McLaughlin v. Florida, 379 U.S. 184 (1964).

148 A municipal corporation has only those powers which are expressly or impliedly granted to it by the state. See, e.g., Booth v. McGuiness, 78 N.J.L. 346, 75 A. 455 (1910). State ex rel. City of Minot v. Gronna, 79 N.D. 673, 59 N.W.2d 514 (1953); Madison Metropolitan Sewerage Dist. v. Comm'n on Water Pollution, 260 Wis. 229, 50 N.W.2d 424 (1951); Such municipal corporations include school districts. Basset v. Fish, 75 N.Y. 303 (1878). McGilvra v. Seattle School Dist. No. 1, 113 Wash. 619, 194 P. 817 (1921); But see e.g., State ex rel. White v. Barker, 116 Iowa 96, 89 N.W. 204 (1902), and Thomas v. Reid, 142 Okla. 38, 285 P. 92 (1930). which suggests that there are some limits on state power over municipal corporations.

partially locally based financing system classifies by wealth since the wealthier the municipality, the higher the tax base will be and the higher the tax base, the more money the municipality will be able to collect and spend on the municipal function in question. Once the assumption implicit in *Serrano* that the amount of expenditure is directly proportional to the quality of service rendered is made, then all such local municipal financing schemes can be invalidated under the *Serrano* ratio decidendi because viable alternatives exist.[149]

Clearly, the two most practical alternative funding schemes consist of full state assumption of the costs and compensatory state aid programs. However, if full state funding of all currently locally supported municipal services were required, all the problems presented by full state funding of education would be extended and magnified. On the other hand, state compensation for disparities in municipal tax base would necessitate state intrusion into traditional municipal affairs to set low maximum expenditure rates. In either case, the shortage of state funds would be intensified.[150] As a result, the quality of municipal services would noticeably diminish if they remained fully maintainable at all.

Furthermore, the need and, correspondingly, the per capita cost of many current municipal services, such as fire protection and police, is dependent both upon the size of municipal area and population use rather than merely the number of residents,[151] while the cost of many other services, such as street lighting or water work maintenance, remains relatively stable regardless of population.[152] In addition, even assuming arguendo that the per capita need for each municipal service is uniform throughout the state, the cost of furnishing that service would not be constant on a statewide basis.[153]

A somewhat analogous problem arises where a fee is charged for a governmental service. All fees by their vary nature classify by wealth because the individual's ability to pay is the measure of that individual's right to that specific service. Even a minimal or nominal fee discriminates against the poor man by requiring him to pay a far higher proportion of his available resources for the service than is required of the more

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149 "[T]he municipality must provide equal and adequate services for its residents." Kollar v. City of Tucson, 319 F. Supp. 482, 484 (D. Ariz. 1970), aff'd mem., 402 U.S. 967 (1971). *Serrano* extends this duty to the state on an intermunicipal basis. For example, Hawkins v. Town of Shaw, 437 F.2d 1286 (5th Cir. 1971) holds that intramunicipal inequalities in municipal services, such as lighting or paving on a racial basis violates the equal protection clause. Accord, Kennedy Parks Home Ass'n v. City of Lackawana, 436 F.2d 108 (2d Cir. 1970), cert. denied, 401 U.S. 1010 (1971) (sewerage facilities). Under the per se suspect concept of wealth classification, inequalities in intermunicipal lighting and paving created through local taxation, regardless of the reasons for the inequalities, violate the equal protection clause. For another example, see Hadnott v. City of Prattville, 309 F. Supp. 967 (M.D. Ala. 1970) which held that a "municipality may not discriminate in the provision of recreational facilities and services on a racial basis. Id. at 972-73. Accord, Dawson v. Baltimore, 220 F.2d 386 (4th Cir.), aff'd, 350 U.S. 877 (1955). Clearly, the extension of the per se suspect concept of wealth classification to the situation in *Hadnott*, supra, would invalidate all municipal recreational facilities which are not equally available in the rich and poor sections of town, while the *Serrano* rationale would invalidate all recreational facilities which are not equally available in the rich and the poor sections of the state. But cf. James v. Valtierra, 402 U.S. 137 (1971).

150 From 1948 to 1966, local government expenditure rose from $13.4 billion to $60.7 billion which represents an annual compound increase of close to 9 per cent. Bradford, Malts, & Oates, supra note 79, at 185. Therefore, it is obvious that we are dealing with the shift of a large and growing economic burden.

151 For example, see Manjares v. Newton, 64 Cal.2d 365, 411 P.2d 901, 49 Cal. Rptr. 805 (1966), where the court noted that due to housing patterns of school age children it would cost the school district $375 per child to bus 8 children to school while for all other children including those an equal distance away from the school, it cost only $49 per child.

152 Theoretically, it costs the same amount of money to maintain a street light or to pave a street whether it is in a high rise apartment district with a large population density or it is in a commercial or industrial district with a population density of zero.

153 For example, in 1966 the average per capita expenditure for police services in four major cities (New York City, St. Louis, San Francisco, Philadelphia) was approximately 2½ times greater than the all-local-government average in the police protection category. Bradford, Malts, & Oates, supra note 79, at 200.

wealthy individual for the same services.[154] As the percentage of his resources required to pay for the service rises, the odds increase that the poor man will forego the service rather than pay the fee. The same danger of self-imposed abstention does not exist for the rich man, however. If he wishes the service, he can afford to and will pay for it.

In contrast to the existing standards which make the validity of the fee dependent on the nature of the service and the relation of the fee to the service,[155] the per se suspect concept of wealth classification would invalidate such fee arrangements, regardless of the nature of the government function in question, and the full financial burden of the service would fall on the offering government unit. Such a heavy financial burden may cause the cessation of many non-essential government services.[156] In view of the current shortages in available municipal funds, it seems unlikely that a municipality could afford to subsidize fully a system of municipal tennis courts or the like.

2. Education as a Fundamental Interest

The court's alternate theory posits education as a "fundamental interest" requiring protection through the use of the compelling state interest test.[157] As a fundamental interest, education may not be conditioned on a factor basically irrelevant to education, such as wealth, absent a compelling state interest.

The court based its adjudication of the fundamental nature of educational interests on two major factors. First, "education is a major determinant of an individual's chances for economic and social success in our competitive society."[158] Second, "education is a unique influence on a child's development as a citizen and his participation in political and community life."[159] Education bolsters and teaches the fundamental values and ideals upon which a society is built and upon which the effective functioning of democracy depends.[160] In addition, compulsory education is universal;[161] it is relevant to all members of society, encompassing a large period of

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[154] For a discussion of the effects of a minimal poll tax on voting, see Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966).

[155] E.g., Boddie v. Connecticut, 401 U.S. 371 (1971); Griffin v. Illinois, 351 U.S. 12 (1956).

[156] See Grier v. Bowker, 314 F. Supp. 624 (S.D.N.Y. 1970).

[157] 5 Cal.3d at 604, 487 P.2d at 1258, 96 Cal. Rptr. at 605.

[158] Id. at 605, 487 P.2d at 1255, 96 Cal. Rptr. at 615-16. Accord, Hosier v. Evans, 314 F. Supp. 316 (D. St. Croix 1970). In its now classic articulation of this position, the United States Supreme Court stated in Brown v. Board of Educ., 347 U.S. 483 (1954):

> Today it [education] is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms.

Id. at 493.

[159] 5 Cal.3d at 605, 487 P.2d at 1256, 96 Cal. Rptr. at 616.

[160] Id. at 608, 487 P.2d at 1258, 96 Cal. Rptr. at 618. "At a minimum, education makes more meaningful the casting of a ballot. More significantly, it is likely to provide the understanding of, and the interest in, public issues which are the spur to involvement in other civic and political activities." Id. And see Abington School Dist. v. Schempp, 374 U.S. 203, 230 (1963) (Brennan, J., concurring) ("Americans regard the public schools as a most vital civic institution for the preservation of a democratic system of government"); San Francisco Unified School Dist. v. Johnson, 3 Cal.3d 937, 950, 479 P.2d 669, 676, 92 Cal. Rptr. 309, 316 (1971). ("Unequal education, . . . leads to unequal job opportunities, disparate income and handicapped ability to participate in the social, cultural and political activity of our society."); Hobson v. Hansen, 269 F. Supp. 401, 505 (D.D.C. 1967), aff'd sub. nom. Smuck v. Hobson, 408 F.2d 175 (D.C. Cir. 1969). ("The democratizing relevance of public school education so intense a concern for the founders of our public schools has lost none of its urgency in the intervening century.").

[161] 5 Cal.3d at 610, 487 P.2d at 1259, 96 Cal. Rptr. at 619.

"Under the English common law a father had almost unlimited control over the education of his child and in the American colonies the same principle applied until modified by statute. This common law rule has been superseded, however, in *all the states* by compulsory attendance legislation." N. Edwards, The Courts and the Public Schools 519 (3d ed. 1971) (emphasis added).

every individual's life.[162] Finally, education presents an unmatched opportunity to develop the personality of society's youth so as to permit proper social functioning.[163]

Similar statements stressing the fundamental importance to society of education have been used to justify decisions compelling local school authorities to provide bus transportation for students in the district's outlying areas,[164] decisions compelling racial desegregation,[165] and decisions compelling the state to provide public education within all state school districts, if such education is provided in any of its districts.[166] Even in decisions prior to *Brown* under the separate but equal theory, such statements have been used to compel school integration where the racially separate facilities were not in fact educationally equal.[167]

The major problem with the court's holding that education is a fundamental interest is the court's failure to define "fundamental interest." Although the court has little trouble demonstrating that education is a "fundamental interest" to which the compelling state interest test must be applied, it fails to explain why similar arguments could not be made for other municipal services such as public health services, municipal government water works, public housing, and municipal sanitation services. For example, good health can be demonstrated to be "a major determinant of an individual's chances for economic and social success in our competitive society"[168] and to exert a "unique influence on a child's development."[169]

Correspondingly, a broad reading of what constitutes a "fundamental interest" would encompass most, if not all, basic municipal services, making them subject to the restrictive standards of the compelling state interest test.[170] The state would probably be forced to assume the partial or complete cost of providing such services and, operationally, the local initiative in municipal government planning would be largely destroyed. As a consequence of the revised municipal-state relationship, the contours of American municipal government itself may require a massive redefinition.

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162 "[P] ublic education continues over a lengthy period of life - between 10 and 13 years. Few other government services have such sustained intensive contact with the recipient." 5 Cal.3d at 609, 487 P.2d at 1259, 96 Cal. Rptr. at 619.

163 "[E] ducation is unmatched in the extent to which it molds the personality of the youth of society." Id. at 609-10, 487 P.2d at 1259, 96 Cal. Rptr. at 619. See Hobson v. Hansen, 269 F. Supp. 401, 483 (D.D.C. 1967), aff'd sub. nom. Smuck v. Hobson, 408 F.2d 175 (D.C. Cir. 1969).

164 San Francisco Unified School Dist. v. Johnson, 3 Cal.3d 937, 950, 479 P.2d 669, 676, 92 Cal. Rptr. 309, 316 (1971); Manjares v. Newton, 64 Cal.2d 365, 375-76, 411 P.2d 901, 908-09, 49 Cal. Rptr. 805, 812-13 (1966). Contra, Carey v. Thompson, 66 Vt. 665, 30 A. 5 (1894).

165 E.g., Brown v. Board of Educ., 347 U.S. 483, 493 (1954); Hobson v. Hansen 269 F. Supp. 401, 505 (D.D.C. 1967), aff'd sub nom. Smuck v. Hobson, 408 F.2d 175 (D.C. Cir. 1969).

166 "[A] bsent a reasonable basis for so classifying a state cannot close the public schools in one area while at the same time, it maintains schools elsewhere with public funds." Hall v. St. Helena Parish School Bd., 197 F. Supp. 649, 656 (E.D. La. 1961), aff'd mem., 368 U.S. 515 (1962). And see Griffin v. Prince Edward County School Bd., 377 U.S. 218 (1964); Allen v. Prince Edward County School Bd., 207 F. Supp. 349 (E.D. Va. 1962); James v. Almond, 170 F. Supp. 331 (E.D. Va. 1959), appeal dismissed, 359 U.S. 1006 (1959).

167 McLaurin v. Oklahoma State Regents, 339 U.S. 637 (1950); Sweatt v. Painter, 339 U.S. 629 (1950); Missouri ex rel. Gaines v. Canada, 305 U.S. 337 (1938).

168 5 Cal.3d at 605, 487 P.2d at 1255, 96 Cal. Rptr. at 615-16.

169 Id.

170 In his dissenting opinion in Shapiro v. Thompson, 394 U.S. 618 (1969), Justice Harlan severely criticized the fundamental interest standard. Justice Harlan stated: "It is unfortunate because it creates an exception which threatens to swallow the standard equal protection rule. Virtually every state statute affects important rights . . .. But when a statute affects only matters not mentioned in the Federal Constitution and is not arbitrary or irrational, I must reiterate that I know of nothing which entitles this Court to pick out particular human activities characterize them as 'fundamental' and give them added protection under an unusually stringent equal protection test." Id. at 661-62.

Of course, the *Serrano* court denies such broad application to the fundamental interest rationale.[171] However, it is unable to support such an assertion except to declare that education has been *demonstrated* to be a *unique* fundamental interest.[172]

D. Minimum Protection: Equality of Essential Services

In recent years, there has been a marked judicial trend toward guaranteeing that certain basic governmental services are provided to all individuals regardless of wealth.[173] Perhaps the most cogent theory analyzing that trend is the "minimum protection" theory of Professor Frank Michelman.[174]

" 'Minimum protection' radar scans, not for inequalities, but for instances in which persons have important needs or interests which they are prevented from satisfying because of traits or predicaments not adopted by free and proximate choice."[175] Professor Michelman's thesis principally emphasizes the trait of poverty.[176] "As applied to economic hazards, a claim of 'minimum protection' would mean that persons are entitled to have certain wants satisfied - certain existing needs filled - by government, free of any direct charge over and above the obligation to pay general taxes."[177] In other words, government must make certain that all essential individual needs are satisfied regardless of individual ability to pay for need satisfaction. Governmental services are "essential" under the Michelman theory, when in a just society, it would be intolerable that non-satisfaction of the want in question could be conditioned on relative individual poverty.[178] Among the minimum rights guaranteed by the Supreme Court from which Michelman derives his theory are the right to vote,[179] the right of equal access to the criminal process,[180] and the right to travel.[181]

In the application of the theory, a line is drawn between those functions which a state is obliged to perform for all those within its boundaries on a non-discriminatory basis in order to guarantee adequate individual survival within society and those optional services which the government may offer its citizens as an incidental benefit of citizenship.[182] Accordingly, admission to a municipal swimming pool is not

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171 In response to defendants' apprehensions concerning the dire effects which the broad approach would have on municipal services, the court stated: "[w]e unhesitatingly reject this argument . . .. Although we intimate no views on other governmental services, we are satisfied that, as we have explained, its uniqueness among public activities clearly demonstrates that *education* must respond to the command of the equal protection clause." 5 Cal. 3d at 614, 487 P.2d at 1262-63, 96 Cal. Rptr. at 622-23 (emphasis added).

172 Id.

173 See Michelman, The Supreme Court 1968 Term - Foreword: On Protecting the Poor Through the Fourteenth Amendment, 83 Harv. L. Rev. 7, 13-14 (1969) [hereinafter Michelman] ; Note, Discrimination Against the Poor and the Fourteenth Amendment, 81 Harv. L. Rev. 435 Passim (1967). Cf. Goldberg v. Kelly, 397 U.S. 254 (1970), which held that due process requires a hearing prior to a cessation of welfare benefits since "[w]elfare, by meeting the basic demands of subsistence, can help bring within the reach of the poor the same opportunities that are available to others to participate meaningfully in the life of the community." Id. at 265.

174 See Michelman, supra note 173.

175 Id. at 35.

176 "The principle focus here will be on [the] class of risks . . . associated with paucity of income or wealth." Id. at 10.

177 Id. at 13.

178 Id. at 35.

179 Id. at 24. See note 122 supra.

180 Michelman, supra note 173, at 25. See note 121 supra.

181 Michelman, supra note 173, at 40-47. See note 124 supra.

182 In Briggs v. Kerrigan, 307 F. Supp. 295 (D. Mass. 1969), aff'd, 431 F.2d 967 (1st Cir. 1970), the court distinguished between education and an inexpensive lunch under the National School Lunch Act, § 9, 42 U.S.C. § 1758 (1970). While the state must supply the former so that it is equally available to rich and poor alike, it does not have to supply the latter upon an equal basis although it may not limit its distribution arbitrarily or invidiously. See Ayala v. District 60 School

guaranteed under minimum protection theory because it is not an essential service, while admission to public school is guaranteed because it is.[183]

Needless to say, minimum protection guarantees apply not only to state failure to supply the essential service to all upon a minimal level but to the offering of essential services of disparately unequal quality as well.[184] For example, in *Hawkins v. Town of Shaw*[185] the Fifth Circuit held that equal protection of the laws forbids denial of adequate municipal services not only by denying a bona fide resident access to the service but also by diminishing the relative quality of that service beneath the level of adequacy through unequal allocation of municipal funds.

The application of such a theory to education would dictate that the state could not close schools within some of the state's districts while maintaining their operation in others.[186] Nor could the state condition admission to its public school system on wealth[187] or the payment of even a minimal fee.[188] Furthermore, Professor Michelman suggests that the minimum protection theory can be used to guarantee substantial equality of educational expenditure as well.[189] In *Serrano*, a similar minimum protection theory could have been applied to prohibit, under the equal protection clause, abridgement of the right to an education, where there is a denial of not only access to public education but also where the value of an individual's education is diminished by the existence of substantially unequal educational quality,[190] pursuant to a discriminatory educational financing scheme.

Bd., 327 F. Supp. 980 (D. Colo. 1971); Shaw v. Governing Bd., 310 F. Supp. 1282 (E.D. Cal. 1970). Compare, Hosier v. Evans, 314 F.Supp. 316 (D. St. Croix 1970) (admission to public school system) with Williams v. Page, 309 F. Supp. 814 (N.D. Ill. 1970) (welfare reimbursement for high school class graduation activities); compare, Tate v. Short, 401 U.S. 395 (1971) (imprisonment of indigent for failure to pay fine) with Baldwin v. Smith, 446 F.2d 1043 (2d Cir. 1971) (prisoner may work for cash payment or partial remission of sentence); compare, Shapiro v. Thompson, 394 U.S. 618 (1969) (residence requirement for welfare benefits) and Kohn v. Davis, 320 F. Supp. 246 (D. Vt. 1970) (one year residency requirement for voting) with Johns v. Redeker, 406 F.2d 878 (8th Cir. 1969), cert. denied, 396 U.S. 853 (1969) and Starns v. Malkerson, 326 F. Supp. 234 (D. Minn. 1970) (one year residence requirement for reduced tuition for state residents at the state university).

183 See Palmer v. Thompson, 403 U.S. 217, 228 (1971) (Blackmun, J., concurring). "The pools are not part of the city's educational system. They are a general municipal service of the nice-to-have but not essential variety and they are a service, perhaps a luxury, not enjoyed by many communities." Id. at 229.

184 In many areas of essential state service, both state failure to offer upon an equal basis and state offering of services of unequal quality have been invalidated. For example, compare, Cipriano v. City of Houma, 395 U.S. 701 (1969) with Reynolds v. Sims, 377 U.S. 533 (1964) and Piper v. Big Pine School Dist., 193 Cal. 664, 226 P. 926 (1924) with Hobson v. Hansen, 269 F. Supp. 401 (D.D.C. 1967), aff'd sub nom. Smuck v. Hobson, 408 F.2d 175 (D.C. Cir. 1969) (education); compare, Loving v. Virginia, 388 U.S. 1 (1967) with Boddie v. Connecticut, 401 U.S. 371 (1971) (marriage).

185 437 F.2d 1286 (5th Cir. 1971).

186 Griffin v. Prince Edward County School Bd., 377 U.S. 218 (1964); Hall v. St. Helena Parish School Bd., 197 F.Supp. 649 (E.D. La. 1961), aff'd mem., 368 U.S. 515 (1962).

187 "[A] State may no more try to fence out those indigents who seek higher welfare benefits than it may try to fence out indigents generally." Shapiro v. Thompson, 394 U.S. 618, 631 (1969). "It could not, for example, reduce expenditures for education by barring indigent children from its schools." Id. at 633.

188 Cf. Boddie v. Connecticut, 401 U.S. 371 (1971) (divorce proceedings); Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966) (poll tax); In re Smith, 323 F. supp. 1982 (D. Colo. 1971) (bankruptcy proceedings).

189 See Michelman, supra note 173, at 47-59, for a discussion of how minimum protection theory could be employed to guarantee equality of education expenditure as applied to McInnis v. Shapiro, 293 F. Supp. 327 (N.D. Ill. 1968), aff'd mem. sub. nom. McInnis v. Ogilvie, 394 U.S. 322 (1969). Under Michelman's theory, it seems obvious that the right of admission to public education is clearly protected. See Hosier v. Evans, 314 F. Supp. 316 (D. St. Croix 1970); Piper v. Big Pine School, Dist. 193 Cal. 664, 226 P. 926 (1924); Halaby v. Board of Directors, 162 Ohio St. 290, 123 N.E. 2d 3 (1954).

190 Due to the competitive nature of American education today, it seems obvious that to render an individual's education substantially unequal to that of his peers, no matter how high the quality of his education may be, is to render his education inadequate to compete successfully in American society.

Perhaps, therefore, *Serrano* ought merely to have held that public education is the type of governmental service which is "essential" within the meaning of the minimum protection theory and, accordingly, must be offered to all individuals within the state on a minimally equal basis[191] regardless of individual or district wealth.[192]

Not only is the minimum protection rationale applicable to *Serrano* but it would seem to be preferable to the rationale actually used. First, it is narrower in its implications than either of the rationales actually applied. The requirement that the service be essential operates as a limitation which makes the rationale considerably less general in scope than the per se suspect wealth classification rationale. It is also narrower than the fundamental interest rational since it requires wealth discrimination in conjunction with an essential service. Therefore, under a minimum protection rationale, the holding would be less likely to spill out into non-essential areas of municipal services and thereby needlessly disrupt municipal government. Second, since the theory only requires minimal equality, it is more flexible than the equal per pupil expenditure standard of *Serrano*. No ceiling must be set on the expenditure level of the richer districts although a floor is set to guarantee that minimal equality is achieved so as to guarantee adequate educational opportunity to all individuals. Accordingly, a richer district will be able to tax and spend more to achieve educational quality above the state's minimum equality level if it so wishes. Furthermore, the state may employ a weighted system of school fund distribution to take into account the diverse educational needs of various districts and disadvantaged students.

VII. CONCLUSION

In effect, *Serrano* and its progeny merely hold that all individuals within the state are entitled to equal educational opportunity in the state public school system. Doubtless additional courts will render the same verdict invalidating locally based school financing systems in the future. However, although in theory the *Serrano* holding seems to reach a constitutionally proper and just result, in practice the *Serrano* decision may have dangerous effects in the areas of education policy and equal protection theory.

The holding in seeking to guarantee that each child is offered equal opportunity to receive an adequate education seems eminently fair. If equality of educational opportunity were to be truly achieved, each American would have equal access to the benefits and awards from participation in American life. In practice, however, the educational impact of *Serrano* seems more doubtful and less optimistic. Equality of educational expenditure does not in itself guarantee that equal educational opportunity will be offered. Mere numerical equality ignores variations in local costs, local needs, local priorities, and local desire for educational experimentation. Nor does such equality adequately provide for the special or additional educational needs of disadvantaged students. Although commendable in terms of constitutional equality, the *Serrano* holding may, in practice, prove educationally meaningless.

Furthermore, the rationale on which the *Serrano* holding rests could generate severe problems in equal protection theory. Either of the rationales employed, if logically extended and applied, could in practice invalidate most municipal and many state government services. Such an extension could operate to cause major disruption, if not discontinuance, of such services, especially those which might be considered non-essential. An alternative rationale, educationally valid and less disruptive of municipal government, does exist, and ought to have been applied to achieve the same

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191 Of course, since minimum protection theory permits additional inputs by individual districts, the theory envisions the level of minimal equality as one of adequate service performance.

192 See note 189 supra. "It happens that educational inequality and educational deprivation are so closely intertwined that minimum protection thinking about the educational finance problem may lead to a statement of grievance in a justiciable form resembling that of more conventional equal protection disputation." Michelman, supra note 173, at 58.

general theoretical results. "Minimum protection" theory would guarantee adequate public education to each individual regardless of individual or district wealth without spilling out into the area of non-essential government services. Furthermore it does not dictate the strict equality of expenditure which makes the *Serrano* standard's educational impact of questionable value. Minimum protection theory sets no ceiling on expenditure level which would prohibit the richer districts from taxing and spending more to improve the quality of their schools and which would prohibit the state from providing additional funds to ensure the adequate education of disadvantaged groups.

It must be remembered that the real enemy to be faced is inadequate, rather than unequal, educational funding. If adequate funds were allotted for education the problem would doubtless solve itself. Unfortunately, since such increased educational funding does not seem to be forthcoming in the foreseeable future, other courts will doubtless follow the example set by the California Supreme Court in *Serrano* as the *Van Dusartz, Rodriguez,* and *Robinson* courts have already done. However, future applications of the *Serrano* decision will hopefully revise *Serrano* in light of educational need and equal protection realities so that the revolution in American school finance initiated by *Serrano* will beneficially integrate the moral equality of the Constitution with the needs and purposes of public education in modern American society.

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